

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

APPLICATION NO.26/22

BETWEEN:

**FELOPATER ZAMBIA LIMITED
WILLIAN NAGIB REZK
WILLIAM ANTONEY REZK**

**1ST APPLICANT
2ND APPLICANT
3RD APPLICANT**



AND

ZAMBIA NATIONAL COMMERCIAL BANK PLC RESPONDENT

Coram : Makungu, Majula and Muzenga J.J.A

On the 2nd February, 2023 and the 23rd day of May, 2023

For the Applicant: Miss R. Nyirenda of Messrs ferd Jere & Co

For the Respondent: Mr. M. Nkurika of Simeza Sanguwa & Associates

RULING

Makungu, JA delivered the Ruling of the Court.

Cases referred to:

1. *Antonio Ventriglia and Another v. Finsbury Investment Limited SCZ Appeal No.2 of 2019*
2. *Adero and Another v. Ulinzi Sacco Society Limited (2002) 1 KLR 577*
3. *Lusaka West Development Company Limited & Others v. Turnkey Properties Limited (1990) Z.R 1 (S.C)*
4. *Barclays Bank PLC v. ERZ Holdings Limited & Others SCZ Appeal No. 71/2007*
5. *University of Zambia Council v. Calder (1998) S.J 21 (S.C)*
6. *Emmanuel Tumba & Others v. Zambia Bata Shoe Company PLC SCZ Appeal No. 140 of 2012*
7. *Motor vessel "Lillian's S" v. Caltex Oil (Kenya) Limited (1989) KLR 19*
8. *Hakainde Hichilima v. The Attorney General SCZ Appeal No. 4 of 2019*

9. *Aristogeramos Vangelatos & another v. Metro Investments Limited & 3 Others* selected Judgment No. 35/2016.

Legislation Referred to:

1. *The Court of Appeal Rules*, SI No. 65 of 2016
2. *Court of Appeal Act* No. 7 of 2016.

Other Authorities Referred to:

1. *The Rules of the Supreme Court of England (White Book)*, 1999 Edition

1.0 INTRODUCTION

- 1.1 This is an application by the respondent to set aside or reverse the rulings, orders or directives of a single judge of this Court for want of jurisdiction pursuant to **Order 10 rule 8 of the Court of Appeal Rules, 2016.**

2.0 BACKGROUND

- 2.1 The 1st applicant defaulted on a mortgage advanced to it by the respondent. The 2nd and 3rd applicants were guarantors on behalf of the 1st applicant.
- 2.2 The respondent applied for an order of foreclosure and sale of the mortgaged property. The applicants admitted the default. The High Court delivered a judgment dated 27th July, 2017 ordering the applicants to pay the respondent the sums of

K2,629,880.36 and K6,558,582.32 together with contractual interest. The court directed that the judgment sum be liquidated within a period of 90 days.

2.3 On 29th November, 2017 the applicants applied for an order to pay the judgment debt in monthly instalments of K500,000.00 and an order to stay execution, which application was dismissed on 18th September, 2020 by the High Court.

2.4 Dissatisfied with the said ruling, the applicants purportedly renewed their application to settle the judgment debt in instalments before this court pursuant to **Order 7 Rules 1 & 2 of the Rules of the Court of Appeal, 2016 as read together with Order 47 rule 1 (3) of the Rules of the Supreme Court (RSC)**. They also applied for an ex-parte order of stay of execution of the judgment pending hearing of the said application; pursuant to **Order 10 Rule 2 (1) and 5 of the Court of Appeal Rules as read together with order 45 rule 11 of the RSC**. An ex-parte order of stay of execution was granted by the single Judge.

2.5 The respondent then filed an application to dismiss the application to settle the debt by instalments and to discharge

the ex-parte order staying execution; for want of jurisdiction pursuant to **Section 9 of the Court of Appeal Act and Order 7 Rule 1 (2) of the Court of Appeal Rules.**

2.6 The single Judge heard both applications namely;

1. The application to liquidate the judgment debt in instalments and;
2. The respondents' application to dismiss the applicant's application for want of jurisdiction.

2.7 The main argument by the respondent was that a single judge of this Court has no jurisdiction to re-hear an application refused by the High Court where the High Court has made a final order. The rationale being that, final orders can only be heard by the Court of Appeal by way of appeal and not by way of re-hearing by a single judge.

2.8 On 28th April, 2021, the single judge ruled that as there was no case pending in the High Court and no appeal before this Court, the High Court's dismissal of the application to liquidate the judgment debt in instalments was final. That since the respondents were dissatisfied with that judgment, they should have proceeded to file an appeal as provided by the Court rules

and not by re-newing the application. On this basis, the single judge held that he had no jurisdiction to re-hear the application. Both applications were accordingly dismissed with costs.

2.9 Following the above ruling, the parties engaged in ex-curia discussions with a view to resolve the matter amicably. On 24th May, 2021, the parties filed a Consent Order before the same judge setting out the terms upon which the applicants would settle the judgment sum in instalments. The Consent Order was endorsed by the judge despite having acknowledged earlier that he had no jurisdiction to entertain the matter.

2.10 Thereafter, a misunderstanding arose between the parties with respect to the terms of the Consent Order. The applicants claimed that prior to the signing of the same, they had paid instalments of ZMW530,000.00 and ZMW250,000.00 to the respondents. That because they had overpaid the respondent by of ZMW 530,000.00, they required a refund, but the respondent had refused to give them a refund.

2.11 The applicants subsequently made an application before the single judge requesting him to interpret the Consent Order.

2.12 The respondent submitted on points of law, arguing that the application for interpretation of the Consent Order was improperly before the Court as the law under which it was brought only applies to interlocutory orders and yet, the application was made post judgment. It was argued that Consent Orders are made pursuant to agreement of parties and an aggrieved party's only course of action is to apply to set aside such a judgment.

2.13 The single judge in his ruling dated 10th December, 2021 declined to interpret the Consent Order for lack of jurisdiction. Nonetheless, he stated that he would simply apply his inherent power to determine whether the applicants had discharged their obligations under the Consent Order. He proceeded to rule that the applicants had discharged their obligations under the said order.

2.14 This ruling created further misunderstandings between the parties. On 8th June, 2022 the respondent filed an application seeking interpretation of the Court's ruling dated 10th December, 2021. On 22nd June, 2022, the judge declined to hear the application on grounds that it had no jurisdiction. The judge ruled that the application should instead have been

directed to the full court by way of motion. On the same day, the matter was adjourned *sine die*.

- 2.15 These were the events leading to the current motion, which is intended to set aside all rulings, orders or directives made by the single judge.

3.0 SKELETON ARGUMENTS IN SUPPORT OF THE NOTICE OF MOTION

- 3.1 On 4th November, 2022 the respondent now applicant filed in skeleton arguments in support of the notice of motion, wherein it was submitted that, the single judge did not have the requisite jurisdiction to entertain any further applications after acknowledging that he had no jurisdiction in his ruling of 28th April, 2021. Reliance was placed on the case **Antonio Ventriglia and Another v. Finsbury Investment Limited**¹ where it was held inter alia that:

“Jurisdiction is everything (and that) without it, a court had no power to make one more step.”

- 3.2 On the basis of the above authority, it was submitted that after the ruling dated 28th April, 2021, the actions of endorsing the

Consent Order on 24th May, 2021, the Ruling dated 10th December, 2021 and the Order of 22nd June, 2022 to adjourn sine die all amount to nothing as they were done without the requisite jurisdiction.

- 3.3 Counsel contended that the Consent Order dated 24th May, 2021 could not confer jurisdiction on the court to endorse the said order and neither did the subsequent applications confer jurisdiction on the Court. In support of this proposition, reliance was placed on the Kenyan case of **Adero and Another v. Ulinzi Sacco Society Limited**² where it stated *inter alia* that:

“Jurisdiction cannot be conferred by consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.

Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.”

- 3.4 Finally, counsel submitted that all the orders and rulings made after 28th April, 2021 should be set aside with costs to the respondent.

4.0 SKELETON ARGUMENTS IN OPPOSITION TO THE NOTICE OF MOTION

4.1 The applicants' now respondents; relied on the skeleton arguments dated 4th November, 2022 wherein counsel submitted that since an amicable settlement was reached by the parties herein, the court cannot be faulted for approving what the parties had agreed upon. Therefore, the Court had the requisite jurisdiction to endorse the Consent Order dated 24th May, 2021.

4.2 Concerning the legal effect of the parties executing a Consent Order/Judgment, we were referred to the case of **Lusaka West Development Company Limited & Others v. Turnkey Properties Limited** ³ where it was held that:

"In the absence of fraud, mistake or illegality parties are bound by the consent order agreement."

4.3 Other authorities cited on the same principle were: **Lusaka Development Co Ltd & others v. Turnkey Properties**³ and **Barclays Bank PLC v. ERZ Holdings Ltd and Others.**⁴ Counsel submitted further that a fresh action ought to be commenced for the setting aside of a Consent Order.

4.4 He further contended that since the procedure for setting aside a Consent Order had not been followed, the respondent's motion to set aside or reverse the rulings of the single judge for want of jurisdiction should be set aside as it is irregular and unjustifiable.

4.5 On the effect of the perfected order, counsel cited the case of **University of Zambia Council v. Calder**⁵ where it was held that:

"When an order, direction or decision made by a single judge has taken effect, nothing remains on record that can be worked discharged or reversed by the whole court."

4.6 It was submitted that pages 133-154 of the record of the motion show that the applicants have since discharged their obligations under the said Consent. Counsel contended that under the circumstances, the motion has come too late. For this reason, we were urged to dismiss the application.

5.0 ARGUMENTS IN REPLY

- 5.1 In reply to the applicants' argument that the normal procedure is that a claim to set aside a Consent Order can only be made in a fresh action, counsel for the respondent emphasised that the motion herein is not for an order to set aside the Consent Order, but to set aside all rulings, orders or directives made by the single judge on the ground that he lacked jurisdiction to hear the matter.
- 5.2 That a fresh action is only necessary where the basis of the application is alleged fraud, mistake etc.

6.0 ORAL ARGUMENTS

- 6.1 At the hearing of the application, counsel for the applicant bank Mr. Nkunika repeated his written arguments. He went on to refer us to the case of **Emmanuel Tumba & Others v. Zambia Bata Shoe Company PLC**⁶ to show that a judgment made without the requisite jurisdiction should be set aside.
- 6.3 When asked by the court how he would justify the claim for costs, he responded that even though the bank was an active

participant in the turn of events, the rules are clear that costs are in the discretion of the Court

6.4 Counsel for the applicants, Miss Nyirenda still contended that this is not a proper case for us to set aside the rulings of the single judge.

6.5 In reply, Mr. Nkunika stated that what confers jurisdiction on this Court are the Notice of Appeal and Memorandum of Appeal and without them, the Court had no jurisdiction to hear the matter.

7.0 OUR ANALYSIS AND DECISION

7.1 We have considered the decisions of the single judge which have been impugned, and the submissions made by both parties. We hasten to point out that a jurisdictional issue can be raised at any stage of the proceedings, even on appeal. See the case of **Aristogeramos Vangelatos & another v. Metro Investments Limited & 3 Others.**⁹

7.2 Having considered the events that led to this application and the arguments by the parties, we take the view that after the ruling dated 28th April, 2021 wherein the single judge found

that he had no jurisdiction to entertain the application to settle the debt by monthly instalments which was purportedly renewed, the Judge should not have entertained any further application. The Judge was on firm ground when he held that the applicants should have brought the matter by way of an appeal against the decision of the High Court refusing their application to settle the judgement debt by monthly instalments instead of proceeding by way of renewal.

7.3 Since the Judge had no requisite jurisdiction, it follows that all the subsequent rulings and orders made by him after the ruling dated 28th April, 2021 are a nullity. We are fortified by the case of **Antonio Ventriglia and Another v. Finsbury Investment Limited¹** *supra*.

7.4 And the case of **Emmanuel Tumba & Others v. Zambia Bata Shoe Company PLC⁶** where the Supreme Court followed the case of **Aristogerasimos Vangelatos v. Metro Investments Limited & 3 Others⁹** where it was held that:

"The absence of jurisdiction nullifies whatever decision follows from such proceedings. This is the position because the power of this court (like that of any other

court created by the constitution) to adjudicate upon matters in terms of articles 188 and 199 of the Constitution of Zambia should be exercised justly in accordance with the constitution and any other laws. The exercise of such power in the absence of jurisdiction amounts to abrogation of the confidence reposed in the courts by the people and a contravention of the constitution and other laws. There is therefore need to cure such a defect at any adjudicative level and on appeal whether or not it was an issue in the court below."

- 7.5 This entails that the High Court's ruling dismissing the application to pay the judgment debt in instalments stands.
- 7.6 Considering the applicant's argument that a Consent Order can only be set aside in a fresh action, our view is that there would be no basis for commencement of a fresh action to set aside a Consent Order which is a nullity.
- 7.7 In any case, such an action would have to be commenced in the lower Court but the High Court lacks jurisdiction to review decisions and processes of a superior court. We are well guided

by the Supreme Court in the case of **Hakainde Hichilima v. The Attorney General**⁸ where it was held that:

"In deference to higher courts, a lower court should not purport to interrogate the conduct of a case which has been decided upon by a higher court with a view to determining whether the higher court conducted the case properly."

7.8 We are of the firm view that the authorities to the effect that a consent judgment or consent order could only be set aside in a fresh action all relate to consent orders that are made by lower courts with the requisite jurisdiction and not consent orders made by superior courts with or without the requisite jurisdiction.

8.0 CONCLUSION

- 8.1 All being said, we find merit in this application and accordingly set aside all rulings and orders made by the single Judge after the ruling dated 28th April, 2021. Each party shall bear its own costs.


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C.K. MAKUNGU
COURT OF APPEAL JUDGE


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B.M. MAJULA
COURT OF APPEAL JUDGE


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K. MUZENGA
COURT OF APPEAL JUDGE