

IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 120 OF 2021
HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

28 JUN 2023

THE PEOPLE

APPELLANT

*(Ex parte Kiambi Safaris Limited
and Chongwe River Lodge Limited)*

AND

DIRECTOR OF NATIONAL PARKS AND WILDLIFE RESPONDENT

CORAM CHASHI, MAJULA AND PATEL, JJA

ON: 14th and 28th June 2023

*For the Appellant: T. Marietta (Ms) and I. Nambule (Ms), Messrs
Howard and Marietta Legal Practitioners*

For the Respondent: N/A

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court

Cases referred to:

- 1. Dean Namulya Mungómba, Bwalya Kanyanta Nga'ndu and Anti-Corruption Commission v Peter Machungwa, Golden Mandandi and The Attorney General – SCZ Judgment No. 3 of 2003*
- 2. Murray & Roberts Construction Limited and Kaddoura Construction Limited v Lusaka Premium Health Limited and Another – SCZ Appeal No. 141 of 2016*
- 3. Robert Simeza & 3 Others v Elizabeth Mzyece (2011) Vol 3, ZR, 290*
- 4. Zambia Wildlife Authority & Others v Muteeta Community Resources & Another (2009) ZR. 156*

Legislation referred to:

1. *The Zambia Wildlife Act, No. 14 of 2015*

Rules Referred to:

1. *The High Court (Amendment) Rules, 2020 Statutory Instrument No. 58 of 2020*
2. *The Supreme Court Practice (White Book) 1999*

Other Authorities referred to:

1. *Applications for Judicial Review, Law and Practice of the Crown Office, 2nd Edition by Grahame Aldous and John Alder, Butterworths 1993*

1.0 INTRODUCTION

- 1.1 This appeal emanates from the Order of Honourable Mr Justice W.G.K Muma, made on 28th April 2021, in which the learned Judge dismissed judicial review proceedings, allegedly on the Appellant's failure to comply with Order 6/1 (3) of **The High Court (Amendment) Rules 2020 - Statutory Instrument No. 58 of 2020¹. (S.I 58)**

2.0 BACKGROUND

- 2.1 The Appellant on 9th September 2020 applied for an Order for leave to apply for judicial review against the decision of the Respondent, to stop the Appellant from conducting tourism activities in Chiawa Game Management Area and denying them access to lower Zambezi National Park. What prompted the Respondent's

decision was the alleged failure or refusal to remit monies claimed to be owing to the local communities and the Government as consideration for operating tourism activities in the Game Management Area. The decision made was based on Section 5 (2) of **The Zambia Wildlife Act, No 14 of 2015**¹.

- 2.2 On 1st October 2020, the learned Judge granted the Appellants leave to apply for judicial review and directed that the application for judicial review be made by originating summons to the Judge in Chambers.
- 2.3 The Appellants then filed an originating summons together with submissions. According to Counsel for the Appellants, the hearing for the substantive application for judicial review was scheduled for 5th May 2021. However, on account of the Covid 19 pandemic and in line with the guidelines previously issued by the Chief Justice, the Appellants' Advocates indicated to the court that at the hearing, they intended to place full reliance on the submissions and requested for their presence to be dispensed with.
- 2.4 Before the hearing date, the Respondent on 29th April 2021, filed into court a notice to raise preliminary issues

pursuant to Order 14A/2 (2) and 33 (2) **Rules of the Supreme Court² (RSC)**, questioning the jurisdiction of the court. We state from the onset that this was wrong, as there is no provision for raising of preliminary issues under judicial review. The proper procedure was for the Respondent to apply for discharge of the Order granting leave to apply for judicial review. Refer Order 53/14/62 **RSC**. These preliminary issues were however not heard by the learned Judge.

- 2.5 The learned Judge instead, on 28th April 2021 upon perusing the file, noticed that the originating summons was not accompanied by an affidavit in support, in accordance with **S.I 58**, in particular Order 6/1 (3) which provides that:

“A matter which under any written law or these rules may be disposed of in chambers, shall be commenced by an originating summons accompanied by an affidavit in support.”

In view of the absence of the affidavit, the learned Judge dismissed the matter for irregularity.

3.0 THE APPEAL

3.1 Dissatisfied with the order for dismissal, the Appellants have appealed to this court advancing three grounds of appeal couched as follows:

- (i) The court below erred in law when it applied Order VI, Rule 1 (3) of the High Court Rules as amended by Statutory Instrument No. 58 of 2020 (the High Court Rules), to judicial review proceedings which are strictly governed by the provisions of Order 53 of the Rules of the Supreme Court, 1965
- (ii) The court below erred in law when it held that the originating summons filed in the court below after the grant of leave to commence judicial review proceedings ought to have been accompanied by an affidavit as provided for by Order VI, Rule 1 (3) of the High Court Rules; and
- (iii) The court below erred in law in dismissing the Appellants action for judicial review for failure to comply with Order VI, Rule 1

**[3) of the High Court Rules without
affording the Appellants the opportunity
to be heard on the issue.**

4.0 ARGUMENTS IN SUPPORT OF THE APPEAL

- 4.1 The Appellants filed their heads of argument on 4th June 2021 together with the list of authorities. Our attention was drawn to the case of **Dean Namulya Mungomba & Others v Peter Machungwa & Others¹** where the Supreme Court stated that Order 53 **RSC** created a uniform flexible and comprehensive code of procedure for the exercise by the High Court. That it is comprehensive and provides the basis of judicial review and that therefore the High Court need to strictly follow the practice and procedure as laid under Order 53
- 4.2 The Supreme Court in that case, settled that our High Court Act and the attendant Rules have no application to judicial review proceedings. It was submitted that Order 53/14/22 **RSC** addresses the avenues of appeal and Order 59/3/5, which is referred to under Order 53/14/22 speaks to the form and content of the notice of appeal.

- 4.3 In addressing the first ground of appeal, it was submitted that the Supreme Court in the **Dean Namulya Mung'omba** case pronounced itself clearly on the strict application of Order 53 **RSC** and therefore there is no room within judicial review proceedings for the application of our High Court Act or any Rules thereunder as the practice and procedure to be followed is strictly that in England.
- 4.4 As regards the second ground, we were referred to Order 53/3, 53/5, 53/5(3) and 53/5 (6) **RSC** and submitted that having followed the requisite steps under those provisions, it would not have been in order to file a fresh affidavit in support of the originating summons. That the implication was that the Appellant was to rely on the affidavit verifying the facts and the notice of application which were filed into court on 9th September 2020.
- 4.5 In arguing the third ground, it was submitted that since the court below did not accord the parties an opportunity to be heard before rendering its decision, the Order of the court was essentially volunteered by the court. The case of **Murray & Roberts Construction Limited and Kaddoura Construction Limited v**

Lusaka Premium Health Limited and Another² was cited where the Supreme Court warned against the courts rendering decisions on matters that have not been argued by the parties. It was further submitted that the court's failure to hear the parties or at the very least the Appellants, put the court in the shoes of a litigant and as such volunteered its Order of 28th April 2021.

5.0 RESPONDENT'S ARGUMENTS IN RESPONSE

5.1 The Respondent had by the time of hearing the appeal not filed their heads of argument and neither were they in attendance at the hearing.

6.0 OUR DECISION

6.1 As earlier alluded to, the Respondents were not in attendance at the hearing of the appeal. We resolved to proceed and hear the Appellants upon being satisfied that the Respondent were served and notified of the hearing. We were comforted by the case of **Robert Simeza & 3 Others v Elizabeth Mzyece³** that no procedural injustice would be occasioned to the Respondent as they were aware of the proceedings but decided not to attend.

6.2 Having considered the record of appeal and the Appellants' arguments, we shall deal with the first and second grounds together as they are entwined. These grounds are basically attacking the learned Judges application of the High Court Rules to a judicial review matter. Our attention was drawn to the case of **Dean Namulya Mung'omba**, where the Supreme Court noted that, Order 53 **RSC** created a comprehensive code of procedure for exercise by the High Court and therefore the High Court Rules were inapplicable. According to the Appellant, as such it was wrong for the Judge to apply High Court Rules and consequently dismiss the matter.

6.3 Further according to the Appellants, having filed an affidavit at the stage of applying for leave, there was no need for the Appellants to file another affidavit at the stage of making the substantive application for judicial review, as that is not provided for under Order 53 **RSC**. The Appellants contention is that all judicial review proceedings should be determined strictly in accordance with Order 53 **RSC**. That therefore the learned Judge had no authority to dismiss the matter

for failure to comply with **S.I 58** as the Rules of the High Court do not apply to judicial review proceedings. We were urged to set aside the Order of the learned Judge and send back the matter for hearing of judicial review.

6.4 Order 53/14/66 **RSC** provides for the mode of applying for judicial review. Order 53/14/68 provides that after leave is granted, an application must be made by originating motion to a single Judge sitting in open court, unless the court has directed that it must be made by originating summons to the Judge in chambers.

6.5 As earlier alluded to, the Judge in the Order granting leave directed that the substantive application be made by originating summons to the Judge in chambers. What that entailed was that the originating summons was to be heard in chambers on affidavit evidence to the exclusion of oral evidence.

6.6 At the stage of applying for leave, there is a requirement for the applicant to file a supporting affidavit (Order 53/3 (2) (b) **RSC**). The affidavit must contain all the basic factual material on which reliance will eventually be placed, if leave is granted. That affidavit, forms the

basis of the Applicant's application for judicial review together with the notice of application.

6.7 The learned authors of **Applications for Judicial Review, Law and Practice of the Crown Office** state at page 166 as follows:

"In all applications for judicial review, the principal source of evidence is from affidavits. The basis of the applicant's case will be set out in the affidavit in support of the application for leave. A copy of that affidavit must be served with the notice of motion or summons."

6.8 Based on the foregoing, the learned Judge erred in dismissing the judicial review process as there is no requirement that the motion or summons should be accompanied by an affidavit. The learned Judge was therefore at fault for applying High Court Rules as they are inapplicable to Judicial review proceedings. We also place reliance on the **Dean Namulya Mung'omba** case and also **Zambia Wildlife Authority & Others v Muteeta Community Resources & Another**⁴ where the Supreme


Court emphasized the need for the High Court to strictly follow the practice and procedure laid under Order 53 **RSC**.

6.9 This in our view is a proper case for setting aside the Judge's Order and sending back the matter for hearing of the substantive application.

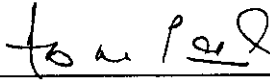
6.10 In the view that we have taken, the third ground becomes *otiose*. We accordingly set aside the Order of the court below and refer the matter back to the High Court before another Judge for determination of the substantive application for judicial review. Costs of this appeal will abide the outcome of the matter in the court below.



J. CHASHI
COURT OF APPEAL JUDGE



B.M. MAJULA
COURT OF APPEAL JUDGE



A.N. PATEL, SC
COURT OF APPEAL JUDGE