

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

**APPEAL NO./243/2021**

**BETWEEN:**

**THELMA CHUNGU**

**AND**

**PRUDENTIAL SOLUTIONS LIMITED**



**APPELLANT**

**RESPONDENT**

**CORAM: KONDOLO SC, MAJULA, CHEMBE**

**On 21<sup>st</sup> September 2023 and 26<sup>th</sup> October 2023**

*For the Appellant:* Not in Attendance

*For the Respondent:* Not in Attendance

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## **J U D G M E N T**

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**KONDOLO SC JA delivered the Judgment of the Court.**

CASES REFERRED TO:

- 1. Zambia Seed Company Limited v Chartered International (PVT) SCZ/20/1999**
- 2. Zambia Revenue Authority v Isikando and 3,525 Others (Appeal 26 of 2013) [2014] ZMSC 87 (29 September 2014)**
- 3. Mayban Allied BHD v Kenneth Godfrey Gomez and Suhhaimi bin Baharudin Rayuan Sivil No. W-02-1094 Tahun 2008**

4. **Lusaka West Development Company Limited, BSK Chiti (Receiver), Zambia State Insurance Corporation v Turnkey Properties Limited (1990) SJ SC.**
5. **Zambia State Insurance Corporation v Turnkey Properties Limited (1990) SJ SC.**

LEGISLATION & PUBLICATIONS REFERRED TO:

1. **The Supreme Court Rules, Whitebook 1999 Edition (RSC)**
2. **Hon. Dr. Justice Matibini, Zambia Civil Procedure, Commentary and Cases, Volume 2, Lexis Nexis, 2017**
3. **Halsbury's Laws of England, 3<sup>rd</sup> Edition**

**1. INTRODUCTION**

- 1.1. This is an appeal against the order of the High Court given by Mwikisa J, on 15<sup>th</sup> March, 2021 in which she dismissed the Appellants application to vary the consent judgement dated 18<sup>th</sup> December, 2020.
- 1.2. The Respondent was the Applicant in the High Court, and the Appellant was the Respondent. We shall refer to the parties as the Appellant and the Respondent.

**2. BACKGROUND**

- 2.1. The Appellant obtained a loan in the sum of K571,500 from the Respondent and handed over her title thus creating an equitable mortgage.

2.2. The Appellant defaulted and the Respondent took out Originating Summons for possession of the mortgaged property.

2.3. The parties on 30<sup>th</sup> November, 2020, executed a Consent Order by which it was agreed that the Appellant would pay the sums due in three equal instalments. Paragraph 3 of the Consent order read as follows;

*“3. It is further agreed that since the value of the collateral is almost equivalent to the value of the Judgement sum, in the event the Respondent does not make any payment towards the Judgement sum by 28<sup>th</sup> February, 2021 the security’s ownership shall be transferred into the applicants name and in the event that the Respondent makes partial payment but defaults in paying the full amount by end of February 2021 the applicant shall maintain possession of the security and exercise its power of sale.”*

2.4. The Respondent defaulted on the payments and on 30<sup>th</sup> March, 2021 she filed Summons to Vary Consent Judgement dated 18<sup>th</sup> December, 2020.

**3. APPELLANTS CASE IN THE HIGH COURT**

- 3.1. The application was supported by an affidavit in which the Appellant attested that she accepted that she and the Respondent had executed a Consent Judgement and that she was not disputing that she owed the claimed sum of K640,000.
- 3.2. That she was asking the Court to vary Clause 2 of the Consent Judgement which stipulates that even after making some payments, so long as the amount due is not fully settled within the prescribed period, the Plaintiff shall take possession of the property attached as collateral, thereby the Defendant is likely to lose both the money paid and the house.
- 3.3. She admitted that she had defaulted on the terms of the said Consent Judgement but was now in a position settle the debt by paying the sum of K320,000 which was half of the claimed sum and the remaining balance within the following six months.
- 3.4. She sought the indulgence of the Court to exercise leniency and vary the terms of the Consent Judgement to enable her settle the debt in full.

#### **4. RESPONDENTS CASE IN THE LOWER COURT**

4.1. There is no affidavit in opposition nor skeleton arguments by the Respondent on the record of appeal (ROA). There is also no transcript of proceedings.

#### **5. DECISION OF THE LOWER COURT**

5.1. The trial judge dismissed the application with a single sentence that read as follows;

*“I refuse to grant the application sought but grant leave to appeal against my refusal.”*

5.2. Dissatisfied with the outcome, the Appellant proceeded to launch an appeal.

#### **6. APPEAL**

6.1. The Appellant filed an appeal relying on only one ground as follows;

**1. The court below misdirected itself when it denied the application by the Appellant for Summons to Vary Consent Judgement dated 18<sup>th</sup> December 2020 specifically challenging the wording of part of paragraph 3 of the consent which states as follows; “in the event the respondent makes partial payment but defaults in paying the full**

*amount by end of February 2021 the applicant shall maintain possession of the security and exercise its power of sale”.*

**6.2. Appellants Argument**

6.3. The Appellant filed Heads of argument on 8<sup>th</sup> October, 2021 advancing only one argument in which she stated the following;

*“My argument is that the lower Court judge refused my application to vary the consent without taking into consideration that what I wanted was only to vary clause two of the consent judgement and not to set aside the entire consent Judgement.*

*I therefore urge this Court consider my emphasis especially on page 24 of the record of Appeal which is on paragraph 8 to 12 of my affidavit.”*

**6.4. Respondents Arguments**

6.5. The Respondent filed its Heads of Argument on 8<sup>th</sup> October, 2023 and quoted from the book by Hon. Dr. Justice Matibini, **Zambia Civil Procedure, Commentary and Cases, Volume 2, Lexis Nexis, 2017 at page 1138**, as follows;

*“A consent judgement or order derives its legitimacy of effect from the agreement of the parties and is identified as a true contract. It must be stressed that a Consent Order once entered is binding on both parties and has the same force as a Judgement rendered by court.”*

6.6. The Respondent submitted that a Consent Judgement can only be challenged or set aside by commencing a fresh action and **Halsbury’s Laws of England, paragraph 1672** and the case of **Zambia Seed Company Limited v Chartered International** <sup>(1)</sup> were cited to that effect.

## **7. HEARING**

7.1. None of the parties were present at the hearing. The Appellant had filed a Notice to Adjourn on 19<sup>th</sup> September, 2023 but there was no notice for the Respondents non-attendance.

7.2. We decided that we would determine the matter on the basis of the record and the arguments filed by both parties.

## **8. DECISION OF THIS COURT**

8.1. We have considered the record of appeal and the arguments advanced by the parties.



- 8.2. We find it incumbent that we comment on the form of the Order appealed against.
- 8.3. The Order issued by the learned trial judge offends the rules of judgement writing which equally apply to Rulings and Orders and the most sacrosanct rule of all is that every decision of a Court of competent jurisdiction must be reasoned.
- 8.4. The Order before us does not describe the application to which it relates and does not, even in the minutest form of summary, state the submissions or arguments advanced by the parties. Most important of all, the trial judge refers to no law and does not explain how she arrived at her decision.
- 8.5. We have however considered the argument by the Appellant that all she sought was that the Consent Judgement she executed with the Appellant be varied by the Court to enable her settle the sums due.
- 8.6. She particularly sought that paragraph 2 of the Consent Judgement be varied because the way it was drafted meant that in the event of default she could lose both the mortgaged property and the monies already paid as instalments towards the debt.



- 8.7. The Appellant submits that she does not seek to set aside the Consent Judgement but just to vary clause 2.
- 8.8. The paragraph containing the detail the Appellant wishes to vary is actually paragraph 3. It is our considered opinion that she seeks to tamper or interfere with the said paragraph which she seems to find disadvantageous and offensive.
- 8.9. Over and above the sound arguments advanced by the Respondent, the effect of Consent Judgements was explained by Chibomba JS as she then was, in the case of **Zambia Revenue Authority v Isikando and 3,525 Others** <sup>(2)</sup> in which she delivered the judgement on behalf of the Supreme Court and cited the case of **Mayban Allied BHD v Kenneth Godfrey Gomez and Suhhaimi bin Baharudin Rayuan Sivil** <sup>(3)</sup> in which Ramly J of the Malaysian Court of Appeal was quoted as follows;

*“The Consent Order is founded on a contract or agreement between parties based on both parties’ willingness to submit ... to certain terms. Once the Appellant and the Respondent took (a) matter beyond the contract and recorded a Consent Order then they*

*must accept all the implications of a Judgement or Order.”*

8.10. In the cited case, the Supreme Court finally held as follows; *“Essentially, although a Consent Order arises out of an agreement and terms arrived at by the parties themselves, and may even evidence a contract with or without obligation, it is a Judgement or Order made by or in the name of the Court and has all the consequences of a Court Judgement or Order (See Order 42/5A/4 RSC White Book 1999 Edition). The parties must therefore accept its implications.”*

8.11. The law is quite settled that when one wishes to vary, amend or otherwise challenge the contents of a Consent Order/Judgement, it can only be done by commencing a fresh action to set it aside. This position was cemented in the cases of **Zambia Seed Company Limited v Chartered International (supra)** and **Lusaka West Development Company Limited, BSK Chiti (Receiver) & Zambia State Insurance Corporation v Turnkey Properties Limited** <sup>(4)</sup>. See also **paragraph 17 A-23 of the Rules of the Supreme**


**Court (Whitebook) Volume 2 and Halsbury's Laws of England, paragraph 1672.**

8.12. In the circumstances of this matter, despite the trial Judges shortcoming in the form of her Order, this appeal cannot succeed because the Appellant was bound by the terms of the Consent Judgement and further, she employed the wrong procedure when she applied to vary its terms.

8.13. This appeal is consequently dismissed.

  
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**M.M. KONDOLO SC**  
**COURT OF APPEAL JUDGE**

  
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**B.M. MAJULA**  
**COURT OF APPEAL JUDGE**

  
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**Y. CHEMBE**  
**COURT OF APPEAL JUDGE**