

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 237/2021

HOLDEN AT LUSAKA

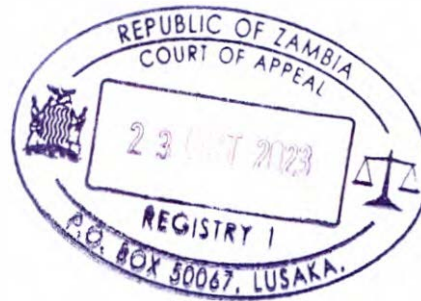
(Civil Jurisdiction)

BETWEEN:

CHRISTINE YENGA

AND

NATIONAL PENSIONAL SCHEME AUTHORITY



APPELLANT

RESPONDENT

CORAM: CHISHIMBA, SICHINGA AND NGULUBE, JJA.

On 21st September, 2023 and 23rd October, 2023.

For the Appellant: Mr. C. Tafeni, Messrs Suba, Tafeni and Associates

For the Respondent: Mr. F. M. Banda, In House Counsel, NAPSA

J U D G M E N T

NGULUBE JA, delivered the Judgment of the Court.

Cases referred to:

- 1. The Zambia National Holdings Limited and United National Independence Party (UNIP) vs The Attorney-General (1993-1994) ZR 115*
- 2. Lusaka West Development Company Limited and Others vs Turkey Properties Limited, SCJ1 of 1990*
- 3. De Lasala vs De Lasala (1980) AC 546*
- 4. Robinson vs Robinson (1982) 2 All ER 699*

5. *Competition and Consumer Protection Commission vs Omnia Fertilizer Zambia Limited and Another (2017) Z.R Vol 351*
6. *Zambia Seed Company Limited vs Chartered International (Pvt) Limited, SCZ Number 20 of 1999*

Legislation referred to:

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

Other works referred to:

1. *Zambia Civil Procedure Commenting and Cases Volume 2, at page 1141*

1.0 INTRODUCTION

- 1.1 This appeal is arising from a Ruling of the High Court at Kitwe delivered by the Honourable Mr. Justice E. Pengele, on 15th January, 2021. By that Ruling, the learned High Court Judge held that a fresh action to challenge a Consent Judgment must be commenced in the court in which the Consent Judgment was settled.
- 1.2 The lower court went on to hold that the plaintiff's action was wrongly commenced in the High Court instead of the Kalulushi Subordinate Court and it was accordingly dismissed. The court

discharged the ex-parte order of interim injunction that it had earlier granted.

- 1.3 This appeal addresses the question whether a party is required to commence a fresh action to set aside a consent order in the court where the said consent judgment was settled i.e whether a consent judgment obtained in the Subordinate Court can be challenged or set aside by commencing a fresh action in the High Court.

2.0 BRIEF BACKGROUND

2.1 The brief background to this appeal is that the appellant, who was the plaintiff in the lower court commenced an action by way of Writ of Summons and Statement of Claim seeking the following reliefs-

- i) An injunction restraining the Defendant from executing the Consent Judgment dated 16th April and/or taking possession of Unit MC3-81 dated 16 April, 2019 or in any way interfering with the plaintiff's quiet enjoyment of House Number MC2-81, NAPSA Housing Complex, Kalulushi.***
- ii) An order setting aside the Consent Judgment dated 16 April, 2019 issued by the Subordinate Court at***

Kalulushi under Cause Number 2019/SKO/15 on grounds of duress, illegality and mistake.

iii) Damages

iv) Costs

v) Interest on the sum found due

vi) Any other relief the court may deem fit.

2.2 Prior to commencing the action in the High Court, the appellant entered into a Consent Judgment with the respondent executed by the Subordinate Court at Kalulushi on 16 April, 2019. The appellant later sought legal representation and made an application to set aside the Consent Judgment before the Subordinate Court at Kalulushi.

2.3 By a Ruling dated 13 August, 2019, the learned Magistrate opined that to set aside the said Consent Judgment, the appellant would have to commence a fresh action to challenge the Consent Judgment.

2.4 On 19 September, 2019, the lower court granted the appellant an ex-parte order of interim injunction restraining the respondent and its agents or servants from executing the Consent Judgment dated 16 April, 2019, under Cause Number

2019/SKO/15 until the matter would be heard inter partes or until further order of the court.

- 2.5 The respondent's Advocates filed an application of Notice of Intention to Raise Preliminary issues pursuant to **Order 14A Rules 1 and 2, Order 33 Rule 3 and Order 2 Rule 2 of the Rules of the Supreme Court, (White book) 1999 Edition.**
- 2.6 In the affidavit in support deposed to by counsel seized with conduct of the matter on behalf of the respondents, Mr. Clement Chikuni, it was deposed that the appellant commenced an action against the respondent on 28th February, 2019, in the Subordinate Court at Kalulushi against claims which included outstanding rental arrears and vacant possession of the premises known as MC2 Unit Number 81, Kalulushi NAPSA Complex.
- 2.7 Mr Chikuni further deposed that after negotiations between the parties, they entered into a Consent Judgment which was settled by the Subordinate Court on 16 April, 2019. On 18 June, 2019, the appellant made an application before the Subordinate Court to extend or vary the Consent Order to enlarge the time within which she could liquidate the Judgment

sum. The application was subsequently withdrawn and on 28th June, 2019, the appellant made an application to set aside the Consent Judgment but the application was dismissed by the Subordinate Court at Kalulushi in a Ruling that was delivered on 13 August, 2019.

2.8 The appellant then filed a Notice of Appeal and a Memorandum of Appeal before the Subordinate Court on 26 August, 2019. Mr. Chikuni further deposed that he was of the view that the appellant's conduct amounted to an abuse of court process and multiplicity of actions.

2.9 The lower court considered the Notice of Motion to raise preliminary issue and came to the conclusion that an appeal from the Subordinate Court is deemed to have been entered after the provisions of Order 44, Rule 3 have been complied with. The court was of the view that the appellant had not completed the process of lodging the appeal. The court concluded that there was no multiplicity of actions and dismissed the respondent's Notice of Motion for lack of merit.

2.10 In its Ruling dated 15 January, 2021, the lower court held that a fresh action to challenge a Consent Judgment must be

commenced in the same court where the Consent Judgment was settled.

3.0 THE APPEAL

3.1 The appellant was dissatisfied with the decision of the lower court and appealed to this court advancing one ground of appeal couched as follows-

1. The Learned Honourable Judge in the Court below erred in law and in fact when he held that a fresh action to challenge a Consent Judgment must be convened in the same court before which the Consent Judgment was settled.

3.2 In arguing the sole ground of appeal, it was submitted regarding the jurisdiction of the High Court that it is unlimited. Our attention was drawn to the case of **The Zambia National Holdings Limited and United National Independence Party (UNIP) vs The Attorney-General¹** where the Supreme Court guided that-

“The jurisdiction of the High Court on the other hand is not so limited. It is unlimited but not limitless since the court must exercise its jurisdiction in accordance with the law. Indeed, Article 94(1) must be read as a

whole including phrases like “under any law and such jurisdiction and powers as may be conferred on it by this constitution or any other law.” It is inadmissible to construe the word “unlimited” in vacuum and then to proceed to find that a law allegedly limiting the powers of the court is unconstitutional... As a general rule, no cause is beyond the competence and authority of the High Court; no restriction applies as to type of cause and other matters as would apply to lesser courts. However, the High Court is not exempt from adjudicating in accordance with the law including limitations such as those one finds in mandatory sentences or other specification of available penalties or, in civil matters, the types of choice of relief or remedy available to litigants under the various laws or causes of action.”

3.3 The appellant’s counsel argued that the jurisdiction of the High Court can only be curtailed by the Constitution and any other written law and procedural requirements as set by various statutes or causes of action.

3.4 Counsel further argued that the reliefs that the appellant sought were within the jurisdiction of the High Court. The case of **Lusaka West Development Company Limited and Others**

*vs Turkey Properties Limited*² was referred to where the court stated that-

“A consent agreement reached in circumstance such as this could possibly only have been allowed to be withdrawn if there were proper grounds upon which validity of any contract could be impugned such as fraud or mistake.

3.5 It was submitted that the appellant sought to have the Consent Judgment set aside on grounds to vitiating factor or duress, illegality and mistake. It was argued that the cardinal issue is that this court must consider is whether the litigation leading to the consent agreement was proper and not tainted with fraud.

3.6 Counsel submitted that the lower court had jurisdiction to determine whether the litigation leading to the Consent Judgment between the appellant and the respondent was proper or regular and not tainted with fraud. We were urged to uphold the appeal for the aforestated reasons.

4.0 RESPONDENT’S ARGUMENTS

4.1 The respondent filed its heads of argument on 17 November, 2021.

4.2 It was submitted that the learned Honourable Judge in the court below was on firm ground when he held that a fresh action to challenge a Consent Judgment must be commenced in the court that settled the Consent Judgment. Reliance was placed on the case of *De Lasala vs De Lasala*³ where the House of Lords stated that-

“Where a party to an action who seeks to challenge on the ground that it was obtained by fraud or mistake, a judgment or order that finally disposes of the issue raised between the parties, the only ways of doing it that are open to him are by appeal from the Judgment or order to a higher court or by bringing a fresh action to set aside.”

4.3 According to Counsel, there are two procedures open to a person who intends to challenge the validity of a Consent Judgment or order. It was submitted that these are the appellate approach and commencement of fresh action before the court that sealed the judgment or order.

4.4 Regarding the appellate application, it was submitted that one of the ways open to a person who seeks to challenge in Consent Judgment is by appeal from the Judgment or order to a Higher

court. It was argued that utilizing an appeal, a person seeking to challenge a Consent Judgment by appeal must do so by way of appeal.

4.5 Counsel submitted that the second approach is by commencement of a fresh action before the court that sealed the Consent Judgment so as to impugn the judgment on grounds of fraud, mistake or misrepresentation. The case of **Robinson vs Robinson**⁴ was referred to, where Ormond, LJ guided that-

“From the point of view of convenient there is a lot to be said for proceedings of this kind taking place before a judge at first instance, because there will usually be serious and often difficult issues of fact to be determined before the power to set aside can be exercised. These can be determined more easily, as a rule, by a judge at first instance. Moreover, he can go on to make the appropriate order which we cannot do in this court... these proceedings should normally be started before a judge at first although there may be special circumstances which make it better to proceed by way of appeal.”

4.6 Counsel further referred to **Zambia Civil Procedure Commenting and Cases Volume 2, at page 1141**, where Honourable Justice Dr Matibini articulated that-

“Therefore the only means open to a party to set aside a Consent Judgment or order on the ground of fraud or mistake is bringing a fresh action for that purpose. Such a claim must be brought before the court that gave the judgment.”

- 4.7 Counsel referred to the case of ***De Lasala vs De Lasala and Robinson vs Robinson (supra)*** and argued that since the matter was wrongly commenced, the court had no jurisdiction to hear it. The case of ***Competition and Consumer Protection Commission vs Omnia Fertilizer Zambia Limited and Another***⁵ was cited where the Supreme Court held that where a matter is wrongly before a court including a tribunal, that court or tribunal has no jurisdiction to make any lawful order or grant any remedy.
- 4.8 Counsel argued that the High Court had no jurisdiction to hear the appellant’s matter and that the lower court was on firm ground when it dismissed the matter. It was submitted that the High Court did not have jurisdiction to hear the fresh action which was commenced to impugn the Consent Judgment that was sealed by the subordinate court. The case of ***Zambia***

National Holding Limited and United National Independence Party (UNIP) vs Attorney – General Supreme (supra) was referred to where the Supreme Court guided that although the High Court has unlimited jurisdiction it is required to adjudicate upon matters in accordance with procedural requirements.

4.9 It was argued that the learned Honourable High Court Judge was required to comply with the procedural requirement relating to the challenge of the Consent Judgment. It was contended that the learned High Court Judge was on firm ground when he held that the appellant's action was wrongly commenced before the High Court instead of the Subordinate Court at Kalulushi.

5.0 THE HEARING

5.1 At the hearing of the appeal, Mr. Tafeni on behalf of the appellant submitted that he would rely on the heads of argument filed. Mr. Banda, on behalf of the respondent also submitted that he would rely on the heads of argument filed.

6.0 DECISION

- 6.1 We have considered the sole ground of appeal, the judgment appealed against and the record of appeal.
- 6.2 The sole ground of appeal assails the holding of the court below that a fresh action to challenge a Consent Judgment must be convened in the same court where the Consent Judgment was settled.
- 6.3 According to the appellant's Counsel, the appellant sought to have the Consent Judgment set aside on grounds of vitiating factor of duress, illegality or mistake. The respondent on the other hand contends that the lower court was on firm ground when it held that a fresh action to challenge a Consent Judgment must be commenced before the court where the Consent Judgment was settled.
- 6.4 It is not in dispute that a Consent Judgment was entered into between the parties on 11th April, 2019 at the Subordinate Court at Kalulushi under cause number 2019/KO/15. The issue for determination is whether or not a Consent Judgment issued by the Subordinate Court can be set aside by

commencing a fresh action in the High Court which did not issue it.

6.5 A perusal of the statement of claim in the High Court indicates that the appellant averred that she entered into the Consent Judgment under duress of eviction by the respondent as she was under pressure to settle rental arrears in the sum of K73,530.00 in three equal installments on or before 3 June, 2019. The appellant contends that she entered into the consent order by mistake, hence commencing the action to set aside the Consent Judgment.

6.6 In terms of how a party may challenge a Consent Judgment, the case of **Zambia Seed Company Limited vs Chartered International (Pvt) Limited⁶**, the Supreme Court guided that this can only be done by way of commencing a fresh action. The Supreme Court guided that-

“By law, the only way to challenge a judgment by consent would be to start an action specifically to challenge the Consent Judgment.”

6.7 The appellant should therefore have commenced a fresh action to challenge the Consent Judgment in the Kalulushi Subordinate Court where the Consent Judgment was executed.

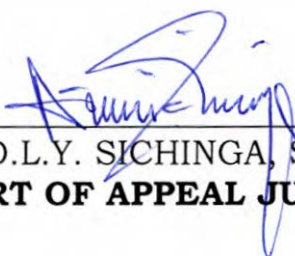
6.8 The appellant's action to set aside the Consent Judgment by commencing a fresh action in the High Court is irregular. The lower court was in firm ground when it held that the appellant should have commenced a fresh action in the court which executed the Consent judgment so as to challenge the said judgment. The court below cannot be faulted for holding that the appellant should have commenced a fresh action in the Subordinate Court at Kalulushi.

7.0 CONCLUSION

7.1 The holding of the lower court that a new action to challenge the Consent Judgment should have been commenced in the Subordinate Court at Kalulushi is upheld. Costs are awarded to the respondent, to be taxed in default of agreement.



F.M. CHISHIMBA
COURT OF APPEAL JUDGE



D.L.Y. SICHINGA, SC
COURT OF APPEAL JUDGE



P. C. M. NGULUBE
COURT OF APPEAL JUDGE