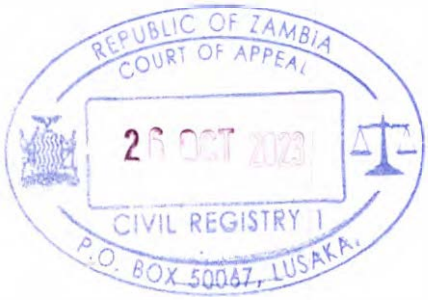
IN THE COURT OF APPEAL **APPEAL/NO./21/2022**
HOLDEN AT LUSAKA **CAZ/08/475/2021**
(Civil Jurisdiction)



BETWEEN:

JULIUS MASUMBA **APPELLANT**

AND

GERSHOM CHILOBO **RESPONDENT**

CORAM: KONDOLO SC, SICHINGA SC, SHARPE-PHIRI JJA

On 16th November 2022 and 26th October 2023

For the Appellant: Mrs. T.M Chisela of Messrs Freddie & Company

For the Respondent : Mrs. N. Malama Kasase of Messrs Michael Masengu & Co.

J U D G M E N T

KONDOLO SC JA delivered the Judgment of the Court.

CASES REFERRED TO

1. **Jamas Milling Company Limited v Imex International Pty Limited (2002) ZR 79**
2. **Trinity Engineering (PVT) Limited v ZANACO SCZ/7/1996**
3. **Attorney General Development Bank of Zambia v Gershom Moses Button Mumba (2006) ZR 77**
4. **Ituna Partners v Zambia Open University SCZ/117/2008**

5. **Turnkey Properties v Lusaka West Development Company Limited, B.S.K Chiti & Zambia State Insurance Company Limited (1984) ZR 85 S.C**
6. **Preston v Luck [1884] 27 Ch D 4937**
7. **Falcon Restaurant and Nite Club & Ashani Pathrirage v Seth Paraza (as secretary general of National Union of Commercial & Industrial Workers) CAZ 139/2019**
8. **Zambia Telecommunications Company Limited (Zamtel) v Aaron Mweene Mulwanda, Paul Ngandwe SCZ/7/20**

STATUTES REFERRED TO

1. **High Court Rules Chapter 27 of the Laws of Zambia**

1. INTRODUCTION

1.1. This is an appeal against the ruling of the High Court delivered by the Honourable Mrs. Justice M Mapani-Kawimbe on 7th October 2020 and the Order of Possession she granted on 9th October, 2020 under Cause No. 2021/HP/0719.

2. BACKGROUND

2.1. This appeal follows on the heels of an action that was commenced by writ of summons on 16th October, 2001 by which the Plaintiff (the Respondent herein) sought, inter

alia, a declaration that he is a tenant in common with a 55% shareholding in Farm Lots No.937 and 249/M, Mufulira.

2.2. The High Court granted the declaration by a judgement delivered on 20th November, 2013 by Honorable Lady Justice R.M. Kaoma, as she then was.

2.3. Dissatisfied with portions of the judgement, the Respondent appealed to the Supreme Court which dismissed his appeal but upheld the declaration that he was entitled to 55% shareholding in the suit farms.

2.4. After a plethora of other applications, the Respondent filed summons for an order of possession of Farm 937 and Lot. No. 249/M and the hearing was scheduled for 7th October 2020.

2.5. This was followed by an application on 25th September 2020, in which the Respondent applied for and obtained an *ex parte* order of interim injunction pending the hearing of the application for possession to be heard by the same Judge on 7th October, 2020. The injunction restrained the Appellant from apportioning, ceding away or selling any portion of Farm No. 937 or Lot 249/M, Mufulira until further order of the court or final determination of the main

matter. The hearing was set down to be heard on 7th October 2020, the same date as the application for an order for possession.

3. DECISIONS OF THE HIGH COURT

3.1. The application for an injunction was heard first and upheld by the trial Judge who noted that the application was unopposed and that after considering the affidavit in support she had decided to confirm the *ex parte* order of interim injunction that was granted to the Respondent on 29th September, 2020.

3.2. The trial Judge considered the process filed by the parties and before delivering her ruling she recounted the history of the case which when presented in point form, is as follows;

a. *The original process was commenced in the High Court on 16th October, 2001. Judgement was delivered on 20th November by Kaoma J, as she then was, and she held that the Respondent was entitled to 55% shareholding in the suit farms and benefits as co-owner and the Appellant was ordered to present a report within 30 days of the judgement.*

b. *The Appellant did not comply with the order and the Respondent went back to court and Makungu J, as she then was, opined that the Appellant had disobeyed Kaoma J's Order and by keeping the suit farms and benefits to himself, he had denied the Respondent the fruits of his judgement.*

c. *The Supreme Court held that the Respondent was entitled to 55% shares in the suit farms.*

3.3. Counsel for the Appellant submitted on a point of law but the trial Judge threw out the submissions because she found that they amounted to evidence from the bar and she proceeded to hold as follows;

"In the circumstances, therefore, I opine that the plaintiff's (Respondent) fruits of judgement are still outstanding because of the 1st Defendants (Appellant) selfish motives. The purported monetary settlement referred to by counsel does not affect the Plaintiff's rights but rather assists with the recovery of his share of benefits from the suit farms as ordered by Judge Kaoma.

In the result, I grant the plaintiff (Respondent) an order of possession of 55% shareholding in farm lots No. 937 and 249/M Mufulira in accordance with the earlier judgement confirmed by the Supreme Court. The Plaintiff (Respondent) is also granted all the money paid into Court as his benefits from the suit farms. Costs are for the plaintiff (Respondent) to be taxed in default of agreement."

3.4. The formal order of possession was filed and signed by the learned trial Judge on 9th October, 2020.

4. APPEAL

4.1. The Appellant appealed the two rulings on the following grounds;

1. **The learned Judge in the Court below misdirected herself in law and in fact when she erroneously signed the Order for possession dated 9th October, 2020 whose contents contradicted her Ruling dated 7th October 2020.**
2. **The learned trial Judge erred in law and fact when she dismissed the application to review the Order of Possession dated 9th October 2020 on the ground that the Appellant did not meet the threshold of seeking review under Order 39 of the High Court Rules Chapter 27 of the**

laws of Zambia and the parties' rights were fully established by the Supreme Court.

3. **The learned trial Judge erred in law and in fact when she confirmed the interim Order of Injunction dated 29th September, 2020 against the Appellant by Order dated 9th October, 2020 without considering the Appellant's 45% interest in the property.**

4.2. **Appellants Arguments**

4.3. Grounds 1 and 2 were argued together.

4.4. In ground 1 the Appellant noted that the High Court judgement of Kaoma J awarded the Respondent 55% shareholding as a tenant in common with the remaining 45% being apportioned to the Appellant. The court was referred to the judgement at pages 31-65 and specifically pages 61 lines 1-11 of the record of appeal.

4.5. We were reminded that the Supreme Court confirmed this position as shown on page 75 lines 18-21 and page 76 lines 1-4 of the record of appeal.

4.6. It was further pointed out that the trial judge acknowledged this fact in her ruling at pages 9-12 and particularly at lines 7-9 of the record of appeal, where she stated, ***"In the***

result, I grant that plaintiff (Respondent) an order of possession of 55% shareholding in farm lots No. 937 and 249/M Mufulira in accordance with the earlier judgement confirmed by the Supreme Court."

4.7. The Appellant wondered why the trial Judge's Order of 9th October 2021 ordered possession of the entire properties to the Respondent.

4.8. The gravamen of the Appellants argument under this ground is that the trial Judge erred by in effect granting the Respondent 100% of the suit farms instead of the 55% ordered by the High Court as confirmed by the Supreme Court.

4.9. It was submitted that the trial Judge erred and the order for possession of 9th October 2021 should be reversed so as to reflect the correct position.

4.10. In respect of ground 2 the court's attention was drawn to page 203 of the record of appeal where it exhibits a writ of possession dated 26th October 2020 which seeks to execute the order of possession dated 9th October 2021.

4.11. It was further brought to this Court's attention that on 24th November 2020 the Appellant applied to set aside the

Order of 9th October 2020 together with an application to stay execution of the Writ of Possession but the trial Judge dismissed the application in an *ex parte* ruling dated 10th December, 2020 holding *inter alia* that, ***"the Order dated 9th October 2020 was in compliance with the judgement of the Supreme Court"***.

4.12. The Appellant drew this Court's attention yet further to his **application under Order 39 Rule 2 of the High Court Rules (HCR)** for special leave to file an application for review of the order dated 9th October, 2020, out of time.

4.13. This application was equally thrown out by the trial Judge in her ruling of 1st March 2021 which found that the Applicant did not meet the threshold for seeking review under **Order 39 HCR**.

4.14. The Respondent cited authorities including **Jamas Milling Company Limited v Imex International Pty Limited** [1] which all showed that an application for review can only be made where the applicant has come across new evidence that will have a material impact on the judgement and it must be shown that it was discovered after judgement was

delivered and could not with reasonable diligence have been discovered earlier.

4.15. The Appellant advanced a further argument that the trial judge's signing of the Order of 9th October 2020 was a slip or omission which could be corrected under the slip rule which is meant for the Court to correct clerical mistakes or errors in a judgement arising from accidental slips or omissions. The cases of **Trinity Engineering (PVT) Limited v ZANACO**[2] and **Attorney General Development Bank of Zambia v Gershom Moses Button Mumba** [3] were cited to that effect.

4.16. It was argued that the obvious error in the trial Judge's Order of 9th October 2020 with regard to the proportions of interest in the suit farms awarded by the High Court and confirmed by the Supreme Court necessitated an application for review which empowers the Court under **Order 39 HCR** to correct or vary its order or judgement.

4.17. The Appellant advanced further arguments to support his arguments in relation to the court's power of review under **Order 39 HCR** and its inherent power to correct obvious

errors in its judgement. We shall not delve into them because they simply repeat the earlier arguments.

4.18. In ground 3, it was argued that the trial judge erred by granting the order for injunction which only favoured the Respondent whilst ignoring the Appellant's 45% interest in the land.

4.19. It was postulated that the perpetual order of injunction granted on 9th October 2021 cannot exist alongside the Appellant's 45% interest in the farms.

4.20. That the perpetual order of injunction was harsh and must be set aside.

5. Respondent's Arguments

5.1. The Respondent filed heads of argument on 20th February, 2022.

5.2. It was argued that the trial Judge erred in law and practice when she heard the Appellant's application to appeal in spite of a pending application by the Respondent to cite the Appellant for contempt of court. We were referred to page 31 of the supplementary record of appeal where the *ex parte* summons filed into court on 14th July 2021 is exhibited.

5.3. That the Appellant's application to appeal was filed on 21st October, 2021. It was argued that interlocutory chamber matters are heard on a first come first served basis meaning that this appeal is improperly before court and should thus be rejected.

5.4. With regard to the Order of Possession dated 9th October, 2020 it was submitted that the Order was properly granted because the Appellant had disobeyed Kaoma J's Order to account for all assets and portions of the farm, including those that he had already sold as shown on pages 17 to 30 of the supplementary record of appeal.

5.5. It was submitted that disobeying a ruling, order or judgement has sanctions under **Order 45/5 1(a) of the Whitebook, 1999 Edition (RSC)** which include, with leave of Court, sequestration against the property of that person.

5.6. The Respondent reiterated that the Order of Possession was properly granted and that the appeal was improperly before this Court and the matter should be sent back to the High Court to have the matter of contempt heard before another judge. That the appeal should be dismissed with costs.

6. THE HEARING

6.1. When the matter came up for hearing on 16th November 2022, the Respondent was granted leave to file further heads of argument which they had filed in the registry on 28th November 2022.

6.2. The Respondent had earlier filed further Heads of argument on 26th November 2022 in which he responded to the three grounds of appeal. On ground 1 and 2, the Respondent's main argument was that the court below was on firm ground when it granted the Order of Possession dated 9th October 2020 and denied the Appellant's application for special leave to review the Order of Possession. It was argued that though the Order of Possession seems to suggest that the Respondent was granted possession of the whole farm, the Ruling of the court was specific in terms of the extent of the possession that was granted and this can be discerned from paragraph 10 to 12 of the record of appeal where it reads as follows:

"In the result, I grant the Plaintiff an Order of Possession of 55 percent shareholding in farm Lot No. 937 and 249/

M Mufulira in accordance with the earlier Judgment confirmed by the Supreme Court"

6.3. On this basis it was the Respondent's contention that if the Appellant was of the view that the Order of Possession granted to the Respondent was erroneous, the remedy lies in making an application before the court below for correction of the omission or mistake under the provisions of **Order 20 Rule 11 of the Rules of the Supreme Court 1999 Edition** and not by way of Appeal. The said provision makes it clear that the remedy available in the event of an accidental slip in an Order of the Court is by way of an application in the same court for correction of the mistake at any stage and not an appeal as in the case before this Court.

6.4. The Respondent argued that the Court below rightly dismissed the Appellant's application for Special Leave to review the Order of Possession. It was contended that there was nothing in the said Order capable of being reviewed. He cited **Order 39 Rule 2 of the High Court Rules** and argued that the provision makes it mandatory for an application for review of a judgment or decision to be made

within 14 days after such decision. However, in this case the Appellant sought to review the said Order which was passed on 9th October 2020 and the Appellant made the application to review on 4th February 2021, way after the statutory period of 14 days.

6.5. It was further argued that the principle on the review of a judgment or decision of the court is that the party seeking the review must show that he has discovered fresh evidence which would have had material effect upon the decision of the court. The cases of **Jamas Milling Company Limited v Imes International Limited (supra)** and **Ituna Partners v Zambia Open University** [4] were cited in aid. The Respondent's argument was that the Appellant in this case did not meet this threshold as the affidavit filed in support did not disclose any fresh evidence which could have had a material effect on the decision of the court.

6.6. On ground 3, the Respondent argued that ground 3 was incompetently before this Court on grounds that there was no Order granting the Appellant leave to appeal against the Order of injunction dated 9th October 2020, exhibited at

page 14 of the Record of Appeal. The Respondent submitted that in the Affidavit in support of the of Summons for an Order for Leave to Lodge Appeal Out of Time, on page 271 to 275 of the Record of Appeal, only two grounds of Appeal were advanced in the Court below and none of the two grounds touched on the Order of Injunction. It was the Respondent's contention that had the Appellant been dissatisfied with the Order for Injunction, he ought to have applied for leave to appeal against the said Order in the court below pursuant to **Order 59 Rule 1 Sub-Rule 93 of the Rules of the Supreme Court 1999 Edition** and **Order 10 Rule 4 (3) of Court of Appeal Rules.**

6.7. The Respondent also argued that the Order of Injunction was necessitated by the fact that the Appellant was selling the land in question to unsuspecting buyers and as shown on pages 181 to 186 of the Record of Appeal is a list of individuals to whom the Appellant had sold land. The injunction Order was therefore necessary to restrain the Appellant from selling more portions of land, in order to maintain the status quo, as well as to protect the

Respondent from irreparable damage. The cases of **Turnkey Properties v Lusaka West Development Company Limited** [5] and **Preston v Luck** [6] were cited to aid this point.

7. ANALYSIS AND DECISION

7.1. We have considered the record of appeal and arguments filed by both parties.

7.2. We shall begin with Ground 1 which addressed the submission that the trial Judge should have exercised her power under **Order 39 HCR** and reviewed her judgement.

7.3. Surprisingly, the Appellant pursued this ground of appeal despite citing correct authorities including the case of **Jamas Milling Company Limited v Imex International Pty Limited (supra)** which very clearly explains the circumstances under which the High Court can exercise the power provided under **Order 39 HCR**.

7.4. In the case of **Falcon Restaurant and Nite Club & Ashani Pathrirage v Seth Paraza (as secretary general of National Union of Commercial & Industrial Workers)** [7] we cited the case of **Zambia Telecommunications Company Limited (Zamtel) v Aaron Mweene Mulwanda,**

Paul Ngandwe [8] where the Supreme Court stated as follows;

> *"The general rule as to the amendment and setting aside of judgements or orders after a judgement or order has been drawn up is as follows: Except by way of appeal, no Court, judge or master has power to rehear, review alter or vary any judgement or order after it has been drawn up, either in application made in the original action or matter, or in fresh action brought to review such judgement or order. The object of this rule is to bring litigation to finality* but it is subject to a number of exceptions".

7.5. In the cited case, the Supreme Court, acknowledged that there are a few exceptions to the rule such as the slip rule, but with regard to seeking relief under **Order 39**, the Court recalled what it said in the **Jamas Milling Case (Supra)**;

> *"For review under Order 39, rule 2 of the High Court Rules to be available, the party seeking it must show that he has discovered fresh material evidence, which would have material effect upon the decision of the*

Court and has been discovered since the decision but could not, with reasonable diligence, have been discovered before.....We also note that there was no fresh material evidence, discovered since the judgment, which would have material effect on the judgment. Review was clearly not available to the respondents. Contrary to the submission by the 1st respondent, review under Order 39, rule1 of the High Court Rules has very limited scope, as per our decisions in the Jamas, Lisulo, and Lewanika cases, referred to above."

7.6. It is thus clear that **Order 39 HCR** can only be resorted to in the narrow confines that apply to introducing new evidence.

7.7. *In casu*, the Appellant has argued that the Judge's decision to award the Respondent 100% possession of the subject farms amounted to new evidence because what was ordered by Kaoma J and confirmed by the Supreme Court was a 55% share in the farms. The Respondent has also argued that the Court below rightly dismissed the Appellants application for Special leave to review the Order

of possession as there was nothing in the said Order capable of being reviewed as there was no fresh evidence produced by the Appellant and that the Appellant made his application past the statutory14 day period.

7.8. In our view, the trial Judge's ruling does not constitute evidence but is merely a decision arising from its own assessment of the evidence and application of relevant law and cannot be used as a means of seeking review under **Order 39 HCR**.

7.9. The arguments regarding the slip rule are equally misconceived because contrary to the Appellants suggestion, the slip rule cannot be used to introduce evidence under **Order 39 HCR**. Secondly, as correctly argued by the Respondents, the application to effect the slip rule should have been made to the lower Court, it cannot be brought at appeal stage.

7.10. In the premises, the arguments in relation to **Order 39** and the slip rule are consequently dismissed.

7.11. This brings us to the Order for Possession of 9th October 2020 and we would have to agree that the trial Judge erred because the wording of the Order was clearly

contrary to what was awarded by Kaoma J and the Supreme Court.

7.12. The Order for Possession, if necessary at all, should have ordered possession of 55% of the suit farms. However, that in itself creates another problem in terms of calculating what constitutes 55% of the properties.

7.13. The trial Judge should not have ordered possession but should have referred the matter for assessment of what was due to the parties including amounts which would have been due if the Appellant had complied with Kaoma J's Order to account.

7.14. We therefore set aside the order for possession and order that the matter proceeds to the Registrar for assessment.

7.15. With regard to ground 3, the Appellant argued that the Order of injunction did not take into account the interest of the Appellant in the property when she confirmed the injunction. It was argued that there was no risk of injustice as the interests and rights of the parties had been determined by the Supreme Court judgment. The Respondent on the other hand argued that that this ground of appeal was not properly before the Court as the

Appellant did not seek leave to appeal against the Order of Injunction.

7.16. We observe that the trial court noted that the application was unopposed and stated that she had considered the affidavit evidence available to her. The trial Judge was however obliged to provide a reasoned ruling stating how the application met the criteria for the grant of an injunction.

7.17. Considering the circumstances of this case it is quite clear that there is a need to preserve the subject farms as the parties await assessment by the Registrar. We therefore uphold this ground of appeal but order that both parties be restrained from interfering with the property.

7.18. We now turn to the Respondents argument that this matter is improperly before this Court. This should have been raised as a preliminary objection and we have stated time and again that preliminary objections must be raised as provided by the rules of this court. We therefore decline to consider the issue raised by the Respondent.

7.19. We have taken note of the Respondents argument that the lower Court properly issued the Order of Possession because Order 45/5 1(a) gives the court power to issue a Writ of Sequestration against a party who disobeys a ruling, order or judgement of the Court, and the Appellant had disobeyed Justice R.M.C. Kaoma's judgement.

7.20. Our short answer to this is that the trial Judge never considered any application to sequester the Appellant's property nor did she make any reference at all that she was exercising any such power. The argument is dismissed on that basis.

7.21. In the premises, the appeal succeeds and the issues relating to the shareholding are referred to the registrar for assessment. The costs are awarded to the Appellant.

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M. KONDOLO, SC
COURT OF APPEAL JUDGE

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

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N.A. SHARPE-PHIRI
COURT OF APPEAL JUDGE