

**IN THE COURT OF APPEAL OF ZAMBIA**      **APPEAL NO. 223/2021**  
**HOLDEN AT KABWE**  
*(Civil jurisdiction)*

**BETWEEN:**

**YOUJUN ZHUANG**      **1<sup>ST</sup> APPELLANT**  
**WANG QINGHAI**      **2<sup>ND</sup> APPELLANT**  
**KINGPHAR COMPANY ZAMBIA LIMITED**      **3<sup>RD</sup> APPELLANT**

**AND**

**BUMU GENERAL TRADING FZE**      **RESPONDENT**

*Coram Makungu, Sichinga and Sharpe – Phiri, JJA*

*On the 21<sup>st</sup> day of May, 2024 and on the 19<sup>th</sup> day of June, 2024*

*For the 1<sup>st</sup> and 2<sup>nd</sup> Appellant: Mr. B. Mweemba of Keith Mweemba Advocates*

*For the 3<sup>rd</sup> Appellant: No appearance*

*For the Respondent: Mr. S.K. Simwanza with B. Lusungo both of Steven  
Osborne Advocates*

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**JUDGMENT**

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***Makungu, JA delivered the Judgment of the Court.***

**Cases referred to:**

- 1. Fred M'membe v. Sunday Bwalya Nkonde (2018/CCZ/001)*
- 2. Fred M'membe and the Post Newspaper v. Abel Mboози and 5 others(SCZ app 07/2021)*
- 3. Sampa and 2 Others v. Wina and Another (SCZ/8/294/2014)*
- 4. Barclays Bank Zambia PLC v. ERZ Holding Limited (SCZ Appeal No.71/2007 (2012))*

5. *Yeta v. African Banking Corporation ABC (Zambia) Limited (CAZ Appeal No. 117 of 2013)*
6. *Zulu v The People (1974) Z.R 58 (SC)*
7. *Zambia Revenue Authority v. Hitech Company Limited (SCZ Judgment No. 40 of 2000)*
8. *John Sangwa, SC v. Sunday Nkonde (SCZ 34/2021)*
9. *Godfrey Miyanda v. The High Court (SCZ Judgment No.5 of 1984)*
10. *African Banking Corporation Limited v Mubende Country Lodge Limited (SCZ Appeal No. 116 of 2016)*
11. *Council of the University of Zambia v Jean Margaret Calder (1998) Z.R 48*

**Legislation referred to:**

1. *The High Court Act, Chapter 27 of the Laws of Zambia*
2. *The Rules of the Supreme Court of England 1965 (the White Book) 1999 Edition.*
3. *The Corporate Insolvency Act No. 9 of 2017*

**1.0 INTRODUCTION**

1.1 This is an appeal against the judgment of K. Limbani J, of the High Court dated 26<sup>th</sup> March 2021, at Kabwe in cause No. 2020/HB/23. The Judge set aside the consent order dated 21<sup>st</sup> April 2020 under cause numbers 2020/HB/15 and 2020/HB/165 because of illegality and irregularity. The respondent was the plaintiff while the appellants were the 1<sup>st</sup> to 3<sup>rd</sup> defendants respectively.

## **2.0 BACKGROUND**

2.1 Cause No. 2020/HB/23 was commenced by writ and statement of claim on 11<sup>th</sup> May 2020, which documents were amended on 23<sup>rd</sup> June 2020. According to the amended statement of claim, on 21<sup>st</sup> April 2020, the defendants entered into a consent order under cause numbers 2020/HB/15 and 2020/HPC/165. According to this consent order, the two Causes were consolidated into a single cause before Justice Kamwendo at the Kabwe High Court. The 3<sup>rd</sup> defendant was placed under supervision, and business rescue proceedings were initiated. Additionally, Lewis Chisanga Mosho, who was the immediate past Court-Appointed Provisional Liquidator under cause 2020/HPC/165, was appointed as the Business Rescue Administrator for the 3<sup>rd</sup> defendant. He was granted all the powers of a business rescue administrator as outlined in the **Corporate Insolvency Act No. 9 of 2017**.

2.2 The plaintiff claimed that the consent order was both irregular and illegal. According to **Order 42, Rule 5A** of the **Rules of the Supreme Court (RSC)**, which specifies the matters that can be settled by way of a consent order, it is not permissible

to appoint a business rescue administrator through a consent order. Additionally, under **Section 23 of the Corporate Insolvency Act**, it is mandatory to notify all affected persons, such as the plaintiff, of the commencement of business rescue proceedings, and to serve them with the process because they have the right to be heard.

2.3 The plaintiff stated that by entering into the consent order, the defendants denied it the right to be heard and to verify whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants were genuine creditors of the 3<sup>rd</sup> defendant. As a shareholder of the 3<sup>rd</sup> defendant, the plaintiff claimed that the 3<sup>rd</sup> defendant is not at all indebted to the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Therefore, the 1<sup>st</sup> and 2<sup>nd</sup> defendants are not affected persons under the Corporate Insolvency Act and do not have the locus standi to initiate winding up or business rescue proceedings against the 3<sup>rd</sup> defendant.

2.4 The plaintiff claimed that the defendants acted fraudulently in obtaining the consent order and cited the following as particulars of the alleged fraud:

*1. The 2<sup>nd</sup> defendant commenced winding up proceedings against the 3<sup>rd</sup> defendant whereupon Lewis Chisanga Mosho*

*was appointed provisional liquidator of the 3<sup>rd</sup> defendant under cause No. 2020/HPC/165.*

- 2. The 2<sup>nd</sup> defendant purported to assign a debt of USD 50,000 to the 1<sup>st</sup> defendant, despite knowing that there was no agreement to prove that the 3<sup>rd</sup> defendant was indebted to the 2<sup>nd</sup> defendant in the sum of USD 1,700,000.00. Moreover, under cause No. 2018/HPC/437, the court refused to accept a document that purported to show the 3<sup>rd</sup> defendant's indebtedness to the 2<sup>nd</sup> defendant.*
- 3. Based on the assigned debt, the 1<sup>st</sup> defendant commenced business rescue proceedings under cause No. 2020/HB/15 without making a formal demand to the 3<sup>rd</sup> defendant as required by law and without serving any court process on the 3<sup>rd</sup> defendant and other affected persons such as the plaintiff.*
- 4. The 1<sup>st</sup> and 2<sup>nd</sup> defendants entered into a consent order with the 3<sup>rd</sup> defendant whereupon the purported provisional liquidator of the 3<sup>rd</sup> defendant under cause No. 2020/HPC/165, who was sponsored by the 1<sup>st</sup> and 2<sup>nd</sup> defendants using PNP Advocates and Keith Mweemba*

*Advocates, became the Business Rescue Administrator of the 3<sup>rd</sup> defendant under cause No. 2020/HB/15.*

*5. Lewis Chisenga Mosho now serving as Business Rescue Administrator of the 3<sup>rd</sup> defendant, entered into a consent order with the same persons who had sponsored his appointment as provisional/Business Rescue Administrator of Kingphar Company Zambia Limited. The consent order was a sham, entered into solely by Wang Qinghai the 2<sup>nd</sup> defendant and his agents.*

*6. The plaintiff argued that as a result of the above actions, it has suffered injustice as the 3<sup>rd</sup> defendant is likely to be administered to their detriment and without following the law.*

2.5 Hence, the plaintiff claimed for:

- 1. An order to set aside the consent order dated 21<sup>st</sup> April 2020 under cause number 2020/HB/15 and 2020/HPC/165 on account of illegality and irregularity.*
- 2. A declaration order that the Business Rescue Administrator appointed under the consent order*

*aforementioned was irregularly appointed and his appointment was void ab initio.*

*3. An order to set aside the proceedings consolidated under cause No. 2020/HB/15 for illegality.*

*4. Any other relief the court may deem fit.*

*5. Costs.*

2.6 The defendants did not file a defence. The 1<sup>st</sup> and 2<sup>nd</sup> defendant's advocates did not attend the hearing. The court therefore only heard the plaintiff.

### **3.0 EVIDENCE BEFORE THE LOWER COURT**

3.1 PW1 was Mwaanga Kasongola, an advocate at the firm of Messrs F.B. Nangudzgambo and Associates, who was subpoenaed to testify in the matter. She narrated that on 24<sup>th</sup> March 2020, she commenced an action on behalf of her client under cause No. 2020/HB/15. Ms. Silvia Bwalya, who sued as the administratrix and beneficiary of the estate of the late Victor Munyimba. The respondents in this case were Malian Mumba, Kenai Bwalya, Cecilia Bwalya, and Rodgers Bwalya Junior, all beneficiaries of the estate of the late Rodgers Bwalya. The action sought authority to sell Stand Number

5606 in Kabwe, which formed part of the estate of the late Rodgers Bwalya. The matter was concluded by consent of the parties, with the signed consent order filed in court on 31<sup>st</sup> March 2020.

3.2 PW1 stated that she later learned of another matter with cause number 2020/HB/15 at the Kabwe High Court District Registry. She produced into evidence the originating summons, affidavit in support of the originating summons, consent judgment, and a copy of receipt No. 9008680 issued by the Kabwe High Court District Registry.

3.3 PW2 was Zheng Wang, a former laboratory technician for the 3<sup>rd</sup> defendant, who testified that before Mr. Moshoo, the Liquidator, fired him, he managed the 3<sup>rd</sup> defendant company's laboratory and also received goods from China. PW2 stated that he never dealt with or received any goods from the 2<sup>nd</sup> defendant. When referred to an interbank electronic receipt for the 2<sup>nd</sup> defendant's account number 6226732800006150 showing that Chinese Yuan RMB 1,970,000.00 was paid to Shijiazhuang Yidiai Trade Company Limited on 2<sup>nd</sup> November 2016, he said that he had never seen that document before.



3.4 PW3 was Wenxiu Pan, a director in the respondent company which is a shareholder in the 3<sup>rd</sup> appellant company. He stated that he is a friend of the director of the 3<sup>rd</sup> defendant company. He also assists the managing director in the financing and borrowing of capital for the 3<sup>rd</sup> defendant company.

3.5 PW3 denied claims that the 3<sup>rd</sup> defendant borrowed USD 1,300,000 from the 2<sup>nd</sup> defendant or any amount of money. He further denied that the 3<sup>rd</sup> defendant owed the 1<sup>st</sup> defendant USD 50,000 on account of the 2<sup>nd</sup> defendant having assigned its debt to him. If the 3<sup>rd</sup> defendant wanted to borrow any money, he would have been consulted as one of its shareholders. Moreover, the 3<sup>rd</sup> defendant never borrowed funds from individuals, nor has it ever notified him of the alleged assigned debt by the 2<sup>nd</sup> defendant.

3.6 Regarding the transfer of RMB 1,970,000 by the 2<sup>nd</sup> defendant on 2<sup>nd</sup> November 2016, he stated that the receipt to Shijiazhuang Yidai Trade Company Limited is not related to any partner or supplier of the 3<sup>rd</sup> defendant company. The transaction between the 2<sup>nd</sup> defendant and Shijiazhuang Yidai

Trade Company Limited had nothing to do with the 3<sup>rd</sup> defendant. The said debt assignment is not documented.

#### **4.0 DECISION OF THE LOWER COURT**

4.1 Upon considering the matter, the learned Judge determined that a High Court Judge had jurisdiction to hear and determine another High Court matter relating to a consent order if the same is challenged. Relying on the case of **Lusaka West Development Company Limited and Order 17A-23 RSC** he held that a party to an action, proceeding, or executed order can apply to set aside a consent judgment by commencing a fresh action.

4.2 The Judge found that cause number 2020/HB/15, filed on 24<sup>th</sup> March 2020 by PW1 at Kabwe District Registry, related to the sale of the estate of Robert Bwalya. It was concluded by a consent judgment dated 31<sup>st</sup> March 2020 endorsed by Judge Kamwendo.

4.3 Another action, involving Youjun Zhuang as the applicant and Kingphar Company Zambia Limited as the respondent, was filed on 23<sup>rd</sup> March 2020, at 14:00 hours, and was purportedly issued cause number 2020/HB/15. This cause number had

already been allocated to the concluded case relating to the settlement of the estate of the late Rodgers Bwalya. The new case involving Youjun Zhuang and Kingphar Company Zambia Limited was improperly assigned the same cause number, creating the appearance that it had been filed earlier than it was. The entry in the registry for filed cases clearly shows this irregularity.

- 4.4 The Judge referred to several definitions of fraud and adopted the definition that fraud is a deliberate act (or failure to act) to obtain an unauthorized benefit, either for oneself or for an institution, by using deception, false suggestions, suppression of the truth, or other unethical means that are believed and relied upon by others.
- 4.5 Based on this definition, the Judge held that the allocation of two cases with the same cause number demonstrates fraud in commencing cause No. 2020/HB/15.
- 4.6 The Judge noted the multiplicity of actions relating to the same parties, and the attempts by the defendants' advocates to move from one court to another, despite commercial matters typically being filed at the Commercial Court, which

was established to resolve such matters unless otherwise directed.

4.7 In light of the above, the following reliefs were granted:

1. *An order to set aside the consent order dated 21<sup>st</sup> April 2020, under cause numbers 2020/HB/15 and 2020/HPC/165 on account of illegality and irregularity.*
2. *A declaratory order that the appointment of the Business Rescue Administrator under the consent order was void ab initio.*
3. *An order to set aside the proceedings consolidated under cause number 2020/HB/15 for illegality.*
4. *Costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.*

## **5.0 GROUNDS OF APPEAL**

5.1 The 1<sup>st</sup> and 2<sup>nd</sup> appellants advanced the following eight grounds of appeal:

1. ***The Court erred in law and fact when it proceeded to set aside the consent judgment under cause number 2020/HB/15 on an application of a non-party to those proceedings as confirmed by the***

*High Court under cause No. 2020/HB/15 in a ruling dated 24<sup>th</sup> June 2020.*

- 2. The Court below erred in law and fact when it held that cause No. 2020/HB/15 related to the sale of the estate of the late Rodgers Bwalya which was commenced on 24<sup>th</sup> March 2020 when in fact the said cause No. 2020/HB/15 related to the matter which was earlier filed on 23<sup>rd</sup> March 2020 between Youjun Zhuang and Kingphar Company Zambia Limited.*
- 3. The Court below erred in law and fact when it held that the allocation of two cases with the same cause number clearly shows deception for the purpose of the illegal or unethical gain at the expense of another as it failed to appreciate that the allocation of cause numbers and subsequent entry into the register, is done by the Court Registry Staff; a process in which the appellants or indeed other parties have no role to play and/or have no control over.*

4. *The Court below erred in law and fact when it held that the alleged irregular and illegally filed process purportedly filed under cause No. 2020/HB/15 was fraudulently done without proof.*
5. *The Court below erred in both law and fact when on the basis of submissions by counsel for the respondents, it held that there was unethical, deceitful and sharp practice associated with the alleged irregular and illegal commencing of the second action under cause No. 2020/HB/15 by some members of the legal profession when in fact cause No. 2020/HB/15 in question was earlier filed and commenced by the 1<sup>st</sup> appellant in person.*
6. *The Court below erred in both law and fact when it proceeded with trial in the matter without hearing and determining the appellant's pending preliminary application which was challenging the respondent's writ of summons and statement of claim.*

***7. The court below erred in law when it proceeded to pronounce itself on a subject matter that had already been determined by another High Court Judge thereby effectively undermining and interfering with the independence of its sister court of equal power and jurisdiction.***

***8. The Court below erred in law and fact when it assumed and vested itself with jurisdiction over the subject matter pending before another Court of equal power and jurisdiction whereby it purportedly pronounced itself and set aside the consent judgment by another High Court Judge Mr. Justice Isaac Kamwendo under cause No. 2020/HB/15 thereby violating the constitution and its attendant sacred constitutional principle of judicial independence.***

## **6.0 1<sup>st</sup> AND 2<sup>nd</sup> APPELLANT'S HEADS OF ARGUMENT**

6.1 The 1<sup>st</sup> and 2<sup>nd</sup> appellants filed heads of argument dated 20<sup>th</sup> September 2021. In support of ground 1, counsel submitted that only a party to the proceedings or consent judgment is

eligible to apply to set aside a consent judgment. This position is buttressed by the cases of **Fred M'membe v. Sunday Bwalya Nkonde**<sup>1</sup> and **Fred M'membe and the Post Newspaper v. Abel Mboози and 5 others**.<sup>2</sup> He argued that the respondent sought to set aside a consent order without applying to be joined to the proceedings.

6.2 Counsel pointed out that the proper procedure should have been for the respondent to join the proceedings since a party can be joined even after a consent order has been entered. The cases of **Sampa and 2 Others v. Wina and Another**<sup>3</sup> and **Barclays Bank Zambia PLC v. ERZ Holding Limited**<sup>4</sup> were cited as authority for this submission.

6.3 Grounds 2, 3, and 4 were argued together as follows: that cause No. 2020/HB/15 which related to the sale of the estate of Rodgers Bwalya was commenced on 24<sup>th</sup> March 2020, while the Kingphar matter was commenced on 23<sup>rd</sup> March 2020. So, it was not logical that the case filed earlier would take up the cause number of a case that was filed later.

6.4 As regards the finding by the lower court that there was fraudulent filing of cause No. 2020/HB/15 to defeat the course of justice, counsel submitted that the finding was



- based on some erasures seen in the register of cases. However, such erasures or alterations could not be said to have been made by any of the appellants or their advocates. In any case, no registry staff was subpoenaed to come and testify about the erasures.
- 6.5 It was a misdirection on the part of the Court to hold that cause No. 2020/HB/15 was dubiously and deceitfully filed by the appellant's advocates when the process was signed and filed by the 1<sup>st</sup> appellant in person.
- 6.6 Therefore, the findings of the court below were erroneous and should be overturned. The case of **Yeta v. African Banking Corporation ABC (Zambia) Limited**<sup>5</sup> was cited to support the submission.
- 6.7 On the 5<sup>th</sup> ground of appeal which challenges the lower court's holding that there was unethical, deceitful, and sharp practice associated with the so-called irregular and illegal commencement of the second cause No. 2020/HB/15 by some members of the legal profession, counsel submitted that a court cannot make pronouncements that are not based on the evidence on record. He argued that this particular finding was based on the submissions by counsel for the respondent as

indicated on J16 in paragraph 10 of the lower court's judgment. This finding is therefore contrary to established principles that counsel cannot give evidence from the bar. The cases of **Zulu v. The People**<sup>6</sup> and **Zambia Revenue Authority v. Hitech Company Limited**<sup>7</sup> were cited in support of this position. We were urged to set aside this finding as well.

6.8 On the 6<sup>th</sup> ground of appeal, counsel submitted that the court below erred in law and fact when it proceeded with trial in the absence of the appellant's defence and defence counsel despite knowing that there was a pending preliminary issue challenging the propriety of the originating process which had not yet been given a hearing date. He argued that the court below denied the appellants the right to be heard.

6.9 He argued further that, where an application to raise a preliminary issue has been made under **order 14A of the RSC**, a court is enjoined to determine the preliminary issue before conducting a trial.

6.10 Reliance was placed on the case of **John Sangwa, SC v. Sunday Nkonde**,<sup>8</sup> where the Supreme Court guided as follows:

***"The idea is that only matters which are deserving of a trial and full hearing should proceed to such***

*trial or full hearing. Where for instance, a petition is so flawed in its presentation or the wrong party is named, we see no reason why the High Court cannot hear an interlocutory objection and spare the aggrieved party unnecessary costs by halting proceedings against that party at interlocutory stage.”*

6.11 Grounds 7 and 8 were argued as follows: that cause No. 2020/HB/15 related to business rescue proceedings which were commenced under the **Corporate Insolvency Act No. 9 of 2017**. The provisions of the Corporate Insolvency Act relating to business rescue proceedings, make it clear that once a court orders that business rescue proceedings commence in respect of a company, the Court does not become functus officio as the law gives it supervisory authority over such a company. (See **Section 24** of the **Corporate Insolvency Act No. 9 of 2017**).

6.12 Counsel argued that Judge K. Limbani interfered with the authority of Judge I. Kamwendo in the performance of his judicial functions relating to the business rescue proceedings

of the 3<sup>rd</sup> appellant which are still active. Therefore, Judge K. Limbani should not proceed to hear and determine cause No. 2020/HB/23 as doing so would amount to supervising Judge Kamwendo's function under cause No. 2020/HB/ 15. We were referred to several precedents on the principle that High Court Judges are of equal power and jurisdiction, including the case of **Godfrey Miyanda v. The High Court.**<sup>9</sup>

6.13 Based on the above-mentioned authorities, counsel implored us to order that the proceedings under cause No. 2020/HB/23 be heard and determined de novo by Judge I. Kamwendo who endorsed the Consent Order being impugned as he is seized with the supervision of the business rescue of the 3<sup>rd</sup> appellant.

## **7.0 RESPONDENT'S HEADS OF ARGUMENT**

7.1 The respondent relied on the heads of argument filed on 16<sup>th</sup> May 2024, which were filed late with leave of the Court granted by a single judge of this Court on 6<sup>th</sup> May 2024.

7.2 To counter the first ground of appeal, counsel argued that the issue of whether or not the respondent was a party to the

consent judgment is misplaced, as the appellants never raised the issue in the Court below.

7.3 According to counsel, not being a party to the proceedings at the time of commencing these proceedings is a curable irregularity and was rectified by the respondent through joining the proceedings in cause No. 2020/HB/15. Thus, this ground of appeal has been overtaken by events.

7.4 In arguing grounds 2, 3, and 4, counsel for the respondent contended that the issues raised under these grounds were not raised in the Court below. Additionally, the appellants, in this case, did not file any defence in the lower Court to rebut the respondent's claim. **Order 11 Rule 1 of the High Court Rules** requires a defendant to enter an appearance and file their defence, if any. Further, the appellants did not comply with the order for directions nor did they appear before the Court on the date set for the hearing.

7.5 Counsel proceeded to argue that since the appellants did not file any defence, any issues impugning the decision of the Court cannot be adequately dealt with by this Court, as these are questions of fact that the lower Court determined. Additionally, the appellants did not demonstrate through

evidence which findings of fact were perverse or made on a misapprehension of facts. Counsel cited the case of **Yeta v African Banking Corporation ABC (Zambia) Limited**<sup>5</sup> to argue that this Court cannot reverse findings of fact made by the lower Court where the same were not perverse, not made in the absence of relevant evidence, or upon a misapprehension of facts.

7.6 On the 5<sup>th</sup> ground of appeal, counsel submitted that the issues raised in this ground were not raised in the Court below and therefore are incompetent.

7.7 In response to ground 6, counsel contended that although the Court did not give a return date for the preliminary issue, the appellants were precluded from raising the preliminary issue under **Order 14A of the RSC** due to their failure to file a memorandum of appearance and defence. He referred us to the Supreme Court's guidance on the prerequisites for filing an application under **Order 14A of the RSC** in the case of **African Banking Corporation Limited v. Mubende Country Lodge Limited**<sup>10</sup>:

*"In the view that we take what constitutes a notice of intention to defend, in the context of*

*our rules, is the filing of a memorandum of appearance which is accompanied by a defence. It, therefore follows that the filing of a memorandum of appearance with a defence is a pre-requisite to launching an application under Order 14A, RSC.”*

7.8 He argued that the appellant’s preliminary objection under **Order 14A of the RSC** did not satisfy these conditions and was therefore a nullity.

7.9 Regarding the appellant’s counsel’s failure to attend Court, counsel stated that the lower Court was not precluded from proceeding with the trial due to the appellant’s counsel’s absence because the matters are court-driven.

7.10 In response to grounds 7 and 8, counsel contended that a consent judgment can be set aside by commencing a fresh action. To support this argument, he referred to **Order 13 Rule 9 of the RSC** and cited cases such as **Council of the University of Zambia v. Jean Margaret Calder**.<sup>11</sup> He argued that setting aside a consent judgment in a fresh action by another judge does not amount to reviewing the decision of the judge who initially entered the consent judgment.

7.11 We were urged to dismiss the appeal.

## **8.0 OUR ANALYSIS AND DECISION**

- 8.1 Upon considering the record of appeal and the arguments made by counsel for all the concerned parties, our views are as follows:
- 8.2 The first ground of appeal challenges the trial court's decision to set aside the consent judgment under cause No. 2020/HB/15, based on an application of a non-party.
- 8.3 Despite the argument put forth by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> appellants that the consent judgment was entered under cause No. 2020/HB/15, it is evident from the record of appeal (R.O.A) on page 215 that the consent judgment was entered under cause No. 2020/HPC/165.
- 8.4 Be that as it may, it is noted that cause number 2020/HPC/165 involved the 2<sup>nd</sup> appellant as the petitioner, and the 3<sup>rd</sup> appellant as the respondent in winding-up proceedings. On the other hand, cause number 2020/HB/15 was for business rescue proceedings initiated by the 1<sup>st</sup> appellant against the 3<sup>rd</sup> appellant as shown on pages 197 to 199 (ROA). The consent order involved the 1<sup>st</sup> appellant as the



1<sup>st</sup> applicant, the 2<sup>nd</sup> appellant as the 2<sup>nd</sup> applicant, and the 3<sup>rd</sup> appellant as the respondent.

8.5 It is evident from the record that the respondent herein was not a party to any of the aforementioned proceedings. Nevertheless, the respondent initiated a new action under cause number 2020/HB/23 to challenge the consent judgment.

8.6 It is settled law that only a party to the proceedings can challenge a consent judgment. Courts have consistently held that for a non-party to an action to challenge a consent judgment, the correct procedure involves applying for leave to join the proceedings or the executed consent judgment, and subsequently initiating a new action to contest it. See the cases of **Fred M'membe v. Sunday Bwalya Nkonde**<sup>1</sup> and **Fred M'membe and the Post Newspaper v. Abel Mboози and 5 others.**<sup>2</sup>

8.7 In the present case, the respondent attempted to challenge the consent judgment entered under cause number 2020/HPC/165 without first being joined to the proceedings. We agree with counsel for the 1<sup>st</sup> and 2<sup>nd</sup> appellants that the respondent, having not been a party to either the proceedings

or the consent judgment, lacks locus standi to challenge the validity of the consent judgment.

8.8 It is permissible for a party to be joined to the proceedings even after a consent judgment has been entered, provided they meet certain conditions, including having locus standi and being unaware of the proceedings earlier. Cases such as **Sampa and 2 Others v. Wina and Another**<sup>3</sup> and **Barclays Bank Zambia PLC v. ERZ Holding Limited**,<sup>4</sup> support this principle.

8.9 While we agree with the court below that a High Court Judge has jurisdiction to set aside a consent order of another High Court Judge if it is challenged, the jurisdiction can only be employed where the correct procedure outlined above has been followed.

8.10 Consequently, we find merit in the first ground of appeal.

8.11 The 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> grounds of appeal will be dealt with together as they are related. We shall start with the issue of which case was initially assigned cause No. 2020/HB/15, between the one involving the 1<sup>st</sup> appellant and the 3<sup>rd</sup> appellant, and the one related to the estate of the late Robert Bwalya.

- 8.12 On page 20 ROA, the lower court's factual findings indicate that cause No. 2020/HB/15, on the estate of the late Robert Bwalya, was filed on 24<sup>th</sup> March 2020 by PW1 at the Kabwe District Registry. Subsequently, the parties filed a consent judgment which was endorsed by Judge Kamwendo on 31<sup>st</sup> March 2020.
- 8.13 In contrast, the action between the 1<sup>st</sup> appellant and the 3<sup>rd</sup> appellant was initiated on 23<sup>rd</sup> March 2020, and was assigned cause number 2020/HB/15 (see page 197 ROA). The case involving the 1<sup>st</sup> appellant and the 3<sup>rd</sup> appellant was filed a day before the matter concerning Robert Bwalya's estate. Therefore, the lower court's conclusion that the case involving the 1<sup>st</sup> appellant and 3<sup>rd</sup> appellant was dubiously given cause No. 2020/HB/15, which was also given to the Robert Bwalya case, contradicts the available evidence. It defies logic for a case filed earlier to be assigned the cause number of a later-filed case. Hence the said lower court's finding was erroneous and is hereby set aside.
- 8.14 Regarding the allocation of the same cause number to two distinct cases and the alleged fraudulent filing of cause No. 2020/HB/15, the lower court referred to irregularities found

in the Court Register for filed cases but did not specify the nature of the irregularities. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> appellants argued that this conclusion was based on erasures observed in the Register, yet no registry staff was summoned to testify regarding the alleged erasures. We agree with counsel for the appellants that the absence of testimony from registry staff leaves unanswered questions about what transpired.

8.15 While it is indeed irregular for two cases to share the same cause number, there is no concrete evidence linking the appellant's legal counsel to any deceptive filing practices concerning the appellant's case, which was initiated by the 1<sup>st</sup> appellant acting in person at that time, as evidenced by the Originating Summons on page 198 of the ROA.

8.16 Based on the evidence on record, we hold that the lower court's finding that the appellant's advocates were involved in the fraudulent allocation of cause No. 2020/HB/15 was unsupported by the evidence on record and should therefore be overturned. We are fortified by the case of **Yeta v. African Banking Corporation ABC (Zambia) Limited**,<sup>5</sup> which established that an appellate court may reverse a trial judge's

findings of fact if they are deemed to be either perverse, unsupported by evidence, or based on a misapprehension of facts. Hence, we find merit in the 2<sup>nd</sup> to 4<sup>th</sup> grounds of appeal.

8.17 Ground 5 has been dealt with under ground 4 as the lower court based its findings only on submissions by the respondent's counsel that underhand methods were employed by counsel for the appellants to make the case appear as though it was filed earlier than the other cause with the same cause number. In the case of **Zambia Revenue Authority v Hitech Trading Company Limited**,<sup>7</sup> the Supreme Court guided that:

***“Arguments and submissions at the bar spirited as they may be cannot be a substitute for sworn evidence.”***

8.18 On this basis, ground 5 also has merit.

8.19 The 6<sup>th</sup> ground of appeal challenges the lower court's decision to proceed with the trial in the absence of the appellant's defence and defence counsel and without dealing with the preliminary application filed by the appellant.

8.20 We note that on pages 218 and 219 ROA is an affidavit in support of ex-parte summons for orders for directions.

Paragraph 5 of the said affidavit indicates that the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a notice of motion to raise preliminary issues about the propriety of the writ of summons as it did not state the plaintiff's postal address, whether or not the pleadings disclose a cause of action fit to be heard and determined by the Court and whether the pleadings were competent as they did not set out material particulars upon which the alleged cause of action was anchored.

8.21 The record shows that the respondent commenced cause no. 2020/HB/23 on 11<sup>th</sup> May 2020. On 4<sup>th</sup> June 2020, the appellants filed an application raising preliminary issues as alluded to above. The record does not show whether the preliminary application was heard.

8.22 It is trite that an interlocutory matter ought to be determined by the court before a matter proceeds to trial. The rationale for this was aptly put in the case of **John Sangwa SC v. Sunday Nkonde**<sup>8</sup> *supra*. Therefore, the court below erred in proceeding to determine the main matter before attending to the interlocutory application and consequently denied the appellants their right to be heard.

8.23 We believe that if the lower Court had considered the preliminary application, it could have determined whether the same was properly before it. We find merit in ground 6.


8.24 On grounds 7 and 8, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> appellants argued that the action by the Honourable Judge Limbani of setting aside the consent order was tantamount to interfering or exercising supervisory power over Judge Kamwendo with whom he ranked *pari passu*.

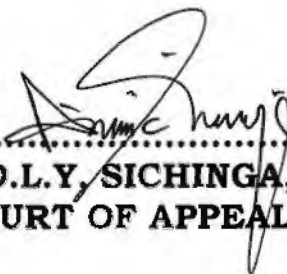
8.25 The procedure for setting aside a consent order has been discussed in the 1<sup>st</sup> ground of appeal. An action to set aside a consent order can even be handled by a different High Court judge who did not sign the consent order. Nevertheless, we have found that the learned Judge erred in setting aside the said consent order because the respondent was not a party to it. So, grounds 7 and 8 partly succeed.

8 1 1 1 3

**9.0 CONCLUSION**

9.1 All being said, the appeal has merit and it is upheld. Costs are awarded to the appellant, to be taxed in default of agreement.

  
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**C.K. MAKUNGU**  
**COURT OF APPEAL JUDGE**

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

  
.....  
**N.A. SHARPE - PHIRI**  
**COURT OF APPEAL JUDGE**