IN THE HIGH COURT FOR ZAMBIA **2009/HPC/0294**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

KALUSHA BWALYA **PLAINTIFF**

AND

CHARDORE PROPERTIES LIMITED **1ST DEFENDANT**

IAN CHAMUNORA NYALUNGWE HARUPERI **2ND DEFENDANT**

BEFORE THE HON. JUSTICE NIGEL K. MUTUNA ON 13TH DAY OF NOVEMBER, 2012

FOR THE PLAINTIFF : MR. K. BWALYA OF KBF AND PARTNERS

FOR THE DEFENDANTS: MS. Y. KAPELEMBI OF THEOTIS MATAKA AND SAMPA, LEGAL PRACTITIONERS

R U L I N G

Cases referred to:

1) ***Shell and B.P. Zambia Limited-Vs-Cornidaris and Others (1974) ZR page 281***
2) ***Chikuta-Vs-Chipata Rural District Council (1974) ZR page 241***

3) Lisulo-vs-Lisulo (1998) ZR 75

4) Lewanika and Others-Vs-Chiluba (1998) ZR page 79

5) Saban and Another-Vs-Milan (2008) ZR 235

6) Roy-Vs-Chitakata Ranching Company Limited (1980) ZR page 198

7) Jamas Milling Company Limited-Vs-Imex International (PTY) Limited SCZ No. 20 of 2002

Other authorities referred to:

1) Supreme Court Practice, 1999, Volume 1

2) High Court Act, Cap 27

3) Robert Meggary, Snell's Principles of Equity, 27th edn, London, Sweet and Maxwell, 1990, page 28

This matter came up for hearing of two applications filed by the Plaintiff for review and stay of judgment pending the application for third party proceedings. When the applications were set down for hearing the Defendants filed a notice to raise preliminary issues pursuant to Order 14A and Order 33 rule 3 of the rules of the ***Supreme Court Practice (white book)*** on 31st July, 2012. By the said notice the Defendants sought the determination of four issues namely:

"1. *The Plaintiff herein having filed its notice of Appeal cannot concurrently also apply for review of the said judgment;*

2. The Plaintiff having filed its Notice of appeal and had its application to stay execution of judgment pending appeal dismissed, the High Court's role in this matter is now functus officio so far as relates to the judgment in issue;

3. That the Affidavit in support of the said application raises contentious issues and should be sworn by the Plaintiff himself and not his advocate

4. *That the said application does not meet the requirements allowing for an application for review as required by law and should therefore not be entertained."*

At the hearing of the application in respect of the preliminary issues counsel for the Defendants indicated that the Defendants had abandoned preliminary issues 1 and 2 and that she would only argue preliminary issues 3 and 4. The reason for this was that it had just come to the attention of the Defendants that the Plaintiff had withdrawn his appeal against the judgment of this Court.

Before I set out the arguments for and against the application, it is important that I highlight the background to this application.

The brief facts of this case as they are relevant to the application before me are that on 25th June, 2012, this Court delivered a judgment dismissing the Plaintiff's claim against the Defendants. The net result of the judgment is that the Plaintiff lost his house. The Plaintiff being dissatisfied with the said judgment decided to appeal and filed a notice of appeal and simultaneously applied for a stay of execution of the judgment. The latter application was heard and dismissed on 4th July, 2012.

Subsequently, on 9th July, 2012 the Plaintiff applied for an order to stay proceedings and or judgment pending an application for an order to enter third party proceedings and for review of the judgment of the Court. In the former application, it is the Plaintiff's wish to join his former advocates to these proceedings for purposes of having them indemnify him for the loss of his house. Whilst in the latter application it is his intention to re open this matter by way of review for purposes of laying before the Court the fresh evidence as to the moneys the Plaintiff allegedly paid his former advocates for purposes of payment of same to the Defendants so that the Court can vary the judgment. These are the two applications that were before this Court, pursuant to which the Defendants have raised the preliminary issues.

In support of the notice to raise preliminary issue counsel for the Defendants and the Plaintiff both filed lists of authorities and arguments in support and opposition respectively. Their submissions at the hearing were based on the said list of authorities and arguments. The arguments are as follows. Ground 3, alleges that the affidavit in support of the application raises contentious issues and should have been sworn by the Plaintiff and not his advocates. Advancing arguments on this ground, counsel for the Defendants, Ms. Y. Kapelembi argued that Courts have time and time again advised counsel to desist from swearing affidavits over contentious matters. She argued that in the case of ***Shell and BP Zambia Limited-Vs-Cornidaris and Others (1)*** the High Court held that it is highly undesirable that legal practitioners conducting cases should introduce evidence by swearing affidavits, the contents of which are hearsay. While the Supreme Court in the case *of* ***Chikuta-Vs-Chipata Rural District Council (2),*** held that the increasing practice amongst advocates conducting cases of introducing evidence by filing affidavits containing hearsay evidence is not merely ineffective but highly undesirable, particularly where matters are contentious. It was argued further that, a cursory perusal of the affidavits currently before this Court sworn by one Kelvin Fube Bwalya, counsel for the Plaintiff, in support of both applications reveals that the issues raised in the affidavits are highly contentious and border on hearsay. There should not therefore have been sworn by counsel.

Ground 4, alleged that the application for review does not meet the requirements allowing for such an application and should not be entertained. Counsel argued that Order 39 rule 1 of the ***High Court Act*** empowers this Court to review its own decision on any grounds it considers sufficient. In doing so, it was argued, the Court is empowered to take fresh evidence.

Counsel argued further that, although the power to review is entirely discretionary, a party seeking such review must demonstrate that there are sufficient grounds upon which the Court can exercise its discretion. She

argued that the cases of ***Lisulo-Vs-Lisulo (3)*** and ***Lewanika and Others-Vs-Chiluba (4)*** have held, in this respect, that it must be demonstrated that there is a ground or grounds considered sufficient for review which then open the way to the actual review. This position it was argued, is restated in the case of ***Saban and Another-Vs-Milan (5).*** It was counsel's submission that the Plaintiff had not demonstrated any such grounds to open the way to review of the judgment rendered in this matter.

Counsel argued that the Plaintiff's arguments are that this Court should rehear this case wholly or in part on the premise that there is need to hear evidence in support of the application to enter third party notice and enjoin the proposed third party. As a consequence of this, the Court would be invited to take fresh evidence in determining the substantive issue. She went on to refer to the case of ***Roy-Vs-Chitakata Ranching Company Limited (6)*** on the circumstances in which fresh evidence will be admitted on review and the case of ***Jamas Milling Company Limited-Vs-Imex International (PTY) Limited (7)*** on what constitutes fresh evidence for purposes of review. It was argued that the fresh evidence that the Plaintiff seeks to rely upon to pave way for review relates to moneys purportedly paid by the Plaintiff to his former advocates. These moneys counsel argued appear to have been intended to settle this matter excuria and it is clear from the exhibits in the affidavit in support that this is an issue the Plaintiff and his advocates knew about before and throughout the trial. Further, the fresh evidence would have no material effect upon this Court's final decision as relates to the pleading in this matter. It was therefore submitted that the Plaintiff has not shown sufficient grounds to warrant the Court's exercise of its discretion to review.

In her concluding remarks, counsel prayed in respect of preliminary issue 3 that the offensive paragraphs of the affidavits in support, that is 8 to 15 should be struck out or be ignored. She made no specific prayer in respect of ground 4.

In response, to ground 3 counsel for Plaintiff Mr. K.F. Bwalya began by reciting the provisions of Order 5 rules 16, 17 and 18 of the ***High Court Act***. He argued that the affidavit that he swore contained only statements of fact and circumstances which he believed to be correct to the best of his knowledge. It was his argument therefore, that the affidavits were compliant with Order 5. Further that, where such belief was from any source other than his own personal knowledge, he explained the circumstances such as telephone conversations or searches on the Court record. It was also argued that he as deponent only stated the undisputed facts rendering the argument by the Defendants that he ought not to have sworn the affidavits unfounded.

In his concluding remarks on this grounds counsel argued that all the requirements for swearing of affidavits had been met.

As regards ground 4 counsel argued thus: the Plaintiff did in fact know about the payments destined to the Defendants during the course of the trial but he was not aware of the fact that his former advocates Messrs SNB Legal Practitioners had misapplied the funds; this it was argued is sufficient ground for review; and that if the Court had knowledge of the fact that the Plaintiff had actually furnished his former advocates with the moneys required to settle the debt to the Defendants which were misapplied, the Court would have arrived at a different decision. This it was argued satisfies the test laid down in the ***Roy-Vs-Chitakata Ranching Company Limited (6)*** case. Counsel argued that the act by the Plaintiff's former advocates was to the Plaintiff's detriment and is new evidence upon which it is necessary for the Court to make a determination because the Plaintiff did not know that the funds had been used for something else. For this reason it was argued, the Plaintiff is on firm ground in applying to have his former advocates joined to this action so that the Plaintiff can be indemnified. It was argued further that the Defendants will not be prejudiced by the joinder of the third party and eventual reviews.

Counsel proceeded to argue the merits in granting the stay of the judgment. It was argued that the decision in this respect is a discretionary one which the Court should take after looking at the totality of the circumstances in the matter. He argued that equity has always demanded that a mortgagee in possession must only foreclose and sell a mortgaged property if there is total failure to redeem the mortgage. In the present case, counsel argued further, the Plaintiff claims that he was already redeemed his property. In urging me to apply the equitable principles to this case, counsel drew my attention to section 13 of the ***High Court Act*** which he argued illustrates the principles of equity. He also drew my attention to the text ***Snell's Principles of Equity***; by ***Robert Meggary.***

In his concluding remarks counsel prayed that the Defendants' preliminary issues should be dismissed.

I have considered the arguments advanced by counsel and revisited the judgment delivered in this matter. The first preliminary issue raised by the Defendants questions the capacity of counsel for the Plaintiff swearing the affidavits in support of the applications for review and to stay proceedings. It has been argued that in view of the contentious matters raised, counsel for the Plaintiff should have allowed the Plaintiff himself to swear the affidavits. Further that, the statements made in the affidavits are hearsay evidence. In response the Plaintiff's advocate argued that most of the facts he deposed to were personally known to him and that where information was given to him he has stated the source.

As counsel for the Defendants has quite rightly argued, this Court and the Supreme Court has expressed misgivings about counsel swearing affidavits where the matters are contentious and facts hearsay. This is in the cases of ***Chikuta-Vs-Chipata Rural Council (2)*** and ***Shell and B.P. (Z) Limited-Vs-Cornidaris and Others (1)***. In the former, Doyle C.J. (as he then was) had this to say at page 242:

> ***"The increasing practice amongst lawyers conducting cases of introducing evidence by filing affidavits containing hearsay evidence is not merely ineffective but highly undesirable particularly where the matters are contentious."***

Whilst in the latter, Moodley, J., quoting from the ***Chikuta (2)*** case had this to say at page 281;

> ***"It is highly undesirable that legal practitioners conducting cases should introduce evidence by swearing affidavits, the contents of which are entirely hearsay."***

In arriving at the foregoing holding Moodley, J. set out the guidelines to be followed by counsel when they swear affidavits. This was with reference to Order 5 rules 15, 16, 17 and 18 of the then ***High Court Act, Cap 50*** which have been adopted in the new ***High Court Act, Cap 27*** under the same Order 5 rules 15, 16, 17 and 18. These rules state as follows:

Order 5 rule 15

> ***"An affidavit shall not contain extraneous matter by way of objection or prayer or legal argument or conclusion."***

Order 5 rule 16

> ***"Every affidavit shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true."***

Order 5 rule 17

> ***"When a witness deposes to his belief in any matter of fact, and his belief is derived from any source other than his own***

> ***personal knowledge he shall set forth explicitly the facts and circumstances forming the ground of his belief."***

Order 5 rule 18

> ***"When the belief of a witness is derived from information received from another person, the name of his informant shall be stated, and reasonable particulars shall be given respecting the informant, and the time, place and circumstances of the information."***

Although the two Courts in the ***Chikuta (2)*** case and the ***Shell and BP Zambia Limited (1)*** case have expressed their misgivings about counsel swearing affidavits based on hearsay evidence and in contentious matters, they do not give a direction as to the fate of such evidence and or affidavits. However, it is safe to say that such evidence would be inadmissible because Doyle, C.J. in his holding in the ***Chikuta (2)*** case states that it is "ineffective" for counsel to swear an affidavit in those circumstances.

Having explained the position of the law on the issue I now turn to determine it. The starting point is a perusal of the affidavit evidence of counsel for the Plaintiff, Kelvin Fube Bwalya as contained in the affidavits in support of summons for review and affidavit in support of summons for an order of stay of proceedings and/or judgment pending an application for an order to enter third party proceedings. By the said affidavit, counsel explains how the Plaintiff instructed his former advocates to pursue an excuria settlement in the matter, pursuant to which certain moneys were paid to them which were intended to be paid to the Defendants. Counsel reveals his source of the said information as being the Plaintiff, a Mr. Sikaona, a Mr. A. Kasolo and a Mr. Tembo. He states in respect of the information received from these four person that he verily believes same to be true. This is in compliance with Order 5 rule 15 of the ***High Court Act***. He however does not state the facts and circumstances forming the ground of his belief, and neither does he

state the particulars representing the time, place and circumstances of the information. In other words counsel merely states that he was informed by the four persons and does not venture further and give the circumstances in which the information was given to him and the time and place the same was given. To illustrate this point in paragraphs 8 and 9 of the affidavit in support of the application to stay proceedings or judgment, counsel states that he spoke to Mr. Sikaona an employee of Standard Chartered bank. He does not however state the time he spoke to the said employee and the circumstances under which the information was being given to him by the said employee. Further, he does not state the facts and circumstances forming the grounds for his belief of the information given to him by Mr. Sikaona. These two omissions are in contravention of the requirements of Order 5 rules 18 and 17 respectively. The same is the case with the contents of paragraph 10 of the same affidavit. In fact by that said affidavit, counsel also fails to give particulars of his informant. That is to say, who is the said Antony Kasolo and in what capacity was he giving him the information and the grounds upon which he believed the information to be true. The fate of paragraphs 11, 12, 13, 14 and 15 is the same as the other paragraphs because counsel omits to give the facts and circumstances forming the ground of his belief.

As for paragraph 10, there is a further omission being that there is no indication as to the time when counsel spoke to Mr. Tembo, the then marshal to Kakusa. J.

As regard the affidavit in support of summons for review, the paragraphs of the affidavit that are wanting are paragraphs 10, 12, 13, 14 and 15. These paragraphs by and large repeat the facts contained in paragraphs 8 to 15 of the affidavit in support of application to stay proceedings and or judgment and are therefore wanting in the same respect. I therefore find that the affidavits fall short of the requirements of Order 5 rules 17 and 18 of the ***High Court Act***. The evidence is in effect hearsay evidence whose fate is

that it is not only “ineffective” but also inadmissible. Further, I shall demonstrate in the latter part of this judgment that the evidence is also is also on contentious matters which counsel should not have sworn but have allowed the Plaintiff to swear.

I therefore find that preliminary issue 3 succeeds

I now turn to determine preliminary issue 4. It has been argued by the Defendants that the Plaintiff has not established that there are grounds that warrant the reopening of this matter by way of review. Further that, the fresh evidence that it is sought to rely on is not such that it would not have been found with due diligence prior to the trial.

The Plaintiff has argued that it has satisfied the requirements for review and sufficient grounds exist for the reopening of the case. Further that, the Defendants will not be prejudice by the review.

The law on review has been aptly summed up by the authorities relied upon by counsel for the two parties. This power of the Court to review its decision is derived from Order 39 of the ***High Court Act***. The Order states as follows:

> ***“Any judge may, upon such grounds as he shall consider sufficient review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn) and upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take such fresh evidence, and to reverse, vary or confirm his previous judgment or decision.”***

The case of ***Lewanika and Other-Vs-Chiluba (4)*** confirms the Court’s power to review under Order 39 and goes further to explain the stages that exist for having recourse to review. It states as follows at page 81:

> ***"Review under Order 39 is a two stage process. First, showing or finding a ground or grounds considered to be sufficient, which then opens the way to actual review."***

By the foregoing authority a party seeking to have a decision reviewed, must initially demonstrate that he has sufficient grounds for seeking the said remedy before the Court can open its doors to review. This the Plaintiff has argued it has satisfied by way of fresh evidence showing that the Plaintiff actually paid his former lawyer funds the purposes of paying the moneys owed to the Defendants, which moneys were misapplied.

Order 39 cited in the preceding paragraph does make provision for the Court to take fresh evidence as sought by the Plaintiff when reviewing its decision and the parameters upon which this is permitted have been set by this Court in the case of ***Roy-Vs-Chitakata Ranching Company Limited (6)*** in which it was held as follows:

> ***"(i) Events which occur for the first time after delivery of judgment would not be taken into account as grounds for review of judgment.***
>
> ***(ii) Setting aside a judgment on fresh evidence will be on the ground of the discovery of material evidence which would have had 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."***

This holding was confirmed by the Supreme Court in the case of ***Jamas Milling Co. Ltd.-Vs-Imex International (PTY) Limited (7)*** where Chitengi, J.S. whilst referring to the ***Roy (6)*** case had this to say at page 83:

> ***"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 had***

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."

It is clear from the two decisions that for review to be resorted to based on fresh evidence the applicant must satisfy the following test namely:

1) that the fresh evidence is material
2) that the fresh evidence would have had material effect upon the Courts decision
3) that the fresh evidence existed prior to the decision of the Court
4) that the fresh evidence was only discovered after the decision of the Court
5) that the fresh evidence could not with diligence have been discovered prior to the decision

Applying the foregoing test to this matter, as I have stated in the earlier part of this judgment the fresh evidence sought to be admitted on review is that regarding the payment allegedly made by the Plaintiff to his former lawyers for purposes of the funds being paid to the Defendants, which funds were misapplied. From the affidavit evidence it is clear that the Plaintiff played a crucial role in making the said arrangement with his former lawyers prior to this Court rendering its judgment or indeed taking conduct of the matter because it was then before Kakusa. J. He was therefore aware of the facts that he now seeks to introduce as fresh evidence before the judgment of this Court and was therefore in a position to bring it to the Court's attention before the judgment. He neglected to do so. Further, the fresh evidence is that it goes to show (if substantiated) what could be termed professional misconduct on the part of the Plaintiff's former lawyers. This is a highly contentious matter as has been demonstrated by the letters dated 21st October, 2009, 15th December, 2009, and 17th December, 2009, collectively marked KFB1 to the affidavit in support of review. These exhibits show

disagreement on the part of the Plaintiff's then advocates and his former advocates as to what moneys were due to the Plaintiff. The recourse for the Plaintiff in this respect lies in taking out an action against the said lawyers. It does not lie in calling upon the said lawyers to indemnify the Plaintiff against their alleged failure to remit the funds to Defendants. As such, the view I take of this is that the said fresh evidence would have no material effect on the judgment of this Court in view of the fact that it has no bearing whatsoever on the issue that was before Court derived from the Plaintiff's claim. The claim as endorsed in the pleading which fell for determination was whether or not the sell agreement in respect of the Plaintiff's property should be nullified. I do not see how the evidence of payment of the funds to the former lawyers by the Plaintiff for purposes of same being directed to pay the Defendants can have a bearing on the said issue. Further, the relief upon which the said fresh evidence is premised is misconceived. The Plaintiff has stated that he requires the judgment reviewed by admission of fresh evidence, and proceed to institute third party proceedings against the Plaintiff's former lawyers. The third party proceedings it is sought to institute is against the Plaintiff's former lawyers and calling upon them to indemnity the Plaintiff against his loss of the house. These proceedings, it is anticipated, will be made pursuant to Order 16 of the ***white book*** as can be discerned from the summons filed by the Plaintiff. The said claim, in my considered view, is misconceived because, third party proceedings for indemnity by their very nature can only be taken out by a defendant against a plaintiff's claim or a plaintiff against a defendant's counter-claim. In this action, there was no counter-claim filed by the Defendants, as such the need to be indemnified under Order 16 does not arise.

I have also considered the argument by counsel for the Plaintiff in relation to the stay of execution and that the Plaintiff had redeemed the mortgage. Not only is the argument misconceived, but is also lacking in merit because, firstly the issue as to whether or not a stay of judgment pending the third

party proceedings should be granted is not being determined by this application. Secondly, the judgment of this Court was that it upheld the sale transaction which in effect negated the contention that the transaction was a loan or mortgage transaction.

The net effect of my findings in respect of preliminary issue 4 is that, it succeeds because the Plaintiff has not proved to my satisfaction that there is a basis upon which the matter can come up for review. That is to say, he has not surmounted the first hurdle for review which is that there is a ground for review. Further having found that the two preliminary issues succeed, I find no basis for entertaining the Plaintiff's two applications and accordingly dismiss them. In so doing I award the Defendants costs of this application.

Leave to appeal is granted.

Delivered on the 13th day of November, 2012

NIGEL K. MUTUNA

HIGH COURT JUDGE