

IN THE HIGH COURT FOR ZAMBIA

2015/HP/A001

AT THE PRINCIPAL REGISTRY

AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

ALICK TEMBO

1ST APPELLANT

DAINESS TEMBO

2ND APPELLANT

AND

JOSEPHINE MOOMBA

RESPONDENT

Before The Honourable Mrs Justice P.C.M. Ngulube in Chambers.

For the Appellants:

Mr Chimembe, Messrs JMC and Associates

For the Respondent:

Mr Hamachila, Messrs Iven Mulenga and
Company

R U L I N G

CASES REFERRED TO:

- 1. Zambia Revenue Authority vs. Hitech Trading (2000) SJ 40***
- 2. Jamas Milling Company Limited vs. Imex International (Pty) Limited (2003) ZR. 79***
- 3. Lisulo vs. Lisulo (1998) ZR. 75***

This is an application for Review of a Judgment of this court. It is made pursuant to Order 39 of the High Court Rules and is supported by an affidavit that was sworn by one Alick Tembo who averred that on the 29th of June, 2015, the court granted Judgment in favour of the Respondent. The Appellants were dissatisfied with the same and lodged an appeal to the Supreme Court. The Appellants subsequently withdrew the appeal and have now applied to this court for leave to Review its Judgment out of time pursuant to Order XXXIX r1 and 2 of the High Court Rules, Cap 27 of the Laws of Zambia. The appellant averred that there is fresh evidence relating to the matter, hence the application for Review.

The Respondent filed an affidavit in opposition stating that the alleged fresh evidence has not been availed to the court. He averred that the Appellants' conduct amounts to forum shopping and an abuse of court process aimed at denying the Respondent the fruits of the Judgment.

At the hearing of the application. Mr Chimembe, Counsel for the Appellants prayed that the court grants the Appellants leave for Review out of time as prayed.

Mr Hamachila, on behalf of the Respondent opposed the application and relied on the affidavit that was filed on the 18th of December, 2015. He further submitted that the application is an abuse of court process and that the Appellants are forum shopping. There was pending an application to dismiss the appeal in the Supreme Court for Want of Prosecution. The

Appellants then withdrew the appeal and made the application before this court.

Mr Hamachila submitted that the appellants' conduct has the ulterior motive of denying justice to the Respondent. He submitted that the appellants have clearly abused the court process and prayed that their application be dismissed with costs to the Respondent.

Mr Chimembe submitted that the appellants discovered new evidence after the appeal was filed. As such, they discontinued that appeal. He referred to the case of **Zambia Revenue Authority vs. Hitech Trading¹ (2000) SJ 40** where the court held that –

“for an application to introduce new evidence to succeed, it must be shown that the evidence could not be obtained by reasonable diligence at trial, that is, that the evidence will have an important influence on the results of the case and the that evidence will be credible.”

Mr Chimembe submitted that the Appellants has complied with Order 39 and are therefore entitled to a stay pending review.

I have considered the affidavits in support and in opposition of the application as well as the submissions by counsel. Order 39 rule 1 of the High Court Rules provides that –

“Any Judge, may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him..... and upon such review, it shall be lawful for him to open and

re-hear the case wholly or in part, and to reverse, vary or confirm his previous judgment or decision.”

In the case of ***Jamas Milling Company Limited vs. Imex International (Pty) Limited***² (2003) ZR. 79, the court stated that-

“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 it could not with reasonable diligence have been discovered before...the fresh evidence must have existed at the time of the decision, but had not been discovered before.”

In the case of ***Lisulo vs. Lisulo***³ (1998) ZR. 75, the Supreme Court held that –

“1. The power to review under Order 39, Rule 1 is discretionary for the Judge and there must be sufficient grounds to exercise that discretion.

The court went on to state that Order 39, Rule 1 of the High Court Rules is not designed for parties to have a second bite. Litigation must come to an end, and successful parties must enjoy the fruits of their judgments.”

Having considered the affidavits and the submissions by counsel in this matter. I do not find any grounds that would make me review my judgment. The Appellant has not shown that fresh

evidence existed at the time of my rendering the judgment in this matter.

This application lacks merit and to say the least, is an attempt by the appellant to seek a second bite at the cherry. It is indeed an abuse of the court process. I dismiss the application with costs to the Respondent.

Delivered this 4th day of May, 2016.



**P.C.M. NGULUBE
HIGH COURT JUDGE**