lib

IN THE HIGH COURT FOR ZAMBIA **2015/HP/287**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

SYLVIA MASEBO **PLAINTIFF**

AND

DAVIES CHAMA (Sued in his capacity as Secretary-General for Patriotic Front) **DEFENDANT**

Before the Honourable Mrs. Justice M. C. Kombe in Chambers

For the Plaintiff : *Ms. M. Mushipe- Mesdames Mushipe & Associates*

For the Defendant : *Mr. Tutwa Ngulube - Messrs Nanguzyambo and Associates.*

R U L I N G

Cases referred to:

1. **Metal Rohstoff v Danaldsom Lufking and Jannet (1990) 1 Q.B 391.**
2. **Boune v Stanbridge (1965) 1 W.L.R 189.**
3. **Ashmac v British Coal Corporation (1990) 2 ALL E.R 981.**
4. **Zambia Seed Company v Chartered International (PVT) Limited (1999) Z.R 151.**
5. **Emeries v Woodword (1890) 43 CH 185.**
6. **Huddesfield Banking Company Limited v Henry Lister and Sons Limited (1895) 2 CH 273.**
7. **Backwell Bakeries Limited v Steyn Jempa -2012/HPA/002- Unreported.**

8. **Bellamaro v Ligure Lombarda Limited (1976) Z.R 267.**
9. **Zambia Revenue Authority v Hitech Fiading Company (2001) Z.R.**
10. **London Ngoma and others v United Bus Company of Zambia (1999) Z.R. 75.**
11. **Miles Emmanuel Sampa, Geoffrey Mwamba and Capt. Seleman Banda Phangula v Inonge Wina and Davies Chama-SCZ/8/294/2014-Unreported.**
12. **Bank of Zambia v Tembo and Others (2002) Z.R. 103.**
13. **Wilding v Sanderson (1897) 2 CH 534.**
14. **Attorney General v Tomline (1877) 7 CH. 388.**
15. **Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited (1995-1997) Z.R. 187.**
16. **Barclays Bank Zambia PLC v ERZ Holdings Limited (In Liquidation) and Five (5) Others-SCZ/8/291/2009.**
17. **Development Finance Corporation (DFC) v Honorio Duran, Isidro Chan and Prudential Duran-Action No. 14 of 1996.**

Legislation and other material referred to:

1. **The Supreme Court Practice, 1999 Edition (White Book)**
2. **Bryan A. Garner, The Black's Law Dictionary, Ninth Edition, 2009.**
3. **The Halsbury's Laws of England Volume 16, Fourth Edition, Butterworths, London, 1976.**
4. **The Halsbury's Laws of England, Volume 22, Third Edition, London Butterworths, 1958.**
5. **Strouds Judicial Dictionary of Words and Phrases, Volume 2, Seventh Edition, London, Thomson; Sweet and Maxwell, 2006.**

This is a Ruling on an application by the Defendant to raise a preliminary point of law. The application was made *viva voce* pursuant to Order 14A of the Rules of the Supreme Court 1999 Edition.

Learned counsel for the Defendant Mr. Tutwa Ngulube informed the court that the issue he was raising was that the amendment to the Writ of Summons and Statement of Claim had introduced in these proceedings issues that were *res judicata* and also issues that were actively before another Court. In this regard, counsel submitted that the said Writ should be struck out for irregularity.

Mr. Ngulube submitted that the fourth claim sought in the Writ of Summons being an Order to set aside the Consent Settlement Order dated 3rd December, 2014 under Cause No. 2014/HP/1906 confirming and declaring Edgar Lungu as President of the Patriotic Front related to another matter which was actively before Hon. Justice Mulenga. He submitted that he regarded the amendment as an abuse of Court process because what the Plaintiff was seeking in this case was a declaration that she was a member of the Patriotic Front and Member of Parliament for Chongwe. He argued that by introducing other proceedings which were actively before another Court made the amended Writ and Statement of Claim irregular for duplicity of action.

He referred the Court to the case of ***Metal Rohstoff v Danaldsom Lufking and Jannet*** [(1)] and the case of ***Boune v Stanbridge*** [(2)].

Mr. Ngulube submitted that based on **Order 18 rule 19 of the White Book**, the amendment to the said Writ and Statement of Claim made these proceedings frivolous and vexatious and an abuse of Court process. Mr. Ngulube further relied on the case of ***Ashmac v British Coal Corporation*** [(3)] where it was held that it was an abuse of Court process to re-litigate issues afresh.

In conclusion, Mr. Ngulube submitted that the Writ of Summons and Statement of Claim in their current form could not be allowed to stand. He prayed that the same be struck out for being irregular and also for amounting to multiplicity of actions.

In opposing the application to raise preliminary issue on a point of law, the Plaintiff filed an affidavit which she deposed to. The Plaintiff in her affidavit explained that she had been advised by her advocates that the core basis of the preliminary issue raised by the Defendant was misconceived, unnecessary and an abuse of Court process and that in this respect, the Consent Judgment she was challenging was binding until it was set aside; that the only means open to her to set it aside on the ground of fraud was to bring a fresh action for that purpose.

She further explained that the claims in the amended originating process were not *res judicata* in any form or manner as the substance and the parties to the two causes were different. She added that in the case under Cause No. 2014/HP/1906, she was merely an alleged contemnor and the allegations against her were never heard but were instead dismissed pursuant to the Ruling delivered by Hounorable Justice M. S. Mulenga on 22nd December, 2014. She produced a copy of the Ruling which was marked **'SM1.'**

The Plaintiff deposed that she had been advised that she was not making an attempt to re-litigate the matters on which findings of fact had earlier on been made by the Court and formed the basis of the Consent Judgment dated 3rd December, 2014 under Cause No. 2014/HP/1906 as alleged by the Defendant's advocates; that the amended originating process was in order and that she was on firm ground by adhering to the correct forum for setting aside a Consent Judgment by way of commencing a fresh action; that the preliminary issue raised by the Defendant was misconceived, not well founded and lacked merit as there was no form of irregularity, multiplicity of action or abuse of Court process whatsoever attached to the amended Writ of Summons and Statement of Claim.

At the hearing of the Plaintiff's response to the preliminary issue raised, learned counsel for the Plaintiff relied on the affidavit in opposition and the skeleton arguments filed into Court.

In the skeleton arguments, Ms. Mushipe commenced her arguments by addressing the issue of the doctrine of *res judicata.*

Ms. Mushipe submitted that the legal basis for the Plaintiff's claim for an Order to set aside the Consent Judgment dated 3rd December, 2014 was centered on paragraph ***17A -23 of the Rules of the Supreme Court 1999 Edition Volume 2*** which provides that:

> ***"a judgment by consent is binding until set aside....a court has no power to vary a consent judgment or order made previously in that Court and therefore the only means open to a party to set aside a consent judgment or order on the ground of fraud or mistake is to bring a fresh action for that purpose."***

Based on this authority and circumstances of this case, counsel submitted that the Defendant could not have issue at this stage with the Plaintiff's fourth claim in the amended Writ of Summons and Statement of Claim. Ms. Mushipe argued that the above cited practice note was absolutely instructive on the procedure to be taken to challenge a Consent Judgment and submitted that the Plaintiff had employed the correct forum in challenging the said Consent Judgment and that this Court was aptly imposed to set it aside. It was therefore her submission that the Defendant's preliminary issue on this point alone was not valid. She referred the Court to the case of ***Zambia Seed Company v Chartered International (PVT) Limited*** [4] where the Court stated that:

> ***"By law the only way to challenge a judgment by consent would be to start an action specifically to challenge that consent judgment."***

In furtherance of her argument, Ms. Mushipe referred this Court to the case of ***Emeries v Woodword*** [5] wherein the Court stated that:

> ***"An application to set aside an agreement for the compromise of an action cannot be made by summons in the action, a fresh action must be sought for the purpose."***

On the issue of whether this instant case was *res judicata*, Mrs. Mushipe submitted that this issue when considered against the backdrop of Cause No. 2014/HP/1906 would best be determined by first considering the phrase *res judicata* and later the extent of its application. In this regard, counsel quoted the definition of *res judicata* from ***Black's Law Dictionary*** which reads as follows:

> ***"The phrase res judicata refers to an issue that has been definitively settled by judicial decision. The three essential elements are:-***
>
> ***(i) An earlier decision on the issue;***
>
> ***(ii) A final judgment on the merits; and***
>
> ***(iii) The involvement of the same parties, or parties in privity with the original parties."***

Furthermore, Ms. Mushipe referred the court to ***paragraph 1254 of Halsbury Laws of England*** which highlights the essentials of *res judicata* as follows:

> ***"In order that a defence of res judicata may succeed it is necessary to show that not only the cause of the action was the same, but also that the plaintiff has had an opportunity of recovering and but his own fault might have recovered in the first action, that which seeks to recover in the second. A plea of res judicata must show either an actual merger, or that the same point had been actually declared between the same parties where the former judgment has been for the defendant, the conditions necessary to conduct the plaintiff are not less stringent. It is not enough that the matter alleged to be concluded might have been put in issue or***

that the relief sought might have been claimed. It is necessary to show it was actually so put in issue or claimed."

In view of the authorities cited, Ms. Mushipe argued that it was quite clear what matters the Court could consider to be *res judicata.* She further submitted that the doctrine was not absolute as there were exceptions; one exception which applied to the instant case was the legal procedure in which consent judgments were allowed to be challenged on grounds of fraud and undue influence. Ms. Mushipe argued that the doctrine of *res judicata* did not extend to Consent Judgments that a party intended to set aside on grounds of fraud and other irregularities. For this proposition, counsel relied on the case of ***Huddersfield Banking Company Limited vs. Henry Lister and Sons Limited***[6] where **Lindley L. J**. stated that:

'I have not the slightest doubt that a Consent Order can be impeached, not only on the ground of fraud, but upon any ground that would invalidate it. It is expressed in a more formal way than usual.... To my mind the only question is whether the agreement upon which the Consent Order was based can be invalidated or not. Of course if that agreement cannot be invalidated the Consent is good. If it can be, the Consent Order is bad.'

In response to the issue relating to duplicity and multiplicity of actions, Ms. Mushipe submitted that the allegations raised were moot as the Plaintiff's claims were not actively before another Court. Counsel argued that the Defendant's allegations of duplicity and multiplicity of actions were raised with reference to the method in which the Plaintiff was challenging the Consent Judgment as well as her claim for fresh elections to be properly held in accordance with the Patriotic Front Constitution, Electoral Regulations, Electoral College and by way of Secret Ballot to elect the President of the Patriotic Front should this Court find that the Consent Judgment be set aside on grounds of fraud and undue influence.

Ms. Mushipe quoted the definition of multiplicity of actions from **Black's Law Dictionary** which is defined as:

> ***'the existence of two or more lawsuits litigating the same issue against the same Defendant.'***

To buttress the argument, counsel also cited the case of ***Backwell Bakeries Limited vs. Steyn Jempa*** [7] where the High Court shed more light on the phrase of multiplicity of actions as follows:

> ***'I am further of the considered view that learned Counsel for the appellant seems to have misunderstood the context in which the Supreme Court frowned upon the commencement of fresh actions. In this context commencement of fresh actions meant commencement of a number of actions based on the same claim in different court with a view of hoping to get a favourable result in at least one of them in what is termed forum shopping.'***

In this regard, Ms. Mushipe submitted that the issue which the Defendant's advocates alleged amounted to a multiplicity of action was the Plaintiff's fourth claim which related to the setting aside of the Consent Judgment. She argued that contrary to the Defendant's assertions, a perusal of the case record relating to cause No. 2014/HP/1906 revealed that the Consent Judgment was not being challenged therein on grounds of fraud or undue influence as the Plaintiff was rightly doing so by way of a fresh action.

Furthermore, it was argued that a perusal of the record revealed that the proceedings which were actively before the Court were intervener proceedings, the intending interveners were Miles Sampa, Geoffrey Bwalya Mwamba and Captain Seleman Phangula Banda. She further submitted that the case record also revealed that the first intending intervener had withdrawn as party from the proceedings and that the other two intending interveners had been dismissed from the proceedings for want of prosecution of their intervener applications.

Ms. Mushipe therefore submitted that all things considered, there were currently no proceedings whatsoever which were pending or actively before Cause No. 2014/HP/1906 let alone there were no proceedings which were being re-litigated by the Plaintiff relating to her main claims where she was challenging her purported suspension and expulsion from the Patriotic Front Party.

In the light of this, Ms. Mushipe submitted that this court had the jurisdiction to adjudicate on all matters and claims listed in the Plaintiff's amended originating process as they did not amount to multiplicity or duplicity of actions.

Ms. Mushipe also argued in the alternative that should this Court find that claim (iv) was irregular as alleged by the Defendant, this Court should hear and determine in the interest of serving justice the other claims in the amended Originating process concerning the validity of the Plaintiff's membership in the Patriotic Front as well as her still being a valid Member of Parliament for Chongwe Constituency. In this regard counsel referred the court to the case of ***Bellamaro v Ligure Lombarda Limited***[8] wherein the Supreme Court stated that the principle must always be to ensure that justice was done between the parties and that it would be wrong to dismiss an action when the defect whether in the Writ or other pleadings could be cured.

In conclusion, counsel submitted that based on the cited authorities, the Plaintiff's fourth claim was competent and properly before the Court and was not *res judicata*. Her prayer was that the action should not be struck out but instead heard and determined on its own merits. Further, that the Defendant's issue of the latest amendment purportedly introducing matters that amounted to multiplicity of actions or abuse of Court process did not apply to the instant

case as the Plaintiff adhered to the rules of court relating to the *Modus Operandi* of challenging a Consent Judgment.

In her verbal submissions Ms. Mushipe submitted that the preliminary issues raised pursuant to **Orders 14A** of the **White Book** were irregularly before this Court as the application should not have been made *viva voce* but by way of formal application pursuant to **Order 33(3)** of the **White Book** since the preliminary issues raised questions of both law and fact.

Furthermore, counsel submitted that the arguments and submissions should not be entertained as they were tantamount to giving evidence at the bar. On this point, Ms. Mushipe relied on the case of ***Zambia Revenue Authority v. Hitech Trading Company*** [9].

In relation to the plea of *res judicata* and multiplicity and duplicity of action, Ms. Mushipe repeated in substance what is contained in the written arguments.

In reply to the submissions made by counsel for the Plaintiff, Mr. Ngulube submitted that it was settled that the issue of the election of President Edgar Lungu was adjudicated upon under Cause No. 2014/HP/1906 before Judge Mulenga; that that court having fully determined the election of President Edgar Lungu and the issue of the Consent Order, this Court could not re-open that dispute.

Mr. Ngulube also submitted that there was no law that allowed a person who was fully aware of those proceedings who failed to join those proceedings and to challenge the Consent Judgment in that matter to open a new set of proceedings. He argued that the Plaintiff was not a party but was fully aware of those proceedings and therefore, she could not challenge the Consent Judgment because she was not a party to those proceedings.

He referred the Court to the Supreme Court judgments of ***London Ngoma and others v. United Bus Company of Zambia*** [(10)] and the case of ***Miles Emmanuel Sampa, Geoffrey Mwamba and Capt. Seleman Banda Phangula v Inonge Wina and Davies Chama*** [(11)]. He submitted that based on these authorities, a person who was not a party to the action could not challenge a Consent Judgment by bringing a fresh action. It was his submission that by bringing in a fresh action that President Edgar Lungu was not duly elected would be tantamount to saying that no Court had determined the legality of that action. He added that the fourth and fifth claims were *res judicata* by virtue of the proceedings under Cause No. 2014/HP/1906 and the subsequent judgment of the Supreme Court wherein it guided that whoever was interested could join and challenge the Consent Judgment; that the failure by the Plaintiff to join the proceedings to challenge the Consent Judgment rendered the matter *res judicata* and an abuse of court process.

In reply to the submission whether this action amounted to multiplicity of action or not, Mr. Ngulube submitted that at the time the Writ of Summons and Statement of Claim were filed, the proceedings under Cause No. 2014/HP/1906 were still active under Hon. Justice Mulenga until the dismissal of the action for want of prosecution. He submitted that notwithstanding that those proceedings had now been determined to their finality; the issue of the Consent Judgment could not competently be raised in these proceedings as the failure by the Plaintiff not to join those proceedings as directed by the Supreme Court was fatal.

In reply to the Plaintiff's argument in the alternative, Mr. Ngulube submitted that this court could make an Order to amend the Writ of Summons or dismiss the whole claim.

Those were the arguments by the parties which I have carefully considered.

By this application, I have been invited to determine the issue whether the amendment by the Plaintiff of the Writ of Summons and Statement of Claim introduced claims on issues which were *res judicata* and also actively before Hon. Justice M. Mulenga under Cause No. 2014/HP/1906.

I should state from the outset that when a court is called upon to decide what questions of law or fact were determined in an earlier matter when considering the doctrine of *res judicata*, paragraph 1527 of the ***Halsbury's Laws of England,*** states that the court is entitled to look at the judge's reasons for his decision and his notes of the evidence. Therefore, in determining this application I have had occasion to peruse the court record relating Cause No. 2014/HP/1906.

In brief, the Plaintiff therein **INONGE WINA** (suing in her capacity as National Chairperson) of the Patriotic Front sued **DAVIES CHAMA** in his capacity as Secretary General of the Patriotic Front and sought the following reliefs:

(1) An Order that the purported cancellation of the decision of the General Conference to proceed with the Election of the Party President Edgar Chagwa Lungu at a General Conference aired on ZBC TV on the 30th November, 2014 was illegal null and void.

(2) An Order that any convening of another General Conference other than the one that elected Honourable Edgar Lungu as Party President and any election emanating therefore was illegal null and void.

(3) An Order of interim injunction restraining of the Secretary General or any other officer or agent of the party from either convening, electing or announcing to the nation the name of another candidate purporting to be Patriotic Front President.

(4) An Order that the purported accreditation of Candidates after the election of Honourable Edgar Lungu was illegal null and void.

(5) Any other relief the court deems fit.

(6) Costs.

The matter did not proceed to trial but the parties executed a Consent Judgment which was endorsed by Justice Mulenga on 3rd December, 2014 in the following terms:

> ***BY CONSENT OF BOTH PARTIES the following Consent Orders are HEREBY MADE:-***
>
> 1. ***That the Election of Honourable Edgar Chagwa Lungu as Party President at the Extra Ordinary General Conference held on 30th November 2014 BE AND IS HEREBY confirmed and the Honourable Mr. Edgar Chagwa Lungu BE AND IS HEREBY DECLARED the President of the Patriotic Front and Sole Presidential Candidate on the Patriotic Front Ticket in the 20th January 2015 elections.***
>
> 2. ***That the Purported General Conference of the 1st December 2014 at which the said Honourable Miles Samba was purportedly elected as another Party President of the Patriotic Front BE AND IS HEREBY DECLARED illegal, null and void and all the decisions made therefrom are hereby QUASHED.***
>
> 3. ***That the Order of Injunction granted on 1st December 2014 BE AND IS HEREBY MADE INTERLOCUTORY AND THE Defendants whether by themselves, agents, candidates, superiors or subordinates BE AND ARE hereby RESTRAINED in perpetuity from purporting to have elected a Party President or Presidential Candidate of the Patriotic Front other than Honourable Mr. EDGAR CHAGWA LUNGU.***

On 25th February, 2015, following her expulsion from the Patriotic Front Party, the Plaintiff took out of the principal registry a Writ of Summons and Statement of Claim seeking *inter alia* an Order that the purported expulsion of 24th February, 2015 by the Defendant from the Patriotic Front was irregular, and as such null and void. On 14th May, 2015, the Plaintiff obtained an Order before the Learned Registrar to amend the Writ of Summons and Statement of

Claim to include *inter alia* claims (iv) and (v). These claims were couched as follows:

1. ***'An Order that the Consent Settlement Order dated 3rd December, 2014 under Cause No. 2014/HP/1906 confirming and declaring Edgar Lungu President of the Patriotic Front is illegal, null and void and be set aside by reason that it was executed by way of fraud and undue influence and that fresh elections be properly held in accordance with the Patriotic Front Party Constitution, the PF Electoral Regulations and by the correct Electoral College and by way of secret ballot to duly elect the rightful President for the Patriotic Front.***

2. ***An Order that all the decisions made by Edgar Lungu in the capacity of President of the Patriotic Front are illegal, null and void ab initio.'***

In view of the above claims sought, the Plaintiff under paragraphs 9, 10, 11 and 14 of the amended Statement of Claim averred as follows:

(9) ***There were no elections that took place to elect on Edgar Chagwa Lungu as President of the Patriotic Front Party at the 'PF' extra ordinary general assembly held in Kabwe but rather he was illegally declared as President through force and threatening of violence.***

(10) In complying with the provisions of the Patriotic Front Party Constitution and the PF Regulations, a person can only assume the Office of President of the Party through holding elections by secret ballot by a particular stated Electoral College but the said Edgar Chagwa Lungu was instead fraudulently elected by show of hands of an illegal constituted electoral college and subsequently declared President by Tutwa Sandani Ngulube who is the newly officer appointed Chairman of Disciplinary Committee who was the returning officer at the General Assembly who happens to be his relative and the lawyer having conduct of this matter on the Defendant's behalf.

(11) There were no legitimate elections which took place and as such one Mr. Edgar Chagwa Lungu is not the legitimate

President of the Patriotic of Patriotic Front and thus all his decisions in that capacity are null and void ab initio.

(14) The legitimate President of the Patriotic Front at that time was Mr. Miles Sampa who in the opinion of the Plaintiff (as Chairperson of Elections) was duly elected to the office of party President in accordance with the provisions of the Patriotic Front Party Constitution and the PF Electoral Regulations and that one Edgar Chagwa Lungu was in fact holding that office unlawfully as no legally constituted General Assembly was held to elect him.

It is these amendments that gave rise to this application that the issue raised in claims (iv) and (v) of the amended Writ of Summons is *res judicata,* amounts to a multiplicity of actions and therefore irregular.

Before I proceed to consider the issue for determination, learned counsel for the Plaintiff argued that the preliminary issue raised pursuant to Order **14A of the White Book** was irregularly before this Court because the issue raised questions of both law and fact and therefore it should not have been made *viva voce* but by a formal application pursuant to **Order 33 rule 3** of the White Book.

It is trite law that a court may determine any question of law or construction of any document arising 'without a full trial of the action' where it appears to the Court that such a determination will finally determine the proceedings or an issue therein.

In this regard, **Order 14A rule 1** of the White Book provides that:

1. –(1) 'The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that-

(a) Such question is suitable for determination without a full trial of the action, and

(b) Such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2)Upon such determination the Court may dismiss the cause or make such order or judgment as it thinks just.

Further, **Order 14A rule 2** provides that an application under rule 1 may be made by summons or motion or may be made orally in the course of any interlocutory application to the Court. The explanatory note under paragraph 14A/2/7 therefore states that great flexibility has been introduced as to the manner in which an application under rule 1 may be made, namely by summons or motion and notwithstanding Order 33 rule 1, it may be made orally.

Therefore it is explained under paragraph 14A/2/9 that if a question emerges during the hearing of an interlocutory application the determination of which would finally dispose of the whole action, instead of adjourning the proceedings to enable an application under rule 1 to be made at a later date, the court is enabled on the application of a party to proceed directly there and then and determine that question.

However, paragraph 14A/2/8 states that where the application is made by way of summons, it should be supported by affidavit evidence deposing to all material facts relating to the question of law or construction to be determined. In addition to the material facts proved by evidence of the parties, the court will take into account all those facts which have been duly admitted whether by pleadings or otherwise.

Order 33 rule 3 on the other hand provides that:

'The Court may order any question or issue arising in a cause or matter whether of fact or law or partly of fact and partly of law

and whether raised by pleadings or otherwise to be tried before, at or after the trial of a cause or matter.'

The explanatory note under paragraph 33/3/1 states that the court can order that a question or issue be stated in the form of a special case and the parties cannot agree between themselves without obtaining the order of the court. However, this rule should be read with Order 14A relating to the disposal of a case on a point of law.

In the present case, the Defendant made a *viva voce* application to raise a preliminary issue on a point of law when the matter came up for hearing of the Plaintiff's application to raise a preliminary issue. The preliminary issue raised was that amended Writ of Summons and Statement of Claim introduced claims on an issue which was *res judicata* and actively before another court and therefore amounted to a multiplicity of action.

In view of the preliminary issue raised by the Defendant, the Plaintiff contends the Defendant should have made a formal application pursuant to Order 33 rule 3 since the question raised was on both law and fact,

Although the application made by the Defendant pursuant to Order 14A should ordinarily have been made by way of summons and supported by an affidavit, I have considered that Order 14A rule 1 is flexible as it permits a question of law to be made orally and at any stage of the proceedings. Therefore the availability of the oral application constitutes an exception to the general rule that an application must be made by summons. In fact, rule 2 is not couched in mandatory terms as it states that the application may be made by summons.

Furthermore, I have considered the nature of the issues raised by the Defendant. I am satisfied that the issues raised if determined would finally determine the claims in question in the amended Writ of summons without a full trial. Therefore notwithstanding the fact that no evidence was adduced by

the Defendant, the nature of the questions raised permits the court to look at the record in the earlier proceedings under Cause No. 2014/HP/1906 and the pleadings filed in order to make a determination on the question of law raised.

For the reasons stated above, I find that the preliminary issue raised on a point of law pursuant to Order 14A is competently before this court and I shall proceed to consider the same.

In determining the preliminary issue raised by the Defendant, I intend first to consider the first limb of the preliminary issue which relates to the doctrine of *res judicata* and the legal procedure for challenging Consent Judgments as there are arguments from both the Plaintiff and the Defendant on this issue. I will then consider the second limb which relates to multiplicity of actions.

The phrase *Res judicata,* a Latin maxim which means 'matter judged' is a common law doctrine that applies in legal systems in many jurisdictions. The underlying principle regarding this doctrine is expressed in the maxim; *republicaes ut sit finis litium,* meaning that it is in the public interest that there should be an end to litigation. In this regard, the doctrine is treated as a branch of the law of estoppel.

In the Stroud's Judicial Dictionary of Words and Phrases, the phrase is explained as follows:

> ***"The phrase res judicata is used to include two separate state of things. One is where a judgment has been pronounced between parties and findings of fact are involved as a basis of that judgment. All the parties affected by the judgment are then precluded from disputing those facts, as facts in any subsequent litigation between them. The other aspect of the term arises when a party seeks to set up facts, which if they had been set up in the first suit, would or might have affected the decision. This is not strictly raising any issue which has already been adjudicated, but***

it is convenient to use the phrase res judicata as relating to that position.

The Black's Law Dictionary has defined it this way:

1. ***'An issue that has been definitely settled by judicial decision.***

2. ***An affirmative defence barring the same parties from litigating a second lawsuit on the same claim or any other claim arising from the same transaction or series of transactions and that could have been- but was not raised in the first suit.'***

The scope of *res judicata* therefore encompasses limits on both the claims and the issues that may be raised in subsequent proceedings. The doctrine of *Res judicata* being a branch of the law of estoppel therefore includes two related concepts which are termed cause of action estoppel and issue estoppel.

Cause of action estoppel applies where a cause of action in a second action is identical to a cause of action in the first, the latter having been between the same parties or their privies and having involved the same subject matter. In this regard, paragraph 1529 of the ***Halsbury's Laws of England***, states that the doctrine will apply in all cases where the cause of action is the same and has been determined on the merits and not on some ground which has ceased to operate when the second action is brought.

Under issue estoppel, the principle is that once an issue of fact has been determined in proceedings between two parties, the parties may not re-litigate that issue even in a proceeding on a different cause of action. Paragraph 1530 of the ***Halsbury's Laws*** states as follows:

'A party is precluded from contending the contrary of any precise point which having once been distinctively put in issue has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in

issue in the first action provided it is embodied in a judicial decision that is final is conclusive in a second action between the same parties and their privies.'

Issue estoppel therefore may arise when a particular issue forming a necessary ingredient in a cause of action has been decided and in subsequent proceedings involving a different cause of action to which the same issue is relevant, one of the parties seeks to re-open the issue. This principle applies whether the point involved in the earlier decision and as to which the parties are estopped is one of fact or one of law or one of mixed law and fact.

In our jurisdiction, the Supreme Court for Zambia had occasion to consider the phrase *res judicata* in the case ***Bank of Zambia v Tembo and Others*** [12]. In that case, the Court held that:

(i) In Order that a defence of res judicata may succeed, it is necessary to show that the cause of action was the same, but also that the plaintiff had an opportunity of recovering and but for his own fault might have recovered in the first action that which he seeks to recover in the second.

(ii) A plea of res judicata must show either an actual merger or that the same point had been actually decided between the same parties.

It is clear from the law as outlined above that three essential elements must exist for the doctrine to apply. These are:

(i) That there is an earlier decision on the issue by a court of competent jurisdiction;

(ii) That there is a final judgment on the merits; and

(iii) The involvement of the same parties, or parties in privity with the original parties or the involvement of a party to the first cause.

Related to the plea of *res judicata* is the argument advanced by the Plaintiff that the doctrine of *res judicata* is not absolute as there are exceptions.

According to the Plaintiff, one of the exceptions is the legal procedure provided for challenging Consent Judgments on the grounds of fraud and undue influence which procedure the Plaintiff contends she has employed in this case.

I will therefore consider the subject of Consent Judgments in so far as it relates to the argument advanced by the Plaintiff.

Order 42/5A of the Rules of the Supreme Court provides that:

> ***'Where all the parties to a cause or matter are agreed upon terms in which a judgment should be given or an order should be made, a judgment or order in such terms may be given as a judgment or order of the court.'***

What I construe from the above provision is that where parties settle a dispute and a court enters a judgment upon the parties consent, that judgment is in many ways like a judgment entered after a full contest or a court's findings and may be enforced in the same way as any other judgment. It is essential to emphasize that a consent judgment derives its legal effect from the agreement of the parties and therefore it is binding until set aside.

The question to be asked is this: What is the procedure for setting aside or impeaching a Consent Judgment? **Paragraph 17 A-23 of the Rules of the Supreme Court Volume 2** is instructive on this point and provides as follows:

> ***'a judgment by consent is binding until set aside and acts as an estoppel... a court has no power to vary a consent judgment or order made previously in that Court and therefore the only means open to a party to set aside a consent judgment or order on the ground of fraud or mistake is to bring a fresh action for that purpose.'***

It is clear from the above that given that an appeal will not ordinarily lie against a consent judgment, the bringing of a fresh action to challenge the

validity of a consent judgment on the ground of fraud or mistake is a standard and accepted procedure.

In the case of ***Emeris v Woodward,*** a case cited by counsel for the Plaintiff, North J. held that it was only through fresh proceedings that a consent order could be set aside.

This principle was adopted by the Supreme Court in the case of ***Zambia Seed Company v. Chartered International (PVT) Limited*** wherein the Court stated that:

> ***'By law the only way to challenge a judgment by consent would be to start an action specifically to challenge that consent judgment.'***

In relation to the grounds upon which a consent judgment may be set aside, paragraph 1672 of the ***Halsbury's Laws of England*** reads as follows:

> ***'A judgment given or an order made by consent may on fresh action brought for the purpose be set aside on any ground which would invalidate a compromise not contained in a judgment or order. Compromises have been set aside on the ground that the agreement was illegal as against public policy, or was obtained by fraud or misrepresentation or non-disclosure of a material fact which there was an obligation to disclose or by duress or was concluded under a mutual mistake of fact, ignorance of a material fact or without authority.'***

Thus, in the case of ***Wilding v Sanderson*** [13] Lindley L.J said at page 550 that:

> ***'a consent order based on and intended to carry out an agreement concluded between the parties ought to be treated as an agreement which could be set aside on any ground which an agreement in the terms of the order could be set aside.'***

Words to much the same effect were used by Vaughen J. in the case of ***Huddersfield Banking Company Limited v Henry Lister & Sons Limited*** that:

> ***'A court has jurisdiction to set aside a consent order upon any ground which would invalidate an agreement between the parties.'***

Similarly, in the case of ***Attorney General v Tomline*** [14] it was held by Fry J. that:

> ***'When a consent order has been drawn up, passed and entered, it is not competent to this court to vary that order except for reasons which would enable the court set aside an agreement.'***

It is clear from the foregoing that courts have jurisdiction to set aside a consent judgment in exceptional cases based on contractual principles which would enable the court set aside an agreement between the parties. The grounds for setting aside a consent judgment include fraud, mistake, misrepresentation or non-disclosure of material fact. To that extent therefore, challenging a consent judgment on these grounds may be considered an exception to the doctrine of *res judicata.*

In relation to the second limb of the preliminary issue on multiplicity of actions, ***Black's Law Dictionary*** defines it as:

> ***'The existence of two or more lawsuits litigating the same issue against the same defendant.'***

Therefore, where a multiplicity of actions exists on the same subject matter, the courts have disapproved the commencement of a multiplicity of procedures, proceedings and actions in different courts which may result in the courts making contradictory decisions on the same matter as it is regarded as an abuse of court process. In this regard, the Supreme Court in the case of ***Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited***

and Sun Pharmaceuticals Limited [15] quashed the injunction because there was already an action on the same subject matter.

Having outlined the law, I shall proceed to consider the 1st limb of the question of law raised whether or not the issues presented under claims (iv) and (v) in the amended Writ of Summons have been pronounced on under Cause No. 2014/HP/1906.

To recapitulate, the claim under paragraph (iv) of the amended Writ of Summons in the present case is for an Order to set aside the Consent Settlement Order dated 3rd December, 2014 wherein Mr. Edgar Chagwa Lungu was confirmed and declared to be the President of the Patriotic Front Party and that once set aside, fresh elections should be held in accordance with the Patriotic Front Party Constitution and Electoral Regulations.

I should point out at this juncture that in my view, the Order sought under claim (v) that all the decisions made by Mr. Edgar Chagwa Lungu in his capacity as President of the Patriotic Front are illegal, null and *void ab initio* is dependent on the finding of the Court under claim (iv) as the two claims are related.

The determination or pronouncement by Justice Mulenga under Cause No. 2014/HP/1906 was that Mr. Edgar Chagwa Lungu was the duly elected President of the Patriotic Front Party. In this regard, the Defendant's contention is that it is an abuse of court process and irregular to re-litigate the issue afresh as it is *res judicata*. Furthermore, the Defendant contends that the Plaintiff could not challenge the Consent Judgment as she was not a party to the action under Cause No. 2014/HP/1906 and that her failure to join those proceedings to challenge the Consent Judgment rendered the matter *res judicata*.

The Plaintiff on the other hand has argued that commencing a fresh action for the purposes of setting aside a consent judgment on the grounds of fraud was an exception to the doctrine of *res judicata*. In this vein, the Plaintiff argued that she was not making an attempt to re-litigate the issue but that she was adhering to the correct forum of setting aside a consent judgment on grounds of fraud and undue influence. In addition, the Plaintiff argued that she was not a party to the matter before Hon. Justice Mulenga and that the claims under paragraph (iv) and (v) were not *res judicata* in any form or manner as the substance and the parties to the two causes were different.

As I have alluded to, three essential elements must be satisfied before the doctrine of *res judicata* can be invoked.

1. ***An earlier decision on the issue by a court of competent jurisdiction.***

In determining this element, I have considered nature of the reliefs sought by the Plaintiff and the averments made in the Statement of Claim under Cause No. 2014/HP/1906 before Justice Mulenga. One of the issues that arose in that cause related to the election of Mr. Edgar Chagwa Lungu as the President of the Patriotic Front Party at the General Conference. In this regard, by the Consent Judgment dated 3rd December, 2014, Mr. Edgar Chagwa Lungu was confirmed and declared as the duly elected President of the Patriotic Front. It is in this vein that the Defendant has argued that this issue cannot be re-litigated in the present case as it was determined and settled by Justice Mulenga. The Defendant therefore has raised issue estoppel.

The Plaintiff on the other hand has argued that the substance of the claims in the amended originating process are different from what the Plaintiff sought under Cause No. 2014/HP/1906 as the Plaintiff herein seeks to set aside the Consent Judgment that declared Edgar Lungu as President of the Patriotic Front Party.

It is clear that the Plaintiff under claim (iv) seeks an Order to set aside the said Consent Judgment that confirmed and declared Mr. Edgar Chagwa Lungu as President of the Patriotic Front Party. However, I am of the view that in the light of this Order sought and the averments made in paragraphs 9, 10, 11 and 14 of the Plaintiff's amended Statement of Claim, this court will inevitably re-litigate the issue whether Mr. Edgar Lungu was the duly elected President of the Patriotic Front as this issue is a necessary ingredient in the claim or Order sought by the Plaintiff under claim (iv).

I say so because under the said paragraphs, the Plaintiff has averred that there were no legitimate elections which took place to elect Mr. Edgar Chagwa Lungu and therefore he is not the legitimate President of the Patriotic Front. In addition, the Plaintiff has averred that the legitimate President of the Patriotic Front at that time was Mr. Miles Sampa who in her opinion was duly elected to the office of Party President.

In this regard, I am of the considered view that the issue determined by Justice Mulenga in the earlier proceedings that Mr. Edgar Chagwa Lungu was the duly elected President of the Patriotic Front Party is also common to the current proceedings notwithstanding that the claims are different under the two causes.

For the foregoing reasons, I find that there was an earlier decision on the issue raised under claim (iv) of the Amended Writ of Summons by a court of competent jurisdiction. Therefore, the first element has been satisfied.

2. A final Judgment on the merit.

As I have alluded to, where all the parties to a cause or matter settle a dispute and a court enters a judgment upon the parties consent, that judgment is in many ways like a judgment entered after a full contest or a court's findings and

may be enforced in the same way as any other judgment. In the present case, the parties to the matter under Cause No. 2014/HP/1906 consented through their advocates to a consent judgment being drawn up on the terms as outlined therein.

I therefore find that second element has been satisfied as there was a final judgment on the merits as the parties consented to that judgment.

3. ***The involvement of the same parties or parties in privity with the original parties or involvement of a party to the first case.***

The Plaintiff's argument is that the parties to the two causes are different and therefore the plea of *res judicata* does not arise.

In considering this element I have considered the holding of the Supreme Court in the case of ***Barclays Bank Zambia PLC v ERZ Holdings Limited (In Liquidation) and Five (5) others*** [16] as it had an opportunity to consider whether the doctrine of *res judicata* could be invoked in matter in which the subject matter in the two causes were unrelated and the parties were different. The Supreme Court stated that:

> ***'Therefore although the Appellant Bank was not a party to the proceedings before Kakusa J and the subject matters before the two Judges (that is Kakusa J and Musonda JS) were totally unrelated, but because the three Respondents were bonafide purchasers of these properties, we agree with Musonda JS that the ownership of the three properties in question was already adjudicated upon and settled through the consent judgment. We hold therefore that the learned trial Judge was on firm ground to have invoked the doctrine of res judicata.'***

The significance of this case is that notwithstanding the fact that the subject matter in the two causes was totally unrelated and the Appellant Bank was not a party to the earlier action before Kakusa J, the court upheld the decision by

Musonda JS to invoke the doctrine of *res judicata* based on issue estoppel. This is because the issue of ownership of the properties which was raised by the Appellant Bank in the subsequent proceedings before Musonda JS was common to the earlier proceedings before Kakusa J. and was settled through the consent judgment before Kakusa J. Therefore, the issue could not be re-litigated in the subsequent proceedings before Musonda JS even though the Appellant Bank was not a party to the consent judgment.

I am guided by the above authority in considering this third element. Although the Plaintiff was not a party to the proceedings under Cause No. 2014/HP/1906, the issue of the election of Mr. Edgar Chagwa Lungu as President of the Patriotic Front which is a necessary ingredient or relevant to claim (iv) in the amended Writ of Summons was determined and settled by Justice Mulenga through the Consent Judgment dated 3rd December, 2014.

Furthermore, Davies Chama who was one of the parties to the earlier proceedings is the Defendant in the present case and he is bound by that Consent Judgment. Therefore, there is an involvement of one of the party to the first case. In this regard, I find that the third element of *res judicata* has been satisfied.

Having made the above findings on the three elements of *res judicata*, the question is whether the doctrine of *res judicata* can be invoked in the present case in view of the argument by the Plaintiff that she was adhering to the legal procedure for challenging a consent judgment on the ground of fraud and undue influence by commencing a fresh action. In short, the question is whether the exception to *res judicata* is applicable on the facts of this case.

Whilst I accept the argument by counsel for the Plaintiff that commencing a fresh action is the correct forum for setting aside a Consent Judgment on the ground of fraud and undue influence, I do not accept that a person who was not a party to the Consent Judgment can commence a fresh action to set it

aside. I say so, guided by the case of ***Wilding v Sanderson*** that a consent judgment is based on and intended to carry out an agreement concluded between the parties and it is therefore treated as an agreement.

Thus, based on the doctrine of Privity of Contract that only a person who was a party to the action can sue on it, it follows that only a person who was a party to the proceedings can set aside a consent judgment by commencing a fresh action on any ground on which an agreement can be set aside such as fraud, undue influence, mistake or misrepresentation.

In the present case, it is not in dispute that the Plaintiff was not a party to the action under Cause No. 2014/HP/1906 and therefore not a party to the Consent Judgment entered into between Inonge Wina (suing in her capacity as National Chairperson of the Patriotic Front) and Davies Chama (sued in his capacity Secretary- General of the Patriotic Front). That being the case, I am of the view that the Plaintiff does not have the right or locus standi to commence this action for the purposes of setting aside the Consent Judgment entered under Cause No. 2014/HP/1906 on the ground of fraud and undue influence as she was not a party to those proceedings.

I am persuaded by the observation made by Shanks J. in the Belize case of ***Development Finance Corporation (DFC) v Honorio Duran, Isidro Chan and Prudential Duran*** [17]. In that case counsel for the Defendant argued that a consent judgment could not be set aside by a third party save by a new action. He therefore referred the court to paragraph 4607 of Volume 2 of the 1985 White Book (which has similar wording as paragraph 17A-23 of the Rules of the Supreme Court referred to above). The import of that passage is that a consent judgment can be set aside in an action commenced for that purpose on any ground that would invalidate an agreement. The Judge when commenting on that passage stated that:

> ***It seems to me that those passages and the point that Mr. Sabido makes are only intended to apply as between the parties to the consent judgment for good and obvious reasons.' (Underline mine for emphasis only).***

In this regard, the Judge allowed the third party to be joined to the earlier proceedings without having to start a fresh action.

Based on the above passage and the finding of the Court, I consider the procedure outlined in paragraph 17A-23 of the White Book for setting aside a consent judgment on the ground of fraud or mistake to apply to parties to a consent judgment and not persons who were not parties to the consent judgment or proceedings in which a consent judgment was entered.

In this regard, since the Plaintiff was not a party to Cause No. 2014/HP/1906 but seeks to set aside the Consent Judgment of 3rd December, 2014, the option which was available to her was to make an application under Cause No. 2014/HP/1906 to be joined to those proceedings so that she could assert her interests under that cause rather than commence a fresh action.

This was the guidance given by the Supreme Court in the ***London Ngoma*** case where it allowed persons who were not parties to an action to be joined to the proceedings for the purposes of setting aside the consent judgment after they demonstrated that they had sufficient interest in the matter and that they were not aware of the proceedings.

The Supreme Court took a similar approach in the case of ***Barclays Bank Zambia PLC v ERZ*** which I have referred to above when it stated that:

> ***'We agree with counsel for the Respondents that the only legal option which was open to the Appellant Bank was to have invoked the provisions of Order 67 and in line with London Ngoma and Others v LCM Company Limited case, to have applied to join the***

proceedings before Kakusa J even after the consent judgment had been entered.'

Similarly, in the case of ***Miles Sampa, Geoffrey Bwalya Mwamba, Capt. Selemani Banda Phangula v Inonge Wina (suing in her capacity as National Chairman for Patriotic Front) and Davies Chama (sued in his capacity as Secretary-General of Patriotic Front)*** the Supreme Court referred the matter to the trial judge to consider an application for joinder of the Appellants as interveners to the Cause No. 2014/HP/1906 as they had explained in their affidavit that the Consent Judgment dated 3rd December, 2014 in which the election of Mr. Edgar Chagwa Lungu had been upheld had affected them. In this case, the Supreme Court observed that the Judgment by Shanks, J in the case of ***Development Finance Corporation (DFC)*** cited above concurred with the approach it took in the ***London Ngoma*** case.

In view of the above authorities, I accept the argument by counsel for the Defendant and I find that the Plaintiff cannot commence a fresh action for the purposes of setting aside the Consent Judgment under Cause No. 2014/HP/1906 as she was not a party to that action. Therefore, the exception does not apply in this case.

The upshot of the above findings is that the doctrine of *res judicata* can be invoked in this case and therefore the first limb of the preliminary issue raised is upheld.

Consequently, I find that claim (iv) in the amended Writ of Summons is *res judicata* as it relates to the issue of the election of Mr. Edgar Chagwa Lungu as President of the Patriotic Front Party which was determined and settled through the Consent Judgment dated 3rd December, 2014 under Cause No. 2014/HP/1906. Therefore, the said claim (iv) is incompetently before this court and therefore irregular.

Since the Order sought under claim (v) that all decisions made by Edgar Lungu in his capacity as President of the Patriotic Front are illegal, null and void is dependent on the finding under claim (iv); I find that claim (v) is also incompetent and irregular.

On the second limb of the preliminary issue that claim (iv) of the amended Writ of Summons introduced issues that were actively before another court and therefore amounted to a multiplicity of action, I have perused the court record under Cause No. 2014/HP/1906 and considered the affidavit evidence adduced by the Plaintiff.

This matter was commenced on 25th February, 2015 by the Plaintiff. On the same day, by consent of the parties, Miles Sampa, the 1st Intending intervener withdrew his application to join as a party to the proceedings under Cause No. 2014/HP/1906. The application for joinder by the other two intending interveners was dismissed. In this regard, I find that there no proceedings which were active before Justice Mulenga therefore the issue of multiplicity of actions does not arise.

In view of the above findings on the first limb of the preliminary issue that claims (iv) and (v) in the amended Writ of Summons are incompetently before this court, I have considered the Plaintiff's argument in the alternative that should the court find claim (iv) to be irregular, this court should not dismiss the action but order an amendment to the Writ of Summons and Statement of Claim so that in the interest of justice, the other claims can be determined.

Since the irregularity only touches claims (iv) and (v), I order that the said claims in the amended Writ of Summons and Statement of Claim be struck out. Accordingly, leave is granted to the Plaintiff to amend the originating process as claims (i), (ii), (iii), (vi) and (vii) in the amended Writ of Summons were not settled under the Consent Judgment dated 3rd December, 2014.

Having considered the nature of this application, I order that costs be in the cause.

Leave to appeal is granted.

Delivered at Lusaka, this 11th day of May, 2016

M.C. KOMBE
JUDGE