IN THE HIGH COURT FOR ZAMBIA **2013/HN/080**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

BANK OF ZAMBIA **1ST PLAINTIFF**

UNITED BANK OF ZAMBIA (In Liquidation) **2ND PLAINTIFF**

AND

TRAIS INVESTMENT LIMITED **DEFENDANT**

BIMAL THAKER **INTENDED 2ND DEFENDANT**

Before The Honourable Madam Justice M.C. Mulanda in Chambers.

FOR THE PLAINTIFFS : Mr. C. Magubbwi,
Messrs Magubbwi & Associates,

Mr. I Zulu,
In-House Counsel,
Bank of Zambia

FOR THE DEFENDANT : N/A

FOR THE INTENDED 2ND DEFENDANT : Mr. N.K.R. Sambo,
Messrs Sambo
Kayukwa & Company.

R U L I N G

CASES REFERRED TO:

1. **Lewanika and Others Vs. Chiluba (1998) ZR 49.**
2. **Thynne Vs. Thynne (1955) 3 All ER 129.**
3. **Investrust Bank Plc Vs. Chick Masters Limited and Dr. Mwilola Imakando 2009/HPC/0013.**
4. **The Attorney General Vs. Aboubacar Tall and Zambia Airways Corporation Ltd. (1995 - 1997) ZR 54.**
5. **Zamtel Vs. Aaron Mulwanda SCZ Appeal No. 63/2009 (SCZ Judgment No. 8/63/2009.**
6. **Mayo Transport Vs. United Dominions Corporation Limited [1962] R & N R.22.**
7. **Maccarthy V Agard [1933] 2 K.B. 417.**
8. **Walusiku Lisulo V Patricia Lisulo (1998) ZR 75.**
9. **Jamas Milling Company Limited V Amex International Pty Limited (2002) ZR 79.**
10. Kangwa Simpasa and Another Vs. Jackson Mwabi Mwanza SCZ Appeal No. 28 of 2012.
11. Kalusha Bwalya Vs. Chardore Properties Limited and Another 2009/HPC/0294.
12. **Chikuta Vs. Chipata Rural District Council (1974) ZR 241.**
13. **Christian Diedricks Vs. Konkola Copper Mines Plc 2010/HN/28.**
14. **Trinity Engineering Ltd Vs. Zambia National Commercial Bank (1995 - 1997) ZR 189.**
15. **ZCCM Investment Holdings Plc Vs. Innocent Katuya and 400 Others SCZ Appeal No. 67/2013 (Unreported).**

LEGISLATION REFERRED TO:

1. **High Court Rules Cap. 27 of The Laws of Zambia, Orders 5 Rules 15 – 19, 39 Rule 2.**
2. **Rules of The Supreme Court 1999 Edition, Orders 14a, 15 Rule 6, 33 Rule 3, 7.**
3. **Legal Practitioners Practice Rules, S.I. No. 51 of 2002 of The Laws of Zambia, Rule 33.**

This is a Ruling on the preliminary objection raised by the Plaintiffs pursuant to Order 33 Rule 3 and Order 14A of the Rules of the Supreme Court, 1999 Edition, following the application for review filed on 22nd July, 2016, by the Intended 2nd Defendant. The application was for me to review my ruling delivered on 23rd May, 2016. The said ruling was on an application to raise preliminary objections, filed by the Advocates for the Defendant and Intended 2nd Defendant on 14th January, 2016, in which they raised the following preliminary issues:

1. That an injunction may not be issued against a person not a party to an action.

2. That the application to join the Intended 2nd Defendant as a party to the action is time barred and may not be entertained by the Court.

After examining the Affidavits and arguments by both parties in support of their respective positions on the matter, the Court held that, since the Intended 2nd Defendant purchased his property in July, 2003, and the main matter was only commenced on 4th April, 2013, this action was commenced within the period of limitation as envisaged in the Limitation Act, 1980, of England. Further that, the application to join the Intended 2nd Defendant to these proceedings was started on 13th March, 2014, a period within the limitation period. The Court concluded that the action was, therefore, not statute barred.

Regarding the issue of whether an injunction can lie against a non-party, the Court maintained in force the *ex parte order* of injunction against the Intended 2nd Defendant.

On 8th July, 2016, I granted the Intended 2nd Defendant special leave to apply for review of the said decision. On 22nd July, 2016, following the grant of special leave, the Intended 2nd Defendant filed an application for review of the said ruling pursuant to Order 39 Rule 2 of the High Rules Cap. 27 of the Laws of Zambia. The application was supported by an affidavit sworn by Mr. Sambo, Counsel for the Intended 2nd Defendant, on behalf of his client, Bimal Thaker, in which he averred that, a perusal of the record shows that the purchase of the property in issue was done in 1997. He referred to page 2 of the Ruling in which the Court made reference to the Lodgement Schedule, item 1 thereof, being the date on which the Defendant acquired title to the property, the subject matter of the substantive proceedings. He further deposed that the cause of action as between the 2nd Plaintiff and the Defendant accrued on 5th December, 1997.

It was his further averment that the Court ought to have taken into consideration the said date when the cause of action accrued in its ruling and consider that the action was statute barred.

On 22nd July, 2016, Counsel for the Intended 2nd Defendant filed arguments in support of the application for review of the Court's ruling. Counsel drew the attention of the Court to some facts, which according to him, were the basis for seeking a review of the decision of the Court. Counsel couched the said facts as follows:

1. *At page R3, the Court recited the claim made by the 2nd Plaintiff, through the Liquidator, which is the First Plaintiff against the Defendant (Trais Investments Limited). In the first paragraph thereof, the Court states that the Writ of Summons in the substantive action was issued on 4th April, 2013;*
2. *By the declaration sought in the substantive action, the 1st Plaintiff, on behalf of the 2nd Plaintiff, seeks a declaration to vest the property (being the subject matter of these proceedings) in the name of the 2nd Plaintiff as if 'the property belongs to the second Plaintiff' at iv) and also 'annulling the Defendant's title, at v);*
3. *At page R10, the Court did make reference to the Lodgement Schedule, item 1 thereof, being the date on which the Defendant acquired title to the property, the subject matter of the substantive proceedings, that date is 5th December, 1997;*
4. *At page R17, the Court supports its decision on the issue of the limitation of action raised by the Intended 2nd Defendant by referring to the*

Limitation Act of 1980 as having application in Zambia and cited section 15 of the said Act as applicable in this matter.

Counsel further quoted the said section 15 of the Limitation Act 1980, of England, which reads as follows:

> **"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."**

It was Counsel's submission that, in applying section 15 of the Limitation Act, 1980, the Court should have had regard to the issue relating to the date on which the 1st and 2nd Plaintiffs sought their relief under the substantive claim against the Defendant. According to Counsel, the right of action accrued in 1997 when the money allegedly used to purchase the property in issue by the Defendant was generated. In view of this, Counsel contended that the action commenced by the Plaintiffs against both the Defendant and the Intended 2nd Defendant was statute barred. In the circumstances,

he submitted that all proceedings and orders rendered; such as the *ex-parte* injunction against the 2nd Defendant, were a nullity.

On 21st February, 2017, Counsel for the Intended 2nd Defendant filed supplementary arguments in support of the application for review of the Court's 23rd May, 2016 Ruling. Counsel submitted that the inherent jurisdiction of the Court to review its own decision was set out in Order 39 Rule 1 of the High Court Rules Cap. 27 of the Laws of Zambia. He further submitted that the approach the Court should adopt in reviewing its decision is one that was established in the case of **LEWANIKA AND OTHERS vs. CHILUBA** [1] in which it was held that:

> **"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."**

Counsel further referred to the case of **THYNNE vs. THYNNE** [2] wherein Morris LJ, in considering when the Courts should exercise its power of review opined as follows:

> **"If there is some error in a judgment or order which arises from any accidental slip or omission, there may be correction both under Ord. 28 r 11, and under the court's inherent powers."**

Counsel further submitted that the case of **THYNNE VS. THYNNE** was considered and applied by the Court in **INVESTRUST BANK PLC vs. CHICK MASTERS LIMITED AND DR. MWILOLA IMAKANDO** [3], a High Court decision which was heard by Mutuna, J, as he then was. It was his further submission that the first step to consider, was to establish whether there was an error in the decision of the Court. Counsel answered this question in the affirmative in respect of my ruling dated 23rd May, 2016, when he stated that the date the Court held as to when the right of action accrued, was erroneous. He argued that the Court should have considered the date upon which the Defendant had property

registered into its name, which was 15th December, 1997, as opposed to the date when the said property was vested in the Intended 2nd Defendant. He contended that the date upon which the 1st and 2nd Plaintiff's right of action accrued was the 15th December, 1997. In support of the submission, Counsel referred to part of the reliefs sought as endorsed on the Writ of Summons; that the Plaintiffs were claiming for: 'a declaration that the property belongs to the 2nd Plaintiff' and 'an order annulling the Defendant's title to the property.'

He submitted that despite the Court making reference in its ruling to the 15th December, 1997, as the date when the property was registered in the name of the Defendant, it erroneously did not apply the said date when calculating the period for purposes of determining that the application for joinder was time barred. Counsel further submitted that, had the Court properly applied its mind to the date of 15th December, 1997, as the date when the right of action accrued, it would have come to the conclusion that the 1st and 2nd Plaintiffs' application for joinder was statute barred with time expiring after 15th December, 2009. Further that, the Court

would have dismissed the application and the order of injunction granted *ex-parte*.

In the alternative, Counsel submitted that, should the Court be inclined to exercise its powers of review on the basis of error which he highlighted above, the Court should hear the matter *de novo*. It was his further submission that as the 1st and 2nd Plaintiffs had secured judgment against the Defendant, the Intended 2nd Defendant could not, therefore, be joined to these proceedings. He referred to the case of **THE ATTORNEY GENERAL vs. ABOUBACAR TALL AND ZAMBIA AIRWAYS CORPORATION LTD** [4], for the submission. According to Counsel, the said case held that 'a party cannot be joined after judgment' but gave courts discretion in the interest of justice to join a party to the proceedings. It was his contention that it cannot be in the interest of justice to join the 2nd Intended Defendant to these proceedings, because the defence of limitation was also available to him. He further submitted that Order 15 Rule 6 of the Rules of the Supreme Court, 1999 Edition, upon which the application for joinder was premised, denies the

right to apply for joinder where the matter was statute barred under the Limitation Act.

For the foregoing submissions, he urged the Court to review its ruling of 23rd May, 2016.

On 17th February, 2017, the Plaintiffs filed a Notice to raise preliminary issues pursuant to Order 33 Rule 3 and Order 14A of the Rules of the Supreme Court 1999 Edition. The issues raised were couched as follows:

1. Whether it is proper to proceed to hear the application for Review when the Affidavit filed in support of the application dated 22nd July, 2016 and sworn by Counsel for the Intended 2nd Defendant, does not raise any discovery of 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, in contravention of Order 39 rule 2 of the High Court Rules Cap. 27 of the Laws of Zambia.

2. Whether it is proper to proceed with the hearing of the application for Review of the decision of the Court when the Affidavit filed in support is irregular as it is sworn by Counsel and contains contentious issues based on hearsay in contravention of Order 5 rules 15, 16, 17, 18 and 19 of the High Court Rules Cap. 27 of the Laws of Zambia and Rule 33 of the Legal Practitioners Practice Rules S.I. 51 of 2002.

The foregoing application was supported by an affidavit sworn by Gladys Chongo Mposha, the Director, Bank Supervision Department in the 1st Plaintiff and the Joint Liquidation Manager for the 2nd Plaintiff. She averred that on the advice of the 1st Plaintiff's In-House Counsel, Mr. Chanza Sikazwe, she believed that the affidavit in support of the application for Review of the Court's Ruling delivered on 23rd May, 2016, sworn by Counsel for the Intended 2nd Defendant and filed in Court on 22nd July, 2016, was irregular as it contained contentious matters which amounted to hearsay.

She further deposed that the said affidavit does not disclose any fresh material evidence which had become available after the Ruling of the Court, as all the facts stated therein were before the Court at the time when the said Ruling was delivered. She further deposed that in the circumstances, Review of the Ruling in question was not available to the Intended 2nd Defendant and, therefore, the application for Review was incompetent, misconceived and an abuse of the process of the Court.

In support of the notice to raise preliminary issues, Counsel filed Skeleton Arguments. Arguing the first preliminary issue, Counsel submitted that Review was not available to the Intended 2nd Defendant as the affidavit sworn by Mr. Nsunka Sambo in support of the application for Review and filed into Court on 22nd July, 2016, did not, in any, way show any fresh material evidence which would have any bearing on the decision of the Court. In support of the submission, Counsel referred to a passage in the case of **ZAMTEL vs. AARON MULWANDA** [5], wherein the Supreme Court stated on page J10-J11 of its judgment that: 'there was no fresh evidence discovered since judgment and therefore review was not

clearly available to the Respondents.' The passage referred to by Counsel is reproduced hereunder:

> **"We have considered the submissions on both sides and have looked at the authorities cited. The issue as to whether a trial Court can amend, rehear, review, alter or vary its Judgment, was effectively dealt with in MAYO TRANSPORT vs. UNITED DOMINIONS CORPORATION LIMITED [6]. That case held that:-**
>
> **(i) The general rule as to the amendment and setting aside of Judgments or orders after the Judgment or order has been drawn up was as follows:**
>
> **"Except by way of appeal, no Court, Judge, or Master has power to rehear, review, alter or vary any Judgment or Order after it has been entered or drawn up, respectively, either in an application made in the original action or matter, or in fresh action brought to review such Judgment or Order.**

The object of the rule is to bring litigation to finality but it is subject to a number of exceptions.

(ii) In regard to the exceptions, the Court preferred not to attempt a definition of the extent of its inherent jurisdiction to vary, modify or extend its own Orders if, in its view, the purposes of justice required that it should do so. Eight possible types of exceptions were set out in the Judgment, though these did not pretend to be exhaustive.

(THYNNE vs. THYNNE (1955) 3 All ER 129 followed. Court Order not altered.)

The Mayo Transport case was an application by the Plaintiff for review of a Judgment. The question was whether there was jurisdiction for a Judge to review his own Judgment on the merits. The application was made under Order 33 of the High Court Rules, which reads exactly, word for word, like the current Order 39, Rule 1. After quoting a passage from Halsbury's Laws of England, the learned trial Judge said at page 23:

"These exceptions are set out in the Judgment of Morris, L.J., in THYNNE v THYNNE [1955] 3 All E.R. 129 at p.145 and p.146 who agreed with the words of EVERSHED, L.J., in MEIER v MEIER (2), [1948] P.89:

"I prefer not to attempt a definition of the extent of the Court's inherent jurisdiction to vary, modify or extend its own orders if, in its view, the purposes of justice require that it should do so."

He then illustrated a few of the Court's powers in this respect, which can be summarized as follows:-

"(a) If there is some clerical mistake in a judgment or order which is drawn up there can be correction under the powers given by R.S.C., O.28.

(b) If there is some error in a judgment or order which arises from any accidental slip or omission, there may be correction both under O.28, r.11, and under the Court's inherent powers.

(c) If the meaning and intention of the Court is not expressed in its judgment or order then there may be variation.

(d) If it is suggested that the Court has come to an erroneous decision either in regard to fact or law then amendment of its order cannot be sought, but recourse must be had to an appeal to the extent to which appeal is available.

(e) If new evidence comes to light and can be called, which no proper and reasonable diligence could earlier have secured, then likewise amendment of a judgment cannot be sought: there might be an appeal and an endeavour to come within the rules and the well-settled principles relating to applications in such circumstances to adduce fresh evidence.

(f) If a party is wrongly named or described, amendment may in certain circumstances be sought, pointing out the distinction between

seeking to get rid of the *'operative and substantive'* part of a judgment and the correction of a misnomer or misdescription. An instance of an attempt to change the substantive part of a judgment is MacCARTHY v AGARD [7]. The proper course to adopt was to appeal.

(g) A Court may in some circumstances of its own motion (after hearing the parties interested) set aside its own judgment, e.g. a person named as a judgment debtor was at all material times non-existent.

(h) Even if a judgment has been obtained by some fraud or false evidence the Court cannot amend the judgment: there must be either an appeal or there must be an action to set aside the judgment: the particular circumstances may denote what procedure is appropriate: but a power to amend cannot be invoked."

MAYO TRANSPORT v UNITED DOMINIONS CORPORATION LIMITED (1962) R & N R.22, which followed THYNNE v THYNNE (1953) 3 All

ER 129, was a High Court decision. However, it was approved by this Court in LEWANIKA & OTHERS v CHILUBA (1998) ZR 79 and WALUSIKU LISULO v PATRICIA LISULO [8]. In those two cases, this Court gave guidance when a trial Court can review its judgment or decision. Then there is also JAMAS MILLING COMPANY LIMITED v AMEX INTERNATIONAL PTY LIMITED [9], on the issue. In that case we said:-

> ***"For review under Order 39, Rule 2 of the High Court Rules to be available, the party seeking it must show that he has discovered fresh material evidence, which would have material effect upon the decision of the Court and has been discovered since the decision but could not, with reasonable diligence, have been discovered before."***

On the issue that review was only available where fresh relevant evidence was discovered after Judgment, Counsel further relied on the decision of the Supreme Court in the case of **KANGWA SIMPASA AND ANOTHER vs. JACKSON MWABI MWANZA** [10]. Further reliance was made on the High Court's decision in the case

of **KALUSHA BWALYA vs. CHARDORE PROPERTIES LIMITED AND ANOTHER** [11].

Counsel summarised the requirements to be met before review of the decision of the Court can be made under Order 39 Rule 2 of the High Court Rules, as follows:

1. *That the fresh evidence is material;*
2. *That the fresh evidence would have had material effect upon the Court's 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; and*
5. *That the fresh evidence could not with diligence have been discovered prior to the decision.*

Counsel further submitted that the Intended 2nd Defendant had not satisfied the standard required for Review under Order 39 Rule 2 of the High Court Rules as his complaint was simply that the Court made an error in its Ruling on the issue of statute bar. Further that, the Intended 2nd Defendant did not

establish that there was the existence of fresh evidence in this matter.

In arguing the second preliminary issue concerning Mr. Sambo's affidavit containing contentious issues, Counsel submitted that the said Affidavit was irregular. He contended that the subject affidavit sworn by Counsel for the Intended 2nd Defendant contained contentious issues based on hearsay which was in contravention of Order 5 Rules 15, 16, 17, 18 and 19 of the High Court Rules Cap. 27, and Rule 33 of the Legal Practitioners Practice Rules Statutory Instrument No.51 of 2002 of the Laws of Zambia. He referred to the case of **CHIKUTA vs. CHIPATA RURAL DISTRICT COUNCIL** [12], where Doyle C.J., as he then was, stated at page 242 that:

> **"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."**

In conclusion, Counsel submitted that Order 33 Rule 3 and Order 14A of the Rules of the Supreme Court, 1999 Edition, pursuant to which the preliminary issue was raised, permits the Court to consider whether there are sufficient grounds disclosed by an application to warrant it to exercise its discretion. Further that, the Court had power to dismiss the application if it was of the view that the application was ill-fated on account of failure to disclose legal grounds.

Counsel for the Intended 2nd Defendant filed Skeleton Arguments in opposition to the Notice of Motion to Raise Preliminary Issues in which he contended that the said notice was defective, irregular, misconceived and embarrassing, and was meant to delay the Review of the Court's Ruling. Counsel argued that Order 39 Rule 2 of the High Court Rules Cap. 27, places discretionary powers on a court to review its decision. He contended that Order 39 Rule 2 does not give opportunity to any party to the proceedings to challenge how the discretion should be exercised or the grounds upon which the discretion should be exercised.

It was Counsel's further submission that, the Court having granted the Intended 2nd Defendant special leave to proceed with the application for review of its Ruling, the Plaintiffs were not entitled to raise the said preliminary objections. It was further contended that there was an error in the Ruling which the Court was empowered to address by exercising its powers of review under Order 39 Rule 2 of the High Court Rules.

On the second preliminary issue of the affidavit containing contentious issues and sworn by himself, Counsel submitted that it was not clear which affidavit the Plaintiffs were referring to. Further that, the contents of the said unspecified affidavit constituting the said hearsay evidence was not identified. He denied that the affidavit in support of the application for Review contained hearsay evidence. He contended that the facts contained in the said affidavit were references to the Court's record and the Ruling. He argued that the supporting affidavit in applications for review of a court's decision is intended to identify any errors or omission that needed to be addressed. In support of the submission, Counsel referred to the case of **CHRISTIAN DIEDRICKS vs. KONKOLA COPPER**

MINES PLC [13] in which Counsel who had conduct of the matter, Mr. Magubbwi, swore the supporting affidavit in an application for review.

It was further submitted that the fact that the notice to raise preliminary issues was filed late in the day, only goes to show that the Plaintiffs intended to further delay the course of justice. He maintained that the cause of action against the Intended 2nd Defendant was statute barred which cannot be ignored by the Court.

In conclusion, Counsel implored the Court to consider that the Intended 2nd Defendant remained prejudiced in the enjoyment of the property in issue to which he had title. Further that, the Intended 2nd Defendant was additionally prejudiced by an injunction granted in favour of a non-party to this action.

When the matter came up on 19th June, 2017, for hearing of the application, Mr. Zulu on behalf of the Plaintiffs, told the Court that he would rely on the issues raised in the Notice to raise preliminary issues filed on 17th February, 2017, and its supporting affidavit as

well as skeleton arguments filed on 16th June, 2017; and augment them with oral submissions.

Counsel submitted that Order 14A and Order 33 Rule 3 of the Rules of the Supreme Court, 1999 Edition, upon which this application was premised, empowers the Court to review, at a preliminary stage, a matter before it and make orders dealing with the matter without proceeding to hear it at a substantive stage.

Submitting on the first ground in the Notice of Intention to raise preliminary issues, Counsel submitted that there was nothing disclosed in the affidavit in support of the application for review showing that there was any ground upon which the Court can exercise its discretionary powers to review its own decision. Counsel contended that, there was no fresh evidence disclosed which would have a material effect on the decision of the Court upon which this Court can review its own decision. Counsel submitted that the plethora of authorities referred to in the skeleton arguments filed by the Plaintiffs in support of their application, established that for a court to exercise its powers of review of its own decision under

Order 39 Rule 2 of the High Court Rules, Cap. 27 of the Laws of Zambia, there must be fresh evidence discovered since Judgment. He contended that a perusal of the affidavit in support of the application for review does not show or purport to show that there was such fresh evidence.

Counsel further submitted that another ground upon which a court can exercise its discretion under Order 39 rule 2 of the High Court Rules, Cap. 27, was, where there was an error in a Judgment or order which arose from any accidental slip or omission. Counsel submitted that such error should be clerical in nature and not logically or reasoning in nature. In support of the submission he referred to the case of **TRINITY ENGINEERING LTD vs. ZAMBIA NATIONAL COMMERCIAL BANK** [14], where the Supreme Court restricted when a Court can make corrections to its Judgment, to when the errors are clerical in nature.

He contended that, a further perusal of the affidavit, the skeleton arguments, as well as the supplementary skeleton arguments in support of the application for review, does not show that there was

any error in the Ruling of the Court arising from any accidental slip or omission. Counsel submitted that, what was argued, however, was that there was an error in the manner the Court dealt with the issue of limitation of actions.

It was Counsel's further contention that, what the arguments of the Intended 2nd Defendant purports to do was to suggest that the Court had come to an erroneous decision with regard to the fact or law relating to limitation of actions in its ruling. He contended that the Supreme Court in the case of **ZAMTEL vs. AARON MULWANDA** held that if it was suggested by a party that a court has come to an erroneous decision, the proper recourse for such a party was to appeal and not to seek an amendment or review of the decision. According to Counsel, the importance of that principle was to ensure that matters are dealt with, with finality by a court of competent jurisdiction and not to allow second cherry-biting by the parties of the same issue.

It was further submitted that a proper circumspection of the materials before the Court reveals that there was no ground upon

which the decision can be reviewed by the Court. Counsel contended that assuming, but without conceding, that there was an error in the Ruling, as alleged by the Intended 2nd Defendant, this Court was *functus officio* as regards that issue and therefore, the only recourse available to him was to lodge in an appeal and not to review.

Regarding the second ground in the Notice to raise preliminary issues, Counsel submitted that it was improper for an Advocate to swear affidavits containing contentious issues based on hearsay. He urged the Court to discourage such conduct by Counsel. He referred to the case of **KALUSHA BWALYA vs. CHARDORE PROPERTIES**, where Mutuna, J., as he then was, urged trial courts to not only end at expressing misgivings about Counsel swearing affidavits based on hearsay evidence, but also proceed to declare such affidavits inadmissible.

On the premises of the foregoing reasons, he implored the Court to dismiss the application for review with costs.

In reply, Mr. Sambo, on behalf of the Intended 2nd Defendant, submitted that the arguments by both Mr. Zulu and Mr. Magubbwi were all squarely ahead of time, as they were responding to the application for review even before he had presented it to the Court. He submitted that the Plaintiffs' Advocates had proceeded to argue against the application and cited authorities even before he had made the application. This, according to Counsel, had taken away the Court's discretion to consider the application which should be made on behalf of the Intended 2nd Defendant. He contended that the Plaintiffs' Advocates had acted presumptuously to bar both the Intended 2nd Defendant from proceeding with his application, and the Court from hearing and exercising its inherent jurisdiction. Mr. Sambo further submitted that the arguments presented by Counsel for the Plaintiffs were all pertinent to the substantive application for review. He argued that in order to bring to finality the Plaintiffs' delaying tactics, the Court should make an appropriate decision in the matter and exercise its jurisdiction.

It was his further submission that the Plaintiffs' preliminary objection was merely a sneaky way of challenging the special leave

that was granted by the Court to the Intended 2nd Defendant to proceed with his application for Review. He further submitted that if the Plaintiffs were desirous of challenging the said special leave, they should have appealed against the decision, instead of raising the preliminary objections in the manner they did.

He contended that the intention by the two Plaintiffs' Counsel to prevent the hearing of the application for review, by raising preliminary issues, was unfair.

On the second ground concerning swearing, by Counsel, of an affidavit with contentious issues, Mr. Sambo submitted that the said affidavit was seen and accepted by the Court as appropriate at the time it granted the Intended 2nd Defendant special leave to proceed with the application for review. He contended that there was no contentious matter that had been raised or pointed out in the Notice to Raise Preliminary Issue or in the affidavit in support. He urged the Court to consider it as an alarmist claim.

In conclusion, he implored the Court to dismiss the preliminary objections raised and proceed to hear the Intended 2nd Defendant's application for review.

In response to Mr. Sambo's submissions, Mr. Zulu submitted that the mere fact that the Court had granted special leave for the application for review to be made, did not preclude it from exercising its powers under Order 14A and Order 33/3 of the Rules of the Supreme Court, 1999 Edition, to preliminarily review whether there are any grounds disclosed by the application which had subsequently been made after leave was granted. It was his further submission that Mr. Sambo had not cited any authority for the proposition that once special leave was granted, the Court cannot exercise its powers under the aforementioned Rules, for such authority does not, in fact, exist.

He vehemently denied that the Plaintiffs' application takes away the Court's power to consider the Intended 2nd Defendant's application for review. Counsel contended that the Plaintiffs' application to raise preliminary issues was properly anchored on rules which gives

the Court power to consider preliminarily the prospects of the intended application succeeding, so that matters that are so frivolous as disclosing no prospects of success or grounds upon which discretion may be entertained, are not allowed to be heard at the substantive stage. It was his further contention that the power to weave out certain applications or processes, at the preliminary stage was critical for the judicious and economical disposal of actions before it.

As regards the submission that there are no contentious issues in the affidavit sworn by Counsel for the Intended 2nd Defendant, Mr. Zulu submitted that the said affidavit deposed as to issues relating to when certain causes of actions arose, which issues according to Counsel, were in contention in this matter.

He denied that the application to raise preliminary objections was intended to be a delaying tactic as it was properly before the Court.

I have carefully examined and considered the Intended 2nd Defendant's application for review, its supporting affidavit, the

arguments filed in support and the oral submissions by his Counsel. I have further considered and scrutinized the Notice to Raise Preliminary Issues filed by the Plaintiffs, the affidavit in support, the skeleton arguments in support of the application and the *viva voce* submissions by Counsel for the Plaintiffs as well as the authorities cited by Counsel for both parties.

The issue calling for the determination of the Court is whether Order 14A and Order 33, Rule 3 of the Rules of the Supreme Court, 1999 Edition, under which the present application was brought, do permit this Court to finally determine the Intended 2nd Defendant's application for review of my Ruling delivered on 23rd May, 2016, on a point of law.

It was contended on behalf of the Plaintiffs that the foregoing rules, give the Court power to consider preliminarily the prospects of the intended application succeeding, so that matters that are so frivolous as disclosing no prospects of success or grounds upon which discretion may be entertained, are not allowed to be heard at the substantive stage. On the other hand, Counsel for the Intended

2nd Defendant, Mr. Sambo, argued that Order 39 Rule 2 of the High Court Rules Cap. 27 under which the application for review was premised, does not give opportunity to any party to the proceedings to challenge how the Court's discretionary powers to review its decision, should be exercised.

Order 14A of the Rules of the Supreme Court, 1999 Edition, reads as follows:

> **(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 appeal) the entire cause or matter or any claim or issue therein.**

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

Order 33 Rule 3 provides that:

> **"The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."**

Further, Order 33 Rule 7 of the Rules of the Supreme Court, 1999 Edition, provides as follows:

> **"If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or**

make such other order or give such judgment therein as may be just."

The foregoing provisions clearly permit a party to the proceedings to raise a preliminary issue at any stage of the proceedings to have the matter finally determined on a point of law. It was held in the case of **ZCCM INVESTMENT HOLDINGS PLC VS. INNOCENT KATUYA AND 400 OTHERS** [15], that:

"...Order 14A Rule 1 of the Rules of the Supreme Court [Rules], 1999, allows a party at any stage to raise a preliminary issue to finally determine a matter on a point of law."

The rationale for such determination of the matter in the manner envisaged by Order 14A of the Rules of the Supreme Court, 1999 Edition, was eloquently put by Wood, J.S., when he delivered the Judgment of the Court in the **ZCCM INVESTMENT HOLDINGS PLC vs. KATUYA AND 400 OTHERS CASE** referred to above, as follows:

> **"There is no point in our view, to try a matter that is bound to fail on a point of law when an appropriate application has been made to terminate proceedings on a point of law."**

I, therefore, opine that proceeding with the hearing of an application which is bound to fail on a point of law in the face of an application to terminate proceedings on a point of law as was counselled by Wood, J.S., in the preceding **KATUYA AND 400 OTHERS CASE**, would only render the proceedings an academic exercise. I accordingly find that this Court has sufficient material on record from affidavits by the parties, arguments and submissions in support of their respective positions, upon which it can determine this matter on a point of law. I will now proceed to determine whether, based on the evidence contained in the affidavit of Counsel for the Intended 2nd Defendant, and the arguments and submissions in support, this Court should exercise its discretionary power to review its Ruling delivered on 23rd May, 2016.

In his application for review, Counsel for the Intended 2nd Defendant contended that the Court made an error when it did not take into consideration that the right of action accrued on 15th December, 1997, when computing the period of limitation. Counsel submitted that, had the Court properly applied its mind to the correct date of accrual, it would have realised that the action against the Intended 2nd Defendant became statute barred on 15th December, 2009. In the, circumstances, Counsel argued that the Court should have dismissed the order of injunction granted to a non-party against the Intended 2nd Defendant.

On the other hand, the Plaintiffs contended that the requirements which must be satisfied by a party seeking the Court's review of its Ruling were not met by the Intended 2nd Defendant. Counsel argued that there was no fresh evidence disclosed which would have a material effect on the decision of the Court upon which this Court can review its own decision. Further that, the Intended 2nd Defendant had failed to demonstrate that there was any error in the Ruling of the Court

arising from any accidental slip or omission. These requirements were concisely put by the Court in the **THYNNE VS. THYNNE CASE**[2] which was quoted with approval by our Supreme Court in the **ZAMTEL vs. MULWANDA CASE**[5]. Both parties seem to agree with these requirements as they all referred to the **THYNNE VS. THYNNE CASE**[2] in their respective submissions.

Having perused the affidavit in support of the application for review and the arguments in support thereof, I am of the opinion that the purpose of the Intended 2nd Defendant's application for review was to impugn the Court's purported erroneous decision in computing the period of limitation. Both in his affidavit and arguments in support of the application, Mr. Sambo did not show the discovery of *'fresh material evidence which would have material effect upon the decision of the Court* which had *been discovered since the decision but could not, with reasonable diligence, have been discovered before'* as was guided by the Supreme Court in the case of **JAMAS MILLING**

COMPANY LIMITED vs. AMEX INTERNATIONAL PTY LIMITED.

Furthermore, the Intended 2nd Defendant did not point out any clerical mistakes in the Ruling in question or some error which could have arisen from any accidental slip or omission. I agree with the submissions on behalf of the Plaintiffs that, where a party suggests that a court has come to an erroneous decision either in regard to fact or law, the avenue available to such a party is to appeal against the purported erroneous decision and not commence review proceedings. I am fortified by the decision in **THYNNE VS. THYNNE CASE** [2] as quoted in the **ZAMTEL VS. MULWANDA CASE** [5]. For the avoidance of doubt, the Court in that case held inter alia that:

> **"If it is suggested that the Court has come to an erroneous decision either in regard to fact or law then amendment of its order cannot be sought, but recourse must be had to an appeal to the extent to which appeal is available."**

Proceeding on the premises of the above authority, I find that there is no basis, upon which this Court can review its Ruling dated 23rd May, 2017.

Mr. Sambo in his submissions suggested that the Court having granted the 2nd Defendant special leave to proceed with the application for review, should have been satisfied that there were sufficient grounds to have the application heard. A perusal, however, of Mr. Sambo's affidavit in support of the application for special leave, reveals that what was deposed was restricted to why there was delay in applying for review of the Ruling. This Court was not called upon, at that stage, to determine whether or not review was available to the Intended 2nd Defendant.

Having found that this is not a proper case for the Court to review its ruling, I am of the view that, it is not necessary for the Court to consider the second preliminary issue; of whether

the affidavit sworn by Counsel for the Intended 2nd Defendant contained contentious issues based on hearsay evidence or not. For the reasons given above, I find that there is merit in the preliminary issue raised by the Plaintiffs. I, therefore, dismiss the Intended 2nd Defendant's application for review of my Ruling dated 23rd May, 2016. I order costs against the Intended 2nd Defendant to be taxed in default of agreement.

Leave to appeal to the Court of Appeal is hereby granted.

DELIVERED AT NDOLA THIS 21st DAY OF July 2017.

M.C. MULANDA
JUDGE.