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IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

APPEAL NO. 123/2013
SCZ/8/129/2013

BETWEEN:

PAUL MUMBA — APPELLANT

AND

ZAMBIA REVENUE AUTHORITY — RESPONDENT

CORAM: Mwanamwambwa, D.C.J, Muyovwe, Wood, J.J.S.

On the 13th January, 2016 and 14th April, 2016

For the Appellant: *In person.*
For the Respondent: *Mr K. Hang'andu of Hang'andu and Co.*

JUDGMENT

Mwanamwambwa, DCJ, delivered the Judgment of the Court.

Cases referred to:

1. **Manal Investments Limited V. Lamise SCZ NO. 1 of 2001**
2. **Donovan V. Gwentoys Ltd (1990) 1 WLR 472**
3. **ZCCM V. Chileshe SCZ Judgment No.1 21 of 2002**
4. **Nykredit Mortgage Bank Plc V. Edward Erdman Group Ltd (No 2) (1998) 1 ALL ER 305.**
5. **Board of Trade v Cayzer, Irvine and Co. Limited (1927) AC 610 at 628**
6. **Water wells Ltd V. Wilson Samuel Jackson (1984) 98.**
7. **ANZ Grindlays Bank (Zambia) Limited V. Chrispine Kaona (1995/1997) Z.R. 85.**

8. Bank of Zambia V. Jonas Tembo and Others (2002) Z.R. 103.
9. Societe Nationale Des Chemis De Pur Du Congo (SNCC) and Joseph Nonde Kakonde, SCZ Judgment No. 19 of 2013.
10. Henderson V. Henderson (1843-1860) ALL ER 378.
11. William Harrington V. Dora Siliya and Attorney-General, (2011) Z.R. p. 253

Legislation referred to:

1. The Employment Act, Cap 268 of the Laws of Zambia, section 65.
2. The Law Reform (Limitation of Actions) Act, Cap 72 of the Laws of Zambia, section 3.
3. The Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia, as amended by Act No. 8 of 2008, section 85.
4. The Limitation Act of 1939, sections 2 and 23(4).
5. The British Acts Extension Act Chapter 10 of the Laws of Zambia, section 2.
6. Halsbury's Laws of England, Vol 28, 4th Edition, Reissue, page 446, para 864 and page 553, para 1083 and Vol 16, 4th Edition, para 1528
7. The Judicial Code of Conduct Act, No. 13 of 1999.

This is an appeal from the decision of the Industrial Relations Court setting aside the Appellant's complaint for being out of time.

The brief facts of the matter are that the Appellant was an employee of the Respondent. He was employed under a 3 year contract from the 19th of September, 1997. The Contract was

scheduled to expire on 18th September, 2000. On the 18th of May, 2000, the Respondent wrote to the Appellant stating that his last working day would be 18th May, 2000, but that he would be paid his terminal benefits up to the end of his contract.

On the 18th of May, 2000, the day which should have been the Respondent's last working day, the Respondent handed over two cheques to the Appellant. The cheques were for the Appellant's salaries from May to September, 2000 and for combined gratuity and leave computation in the amounts of K14,376,185 and K10,133,713 respectively.

The Appellant deposited the two cheques in his account. However, before the cheques were honoured, the Respondent instructed its bank not to honour the cheque for gratuity and leave computation in the sum K10,133,713 on grounds that it had a mistake. According to the Appellant, this money was never credited to his account.

As a result of the non-payment of this gratuity, the Appellant began pursuing the Respondent to correct the cheque and pay him his gratuity. According to him, he made all efforts to have the cheque corrected which failed. The Appellant then

engaged various bodies to try and recover his money. Some of these bodies include the Zambia Police, the Zambia Revenue Authority Governing Board, the Commission for Investigations and the Ministry of Labour. Efforts by these bodies to help the Appellant recover the money proved futile.

Meanwhile, on the 14th of January, 2003, the Appellant took out an action in the High Court seeking the following reliefs:

1. **Damages for wrongful/an unlawful termination of contract;**
2. **Damages for humiliation, mental anguish, contempt and public odium suffered at the hands of the Defendant;**
3. **Damages for loss of future earnings;**
4. **Any other relief the court may deem fit; and**
5. **Costs.**

After hearing this matter, the High Court dismissed it. However, the Appellant appealed to the Supreme Court against the decision of the High Court.

Coming back to the matter before us, the Ministry of Labour, through the office of the Labour Commissioner engaged the Respondent to try and reach an amicable solution to the payment of the Appellant's gratuity. In light of the above, a meeting was held on the 29th of November, 2010. The meeting was attended by the Assistant Labour Commissioner, the

Principal Labour Officer, the Respondent's Director of Human Resources, the Respondent's Assistant Director of Human Resources, the Respondent's Legal Officer and the Appellant. At this meeting, it was agreed that-

> **"ZRA through their DHR indicated the need to have proper records before any payment can be initiated and have since written to ZANACO to avail them the cheque that was cancelled and that once clarity has been sought, the payment process could be initiated...**
>
> **Conclusion**
>
> **Management resolved to pay Mr. Mumba his claims upon receipt of a write up from the office of the Assistant Labour Commissioner with a record of the deliberations."**

On the 6th of January, 2011, the Assistant Labour Commissioner wrote to the Respondent forwarding the minutes of the meeting. It appears that even after this letter, the Appellant was not paid his gratuity. As a result, on the 7th of October, 2011, the Assistant Labour Commissioner wrote another letter to the Respondent stating, among other things, the following:

> **"kindly be advised that at a meeting that was held at the Ministry of Labour headquarters on 29th November, 2010, chaired by the Acting Labour Commissioner, Mr Simon Kapilima, the Ministry was led to understand that the terminal dues for Mr Mumba would be paid. A copy of the deliberations of the meeting was availed to yourselves and as a Ministry, we assumed that**

thereafter, the payment was effected but to our surprise, the complainant has resurfaced claiming the same dues.

In view of what was agreed upon, the Ministry is advising that the terminal dues be paid to the complainant. Should there be any misunderstandings, you are at liberty to contact us..."

Despite the above letter, it appears that the Appellant was not paid his gratuity. Therefore, on the 2nd of February, 2012, the Assistant Labour Commissioner referred the matter to the Industrial Relations Court.

On the 23rd of February, 2012, the Appellant applied for leave to lodge his complaint over the gratuity out of time. This application was allocated to Mung'omba, J. However, before the application could be heard, the Appellant raised a number of complaints against the Judge forcing her to recuse herself from the matter. The matter was then re-allocated to Musona, J. He granted the Appellant leave to file the complaint out of time and ordered the Respondent to file its answer within 21 days. The Respondent did not file its answer within 21 days. As a result of this, the Appellant applied for an order to debar the Respondent from taking any further part in the proceedings on grounds that it had failed to deliver its answer within the ordered time. However, before this application could be heard, the Respondent

applied by summons to set aside leave to lodge Complaint out of time. The Court decided that it would first hear the Respondent's application to set aside leave to lodge Complaint out of time. The Appellant was not happy with this decision. He lodged a complaint with the Chairperson of the Industrial Relations Court, against Musona, J. As a result, Musona, J recused himself too. The matter was then re-allocated to Chanda, J.

We have deliberately outlined the above events because some of the grounds of appeal touch on decisions made by the first two Judges who recused themselves.

The application for leave to set aside leave to lodge Complaint out of time was finally heard by Chanda, J. The case for the Respondent, who was the applicant in this case, was that the Appellant's action was statute barred having brought the claim for his benefits on events that arose on 18th May, 2000, twelve years later. Secondly, that the Appellant's action was *res judicata* and was pending appeal in the Supreme Court under appeal No. 9/2009.

The case for the Appellant was that the affidavit in support of the summons to set aside complaint was not signed by the

deponent. That it was only signed afterwards. He also argued that the application was misplaced because the Court had already granted him leave to file complaint out of time. It was his argument that his case was a referral from the Labour Commissioner under **section 65 of the Employment Act, Cap 268 of the Laws of Zambia** and hence was not statute barred.

On the argument that his matter was *res judicata*, the Appellant argued that the first matter commenced in the High Court was for damages for unlawful termination of contract and not a claim for terminal benefits.

After analysing the application before it, Chanda J, held the view that the matter was statute barred as it was brought twelve years after it arose. She added that having established that the Appellant's matter was statute barred, there was no need to address the Respondent's alternative ground on *res judicata* as doing so would have rendered the Court's effort in vain. She therefore, upheld the Respondent's application.

The Appellant was dissatisfied with the above Ruling by the Court below, therefore, he appealed to this Court on fifteen (15) grounds. However, during the hearing of the appeal, the

andoned five (5) of the fifteen (15) grounds of appeal leaving the following ten grounds:

1) The Lower Court erred in fact and in law when they overruled the Lower Court Oder of another Judge. Hon. Judge, Musona on Wednesday, July 4, 2012 ruled that:

   'We have heard the application, we have seen no reason to refuse this application. The application to file complaint out of time is granted and same to be filed within 7 days from today filing until this application shall stand dismissed. We shall leave costs in the cause.'

2) The Third (3rd) Lower Court chaired by Hon. Judge M. Chanda erred in law and in fact when they allowed the application to set aside the leave to file Complaint out of time of page 87 of the Record of Appeal of Volume One from the Respondent on the Courts Award, Declaration, Decision and Judgment concerning an approved extension of time Court Order by another Lower Court at par. The Lower Court allowed the Respondent application on Thursday, February, 28, 2013.
3) The Second (2nd) Lower Court chaired by Hon. Judge E.L. Musona erred in law and in fact when they allowed and accepted the Three (3) Unsigned Affidavits from the Respondent which were clearly invalid and Statute barred.
4) The Second (2nd) Lower Court chaired by Hon. Judge, E.L Musona erred in law and in fact when they acted against Natural Justice of first come first serve by allowing the late Court application by the Respondent to be heard first and not the first Court application by the Appellant to debar the Respondent which was not even allowed to be heard when it was actually filed in the second (2nd) Lower Court.
5) The First (1st), Second (2nd) and Third (3rd) Lower Courts erred in law and in fact when they allowed the Respondent to disregard the Lower Courts, the Industrial Relations Court Rules, the Supreme Court Rules with impunity.

6) The Third (3rd) Lower Court chaired by Hon. Judge, M. Chanda erred in law and in fact when did not deal with the Respondent second secondary application ground that the Appellant's application was statute barred and the lower Court did not even deal with the Respondent third secondary application ground that the Appellants application was duplicitous and vexatious.

7) The Third (3rd) Lower Court chaired by Hon. Judge, M. Chanda erred in law and fact when they accepted that's the second (2nd) Lower Court chaired by Hon. Judge, E.L Musona cannot exercise its power or discretion to extend the period in which a Complaint can be filed when the second (2nd) Lower Court had already granted the extension as noted earlier. However, the reference to section 19 (3) (6) (1) of the Industrial Relations Court Act No. 8 of 2008 was misplaced and misdirected.

8) The Third (3rd) Lower Court chaired by Hon. Judge, M. Chanda erred in law and in facts when they did not acknowledge and observe that's the Appellant exhausted all the administrative channels available to him like the second (2nd) Lower Court had heard, accepted and consequently granted the extension period of the Lower Court application as noted earlier on Wednesday, July 4, 2012.

9) The Lower Court also erred in law and in fact when they discriminated and prejudiced the Appellant in their performance of adjudicative duties. Clearly, as the court proceedings would show the Respondent was being favoured at every stage by the First (1st), Second (2nd) and Third (3rd) Lower Courts which is also contrary to the laws of the land of Zambia.

10) The Third (3rd) Lower Court chaired by Hon. Judge, M. Chanda erred in fact and law when they failed to acknowledge the fact that the Respondent submitted false and fraudulent statements in the Lower Court on Thursday, February 28, 2013, and yet it is a lawful requirement in Court to speak and Truth as per Rule 106 of the Industrial and Labour Relations Acts 517 of the Laws of Zambia which carries a conviction sentence of a term not exceeding Three (3) years.

Both parties filed written heads of argument.

The Appellant's written heads of argument were lengthy. In brief, there were mainly five arguments.

Firstly, he argued that his application for leave to file Complaint out of time was 'approved' by Musona, J. That the lower Court by Chanda, J, had no jurisdiction to overturn a decision made by a fellow Judge when Musona, J, granted the Appellant leave to file the Complaint out of time. He cited the case of **Manal Investments Limited V. Lamise** [1] to support his argument.

Secondly, the Appellant argued that the lower court erred by dealing with the Respondent's application first instead of dealing with his application. The Appellant submitted that his matter was not statute barred because it was a referral case from the Labour Commissioner. The Appellant added that the delay in filing his Complaint out of time was as a result of trying to exhaust all the administrative procedures available to him. That, therefore, Chanda, J, erred when she held that his Complaint was statute barred.

Thirdly, the Appellant argued that this matter was not res judicata.

Fourthly, that the lower court discriminated and prejudiced the Appellant in the performance of their functions by favouring the Respondent at every stage.

Fifthly, the Appellant argued that the lower Court erred when it failed to acknowledge the fact that the Respondent submitted false and fraudulent statements in the lower Court.

On behalf of the Respondent, Mr Hang'andu submitted that the Appellant's matter was statute barred since it was brought 12 years after it accrued. That as a result, the lower court lacked jurisdiction to deal with a matter that is statute barred. He argued that courts should frown upon stale claims. He relied on the case of **Donovan V. Gwentoys Ltd** [2] to support his argument.

Counsel argued that this action is specifically governed by the proviso to **section 3(3)(a) of the Law Reform (Limitation of Actions) Act, Cap 72 of the Laws of Zambia**, which requires that an action for breach of an employment contract is not tenable after three years from the date when the cause of action

accrued. He added that this Court held In **ZCCM V. Chileshe**[3], that a defendant is entitled to plead that an action is stale regardless of whether the delay is attributable to ex curia negotiations between the litigants. Counsel added that this matter is *res judicata* because the Appellant had earlier on taken out a similar action in the High Court.

We have examined the pleadings in the Industrial Relations Court and High Court. We have also perused the Ruling in the Industrial Relations Court, the parties heads of argument as well as the authorities they cited.

We shall start with the Appellant's argument that this matter is not statute barred. The Appellant argued that he could not file his Complaint in time because he wanted to exhaust the administrative procedures available to him.

Section 85 of the Industrial and Labour Relations Act, as amended by Act No. 8 of 2008, provides that-

> "(3) The Court shall not consider a complaint or an application unless the complainant or applicant presents the complaint or application to the Court-
>
> (a) within ninety days of exhausting the administrative channels available to the complainant or applicant; or

(b) where there are no administrative channels available to the complainant or applicant, within ninety days of the occurrence of the event which gave rise to the complaint or application:

Provided that-

(i) upon application by the complainant or applicant, the Court may extend the period in which the complaint or application may be presented before it; and..."

In the case at hand, the Appellant reported the matter to the Police, the Zambia Revenue Authority Governing Board Investigator General and finally the Ministry of Labour. In our view, administrative procedures envisaged by the above section are the ones applicable in the particular organisation the employee worked. In the case at hand, the Appellant should have restricted himself to the administrative procedures available to him within the Respondent organisation. The route taken by the Appellant of reporting this matter to the Police and the Investigator General was unnecessary.

Further, in deciding whether this matter was statute barred, it is necessary for us to determine when the cause of action accrued.

The Limitation Act of 1939 applies in Zambia by virtue of the provisions of **section 2 of the British Acts Extension Act**

Chapter 10 of the Laws of Zambia which states that the Acts of the Parliament of the United Kingdom (which include the Limitation Act of 1939) set forth in the Schedule to the Act shall be deemed to be of full force and effect within Zambia. **Section 2 (1) (a) of the Limitation Act, 1939** provides as follows:

> "2. (1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:-
> (a) actions founded on simple contract or on tort;..."

Further, the amendment to section 2 of the Limitation Act, 1939 by the **Law Reform (Limitation of Actions, ETC) Act, Cap 72 of the Laws of Zambia**, provides that-

> "In its application to the Republic, the Limitation Act, 1939, of the United Kingdom, is hereby amended as follows:
> (a) by the insertion of the following proviso at the end of subsection (1) of section 2:
> Provided that, in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years..."

It is clear from the foregoing provision of the Act that any action that is based on simple contract must be commenced within a period of six years from the date the cause of action accrues. In our view, a contract of employment is a simple contract and falls under the ambit of the 6 year limitation period.

The amendment to **section 2** of **the Limitation Act, 1939**, above relates purely to personal injury actions and does not extend to actions relating to contract. Therefore, we do not agree with the argument by counsel for the Respondent that the amendment applies to contract as well. Accordingly, the limitation period for the matter before us is six (6) years from the date it accrued.

This brings us to the question of when the cause of action accrued.

In **Nykredit Mortgage Bank Plc V. Edward Erdman Group Ltd (No 2)** [4] Lord Nicholls of Birkenhead stated that:

> "... causes of action for breach of contract and in tort arise at different times. In cases of breach of contract, the cause of action arises at the date of the breach of contract. In cases in tort, the cause of action arises, not when the culpable conduct occurs, but when the plaintiff first sustains damage."

Further, the learned authors of **Halsbury's Laws of England, Vol 28, 4th Edition, Reissue, page 446, para 864** state as follows:

> " In an action for breach of simple contract, the cause of action is the relevant breach and not the time of damage as breach of contract is actionable per se. Accordingly, such an action must be brought within six years of a breach; after expiration of that period, the action will be barred, although damage may have accrued to the plaintiff within six years of the action brought..."

In **Board of Trade v Cayzer, Irvine and Co. Limited** [5], Lord Atkinson made the following observation.

> "The whole purpose of this Limitation Act is to apply to persons who have good causes of action which they could if so disposed, enforce, and to deprive them of the power of enforcing them after they have lain by for the number of years respectively and omitted to enforce them. They are thus deprived of the remedy which they have omitted to use."

From the above authorities, it is clear that the general rule is that the cause of action in a simple contract accrues on the date of the breach and that the limitation period begins to run when the plaintiff's cause of action accrues. The authorities also show that the limitation period for a matter involving a simple contract is six years.

However, the learned authors of **Halsbury's Laws of England, 4th Edition, Volume 28, Reissue, at para 1083, page 553** state as follows:

> "where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest in any such estate, and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it, the right is deemed to have accrued on and not before the date of the acknowledgement or payment."

Further, **the Limitation Act, 1939**, provides, under **section 23(4),** that-

> "Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgement or the last payment..."

The above authorities show that when a person liable acknowledges a claim, time begins to run afresh, from the date of acknowledgment.

In the present case the plaintiff's action arises out of a contract of employment between the plaintiff and the defendant.

Although counsel for the Respondent argued that the Respondent never acknowledged the claim, there is sufficient evidence on record to show that the Respondent acknowledged the claim. This evidence is on pages 590 and 623 of Volume 2 of the record of appeal. The documents on these pages are minutes of the meeting held at the Labour Commissioner's office on the 29th of November, 2010 and attended by three senior officers from the Respondent and the subsequent letter written by the Assistant Labour Commissioner on the 7th of October, 2011, respectively. This subsequent letter confirmed that the conclusion of the meeting was that the Appellant would be paid his gratuity. Further, the three senior officers never objected to the conclusion arrived at during the meeting.

During the hearing of the appeal, we asked Mr Hang'andu if the said minutes and letter were before the Industrial Relations Court when the application to set aside leave to file Complaint out of time was lodged, and he answered in the affirmative. In our view, since these documents were before the lower Court, the lower Court was obliged to consider them before arriving at whether this matter was statute barred.

The evidence on record shows that the Respondent promised to pay the Appellant in 2010. This was ten years after the action accrued.

On the authorities we have referred to above, we hold the view that time begun to run afresh after this acknowledgement to pay by the Respondent. It would seem to us that the lower Court glossed over the documents that were before it. If the lower Court had taken into account the aforementioned evidence, it would have found that the matter was not statute barred because time started running from the date the Respondent acknowledged the debt.

Therefore, we hold that the lower court misdirected itself when it made a Ruling that was not supported by the evidence before it. Accordingly, we allow this ground of appeal.

We now come to the issue raised by the Appellant that the lower Court erred when it decided to hear the Respondent's application first instead of the Appellant's application which was filed earlier. Further, the Appellant argued that Chanda, J, had no jurisdiction to set aside the leave to file the Complaint out of

time which had been granted by Musona, J, because the two Judges had equal jurisdiction.

On the issue of jurisdiction of the two Judges, we wish to state that indeed the two judges were of equal jurisdiction. However, what was granted by Musona, J, was leave to file the complaint out of time. This leave could be set aside at any time, even by Musona, J, himself. However, because he recused himself from hearing the application, the leave was set aside by Chanda, J, who heard the application. We wish to point out that it was the complaint that the Appellant made against Musona J, that made Musona J recuse himself from hearing the application. We wish to add that the Appellant's complaint against Musona J was misplaced and unjustified, as we will show shortly. Therefore, we find no merit in this argument by the Appellant and we dismiss it.

On the argument about which application should have been heard first, we refer to this Court's decision in **Water Wells Ltd V. Wilson Samuel Jackson** [6], where we held that-

> "applications which may result in a judgment being set aside should be accorded priority over other proceedings stemming out of the judgment called in question. There is certainly very

> little point, as happened in this case, in ignoring an application against a judgment and in proceeding to conclude and deliver a decision on the assessment based on that judgment when the application might have succeeded and the court's further labour been in vain."

We are of the view that the principle in the above authority applies to this case. The above authority shows that a subsequent application which may have the effect of setting aside a decision in an earlier application must be given priority over an earlier application. In the case at hand, the effect of the Appellant's matter being found to be statute barred or *res judicata* would have rendered the earlier application to debar the Respondent from taking a further part, irrelevant. Further, this would have rendered the lower Court's effort in vain if the court had proceeded to hear the Appellant's application first.

Therefore, in circumstances such as this case, a court is entitled to hear a subsequent application in preference to an earlier one. Accordingly, we dismiss this argument by the Appellant for lack of merit.

We now wish to deal with the Appellant's argument that the lower court favoured the Respondent at every stage of the proceedings. Here the Appellant is accusing the lower Court of

bias in favour of the Respondent. We have in the past strongly disapproved of the tendency by losing litigants and their Advocates, of making unwarranted accusations of bias against Judges. See: **Harrington v Siliya and the Attorney General** (11).

We find the Appellant's accusations of bias against Chanda J, totally unjustified and unwarranted. And we strongly disapprove of the very accusation, which amounts to contempt of Court. We hereby dismiss the argument.

We now move to the issue of *res judicata*. *Res judicata* means that an issue has been adjudicated upon. In the case of **ANZ Grindlays Bank (Zambia) Limited V. Chrispine Kaona** (7), it was held that-

> "In order for a defence of *res judicata* to succeed, it is necessary to show not only that the cause of action was the same but also that the plaintiff has had no opportunity of recovering in the first action that which he hopes to recover in the second."

In another case of **Bank of Zambia V. Jonas Tembo and Others** (8), it was held that-

> "A plea of *res judicata* must show either an actual merger or that the same point had been actually decided between the same parties."

The Learned authors of **Halsbury's Laws of England, 4th Edition, Volume 16, at paragraph 1528**, explained that-

> "in order that a defence of *res judicata* may succeed, it is necessary to show that not only the cause of action was the same, but also that the plaintiff has 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..."

This Court, in the case of **Societe Nationale Des Chemis De Pur Du Congo (SNCC) and Joseph Nonde Kakonde,**[9] which followed the case of **Henderson V. Henderson,** [10] stated as follows:

> *"Res judicata* is not only confined to similarity or otherwise of the claims in the 1st one and the 2nd one. It extends to the opportunity to claim matters which existed at the time of instituting the 1st action and giving rise to the judgment."

In **Henderson V. Henderson**,[10] Wigram V-C, held that-

> "where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion

> and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

In the case before us, the issue between the Appellant and the Respondent in the Industrial Relations Court was one for gratuity under a contract of employment. A look at the Appellant's statement of Claim in the earlier matter in the High Court reveals that the claim was for, among other things, "damages for wrongful/unlawful termination of contract". This is the same contract where the claim for K10,133,713 gratuity emanates. The cause of action was the same termination of the contract. The Appellant had an opportunity, in the High Court, to litigate, at once, both on the damages for wrongful or unlawful termination of contract as well as on the gratuity that was not paid to him. When the Appellant noticed that the Respondent was refusing or neglecting to pay, he should have amended his claim in the High Court to include the claim for his gratuity.

From what we have said and on the authorities we have referred to above, we hold that this matter is *res judicata.* Accordingly, we dismiss the Appellant's argument on *res judicata.*

Having held that this matter is *res judicata*, it is not necessary for us to deal with the other grounds of appeal on the argument that the lower Court erred when it failed to acknowledge the fact that the Respondent submitted false and fraudulent statements in the lower court. We say so on the authority of **William Harrington V. Dora Siliya and Attorney-General**[11], where we said that this Court can decide not to deal with an issue if deciding on the issue becomes unnecessary.

At this stage, we wish to comment generally, on the style the Appellant adopted in attacking the decisions of the lower court.

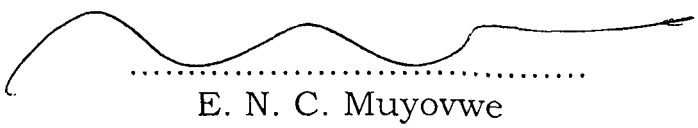
We note that the Appellant, in his grounds of appeal is complaining about decisions of what he terms as "the 1st lower court" and "the 2nd lower court." We believe he is referring to Mung'omba J and Musona J, who earlier recused themselves from this case. We wish to point out that this appeal is against a specific Ruling delivered by Chanda J, on 4th April 2013, allowing the Respondent's application to set aside leave to file Complaint out of time. Therefore, the Appellant cannot use this appeal to complain about decisions that were made by the two other Judges. He did not appeal against the decisions he is complaining about. It is not in order for him to try and sneak

them in this appeal. Accordingly, we reject his arguments on them.

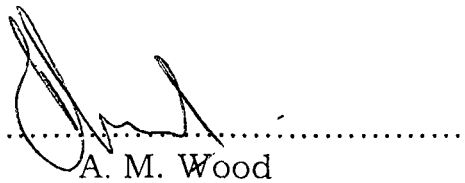
In summary, we hereby reverse and set aside the lower court's Ruling to the extent it decided that the Appellant's claim for gratuity was statute barred. The appeal is partly allowed to that extent. However, we uphold the lower Court's Ruling to the extent it decided that the Appellant's claim for gratuity was *res judicata*. The appeal is hereby partly allowed to that extent. The net effect is that the appeal is unsuccessful, as the matter is *res judicata*.

On the facts of this case, we order that each party bears own costs.

M. S. Mwanamwamba
DEPUTY CHIEF JUSTICE



E. N. C. Muyovwe
SUPREME COURT JUDGE



A. M. Wood
SUPREME COURT JUDGE