IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 68/2015
HOLDEN AT NDOLA
(CIVIL JURISDICTION)

B E T W E E N:

PATMAT LEGAL PRACTITIONERS
(Sued as a Firm) APPELLANT

AND

CHIPO ZYAMWAIKA MUDENDA NDELE 1ST RESPONDENT
CRAMOS MAKANDA 2ND RESPONDENT
SALLY JARIELLE TROLLIP AND
KENNY H. MAKALA (Sued as Joint Administrators
of the Estate of the late HORACE MAKALA) 3RD RESPONDENTS

CORAM: MAMBILIMA, CJ, KAOMA AND KAJIMANGA, JJS.
On 5th December, 2017 and 12th December, 2017

For the Appellant: Mr. H. A. Chizu, of Messrs. Chanda, Chizu and Associates
For the 1st and 2nd Respondents: No Appearance
For the 3rd Respondents: No Appearance

JUDGMENT

MAMBILIMA, CJ delivered the Judgment of the Court.

CASES REFERRED TO:

1. R V. APPEAL COMMITTEE OF COUNTY OF LONDON QUARTER SESSIONS, EX PARTE ROSSI (1956) 1 ALL ER 670;

2. **R V. UNIVERSITY OF CAMBRIDGE (DR. BENTLEY'S CASE) (1723) STRA 557;**
3. **SIMBEYE ENTERPRISES LIMITED AND INVESTRUST MERCHANT BANK (Z) LIMITED V. IBRAHIM YOUSUF (2000) ZR 159;**
4. **EMMANUEL MPONDA V MWANSA CHRISTOPHER MULENGA, CHRISTOPHER MUNGOYA AND THE ATTORNEY GENERAL, APPEAL NO. 42 OF 2017; AND**
5. **JOHN R. NG'ANDU V. LAZAROUS MWIINGA (1988- 1989) ZR 197.**

LEGISLATION REFERRED TO:

a. **EMPLOYMENT ACT, CHAPTER 268 OF THE LAWS OF ZAMBIA; SECTION 20;**
b. **INDUSTRIAL RELATIONS COURT RULES, CHAPTER 269 OF THE LAWS OF ZAMBIA; AND**
c. **HALSBURY'S LAWS OF ENGLAND, 5TH EDITION, VOLUME 79.**

OTHER AUTHORITIES REFERRED TO:

i. **GOWER, L.G.B, "POLLOCK ON THE LAW OF PARTNERSHIP", 15TH EDITION, STEVENS & SONS LIMITED (1952), PAGE 41.**

This appeal is from a Judgment of the Industrial Relations Court (IRC), delivered on 9th September, 2014. The said Judgment followed a Notice of Complaint filed by the 1st and 2nd Respondents on 27th December, 2013. The Notice of Complaint was supported by an affidavit deposed to jointly by the 1st and 2nd Respondents.

The grounds on which the 1st and 2nd Respondents filed the Complaint were that the Appellant verbally employed the 1st Respondent as an accountant, on 12th July, 2011, and the 2nd Respondent as a legal assistant, on 9th September, 2010. The two

Respondents averred that on 20th June, 2013, Mr. Horace Makala who, according to them, was the 'purported' Managing Partner of the Appellant firm, passed away. They referred to Mr. Makala as "the purported" Managing Partner because according to them, the records at the Patents and Companies Registration Agency (PACRA) did not show his name as the Managing Partner of the Appellant. That the records at PACRA instead showed a Mr. Geoffrey Wamusula Simukoko, as the sole partner in the Appellant.

The 1st and 2nd Respondents deposed that upon the demise of Mr. Makala, the remaining partner in the firm, Mr. Simukoko, on about 9th September, 2013, told them to stop going for work on the basis that the administrators of the estate of the late Horace Makala were preparing their terminal benefits. According to the two Respondents, the implication of this was that they had been declared redundant, as the Appellant's offices were closed and it could no longer manage to pay them their salaries.

The 1st and 2nd Respondents stated that on 6th November, 2013, they were served with termination letters which indicated that their last day of employment was 6th December, 2013 and that

all their dues would be paid on that date. That on 5th December, 2013, they made a telephone call to Mr. Simukoko to find out if their terminal benefits would be paid on 6th December, 2013 in accordance with the termination letters. According to them, Mr. Simukoko indicated that he was still negotiating with the administrators of the estate of the late Horace Makala. They stated that thereafter, they wrote to the said administrators, who denied any liability and told them to make their claim to the Appellant. It is this impasse that prompted them to institute this action.

The reliefs sought by the 1st and 2nd Respondents in their Notice of Complaint to the IRC were that the Appellant should pay them their salary arrears, leave days, National Pensions Scheme Authority (NAPSA) contributions, redundancy pay, costs, interest on the sums found due and any other benefits the Court would deem fit. In their affidavit in support sworn by the 1st Respondent, they essentially repeated what they had stated in the Notice of Complaint.

On 5th March, 2014, the Appellant filed summons for joinder of the administrators of the estate of Mr. Horace Makala to the

proceedings. The summons were supported by an affidavit deposed to by Mr. Simukoko. The gist of the said affidavit was that in April, 2012, Mr. Makala and a Mr. Charles Siamutwa approached him (Mr. Simukoko) and asked him to acquire a stake in the Appellant firm which the two were operating as a partnership. That the proposal was for Mr. Simukoko to acquire Mr. Siamutwa's stake as he was exiting to set up another law firm. That on 16th March, 2012, Mr. Simukoko applied to the Law Association of Zambia for permission to merge his law firm, G W Simukoko and Company, with the Appellant law firm. According to Mr. Simukoko, Mr. Makala promised to introduce him to the Appellant's bankers, Indo Zambia Bank, and to arrange for changes to the signing mandate so that he could replace Mr. Siamutwa as a signatory to the Appellant's business and clients' accounts. He claimed that, although he started operating in an office at the Appellant's premises since June, 2012, the formalities for him to acquire Mr. Siamutwa's share in the Appellant and the completion of formalities with the Appellant's bank were never executed. That, therefore, Mr.

Makala continued to manage the Appellant's affairs including its bank accounts.

Mr. Simukoko deposed that following Mr. Makala's death, he discovered that Indo Zambia Bank had allowed Mr. Makala to operate the clients' and business accounts as a sole signatory. He further claimed that it was brought to his attention by one of the Appellant's employees, Ms. Bridget Mfuzi, that the Appellant was owing money to various clients as a result of incomplete mortgage transactions for which Indo Zambia Bank had paid money into the Appellant's clients' account, and to other clients who had made payments directly to Mr. Horace Makala. That he met the Bank Manager of Indo Zambia Bank who acknowledged that the Bank had noticed some irregularities on the Appellant's accounts.

Mr. Simukoko stated that he had earlier agreed with Mr. Kenny Makala, the elder brother to the late Horace Makala, that the misappropriated funds and other liabilities of the Appellant, which had resulted from misappropriation of the Appellant's funds, would be refunded from the proceeds that would be realised after selling Mr. Horace Makala's residential properties and other assets.

Mr. Simukoko further deposed that all the properties that belonged to the Appellant were taken by the administrators on the understanding that they would be sold and that the proceeds would be used to honour the Appellant's liabilities. He stated that these properties included office furniture, equipment and motor vehicles, which were bought by Mr. Horace Makala using the Appellant's funds.

Mr. Simukoko went on to state that after the death of Mr. Horace Makala, it came to his attention that he (Mr. Makala) had employed several employees on behalf of the Appellant but, there were no employment records for the said employees. That in order to mitigate potential liability to himself, and after discussing with Mr. Kenny Makala, he decided to terminate the employment of the 1st and 2nd Respondents. That Mr. Kenny Makala agreed in principle to pay the 1st and 2nd Respondents' dues subject to them providing evidence of their employment and conditions of service.

On the basis of the above, Mr. Simukoko asked the lower Court to join the administrators of the estate of the late Horace Makala to this case.

When the matter came up for consideration of the application for joinder, Counsel for the intended new parties did not object to that application. He, however, requested to file an Affidavit in Opposition to specifically respond to some of the issues raised in the Affidavit in Support of the application for joinder. The lower Court granted the application for joinder and also allowed Counsel for the intended new parties to file an affidavit in opposition as requested. The intended new parties, accordingly, became the 2nd and 3rd Respondents, respectively, although they have been cited jointly as 3rd Respondents in this appeal.

In response to the action, the Appellant filed an Answer. The Appellant admitted that the 1st and 2nd Respondents were its employees but that, because there were no employment records, it was difficult to ascertain when they were employed and the conditions under which they served. That the management and control of the Appellant was exercised by Mr. Horace Makala up to the time of his death. Further, that the 1st and 2nd Respondents' oral contracts of employment were properly terminated.

The 3rd Respondents did not file an Answer to the Notice of Complaint.

When the matter came up for hearing on 3rd September, 2014, only the 1st Respondent appeared. According to the lower Court, no explanation was given for the absence of the Appellant and the 3rd Respondents at the hearing. The Court stated that it was satisfied that the Appellant and the 3rd Respondents were aware of the hearing date. It, accordingly, proceeded to hear evidence from the 1st Respondent who also testified on behalf of the 2nd Respondent. Thereafter, the Court adjourned the matter for Judgment.

The crux of the testimony of the 1st Respondent was that Mr. Simukoko was fully aware of the conditions of service under which the 1st and 2nd Respondents worked. That this was because Mr. Simukoko even gave the two Respondents part of their salaries for the months of July and August, 2013. Further, that when Mr. Simukoko joined the Appellant, the late Mr. Makala introduced the 1st Respondent, to Mr. Simukoko, as an accountant in the Appellant firm.

Before proceeding to decide on the main issues raised in the matter, the lower Court reconsidered the joinder of the 3rd Respondents to the action and came to the following conclusion:

> **"After looking at the documents filed into Court and the testimony of the 1st Complainant, we are convinced on the balance of probability that there is no cause of action against them. The reason for this finding is that all documentation before us indicate that the Complainants were employees of the 1st Respondent and letters terminating their employment were authored by the 1st Respondent. The attempt to bring in the 2nd and 3rd Respondents to this suit is not justified as the 1st Respondent is still operational and has the capacity to settle any liabilities. We, therefore, dismiss the claim against the 2nd and 3rd Respondents for being frivolous and vexatious."**

With regard to the main matter, the lower Court established that the 1st and 2nd Respondents were employed by the Appellant under oral contracts of service. That the Appellant terminated the said contracts by giving one month's notice in accordance with Section 20 of the **EMPLOYMENT ACT**[a]. The relevant portions of the said Section 20 provide as follows:

> **"20. (1) Either party to an oral contract may terminate the employment on the expiration of notice given to the other party of his intention to do so, and where the notice expires during the currency of a contract period, the contract shall be thereupon terminated.**
> **(2) In the absence of any agreement providing for a period of notice of longer duration, the length of such notice shall be-**
> **... .**
> **(c) thirty days where the contract is for a period of one week or more.**

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(4) Where notice is given, there shall be paid to the employee, on the expiration of the notice, all wages and benefits due to him."

The Court found that the Appellant acted within Section 20 of the **EMPLOYMENT ACT**[a] when it terminated the 1st and 2nd Respondents' contracts of employment by giving them one month's notice.

With regard to the claim for redundancy packages, the lower Court stated that there was no basis for that claim.

On the claim for payment for leave days, the Court found that the Appellant was liable to pay the 1st and 2nd Respondents for any leave days accrued up to the date of termination of employment on 6th December, 2013. Further that the Appellant owed a total of K25, 000.00 in salary arrears to each of the two Respondents.

As for the claim by the 1st and 2nd Respondents for refunds of NAPSA contributions, the Court held that this claim was supposed to be made to the National Pension Scheme Authority.

It is against the above determinations by the lower Court that the Appellant has now appealed to this Court. In its Memorandum of Appeal, the Appellant only raised two grounds of appeal. However, the Appellant raised three further grounds of appeal in its

heads of argument without first obtaining leave of this Court to do so. At the hearing of the appeal on 5th December, 2017, the learned Counsel for the Appellant, Mr. Chizu, conceded that he did not obtain leave of the Court to file the further three grounds of appeal. He, however, contended that he filed the further grounds of appeal pursuant to paragraph 3 in the memorandum of appeal which stated:- **"Such further grounds as may be filed later upon perusal of the Case Record."**

We must state at the outset that such a statement cannot be used to circumvent the requirement of the rules of the Court to seek leave before filing grounds of appeal that are not stated in the memorandum of appeal. The statement on which Mr. Chizu has relied is not a ground of appeal but merely an indication that the Appellant may file further grounds of appeal, later, on perusal of the case record.

We must yet again express our disdain on the practice by advocates and parties to attempt to introduce new grounds of appeal through such kind of statements in the memorandum of appeal in complete disregard of the rules of the Court. Grounds of

appeal must be prepared and set out in the Memorandum of Appeal at the time of filing the case record. As we stated in our recent decision in the case of **EMMANUEL MPONDA V MWANSA CHRISTOPHER MULENGA, CHRISTOPHER MUNGOYA AND THE ATTORNEY GENERAL**[4] "...a statement such as ***'further grounds to follow upon perusal of the record of appeal'*** **or** ***'such other grounds as may be furnished upon further perusal of the record'*** **which manifestly find their way in the memoranda of appeal do not constitute a valid ground of appeal."** Such statements in the memoranda of appeal do not serve any useful purpose because a party will still have to apply for leave of court to file or introduce further grounds of appeal. This is the strict requirement of Rule 58(2) and (3) of the **SUPREME COURT RULES, CHAPTER 25 OF THE LAWS OF ZAMBIA**, which provides as follows:-

> **"58. (2) The memorandum of appeal shall be substantially in Form CIV/3 of the Third Schedule and shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the judgment appealed against, and shall specify the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively.**

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(3) The appellant shall not thereafter without the leave of the Court put forward any grounds of objection other than those set out in the memorandum of appeal, but the Court in deciding the appeal shall not be confined to the grounds put forward by the appellant:
Provided that the Court shall not allow an appeal on any ground not stated in the memorandum of appeal unless the respondent, including any person who in relation to such ground should have been made a respondent, has had sufficient opportunity of contesting the appeal on that ground." (Emphasis by underlining is ours)

Accordingly, we hold that the three additional grounds of appeal contained and argued in the Appellant's heads of argument are incompetent. The appeal will, therefore, be considered on the two grounds of appeal contained in the memorandum of appeal. These are that:-

1. **the lower Court misdirected itself in both law and fact when it heard the 1st Respondent in the absence of the Appellant and relied on the 1st Respondent's oral evidence that the Appellant was aware of the hearing date and had deliberately not attended Court on the 3rd of September, 2014. This is contrary to the rules of natural justice which entitle the Appellant to be given a reasonable opportunity to present its case and meet that of the 1st and other Respondents herein and more specifically contrary to Rules 12 and 45(1) of the Industrial Relations Court; and**
2. **the lower Court misdirected itself in both law and fact when it held that the application for joinder of the 3rd Respondent was frivolous and vexatious and dismissed it when it had earlier granted the said application for joinder based on the Appellant's affidavit and had with the consent of the 3rd Respondents ordered that the 3rd Respondents should file an Affidavit in opposition to the Affidavits of the 1st Respondent and that of the Appellant, an order which the 3rd Respondents had as of the date of hearing not obeyed and despite being aware of the hearing date did not themselves attend Court on the hearing day.**

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In support of these grounds of appeal, Mr. Chizu filed written heads of argument on 5th March, 2015 on which he relied entirely. The gist of Counsel's arguments in the first ground of appeal is that the lower Court misdirected itself when it heard the 1st Respondent in the absence of the Appellant. He has submitted that there was no proper service of the notice of hearing for the sitting of 3rd September, 2014. That, therefore, the Appellant was not aware of the hearing date.

Counsel expressed the view that the lower Court should not have relied on the 1st Appellant's word to arrive at the conclusion that the Appellant was aware of the hearing date. According to him, the fact that the Appellant and the 3rd Respondents, both of whom were represented by very senior Counsel, were absent should have alerted the Court to the possibility that the said parties may not have been aware of the hearing date. He contended that the Court's conclusion, that the Appellant was aware of the hearing date, was not corroborated by any independent evidence and was manifestly erroneous. That this is because when the matter came up on 15th April, 2014, the Court in effect adjourned the case *sine die*. That it

was, therefore, imperative that the new date, which was set in the absence of the parties, be communicated by proper service of the notice of hearing on the parties. In support of these arguments, Counsel cited the case of **R V. APPEAL COMMITTEE OF COUNTY OF LONDON QUARTER SESSIONS, EX PARTE ROSSI**[1], where Lord Denning stated that:-

> **".....it is to be remembered that it is a fundamental principle of our law that no one is to be found guilty or made liable by an order of any tribunal unless he has been given fair notice of the proceedings so as to enable him to appear and defend them. The common law has always been very careful to see that the defendant is fully appraised of the proceedings before it makes any order against him."**

Counsel stated that the lower Court should have called for production of an affidavit of service to prove due service of the notice of hearing. He went on to submit that the denial of the right to present the Appellant's case was contrary to Rules 12 and 45(1) of the **INDUSTRIAL RELATIONS COURT RULES**[b] which provide, respectively, as follows:

> **"12. The Registrar shall, as soon as practicable, give to every party to the proceedings notice of the arrangements made by the Court for hearing the complaint, and shall notify every such party of the date appointed by the Court by which any interlocutory application may be made.**

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45. (1) Any notice or other document required or authorised by these Rules to be served on, or delivered to, any person may be sent to him by post to his address for service or, where no address for service has been given, to his registered office, principal place of business or last known address, and any notice or other document required or authorised to be served on, or delivered to, the Court may be sent by post or delivered to the Registrar."

Mr. Chizu contended that the Appellant was denied the right to be heard in contravention of the rules of natural justice. To buttress this point, he referred us to a number of authorities including the case of **R V. UNIVERSITY OF CAMBRIDGE (DR. BENTLEY'S CASE)**[2], where Vortescue, J stated that-

"The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion that even God himself did not pass sentence upon Adam before he was called upon to make his defence ...."

Coming to the second ground of appeal, Counsel faulted the lower Court for having held that the application for joinder of the 3rd Respondents was frivolous and vexatious when the Court had earlier allowed that application. He alleged that the late Horace Makala misappropriated huge amounts of money from the Appellant's clients' and business accounts and used the said money to buy real and personal property. That consequently, at the time of his death, he left the Appellant in a state of bankruptcy. That the

Appellant was forced out of its business premises by its landlord because Mr. Horace Makala had issued a cheque to the landlord which was not honoured.

Mr. Chizu submitted that it was because of the misappropriated funds and the consequential liabilities that the Appellant made the application to join the 3rd Respondents to the proceedings. That in addition, the 3rd Respondents took all the Appellant's assets into their custody and did not render an account for the said assets. Counsel contended that there was a real connection of the joint administrators of the estate of Mr. Makala to his assets and dealings, since the said administrators had taken over his liabilities and assets. That having earlier granted the application for joinder, the lower Court referred to it in its judgment as having been frivolous and vexatious. In support of these submissions, Counsel referred us to, among other authorities, Rule 32 of the **INDUSTRIAL RELATIONS COURT RULES**[b], which provides that:-

> **"32. The Court may, on the application of any person or of its own motion, direct that any person not already a party to proceedings be added as a party, or that any party to proceedings shall cease to be a**

party, and in either case may give such consequential directions as it considers necessary."

Counsel also cited the case of **SIMBEYE ENTERPRISES LIMITED AND INVESTRUST MERCHANT BANK (Z) LIMITED V. IBRAHIM YOUSUF**[3], where this Court held that:-

"It has been the practice of the Supreme Court to join any person to the appeal if the decision of the court would affect that person or his interest. The purpose of the rule is to bring all parties to disputes relating to one subject-matter before the court at the same time so that disputes may be determined without the delay, inconvenience and expense of separate actions and trials."

Counsel went on to submit that since the administrators of the estate of Mr. Makala had taken charge of the affairs of Mr. Makala, the said administrators were answerable on his behalf.

On the basis of his submissions, Mr. Chizu contended that the judgment of the lower Court was irregular and must be set aside. He asked us to order a retrial because, in his opinion, there was no proper trial before the lower Court.

Counsel for the Respondents did not file any heads of argument and did not appear at the hearing of this appeal. After establishing that Counsel for the Respondents were informed of the day of hearing of this appeal and signed the register in acknowledgment, we decided to hear the appeal in their absence.

We have carefully considered the evidence on record, the judgment appealed against and the submissions of Counsel.

In our view, the main question for our determination on the first ground of appeal is **"whether there was proof that the Appellant was aware that the hearing of this matter before the lower Court had been scheduled for 3rd September, 2014"**. A study of the record of appeal establishes that after its sitting of 15th April, 2014, the Court did not set the date for the next hearing. In effect, the matter was adjourned to a date to be communicated to the parties. On 7th May, 2014, a notice of hearing was issued setting 3rd September, 2014, as the next hearing date. However, there is no evidence on record to establish that the said notice of hearing was served, particularly on the Appellant and the 3rd Respondents. It is clear from the record of appeal that the lower Court concluded that the Appellant and the 3rd Respondents were aware of the date of hearing on the basis of the word of the 1st Respondent and the mere fact that the notice of hearing had been issued.

The proceedings on the record of appeal show that when the matter came up on 3rd September, 2014, only the 1st Respondent

was in attendance. The Court asked him whether he knew why the Appellant and the 3rd Respondents were not before Court. He told the Court that he had contacted Mr. Simukoko and that Mr. Simukoko had indicated that he was aware of the date of hearing for the case. Further, that he did not have any information in relation to the non-appearance of the 3rd Respondents. On the basis of the foregoing, the Court made the following decision:

> **"There are no reasons advanced to explain the non-attendance of the Respondents before Court this morning. There is a Notice of Hearing that was issued way back on 7th May, 2014 for today's hearing. We are convinced that the Respondents knew of this date just as the Complainants did and are before Court. We will therefore proceed to hear the case in the absence of the Respondents."**

From the above passage, it would appear that the lower Court based its decision, that the Appellant and the 3rd Respondents were aware of the hearing date, firstly, on the 1st Respondent's word; secondly, on the fact that a notice of hearing was issued; and, lastly, on the fact that the 1st Respondent appeared at the hearing. In our view, the lower Court misdirected itself when it relied on these factors to proceed in the absence of the Appellant and the 3rd Respondents. There was no evidence before the Court to establish that the notice of hearing was actually served on the Appellant and

the 3rd Respondents. The issuance of the notice of hearing should not have been taken as proof that the said notice was served. The Court should have asked for proof that the notice had in fact been served on the Appellant and the 3rd Respondents. This could have been done by, for instance, filing an Affidavit of service or some other evidence of acknowledgment of receipt of the notice. In the absence of proof of service, we hold that the lower Court misdirected itself when it proceeded to hear the matter in the absence of the Appellant. This holding is supported by our decision in the case of **JOHN R. NG'ANDU V. LAZAROUS MWIINGA**[4].

In brief, the facts of the **JOHN R. NG'ANDU**[4] case were that the Appellant appealed to the High Court from a decision of a magistrate. After numerous adjournments, the case was fixed for hearing. On the hearing date, neither party appeared. The Judge dismissed the appeal without proof of service of the notice of hearing. The Appellant sought a review of the order by the same Judge who dismissed the appeal and the Judge refused to review the order. On appeal by the Appellant to this Court we stated the following:

"In order for the learned trial judge to have had power to dismiss the appeal instead of striking it out of the list, it was necessary in terms of Order 47, Rule 15, for proof of service of notice of the adjourned hearing date to have been produced before the learned judge. It is apparent from the record that no such proof of service was forthcoming.

It follows from what we have said that we agree with Mr. Luywa that the learned trial judge had no jurisdiction to dismiss the appeal for want of attendance of the appellant's advocates. In the absence of proof of service of a notice of the new hearing date, the only courses open to the court were to allot a fresh hearing date and to cause notices thereof to be served on the advocates for the parties, or to strike the case out of the list and leave it to the parties to make application to restore."

Although the **JOHN R. NG'ANDU**[4] case was an appeal from a decision of the High Court, we are of the view that our pronouncements in that case apply with equal force to proceedings before the Industrial Relations Court.

Another authority on point, in this regard, is the case of **R. V. APPEAL COMMITTEE OF COUNTY OF LONDON QUARTER SESSION, EX PARTE ROSSI**[1] to which we have been referred by Mr. Chizu. The words of Lord Denning LJ that: **"it is a fundamental principle of our law that no one is to be found guilty or made liable by an order of any tribunal unless he has been given fair notice of the proceedings so as to enable him to appear and defend them,"** sum up the position of the law.

Applying our decision in the case of **JOHN R. NG'ANDU**[4] and taking a leaf from Lord DENNING's judgment in the case of **R. V. APPEAL COMMITTEE OF COUNTY OF LONDON QUARTER SESSION, EX PARTE ROSSI**[1], we hold that in the instant case, in the absence of proof of service of the notice of hearing for 3rd September, 2014, the lower Court should have given the case a fresh date of hearing and ordered service, and proof of service of the notice of hearing for the fresh date. We, accordingly, hold that the lower Court misdirected itself when it proceeded to hear the matter in the absence of proof that the Appellant had been notified of the date of hearing.

We, therefore, find merit in the first ground of appeal.

Coming to the second ground of appeal, Counsel for the Appellant has alleged that the late Mr. Horace Makala misappropriated huge amounts of money from the Appellant's clients' and business accounts and used that money to buy real and personal property. However, there is no evidence on record to show that these allegations have been proved before any court of law. It is our view, therefore, that the said allegations cannot, on

their own, be used as the basis for faulting the lower Court's decision to remove the 3rd Respondents from these proceedings.

Notwithstanding the foregoing, we are of the opinion that the lower Court erred when it overturned its own decision to join the 3rd Respondents to this case. This is because the Court had already considered the application for joinder and had allowed it. It could only have done so after finding that the application was not frivolous and vexatious. In fact, a look at the record of appeal shows that Counsel for the 3rd Respondents did not raise any objection to the application for joinder. Further, although Counsel for the 3rd Respondents applied, and was allowed, to file an affidavit to respond to some of the issues raised in the affidavit in support of summons for joinder, he did not file the said affidavit. In addition, a perusal of the evidence adduced by the 1st Respondent at the trial establishes that there was no evidence on which the lower Court could have based the reversal of its earlier decision to join the 3rd Respondents to the proceedings. Having joined the 3rd Respondents to the proceedings, the Court should not have removed them on its own motion. There were some serious allegations made against Mr.

Horace Makala by Mr. Simukoko who deposed that upon the demise of Mr. Makala, his administrators took all the properties belonging to the Appellant, including all office furniture, equipment and motor vehicles, allegedly bought using the Appellant's funds. There was also the issue of Mr. Makala's standing in the firm. The 1st and 2nd Respondents referred to him as the 'purported Managing Partner' because they claimed that he did not appear as a Partner at PACRA. There was need for the Court to decide on all these and other matters in controversy between the parties, without subjecting them to possibilities of commencing multiple legal proceedings on the same facts. The matters in contention will have to be decided in the context of the law on partnerships, more so, that the obligations and liabilities of partners follow them even after death. The learned authors of **POLLOCK ON THE LAW OF PARTNERSHIP**[i] aptly pronounced on this position when they said:-

> **"Every partner in a firm is liable jointly with the other partners... for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied".**

It is our considered view therefore that the 3rd Respondents were properly joined to these proceedings and the Court should not have disjoined them in the manner that it did. In the case of **SIMBEYE ENTERPRISES LIMITED**[3], we provided guidance on factors that should be taken into account when considering an application for joinder. We said that:-

> **"This rule should be construed so as to effectuate what was one of the great objects of the Judicature Acts, namely, to bring all parties to disputes relating to one subject-matter before the Court at the same time so that the disputes may be determined without the delay, inconvenience and expense of separate actions and trials."**

Applying our pronouncements in the **SIMBEYE ENTERPRISES LIMITED**[3] case, we hold that joining the 3rd Respondents to the proceedings would have allowed the Court to decide on all issues relating to the claims made by the 1st and 2nd Respondents against the Appellant.

Accordingly, we hold that the second ground of appeal, too, has merit.

The two grounds of appeal having succeeded, we allow the appeal and remit the matter back to the IRC for retrial before another panel of that Court. Accordingly, that action will include

the 3rd Respondents who were disjoined by the Court below. We make no order for costs.

I.C. Mambilima
CHIEF JUSTICE

R.M.C. Kaoma
SUPREME COURT JUDGE

C. Kajimanga
SUPREME COURT JUDGE