L.b

IN THE SUPREME COURT OF ZAMBIA **Appeal No. 5 of 2021**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

ZLATAN ZLATKO ARNAUTOVIC **APPELLANT**

AND

STANBIC BANK ZAMBIA LIMITED **RESPONDENT**

CORAM: Kajimanga, Kabuka and Chinyama, JJS

On 15th July 2021 and 1st September 2022

For the Appellant: Mr. J. Madaika - Messrs J & M Advocates

For the Respondent: Mr. Eric Silwamba SC and Mr. Jalasi - Messrs Eric Silwamba Jalasi & Linyama Legal Practitioners; Mr. Chakoleka - Messrs Mulenga Mundashi; Ms. J. Mutemi - Mesdames Theotis Mutemi Legal Practitioners and Mr. J. Kabwe – In-house Counsel.

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

1. *Finance Bank (Z) Ltd v Sidik Valli Patel T/A Libala Stores and Judith Hamaluba SCZ Appeal No. 40 of 2009*
2. *Chikuta v Chipata Rural Council (1974) Z.R. 241*
3. *Newplast Industries Limited v The Commissioner of Lands and The Attorney General (2001) Z.R. 58*
4. *Gerrison Zulu v ZESCO (2005) Z.R. 39*

5. *Attorney General v E.B Jones Machinists (2000) Z.R. 114*
6. *Sangare Transport Limited v Commissioner of Lands and Janet Kalayata Appeal No 48 of 2019*
7. *Aristogerasimos Vengelatos and Vasiliki Vangelatos v Metro Investments Limited and 3 Others - Selected Judgment No. 35 of 2016*
8. *Godfrey Miyanda v The High Court (1984) Z.R. 62*
9. *William Harrington v Dora Siliya and the Attorney General (2001) 2 Z.R. 253*
10. *Kalusha Bwlaya v Chardore Properties and Ian Chamunora Nyalungwe Haruperi (2015) Z.R. 100*
11. *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 Others [2014] eKLR*
12. *Boy Juma Boy and 2 Others v Mwamlole Tchappu Mbwana and Another [2014] eKLR (Civil Appeal/Application 45 of 2013)*
13. *Derby & Co Ltd v Larsson [1976] 1 WLR 202*
14. *Republic of Liberia v Gulf Oceanic Inc [1985] 1 Lloyd's LR 539*
15. *National Westminster Bank v Kitch [1996] 1 WLR 1316*
16. *Setrec Steel & Wood Processing Limited and 2 Others v Zambia National Commercial Bank Plc, Appeal No. 66 of 2009*
17. *Zambia National Holding and UNIP v The Attorney General (1993 – 1994) Z.R. 115*
18. *Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and sun Pharmaceuticals (1995 – 1997) Z. R. 187*

Legislation referred to:

1. *High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia*
2. *Rules of the Supreme Court, 1999 Edition*
3. *Court of Appeal Rules, 2016*
4. *Supreme Court of Zambia Act, Chapter 25 of the Laws of Zambia, Rules 19(1) and 58(4)*

Other Works referred to:

1. *Odger's Principles of Pleadings and Practice (22nd Edition)*
2. *Bryan A. Garner, Black's Law Dictionary, 11th Edition (2019)*

Introduction

[1] This is an appeal against part of the judgment of the Court of Appeal handed down on 26th July 2019, relating to the court's determination on whether the High Court had jurisdiction to hear and determine the respondent's counterclaim in the form it had been presented to the lower court.

[2] In the main, the appeal interrogates whether Order 30, rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia proscribes a mortgagee from making a counterclaim against a mortgagor in a matter commenced by writ of summons against a mortgagee.

[3] It also discusses the timing of raising a jurisdictional issue in legal proceedings.

Background to the appeal

[4] We have given a detailed background below in order to contextualise the germane issue in this appeal namely, the propriety or lack of it, of the respondent's counterclaim. This case has a protracted history which dates back to 1999. Some-

time in that year the appellant defaulted on his loan facilities. Consequently, the respondent demanded payment within 14 days from 11th October 1999 and also gave notice on 13th October 1999 to enforce its securities.

[5] By what may best be described as a preemptive strike, the appellant commenced this action on 20th October 1999 by writ of summons against the respondent under cause number 1999/HP/1736 claiming, among others, ZMK770,529,827.42 (all Kwacha amounts unrebased) allegedly resulting from unlawful penalty interest, unauthorized compound interest, unauthorized transfers and transaction charges.

[6] The appellant also sought an order of injunction restraining the respondent from enforcing its securities or appointing a receiver, an order to account as well as an independent audit on all financial dealings.

[7] On the same day (20th October 1999), the appellant obtained an *ex parte* order of injunction restraining the respondent from appointing a receiver/manager and from calling on the securities until the matter was determined by the court. The order also directed the appellant to pay into court the proceeds

of the sale of maize, cattle and wheat stock which were otherwise due to the respondent, pending the outcome of the proceedings.

[8] In response, the respondent filed its defence and counterclaim disputing the appellant's claims and claiming payment of the outstanding amounts on the various facilities.

[9] On 28th October 1999 the respondent obtained an order directing the appellant to relinquish control or possession of the charged assets in favour of the acting Sheriff of Zambia so as to preserve the charged assets pending resolution of the matter.

[10] Thereafter, the matter was adjourned *sine die* to facilitate an amicable settlement. In the meantime, the respondent availed two more agricultural loan facilities for wheat and maize as negotiations were ongoing. The attempt to settle the matter amicably failed and it was restored to the active cause list on 22nd November 2000. The appellant accordingly filed his reply and defence to the counterclaim on 4th January 2001.

[11] Trial subsequently commenced before Mutale, J. In the meantime, the appellant defaulted on the wheat and maize facilities granted in 1999/2000 and the respondent commenced

an action to recover the outstanding amounts under cause number 2002/HPC/110 before Chibomba, J (as she then was).

[12] Unfortunately, Mutale, J. expired before delivery of the judgment. The matter was then re-allocated to Zikonda, J on 18th December 2002 who started the trial *de novo*.

[13] Several preliminary issues were raised before Zikonda, J including an application to transfer the matter to the commercial list and to consolidate the matter with cause number 2002/HPC/110. Both applications were declined.

[14] Before commencement of trial, the parties agreed that the mortgaged property be sold, and all proceeds therefrom be kept in an escrow account pending the resolution of the proceedings. This was done and is currently the subject of litigation in cause number 2011/HPC/0520.

[15] Cause number 2002/HPC/110 was reallocated from Chibomba, J to Chulu, J. When the matter came up for a scheduling conference on 16th June 2003, Chulu, J opined that the consolidation should not have been declined and impressed on the parties to have the pending matters tried together. It was accordingly agreed that the matter before Chulu, J be

discontinued and treated as a further counterclaim in the matter before Zikonda, J. This was achieved through amendment of the pleadings in this matter.

[16] Zikonda, J delivered his judgment in this matter on 24th July 2006 and held that the appellant had no claim against the respondent. For unknown reasons, the judge neglected to pronounce on the respondent's counterclaim.

[17] The appellant appealed to the Supreme Court against the judgment and the respondent filed a cross-appeal. The Supreme Court heard the appeal in 2011 and directed that the matter be referred back to the High Court for retrial before another court so that the respective claims by both parties could be determined.

[18] Following the order of the Supreme Court, the matter was allocated to Hamaundu, J (as he then was) and the parties amended their respective pleadings (in view of the various orders, some of which had overtaken the initial pleadings).

[19] In his amended writ of summons, the appellant sought the following reliefs:

[19.1] A declaration that the purported debits to the plaintiff's accounts

amounting to ZMK1,183,333,352.39 was without authority and of no effect.

[19.2] An order for the refund of the sum of ZMK6,318,528,697.56 being damages for the amount that the defendant bank charged the plaintiff in unlawful penal interest, unauthorized compound interest, unauthorized transfers and transaction charges amounting to ZMK1,183,333,352.39 plus interest thereon of ZMK5,135,195,345.17.

[19.3] An order for the payment of interest on the amount of ZMK6,318,528,697.56 from the date of writ until date of payment.

[20] In its re-amended defence and counterclaim, the respondent sought the following reliefs:

[20.1] The sum of ZMK1,097,223,335.42 as at 30th June 2020 plus the further borrowing of ZMK880,431,747.00 as at 31st August 2001 bringing the total outstanding amount under the loan facilities to ZMK1,977,655,082.42 plus interest.

[20.2] The sum of US$47,222.02 being a further outstanding loan plus interest.

[20.3] A declaration that the defendant is entitled to exercise its various powers and to enjoy the various rights arising under various security instruments executed by the plaintiff in favour of the defendant including those specifically set out in the endorsement of the writ of summons issued.

[20.4] An order for delivery by the plaintiff to the defendant of all such goods and other things as were subject of any security instrument alluded to in [20.3] above.

[20.5] A further order granting the defendant leave to realise all the securities which were the subject matter of the said security documents.

[21] Trial commenced on 28th October 2013. Fourteen (14) years after the matter had commenced, the appellant raised a preliminary issue pursuant to Order 14A and Order 33 of the Rules of the Supreme Court (1999 edition) on 12th June 2014, challenging the respondent's counterclaim. He requested the court to determine the following issues:

21.1 Whether the defendant's counterclaim was properly before the court considering that it was a mortgage action.

21.2 Whether the counterclaim was properly before the court having been commenced by writ of summons instead of originating summons as strictly provided by Order XXX, rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia.

21.3 Whether the court had jurisdiction to entertain the counterclaim which had been commenced by a wrong procedure.

[22 By a ruling dated 6th January 2015, the trial judge found that when a defendant sets up a counterclaim in the plaintiff's action, such a defendant was not commencing a separate action. As such, the rules regarding commencement of an action do not apply to a counterclaim.

[23] He also found that since the counterclaim related to the same or similar loan agreements that had given rise to the appellant's action, it could conveniently be tried together with the

appellant's claim. Further, that the counterclaim had been set out clearly and would enable the appellant to put up a defence to it. The preliminary issue was therefore dismissed, and the matter proceeded to trial. The appellant did not appeal against this ruling.

[24] After trial, the learned High Court judge delivered a judgment dismissing the appellant's claims and granting the respondent's claims as set out in the counterclaim. It is from this judgment that an appeal was launched before the Court of Appeal.

[25] At the hearing of the appeal, counsel for the appellant raised a preliminary issue on the jurisdictional question that had been put before the High Court. The Court of Appeal ruled that it agreed with the ruling of the High Court that it was convenient to try the counterclaim at the same time with the appellant's claim as it did not cause any prejudice to the appellant's case.

[26] It also observed that the ruling of the High Court was never a subject of appeal and further, that the jurisdictional question raised before it by the appellant did not fall under any of his grounds of appeal. The Court of Appeal concluded that it could

not consider the issue which, in its view, the appellant was seeking to sneak into the appeal before it.

The grounds of appeal to this Court

[27] The appellant appealed to this court on the following grounds:

[27.1] The Court of Appeal erred in law and fact when it declined to pronounce itself on whether or not the lower court had jurisdiction to hear and determine the counterclaim in the form it had been presented to the High Court. That is, as a counterclaim to the Appellant's action commenced by Writ of Summons and Statement of Claim.

[27.2] The Court of Appeal erred in law and fact when it failed to address its mind to the fact that the respondent did not dispute that the counterclaim was commenced by a wrong mode of commencement. The respondent opted to raise issues relating to how the issue of jurisdiction was placed before the Court of Appeal and did not address the merit of the issue. This failure to address this legal question on the merit was a concession on the part of the respondent and the Court of Appeal erred in failing to hold as such.

Preliminary Objection

[28] Following the filing of their heads of argument, the respondent filed a notice to raise a preliminary objection to the appeal pursuant to Rule 19(1) and Rule 58(4) of the Supreme Court Rules, Chapter 25 of the Laws of Zambia. In the preliminary

objection, the respondent sought the determination of the following issues:

[28.1] Whether ground two of this appeal is competently before this court as the same stretches beyond the point of law upon which leave to appeal was granted by the single judge of this court.

[28.2] Whether the appellant's appeal is competently before this court in view of the appellant's failure to draw up the record of appeal in the prescribed manner in accordance with the provisions of Rule 58(4) of the Supreme Court Rules, Chapter 25 of the Laws of Zambia.

[29] At the hearing of the appeal, we made an *ex-tempore* ruling in which we sustained the first preliminary issue on the basis that ground two of the appeal did not encompass the point of law of public importance upon which leave to appeal was granted by the single judge of this court namely, the refusal by the Court of Appeal to pronounce itself on the jurisdictional issue which was raised by the appellant. Thus, the ground extended beyond the leave granted by the single judge. We also found that the said ground offended Rule 58(2) of the Supreme Court Rules as it contained legal arguments and it was consequently severed from the grounds of appeal.

[30] The second preliminary issue, which was premised on the fact that the record of appeal was incomplete, did not succeed and

counsel for the respondent properly conceded that the appeal could still be resolved in the absence of the documents allegedly omitted from the record.

The arguments presented by the parties on the sole ground of appeal.

[31] In his written heads of argument, counsel for the appellant, Mr. Madaika, began his submissions by pointing out that neither the High Court nor the Court of Appeal denied that the respondent's counterclaim in the lower court was in fact a mortgage action. Equally, counsel for the respondent in his oral arguments before the High Court did not dispute that it was a mortgage action but instead asked the lower court to exercise its discretion to permit the matter to be heard together with the appellant's matter since what was in issue was money being owed.

[32] He argued that a mortgage action is one which falls within the provisions of Order 30, rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia which provides that:

> *"Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable*

charge, or any person having the right to foreclosure or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable in the chambers of a Judge for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require; that is to say-

Payment of moneys secured by the mortgage or charge;

Sale;

Foreclosure;

Delivery of possession (whether before or after foreclosure) to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property;

Redemption;

Reconveyance;

Delivery of possession by the mortgagee".

[33] It was his contention that the claim for payment of monies so long as it relates to monies secured by mortgage or charge is a mortgage action. That the counterclaim filed by the respondent is clearly a mortgage action as it was seeking, among other things, to enforce loan agreements which were secured by mortgages over the appellant's property. According to Counsel, the Supreme Court has pronounced itself clearly and settled the law to the effect that a mortgage action cannot be commenced by any other way apart from an originating summons as

established by statute under Order 30, rule 14 of the High Court Rules. In support of this argument, he cited the case of *Finance Bank (Z) Ltd v Sidik Valli Patel T/A Libala Stores and Judith Hamaluba*[1].

[34] Relying on the cases of *Chikuta v Chipata Rural Council*[2] and *Newplast Industries Limited v The Commissioner of Lands and The Attorney General*[3], Counsel submitted that it is a long-established principle that mode of commencement goes to jurisdiction. Therefore, the failure by the Court of Appeal to pronounce itself on the jurisdiction of the High Court when the issue was raised before it in the appellant's heads of argument and at the hearing of the appeal was a grave error.

[35] According to counsel, the guidance from the Supreme Court has always been that questions of jurisdiction take precedence over every other matter and can be raised at any time in a matter. The case of *Gerrison Zulu v ZESCO*[4] was cited in support of the argument.

[36] Counsel contended that the respondent's counterclaim was incompetent from the date of filing and neither the ruling of the High Court permitting the counterclaim nor the judgment of the

Court of Appeal upholding the High Court's decision could confer competence on originating process which is filed in breach of the rules of court.

[37] Mr. Madaika argued that the fact that the High Court ruling was not appealed against did not operate as an estoppel which could grant the court jurisdiction that it never had from inception. He relied on the cases of *Attorney General v E.B Jones Machinists*[5] and *Sangare Transport Limited v Commissioner of Lands and Janet Kalayata*[6].

[38] As to the approach to be taken by a court when faced with a question of jurisdiction, counsel cited the case of *Aristogerasimos Vangelatos and Vasiliki Vangelatos v Metro Investments Limited and 3 Others*[7] where we stated:

> *"...although it is a general rule that an issue that has not been raised in the court below cannot be raised on appeal, the question of jurisdiction can be raised on appeal notwithstanding the fact that it was not raised in the court below".*

[39] Counsel submitted that in the *Vangelatos* case, the Supreme Court entertained a plea of jurisdiction even when it had not been raised prior to the appeal. By contrast, in the current case, the Court of Appeal refused to entertain a plea of jurisdiction

which had been raised in the court below and was put forward in the appellant's heads of argument.

[40] He argued that despite the issue of jurisdiction not having been a new one, the Court of Appeal still declined to entertain it on the basis that it was not contained in a valid ground of appeal. This reasoning, he contended, was in defiance of what this court has pronounced not only in the *Vangelatos* case but also in a myriad of other cases including *Godfrey Miyanda v The High Court*[8].

[41] We were accordingly urged to reverse the holding of the Court of Appeal and uphold the appeal.

[42] In opposing the appeal, counsel for the respondent submitted in their joint written heads of argument, that contrary to the assertions by the appellant that the Court of Appeal did not pronounce itself on the jurisdiction of the High Court to determine the counterclaim, the Court did in fact determine the question of jurisdiction and gave three reasons for not accepting the appellant's submissions on the issue.

[43] Firstly, that the Court of Appeal agreed with the High Court's

interpretation of Order 15 of the RSC as well as the court's reliance on Odger's Principles of Pleadings and Practice when the issue of jurisdiction was raised in the High Court. Secondly, the Court of Appeal held that the ruling on the question of jurisdiction was delivered by the High Court on 6th January 2015, and there was no appeal. Thirdly, the court held that it had perused the grounds of appeal and the issue did not fall under any of the grounds of appeal.

[44] It was contended that no appeal was made against any of these three findings of the Court of Appeal and the challenge mounted by the appellant in the sole ground of appeal is not that the Court of Appeal erred in its reasoning on jurisdiction. Instead, the appellant alleges that the Court of Appeal did not pronounce itself on the issue, which is clearly not the case.

[45] According to counsel, what the Court of Appeal declined was to get side-tracked from the issues presented in the appeal when it concluded that it was disinclined to being drawn into the issue which the appellant ingeniously wanted to be part of the appeal. This, in counsel's contention, cannot be read in isolation but should be read with reference to the reasons the

court declined the submission on the issue. When read in context, it was argued, the decision shows that the Court of Appeal determined the issue of jurisdiction; what it declined was the appellant's submission on the issues.

[46] Counsel argued that since the court determined the issues complained of by the appellant, the appeal ought to collapse. That to entertain any further arguments on the merits of the decision of the Court of Appeal would go beyond the scope of what needs to be determined as well as the grievance contained in the notice and memorandum of appeal. The cases of *William Harrington v Dora Siliya and the Attorney General*[9] and *Kalusha Bwalya v Chardore Properties and Ian Chamunora Nyalungwe Haruperi*[10] were cited in support of this argument.

[47] Counsel for the respondent submitted in the alternative, that the appeal ought to fail on the basis of the following grounds:

[47.1] The appellant's position that the High Court had no jurisdiction to determine the counterclaim conveniently ignores the facts and the history of the matter. Specifically, that the appellant defaulted on his loan facilities and the respondent demanded payment failing

which it would enforce its security. In reaction, the appellant commenced this action and obtained an ex-parte order of injunction against the respondent which effectively meant that the respondent could not enforce its securities by way of mortgage action. That the proceeds of sale of maize, cattle and wheat stock, which were otherwise due to the respondent, were to be paid into court pending resolution of the matter.

[47.2] In these circumstances, it was argued, the appellant cannot insist that the respondent should have commenced a separate mortgage action by way of originating summons when he had an injunction restraining the respondent from calling on its securities. That the correct forum to ventilate any dispute was, therefore, in the matter commenced by the appellant, which the respondent did by filing a counterclaim. This, in counsel's view, is in line with the guidance given to litigants by this court on the undesirability of having parallel matters over the same subject matter in different courts.

[47.3] The appellant's position was also defeated by two other court orders in the matter. The first is the order of preservation obtained by the respondent on 28th October 1999 directing the appellant to relinquish control or possession of the charged assets in favour of the acting Sheriff of Zambia, which property was to be preserved until the parties' claims were resolved by the trial judge in the matter.

[47.4] Thus, it is absurd to expect the respondent to commence a separate action in another court when the subject matter of the dispute was under preservation before another High Court judge of equal jurisdiction.

[47.5] The second is the order of the Supreme Court handed down in 2011 directing that the matter be referred to the High Court before another judge for retrial of both the appellant's claim and the respondent's counterclaim. In light of this decision, counsel submitted, the appellant cannot insist that the respondent should have commenced a separate mortgage action by way originating summons as this

court directed that the issues be resolved by way of retrial before another judge.

[47.6] The present case is distinguishable from the authorities relied on by the appellant concerning a jurisdictional issue being raised at any stage of the proceedings as there is none to be resolved in this appeal. Furthermore, the question of jurisdiction in those authorities was being raised in one of two ways - for the first time on appeal or by way of appeal from the decision of a lower court whereas in this appeal, the question of jurisdiction was determined by the High Court in a ruling which to date has not been appealed against.

[47.7] Thus, in the present case, the issue of jurisdiction is not being raised for the first time on appeal or by way of appeal from the impugned decision. That arising from this was the question as to what recourse is available to the litigants where a plea of jurisdiction has been raised and determined by a court of competent jurisdiction.

[47.8] Following from the *Chikuta case,* the decisions show that where a wrong mode of commencement is adopted

the court has no jurisdiction and the decision is a nullity. However, the issue in the present case does not relate to commencing an action. Rather, it relates to making a counterclaim in a matter that is already before court and thus distinguishable.

[47.9] The aspects of jurisdiction considered in the decided authorities differ materially from what is in issue in this case. For example, the jurisdictional issue in the *Vangelatos* case was the authority of the trial judge to determine the matter after he had been promoted to a higher court and there was therefore no coram.

[47.10] The *Finance Bank* case relied on by the appellant to assert that a mortgage action cannot be commenced as a counterclaim should be read in context and in view of the facts of that matter. A review of the case will show that the issue in that case was whether the court could order joinder of the 2nd respondent to a judgment earlier obtained by the appellant and the court held that the second action brought by the appellant could only be commenced by originating summons. Thus, the case is

not authority for the proposition that a claim for foreclosure cannot be made by a counterclaim.

[47.11] Furthermore, unlike all the cases cited, the unique facts of this case have to be considered from the injunction obtained by the appellant against any form of enforcement by the respondent; the order of preservation of property; the evolution of the matter and the agreement to sell the mortgaged property and have the funds kept in an escrow account; the order of this court for retrial of the appellant's and respondent's claims; as well as the decision of the High Court on the question of jurisdiction, to which there has been no appeal. All these factors show that the case is distinguishable from the authorities cited and militates against the blanket application of authorities adopted by the appellant.

[47.12] It was contended that while jurisdiction can be raised at any stage of the proceedings, the manner in which the question is raised is cardinal. That the appellant having raised the issue once in the High Court and the

court having decided on it without a subsequent appeal by the appellant against the said decision, he cannot raise it again in an appellate court as a fresh issue as it was settled by the High Court.

[47.13] Counsel also pointed out that none of the grounds of appeal before the Court of Appeal touched on the jurisdiction of the High Court to entertain a mortgage action as a counterclaim. They submitted that instead of making an application to amend his grounds of appeal to include the issue of jurisdiction of the High Court to entertain a mortgage action as a counterclaim, the appellant elected to simply introduce the same in his heads of argument. According to counsel, the fact that the appellant did not appeal against the ruling of 6th January 2015 means that the Court of Appeal did not have jurisdiction to deal with the issue.

[47.14] Relying on the Kenyan cases of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 Others*[11] and *Boy Juma Boy and 2 Others v Mwamlole Tchappu Mbwana and Another*[12], it

was argued that the filing of a notice of appeal against a particular decision impugned gives the court jurisdiction. In the present case, however, no such notice was filed. Thus, the Court of Appeal cannot be faulted when it held that it could not entertain the issue of the High Court's jurisdiction to entertain the respondent's counterclaim since it was not raised by the appellant in his grounds of appeal.

[47.15] In the alternative, counsel submitted that the High Court had jurisdiction to determine the counterclaim. It was their contention that a counterclaim is not caught up by the rules on commencement of actions in that by its very definition, a counterclaim depends on an original action being filed. That is to say, there can be no counterclaim unless an action has already commenced.

[47.16] Therefore, by settling a counterclaim, a defendant is not commencing an action as contemplated in Orders 6 and 30, rule 14 of the High Court Rules. These rules, according to counsel, apply only to prospective plaintiffs

or applicants who wish to start new proceedings in court and not for defendants who are already before court. They argued that if the provisions extended to counterclaims, the rules would have so provided.

[47.17] Counsel submitted that Order 28, rule 3 of the High Court Rules and Order15, rule 2(1) of the RSC give the High Court power to determine a counterclaim in any matter and that there is no restriction under these rules as to matters in which a counterclaim may be made. They argued that it is not uncommon for a mortgagor to make a counterclaim in foreclosure proceedings commenced by a mortgagee by way of originating summons; and that by parity of reasoning, there is nothing that prevents a mortgagee from making a counterclaim against a mortgagor in an action commenced by writ, particularly where there is mutuality in the matters to be determined.

[47.18] In the circumstances, it was argued, the counterclaim filed by the respondent was well within the jurisdiction of the High Court to determine, notwithstanding that it

could have been commenced as a separate action by originating summons. The cases of *Derby & Co Ltd v Larsson*[13] and *Republic of Liberia v Gulf Oceanic Inc*[14] were cited in support.

[47.19] It was further submitted that the High Court did not grant the respondent any reliefs relating to a mortgage action. After quoting Order 30, rule 14 of the High Court Rules and Order 88, rule 1 of the RSC, it was counsel's contention that the terminology of these provisions suggests that a claim by a mortgagor or mortgagee would only fall within the ambit of the two provisions if the mortgagor or mortgagee relies on the mortgage in making his claim. To buttress this argument, the court was referred to the cases of *National Westminster Bank v Kitch*[15] and *Setrec Steel & Wood Processing Limited and 2 Others v Zambia National Commercial Bank Plc*[16].

[47.20] It was argued that a critical review of the respondent's re-amended defence and counterclaim shows that the respondent did not rely on the mortgage and agricultural charges in making its claim for payment of

the moneys that were awarded to it; the endorsement simply states that the amounts were outstanding under loan facilities. Therefore, the appellant is misleading this court when he alleges that at the time that the counterclaim was filed, the respondent was seeking to enforce loan agreements which were secured by a mortgage.

[47.21] That even assuming that this action was initially started out as a mortgage action, by the time that the re-amended defence was filed, and the matter was heard by the trial court, it had ceased to be one and transformed into a mere debt recovery action. Thus, the respondent's action was not a mortgage action so as to fall under the procedural requirements of Order 30 rule, 14 of the High Court Rules.

[47.22] Counsel therefore concluded that this appeal is misconceived and should be dismissed with costs as it is merely an attempt by the appellant to avoid paying a debt which he voluntarily contracted.

[48] In reply, Mr. Madaika pointed out that the Court of Appeal raised no objection, nor did it decline to deal with the other matters canvassed in ground one of the appeal except the issue of jurisdiction. It was his contention that if the ground was sufficient to address all the other issues that were argued under it, there was no basis for the Court of Appeal to decline to hear an issue validly placed before it by the appellant.

[49] Counsel went on to submit that the suggestion by the respondent that the Supreme Court cannot proceed to pronounce itself on the correct position as to the jurisdictional question which the Court of Appeal declined to deal with, seeks to place a fetter on the powers of the Supreme Court in an appeal. However, counsel argued, the powers of the Supreme Court in hearing an appeal are very broad and set out very clearly in section 25 of the Supreme Court of Zambia Act, Chapter 25 of the Laws of Zambia.

[50] As to the argument that the appellant should have appealed against the High Court's ruling which indirectly raised estoppel, counsel, relying on the case of *Attorney General v E. B. Jones Machinists*[5], argued that estoppel cannot be raised against a

statute. He submitted that once a statute prescribes a mode of commencement and forum, a party that files a claim in breach of the statutory prescription cannot claim to obtain immunity by virtue of estoppel.

[51] According to counsel, a court's jurisdiction is primarily derived from statute; if a statute says a court can only deal with a matter when it is commenced in a certain way, a court cannot decide that for convenience's sake it shall suspend the statute since the powers of courts are circumscribed by statute as per the holding in *Zambia National Holding and UNIP v The Attorney General*[17].

[52] Counsel went on to submit that the proposition that rules on modes of commencement do not apply to counterclaims has no basis in law. He also contended that the argument that the counterclaim ceased to be a mortgage action when the mortgaged property was sold and on account of the several amendments to the case which changed the character of the action, is fundamentally flawed. According to counsel, what was being amended in the court below through the several

amendments were the claimed amounts which kept on being reduced as per the evidence tendered by the witnesses.

[53] He submitted that the action remained the same and even if an attempt were made to change the character of the claim, the court below would have no jurisdiction to permit such changes because everything would still be a nullity for want of jurisdiction in that a wrongly commenced action cannot be cured by mere amendment.

Consideration of the appeal and decision of the Court

[54] At the hearing of the appeal, counsel for the respective parties orally augmented their written heads of argument. We will not reproduce them here as they were, in the main, a repetition of their written heads of argument.

[55] We have considered the record of appeal, the judgment appealed against and the arguments of the parties.

[56] The thrust of the appellant's grievance in the sole ground of appeal is that the Court of Appeal fell into error by declining to pronounce itself on whether or not the High Court had jurisdiction to hear and determine the counterclaim in the form it had been presented to the court.

[57] Before we consider the appellant's assertion, an examination of the ruling of the Court of Appeal being assailed is imperative. At pages J31 – 32 of the judgment, the Court stated as follows:

> *"On the issue of the counterclaim, we note that this issue was raised as a preliminary issue in the court below.*
> *The learned Judge rendered a ruling which appears at page 1083 of the record. In the said ruling, the Appellant's application to have the counterclaim misjoined from the cause of action was dismissed as the court was of the view that it can conveniently be tried together with the Appellant's claim. The court was further of the view that the counterclaim had been set out clearly and it would enable the Appellant to put up a defence against it.*
> *We are in agreement with the ruling of the court below on the interpretation of Order 15 of the Rules of the Supreme Court (RSC) and the views of the learned author of Odger's Principles of Pleadings and Practice which the learned Judge relied on.*
> *In addition, we note that the said ruling which was delivered on 6th January 2015 was never a subject of an appeal.*
> *We have also perused the grounds of appeal before us and we note that the issue being raised by the Appellant does not fall under any of the grounds of appeal. We are therefore disinclined from being drawn into this issue which the Appellant ingeniously wish to be part of the appeal".* [Emphasis added]

[58] Our understanding of the excerpt in the preceding paragraph is that albeit the Court of Appeal concluded by observing (obiter) that it was disinclined from being drawn into the issue, the court had in fact already made a pronouncement that the trial

judge had jurisdiction to hear and determine the counterclaim. This can be discerned from the words: "*We are in agreement with the ruling of the court below on the interpretation of the Rules of the Supreme Court (RSC) and the views of the learned author of Odger's Principles of Pleadings and Practice which the learned Judge relied on.*"

[59] After citing Order 15 of the Rules of the Supreme Court and a passage from the learned author of Odger's Principles of Pleadings and Practice, the trial judge stated in relevant parts as follows at pages R7 – R8 of his ruling:

> *"The learned author explains the effect of Order 15 of the Rules of the Supreme Court very clearly. The point to note from this explanation is this; when a defendant sets up a counterclaim in the plaintiff's action, such a defendant is not commencing a separate action.*
> *... since a counterclaim is not a separate action, the rules regarding commencement of an action do not apply to a counterclaim.*
> *... In my view, however, the counterclaim relates to the same or similar loan agreements that have given rise to the plaintiff's action. Therefore, it can conveniently be tried together with the plaintiff's claim".*

This is the High Court Judge's ruling which the Court of Appeal agreed with.

[60] The fact that the Court of Appeal did not pronounce itself in the manner desired by the appellant, on whether the High Court had jurisdiction is immaterial. We agree with the respondent that the Court of Appeal had in fact pronounced itself on the High Court's jurisdiction to determine the counterclaim, contrary to the appellant's assertion. We therefore find no merit in the sole ground of appeal.

[61] We posit that our determination of this appeal would be inconclusive if our judgment ended here. For completeness and since an appeal is a rehearing on the record, we consider it appropriate to interrogate whether the trial judge had jurisdiction to hear and determine the counterclaim.

[62] According to the appellant, the respondent's counterclaim was a mortgage action and as such it could not be commenced by any other action but by originating summons pursuant to Order 30, rule 14 of the High Court Rules. The appellant's argument was anchored on our decision in the *Finance Bank* case. We must state from the outset that the *Finance Bank* case is, without doubt, distinguishable from this one.

[63] In that case, the appellant took out a writ of summons against the 1st respondent seeking the recovery of monies it lent to the 1st respondent and later obtained judgment in its favour. The appellant subsequently failed to execute the judgment as the 1st respondent could not be located. Consequently, the appellant commenced a mortgage action against both the 1st and 2nd respondents by originating summons pursuant to Order 30, rule 14 of the High Court Rules. Following a preliminary issue raised by the 2nd respondent, the High Court dismissed the mortgage action on the basis that the appellant ought to have joined the 2nd respondent in the earlier action and its failure to do so constituted an abuse of court process.

[64] On appeal, the Supreme Court held that since the 2nd respondent was not a party to the first action, the second action could not be said to be an abuse of court process in respect of the claims made against her. Further, that it would have been inappropriate and contrary to the procedure prescribed under statute for the second respondent to be enjoined to the first action. Thus, the trial court erred by ruling that the appellant ought to have applied to join the 2nd respondent to the first

action in enforcing its equitable mortgage in an action commenced by writ of summons when such action could only be commenced by originating summons.

[65] The facts of this case are completely different. Here, the appellant defaulted on his loan facilities. The respondent demanded payment, in default of which it would enforce its security. The appellant preempted the respondent's threatened action by commencing this suit against the respondent, by writ of summons and obtained an injunction restraining the appellant from calling on its securities. The respondent filed a defence and extended it with a counterclaim seeking, among others, the amounts allegedly owed by the appellant.

[66] So, the issue is, was the counterclaim competently raised in the appellant's action as to confer the trial Judge with jurisdiction to hear and determine it? The answer to this question, which we give in the affirmative, lies in Order 28, rule 3 of the High Court Rules, the authoritative text of the learned author of *Odger's Principles of Pleadings and Practice (22nd edition) and Order 15, rule 2 of the RSC.* Order 28, rule 3 of the High Court

Rules enacts that:

> *"A defendant in an action may set off, or set up by way of a counterclaim against the claim of the plaintiff, any right or claim whether such set off or counterclaim sound in damages or not, and such set off or counter-claim shall have the same effect as a statement of claim in a cross-action so as to enable the Court to pronounce a final judgment in the same action, both on the original and cross-claim. But the Court or a Judge may, if, in its or his opinion, such set off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereto".* [Emphasis added]

The learned author of Odger's Principles of Pleadings and Practice states at page 203 as follows:

> *"As we have seen, the modern counterclaim was entirely the creation of the Judicature Act, 1873. It need not relate to or be in any way connected with the plaintiff's claim, or arise out of the same transaction. It need not be an action of the same nature as the original action or even analogous thereto. If the defendant has any valid cause of action, legal or equitable, against the plaintiff, there is no necessity for him to bring a cross-action, unless the counterclaim be of such a nature that it cannot conveniently be tried by the same tribunal or at the same time as the plaintiff's claim".* [Emphasis added]

And Order 15, rule 2 of the RSC provides that:

> *"(1) Subject to Rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff*

in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim to his defence". [Emphasis added]

[67] It is plain from the quotations in the preceding paragraph that a defendant who has a valid cause of action against a plaintiff, whether legal or equitable, can make a counterclaim against a plaintiff in any matter. The only restriction is where the counterclaim is of such a nature that it cannot conveniently be tried by the same court or at the same time as the plaintiff's claim. The trial judge was correct in stating that since the counterclaim related to the same or similar loan agreements that had given rise to the appellant's action, it could conveniently be tried together with the appellant's claim.

[68] On the facts of this case, the appellant's claim and the respondent's counterclaim are so entwined that it would have been practically imprudent and should we add, not logical to, split and have them determined in separate court actions and at different times. This is because the appellant's claim and the respondent's counterclaim have the same genesis – the loan facilities advanced to the appellant by the respondent. The

respondent's intention to enforce its securities was thwarted by the appellant's preemptive action of issuing a writ of summons against the respondent; and obtaining an injunction restraining the respondent from calling on its securities.

[69] Under these circumstances, we opine that it would be illogical and unconscionable to expect the respondent to commence a separate action by originating summons to oppose the injunction. There was, therefore, no irregularity for the respondent to extend its defence with a counterclaim as the claim and the counterclaim related to the same subject matter and involved the same parties. It is without doubt that if the respondent were to commence a separate action under these circumstances, it would have resulted in unnecessary multiplicity of actions and inappropriate use of the scarce judicial resources and time.

[70] Time without number, this court has pronounced itself very strongly in deprecating multiplicity of actions in several decisions. See for example, *Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun*

Pharmaceuticals[18] where Ngulube, CJ stated that:

> *"We listened to the arguments in this appeal; and would like to immediately affirm the judge on his disapproval of the action taken in this matter whereby one action is pending and some other steps are being pursued. We also disapprove of parties commencing a multiplicity of procedures and proceedings and indeed a multiplicity of actions over the same subject matter."*

We posit that in the circumstances of this case, the respondent would have acted contrary to our guidance in the above cited case if it had commenced a fresh action to pursue its counterclaim which was closely related to the appellant's claim. Quite clearly, the *Finance Bank* case, albeit good law, is not on point and therefore not applicable to this case.

[71] We agree with the respondent that by settling a counterclaim, a defendant does not commence an action as envisaged in Orders 6 and 30, rule 14 of the High Court Rules. The point should be made that a counterclaim does not exist on its own – it depends on an original action filed by a plaintiff. As aptly argued by counsel for the respondent, the issue in this case does not relate to commencing an action - it relates to a counterclaim in a

matter which is already before court. Therefore, the *Chikuta* case is inapplicable here.

[72] In point of fact, a counterclaim is an extension of a defendant's defence to a plaintiff's claim in an existing action and that is why it carries the description 'counterclaim'. Stated differently, a counterclaim is a defendant's action against a plaintiff in an existing litigation and it is not affected by the mode of commencement of an action prescribed by statute. We are fortified by Black's Law Dictionary (11th Edition) which defines a counterclaim as:

> *"A claim for relief asserted against an opposing party after an original claim has been made; esp., a defendant's claim in opposition to or as a set off against the plaintiff's claim. Also termed as counterclaim; conteraction; countersuit; cross demand." [Emphasis added]*

[73] The wording of Order 30, rule 14 which is reproduced at paragraph 32 of this judgment is quite plain. It requires no other interpretation but a literal one. Our literal interpretation of Order 30, rule 14 is that it does not, expressly or impliedly, proscribe a mortgagee or a mortgagor from settling a counterclaim to an original action commenced pursuant to this Order. If the intention of the legislature was otherwise, they

would have made an express provision to that effect in the Order.

[74] We can say the same about Order 88, rule 1 of the RSC dealing with mortgage actions, which has similar wording with our Order 30, rule 14, that it also does not proscribe a counterclaim by a mortgagee or mortgagor. If it were otherwise, Order 15, rule 2 of the RSC would not have allowed a defendant in any action to extend his defence with a counterclaim instead of bringing a separate action.

[75] There has also been extensive debate between the parties on when a party should raise a jurisdictional issue in the proceedings. As an extension of this argument, the respondent has asserted that it was incompetent for the appellant to raise the jurisdictional issue in the Court of Appeal when it was not part of the grounds of appeal.

[76] We will not belabour this issue because the law is well settled in a plethora of our decisions, some of which have been cited by counsel. In sum, it is settled that a jurisdictional issue can be raised at any time in the proceedings. As properly argued by the appellant, a jurisdictional issue takes precedence over any

other matter. The reason is obvious – if a trial judge had no jurisdiction to adjudicate a matter *ab initio*, its judgment would amount to nothing. It follows that the appellate court would also not be clothed with jurisdiction to entertain an appeal against such judgment. It matters not that the appellant in this case did not appeal against the ruling of the trial judge. Therefore, the jurisdictional issue was properly raised before the Court of Appeal.

Conclusion

[77] The sole ground of appeal having failed, we find no merit in the appeal. It is accordingly dismissed with costs to the respondent, to be taxed in default of agreement.

C. KAJIMANGA
SUPREME COURT JUDGE

J. K. KABUKA
SUPREME COURT JUDGE

J. CHINYAMA
SUPREME COURT JUDGE