SELECTED JUDGMENT NO.35 OF 2016

P.1246

IN THE SUPREME COURT FOR ZAMBIA **SCZ/8/122/2012**

HOLDEN AT NDOLA **APPEAL NO.45/2014**

CIVIL JURISDICTION

BETWEEN:

ARISTOGERASIMOS VANGELATOS	**1ST APPELLANT**
VASILIKI VANGELASTOS	**2ND APPELLANT**
AND	
METRO INVESTMENTS LIMITED	**1ST RESPONDENT**
KING QUALITY MEAT PRODUCTS	**2ND RESPONDENT**
DEMETRE VANGELATOS	**3RD RESPONDENT**
MARIA LIKIARDO POILOU	**4TH RESPONDENT**

Coram : Mambilima CJ, Musonda and Mutuna, JJS

On 6th September 2016 and 9th September 2016

For the Appellants : Mr. S.S. Zulu SC of Messrs Zulu and Company

For the Respondents : Mr. L. Linyama of Messrs Eric Silwamba Jalasi Linyama

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J U D G M E N T

Mutuna JS delivered the judgment of the court.

Cases referred to:

1) *Macaura vs Northern Assurance Co. Ltd (1925) AC 619*

2) *Dyer vs Dyer (1775 - 1802) ALL ER Rep 205*

3) *The Venture (1908) P. 218*

4) *Gravesend Corporation vs Kent County Council (1934) ALL ER Rep 362*

5) *Rahim Obaid vs The People (1977) ZR 119 (H.C)*

6) *Montgomery vs Foy (1895) 2 QB 321 at p. 324*

7) *Development Bank of Zambia and KPMG Peat Marwick vs Sunvest Ltd and Sun Pharmaceuticals Ltd (1995 - 1997) ZR 187*

8) *BP Zambia Plc vs Interland Motors Ltd (2001) ZR 37*

9) *Simbeye Enterprises Ltd and Investrust Bank (Z) Ltd vs Ibrahim Yousuf (2000) ZR 159*

10) *Wilheim Roman Buchman vs Attorney General SCZ Judgment No. 14 of 1994*

11) *Mususu Kalenga Building Limited and another vs Richman's Money Lenders Enterprises SCZ Judgment No. 4 of 1999*

12) *Milorad Saban (Being sued as Administrator of the Estate of the late Savo Saban) & Mechanist Engineering Limited vs Gordie Milan (2008) ZR 233*

13) *The Attorney General vs Nigel Kalonde Mutuna, Charles Kajimanga and Phillip Musonda SCZ Judgment No. 185 of 2012 (unreported)*

14) *Chikuta vs Chipata Rural Council (1974) ZR 241 (SC)*

15) *Kafue District Council vs James Chipulu (1997) S.J 13 (S.C)*

16) *Jamas Milling Company Limited vs Imex International (PTY) Limited SCZ Judgment No. 20 of 2002*

17) *Re: Pan Electronics Limited and Savvas Panayiotides and Others vs Andereas Miltiadous and Others (1988) S.J 1 (S.C)*

18) *Enesi Banda vs Abigail Mwanza 2006/HP/A002*

19) *Allan Mulemwa Kandala vs Zambia National Commercial Bank Plc 2010/HPC/0766*

20) *Amber Louise Guest Milan Tribonic vs Beatrice Mulako Mukinga, Attorney General - 2010/HP/0344*

21) *Bank of Zambia vs Jonas Tembo and Others SCZ Judgment No 24 of 2002*

22) *Nkhata and Four Others vs The Attorney General of Zambia* (1966) *ZR 124 (C.A)*

23) *Wilson Masauso Zulu vs Avondale Housing Project Limited (1982) ZR 172 (SC)*

24) *Attorney General vs Marcus Kampumba Achiume (1983) ZR 1 (SC)*

25) *Chief Kwame Asante vs Chief Kwame Tawia (1949) WN 40*

Legislation Referred to:

1) *High Court Act, Chapter 27 of the Laws of Zambia, Vol. 3*
2) *The Constitution of Zambia, Act No. 2 of 2016*
3) *The Companies Act, Chapter 388 of the Laws of Zambia*
4) *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*
5) *Arbitration Act, No. 19 of 2000*

Works referred to:

1) *Supreme Court Practice (1999) edition (White book)*
2) *Mayson, French and Ryan on Company Law (2002 - 2003), Oxford University Press; Oxford, London*
3) *Gowers Principles of Modern Company Law (1992) 5th edn, Sweet & Maxwell; London*
4) *Halsbury's Laws of England, 4th edn, volume 10 by Lord Hailsham of St. Marylebone (1973), Butterworths: London*

This is an appeal against the judgment of the Learned High Court Judge sitting at Lusaka in which he upheld the Respondents' claim and adjudged, *inter alia,* that the First and Second Appellants are not share-holders or directors in the First and Second Respondents. The Learned High Court Judge also granted possession to the Respondents of the First Respondent's premises, ordered an account of all rentals received by the First and Second Appellants in respect of the said premises, and removal of the caveats lodged by the First and Second Appellants over the properties belonging to the Respondents. The Learned High Court Judge further dismissed the First Appellant's counter claim by which he claimed that: the assets of the First and Second Respondents were purchased from funds belonging to Dar Farms and Transport Limited (the company); the Second Respondent is a subsidiary of the company; and the Fourth Respondent's shareholding and directorship in the Second Respondent is fraudulent; and that he is a director in the Second Respondent.

The dispute in this matter arises from a difference between two siblings, the First Appellant and Third Respondent, both of Greek nationality, over the ownership of the First and Second Respondents. The Third Respondent came to Zambia sometime in 1969 and initially tried his hand at various ventures. He eventually settled for the business of buying cattle from Southern Province and selling it on the Copperbelt. He was joined by his brother, the First Appellant, and they conducted business together. Subsequently, the Third Respondent purchased three trucks and moved to Lusaka and secured a haulage contract with J. Curtis Transport. At this stage the First Appellant remained at a farm house in Chingola.

The Third Respondent initially traded under the name and style of Dar Farms and later under the name of Dar Farms and Transport. He also made the First Appellant an equal partner in the business. On the advice of his accountant, the Third Respondent incorporated Dar Farms and Transport Limited so that he could benefit from the status of a limited liability company. After the

incorporation of the company, the Third Respondent surrendered all his personal assets to it.

In the year 1995, the Third Respondent through his advocates purchased the First Respondent. In doing so, he, the Fourth Respondent, and his spouse, became the shareholders and directors. The First Respondent at that time only had one asset which was a vacant plot which the Third Respondent intended to use as a parking lot for his trucks.

After the purchase of the First Respondent, the Third Respondent used it as a vehicle for investment and purchasing various assets in Lusaka and elsewhere. These assets included stand number 29390, Chila road, Lusaka, comprising a block of flats known as Acropolis, from which the First Respondent was generating rental income. Subsequently, in 2002 the Third Respondent and one Evangelos Andrew Tattis incorporated the Second Respondent for purposes of purchasing the assets of Zambia Pork Products Limited (in receivership). This included the

land, buildings and equipment situate at stand number 4817 Lusaka. The purchase price for the assets was USD435,000.00.

After the purchase of the assets of Zambia Pork Products (in receivership) the Third Respondent, through the Second Respondent, also purchased a tannery from Zambia Bata Shoe Company Limited at the price of USD300,000.00. The purpose of the said purchase was to enable the Second Respondent operate more effectively.

At the time the Third Respondent was making most of these investments, the First Appellant was away in Greece. Upon his return, a dispute arose between him and the Third Respondent as to the ownership of the First and Second Respondents. It was contended by the First Appellant that the First and Second Respondents were purchased through funds owned by the company and the Second Respondent is a subsidiary of the company. As such, being a fifty percent share-holder in the company, the First Appellant had an interest in the First and Second Respondents. It

was also contended that the Third Respondent had mismanaged the affairs of the company.

When the dispute arose, the First Respondent took out an action in the High Court against the First and Second Appellants on 5th September 2007. The action was by way of originating summons, in support whereof was an affidavit. The action was pursuant to Order 113 of the ***Supreme Court Practice (1999 edition), (White book)*** and it sought recovery of stand number 29390 Lusaka from the Appellants on the ground that they were trespassers. By an order of a Judge of the High Court dated 15th July 2008, leave was granted to the First Respondent to amend the originating summons and the matter was deemed as if it was commenced by a writ of summons. Pursuant to the said order, the First Respondent filed a statement of claim, as Plaintiff against the two Appellants, as Defendants, on 29th July 2008. Subsequently, on 27th October 2010, an amended statement of claim was filed which, among other things, saw the Second, Third and Fourth Respondents, joined to the proceedings as Plaintiffs. The claim as it

is endorsed on the said statement of claim is for the following reliefs:

(i) A declaration that the Defendants (Appellants) are not shareholders or directors in the 1st and 2nd Plaintiff (1st and 2nd Respondents) companies and therefore lack the requisite locus standi to take charge of assets that belong to the said companies;

(ii) An order for possession of stand No.29390 Lusaka;

(iii) An account of how the Defendants have used all the moneys collected from the leasing out of flats at stand 23930 Lusaka;

(iv) An order for the payment by the Defendants to the 1st Plaintiff for the loss of rental income amounting to USD761,600.00 ... due to illegal occupation by the Defendants of stand No.29390 Lusaka;

(v) An order for removal of caveats lodged by the 1st Defendant on all properties that belong to the 1st and 2nd Plaintiffs,

(vi) Damages occasioned to the 1st Plaintiff as a result of the acts of the Defendants in interfering with construction works at stand No.29390 Lusaka

(vii) Damages for loss of use of funds;

(viii) Interest on all sums payable at the short term deposit rate; and

(ix) Costs.

(We have assumed the reference to stand 23930 Lusaka in paragraph (iii) to be stand 29390 Lusaka).

The First Appellant responded by way of a defence and counter-claim. The defence essentially contested the manner in which the assets of the First and Second Respondents were purchased and contended that the First Appellant had an interest in the First and Second Respondents on account of his beneficial interest in the company, whose funds, it was contended, were used to purchase the said assets.

The counter-claim was, *inter alia*, as follows:

1) ...

2) The 1st Plaintiff was purchased and has been financed by Dar Farms and Transport Limited in which the 1st Defendant is beneficially interested.

3) The 2nd Plaintiff has been financed by Dar Farms and Transport Limited in which the 1st Defendant is beneficially interested.

4) The 2nd Plaintiff is similarly a subsidiary of Dar Farms and Transport Limited in which the 1st Defendant is beneficially interested.

5) The 1st Defendant will aver that the 4th Plaintiff's purported shareholding and directorship in the 2nd Plaintiff is fraudulent and or alternatively irregular and therefore null and void.

6) The directorship in the 2nd Plaintiff properly ought to be the 3rd Plaintiff and 1st Defendant.

7) The 3rd Plaintiff has unilaterally made decisions in respect of the 1st and 2nd Plaintiffs to the exclusion of the 1st Defendant who ought to be a director and share-holder in both the 1st and 2nd Plaintiffs

8) The 3rd Plaintiff, either by himself and/or in concert with the 4th Plaintiff has fraudulently, alternatively transferred various assets from Dar Farms and Transport Limited to the 1st Plaintiff without recourse to the 1st Defendant

9) Further, the 3rd Plaintiff, either by himself and or in concert with the 4th Plaintiff has acquired various assets in the name of the 1st Plaintiff out of funds generated from Dar Farms and Transport Limited. ...

The Learned High Court Judge who determined the matter took charge of the record on 27th August, 2010 when he was still a High Court Judge, following an order of re-allocation of the record made by Mwanza J (retired) on 4th May 2010. After taking charge of the record, the Learned High Court Judge called it up, on divers

days, for trial but it was adjourned at the instance of counsel, for reasons ranging from need to join parties, settlement of issues, etc. He finally held the trial on 7th February 2011, by which time he was still a High Court Judge. When he concluded the trial and delivered the judgment he had been appointed to the Supreme Court Bench.

At the trial in the court below, the Respondents called three witnesses, namely, Lloyd Musonda, an Assistant Inspector at Patents and Companies Registration Agency (PACRA), Arjunan Ammayappan, and the Third Respondent. The evidence of Lloyd Musonda was that he had worked for PACRA for 9 years, and is familiar with the record keeping at PACRA. That he had in his possession, at the trial, the files for the three companies that is to say, the First and Second Respondents and the company. He went on to testify that the First Respondent was registered on 23rd November 1991 as a private company limited by shares pursuant to which certificate of incorporation number 24456 was issued. The four shareholders are Alexandros Vangelatos, the Fourth

Respondent, Third Respondent and Epthimios Vangelatos who respectively, hold shares with the following monetary values: K4 million, ordinary shares; K1 million ordinary shares; K1 million ordinary shares; and K4 million ordinary shares. That the First Respondent is not a subsidiary of any company.

Regarding, the Second Respondent, Lloyd Musonda's evidence revealed that it was registered on 16th January 2002 as a private company limited by shares. Pursuant to the said registration, a certificate of incorporation number 49013 was issued. At the time of incorporation, the share-holders were the Third Respondent and Evangelos Andre Tattis who both held five million ordinary shares each. Subsequently, there was an increase in the share capital following which, the Third Respondent transferred 5.4 million ordinary shares to Epthimios Vangelatos and 8 million shares to Alexandros Vangelatos, while the Fourth Respondent transferred 2.5 million ordinary shares to Epthimios Vangelatos. The share holding in monetary terms, as at 4th March 2011, was as follows: Alexandros Vangelatos, K8 million, ordinary shares; the Fourth

Respondent K2 million, ordinary shares; the Third Respondent, K2 million, ordinary shares; and Epthimios Vangelatos, K8 million, ordinary shares. The foregoing brings the total value of the shares to K20 million. Further that, there is no company which is a share holder owning fifty percent of the shares of the Second Respondent.

The second witness was Arjunan Ammayappan an accountant by profession, and in the employ of the company. He testified that he joined the company in July 1997 and confirmed that the Third Respondent is a shareholder and director in the company. Further that the Third Respondent is also a share-holder in the First and Second Respondents.

The evidence revealed further that when he took over the duties of accountant of the company, he discovered that the First Respondent was stated in the company's books of account as an asset of the company. There were no supporting documents to indicate how the First Respondent was acquired as such asset by the company. This prompted him to advise the members of the company that it was an error in the books of account which needed

to be corrected. He proceeded to prepare fresh accounts reversing the entry which were approved by both the First Appellant and Third Respondent as directors of the company.

As regards the operations of the First and Second Respondents, the evidence revealed that the two companies are not related nor are they related to the company. The only common feature between them and the company is the Third Respondent who manages them as he is a shareholder and director in all the three companies. As a consequence of this, all three companies were initially registered as one group at Zambia Revenue Authority to avoid duplication of payment of Value Added Tax (VAT). This was subsequently reversed because certain activities that the company was involved in were exempt from payment of VAT.

The evidence revealed further that the First Respondent is in the business of property development and agricultural activities. That its operations have been financed by borrowings from Finance Bank of Zambia Limited and the Development Bank of Zambia. Further funding was raised from the purchase of 400,000 shares in

the First Respondent by Max Prest Tyres Zambia Limited for the sum of K1,480,000,000.00.

As regards the Second Respondent, the evidence revealed that the source of funds for its establishment and operations were from loans acquired from Leasing Finance Company Limited in the sum of USD763,750.00. The documentation relating to the loans were all executed by the Third Respondent in his individual capacity. Further funding for the purchase of the tannery in the sum of USD300,000.00 was obtained from Finance Bank Zambia Limited by way of a loan.

The evidence of the Third Respondent revealed how he came to Zambia from Greece in 1969. Upon arrival he invested the little moneys he had in the business of buying cattle from the Southern Province and selling it to markets on the Copperbelt. This business was conducted in Chingola under the name and style of Dar Farms. Later on he was joined by his brother, the First Appellant and the two embarked on various business ventures. At a certain point, the Third Respondent purchased trucks and moved to Lusaka where he

was involved in the business of transporting coal from Maamba Collieries. During this period he changed the trading name of the company from Dar Farms to Dar Farms and Transport and he made the First Appellant an equal partner.

Subsequently, and on the advice of his accountants, the Third Respondent caused Dar Farm and Transport to be incorporated as a limited liability company. After the incorporation of the company, the Third Respondent and First Appellant were equal shareholders and the Third Respondent invested all of his assets into the company. He was also the Chairperson and Chief Executive of the company whilst the First Appellant was merely an employee.

In or about the year 1988, the First Appellant decided to go back to Greece because he was no longer interested in working or doing business in Zambia. To facilitate his departure, it was agreed that he would be paid the sum of USD100,000.00 by the company and a sum equal to the cost of repairs to his house in Greece. This was done and he left Zambia. He returned to Zambia sometime between May 1990 and April 1991 to take full management of the

company. This was during the period of their father's illness and subsequent death, and the Third Respondent's recuperation after an operation to his spine in Greece. The First Appellant however, insisted on the Third Respondent's return to Zambia so that he could rejoin his family in Greece. This prompted the Third Respondent to return to Zambia about April 1991 and take over management of the company. The First Appellant thereafter left for Greece.

Upon resumption of management of the company, the Third Respondent discovered that: eighty percent of the trucks had broken down and no money had been directed towards their repair; no trade suppliers had been paid because the First Appellant had told them that they would be paid when the Third Respondent returned; all funds in the bank accounts had been withdrawn by the First Appellant and he took it to Greece; and the company had been badly managed. The Third Respondent, therefore, set about the task of rehabilitating the trucks and borrowing from banks to pay off trade creditors. In 1993 he also obtained a loan from a

commercial bank in Greece to enable him purchase new trucks. Further, he obtained an investment licence and due to the incentives attaching to the licence, between 1993 and 2004, he expanded the fleet of new vehicles to eighty eight trucks and trailers.

The evidence revealed further that, prior to the occurrence of the events in the preceding paragraph, in 1979, the Third Respondent went into partnership with one Emmanuel (Melis) Constantinou and purchased three farms in Mazabuka. These were subdivision A of Farm No.134a; farm number 1127; and the remaining extent of Farm 133a. The farms were all going concerns at the time and had 2000 head of cattle. The First Appellant was in Zambia at the time and was aware of the Third Respondent's activities. Between 1980 and 1984, the Third Respondent bought more farms in Chisamba.

During the period of absence from Zambia of the First Appellant, the Third Respondent and Fourth Respondent purchased the First Respondent through acquisition of its shares. In doing so

they acquired the only asset owned by the First Respondent being, a vacant plot, which the Third Respondent needed for parking his trucks. Further that, the First Respondent was not purchased as a subsidiary of the company.

After the purchase of the First Respondent, the Third Respondent used it as a vehicle for investing in other ventures. To this end, he acquired the property known as stand number 29390 Chila road, Lusaka in the name of the First Respondent which comprises a block of flats. The First Appellant has, however, taken control of the said property and has collected rental from the tenants in the said property in excess of USD850,000.00.

Later in the year 2001, the Third Respondent and one Andrew Tattis entered into negotiations with the receivers of Zambia Pork Products Limited (in receivership) for the purchase of its assets. The two accordingly incorporated the Second Respondent through which they acquired the assets of Zambia Pork Products Limited (in receivership) at a cost of USD435,000.00.

The funds used for the purchase of the shares in the Second Respondent were by way of a loan from Leasing Finance Company Limited in the sum of USD763,750.00 and secured by the assets of the Second Respondent.

After the purchase of the Second Respondent, the Third Respondent decided to purchase a tannery from Zambia Bata Shoe Company Limited, at a cost of USD300,000.00. The purchase price was financed by a loan to the Second Respondent by Finance Bank Zambia Limited. The First Appellant was not involved in the purchase and, therefore, has no interest in the Second Respondent, nor is he a director or share-holder.

Sometime in July 1998, whilst the Third Respondent was in Greece on holiday, the First Appellant informed him that he intended coming back to Zambia because he had run out of money. At that point he gave the First Appellant an *ex gracia* payment of USD10,000.00 and the two agreed that upon his return, the First Appellant would operate the old fleet of the trucks, whilst the Third Respondent would operate the new fleet of trucks in which the First

Appellant had no proprietary interests. The two would each keep the proceeds generated from their respective trucks and it was an understanding between the two that the First Appellant had no claim to ownership of the two trucks and the new assets the Third Respondent had acquired in his absence. Upon his return, the First Appellant initially complied with the agreement between the two. Later when the Third Respondent purchased a house in Kabulonga on subdivision B1 of subdivision 15 of Farm 488a Lusaka, he registered it in his name and that of the First Appellant. He also allowed the First Appellant to reside in it after he renovated it. However, contrary to the agreement of the two parties, later the First Appellant insisted that the company should account to him for all the moneys generated by the old trucks from February 1998. This was done and he accordingly drew a total of K673,048,712.00 (un-rebased). He continued to draw money from the company from April 2000 to 2005, and has thus far drawn a total of K2,036,641,712.00 (un-rebased) for his personal use.

This was the Respondents' evidence.

The first witness for the Appellants was Roman Krouprik a businessman. He testified that he was a share-holder in the First Respondent until he sold his shares to the Third Respondent.

The second witness was the First Appellant. In his testimony he narrated how he came to Zambia from Greece and went into the business of buying cattle from Mazabuka and selling it on the Copperbelt with his brother the Third Respondent. He also narrated how he and the Third Respondent eventually set up the company with both of them owning fifty percent share-holding.

The First Appellant's evidence went on to reveal how the company purchased various assets including the First and Second Respondents. Further that on two occasions he left Zambia to settle in Greece but returned and found that the Third Respondent, had been mismanaging the affairs of the company. He stated in this regard that, as a share-holder of the company he never benefitted from the company in his absence from the country and upon his return, no account was rendered to him as to how the funds of the company were applied. He and the Second Appellant therefore

obtained a bank statement of the kwacha account of the company held at ZANACO and discovered that between February and March 1998 the Third Respondent had transferred the sum of USD500,000.00 to his private account. Following from this, the Appellants then went to PACRA and discovered that the company was not a share-holder in the First Respondent but that the Third and Fourth Respondents were the share-holders. A further search on the records of the Second Respondent also revealed that the company is not a share-holder in the Second Respondent but that the Third Respondent and one Angelos Tattis are share-holders. This was the case notwithstanding the fact that there was no board resolution by the company transferring its shares in the Second Respondent and the Second Respondent being a subsidiary of the company. As a consequence of the foregoing, the First Appellant was prompted to take ownership of the stand 29390 Chila road Lusaka and has, in this regard, been collecting rentals from the flats in the said property and he resides in one of them.

The evidence went on to confirm that when the First Respondent was being acquired the First Appellant was out of the country and that the properties allegedly owned by it are registered as such. Further that he had not seen any documents which shows that the company is a share-holder in the First Respondent.

As regards the Second Respondent the First Appellant testified that at the time it was being purchased he was in the country. Further that, the documents presented before the court did not reveal that the company is a share-holder in the Second Respondent.

The evidence of the third witness for the Appellants was not included in the record of appeal, we have therefore not summarized it.

The Appellants' fourth witness was Hendrik Michael Grobler, a crop manager with the company. His evidence revealed that the Cattle New Farm in Chisamba, Dallas Ranch in Mazabuka and Lukali Ranch in Kabwe were owned by the company. Further that

on a monthly basis, returns of the company were prepared in respect of the cattle stock. It also revealed that sometime in March or April 2005 Arjunan Ammayappan instructed that all closing balances for the cattle stocks should be reflected as opening balances in the books of the First Respondent because Lukali Farm was the property of the First Respondent. This was accordingly done and the company's books of account on cattle stock were surrendered to Arjunan Ammayappan.

The evidence revealed further that when Hendrik Michael Grobler joined the company in 1999, there were no cattle at Lukali Ranch. That the cattle were only received by the ranch in the year 2001.

The fifth witness was Johan Hendrik Buitendag. His evidence revealed that the cattle at Good Hope Ranch were all owned by the company and that it was all accounted for in the company's monthly cattle returns. This was the practice until February 2005,

when Arjunan Ammayappan issued instructions that the company's cattle return books be closed and the details transferred to the First Respondent's books of accounts. Following from these instructions, the company's cattle return books were closed and all accounts in respect of cattle as from March 2005 to date are accounted for in the First Respondent's books of accounts.

The sixth witness was Mahendra Kumar Ramanela Tah, an accountant with Professional Services Limited. His evidence revealed that he had been doing the accounts for the company from 1987 to 2007. Between 1994 and 1995, whilst preparing the accounts for the company, he was informed by officers of the company that it had purchased the First Respondent. Later, a faxed copy of the sale of shares agreement for the purchase of the First Respondent was provided to him which was executed by the company, Third Respondent and the original share-holder of the First Respondent.

The evidence revealed further, that there was no indication in the sale of shares agreement the percentage of shares acquired by

the company but that he was informed that it owned 100 percent shares in the First Respondent. As a consequence of this, the First Respondent was reflected as an asset of the company. This was notwithstanding the fact that the share-holder agreement was not availed to Mahendra Kumar Kamanela Tah. Further that, he did not conduct a search at PACRA to confirm if the sale of share agreement was registered. Later on, the First Respondent was removed from the assets lists of the company accounts upon receipt of instructions to that effect. In March 1998/1999, the two share-holders of the First Respondent were the Third and Fourth Respondents.

The evidence also revealed that the company accounts reflected a debt of K511,939,989.00 owed to the company by the First Respondent, which sum of money was later paid back.

As regards the Second Respondent, the evidence revealed that the company did not borrow money to acquire the assets of the Second Respondent. That the Second Respondent was purchased from Bata Shoe Company. Further that the company did not

sponsor the purchase of the tannery but that the purchase was by way of a loan from Finance Bank of USD300,000.00.

The last witness was Philip Chibangu a police officer. He confirmed that an investigation was conducted into the affairs of the company. That the investigation revealed that there were no documents showing that the First Respondent is wholly owned by the company, and neither is there a record to that effect at PACRA.

As regards the Second Respondent, the evidence revealed that there were no documents to show that the company has shares in the Second Respondent.

This was the evidence presented to the Learned High Court Judge by the parties. After he considered it, he found the following facts as having been established:

1) *That 10,000 shares in the First Respondent were transferred from Roman Kroupuck to the Third Respondent for the Sum of K500,000.00 by way of a share transfer dated 31st May 1995*
2) *That the Third Respondent and First Appellant appended their signatures to the company's statement of accounts dated 31st March 1998, which*

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3) *effectively removed the First Respondent from the assets list of the company. That, having signed the statement of accounts, the First Appellant is estopped from reclaiming the First Respondent back as an asset of the company.*

4) *The Second Respondent was sold to the Third Respondent and his associates by way of a contract of sale, at the price of USD435,000.00 paid to the receiver managers, Sipho Phiri and Simon Lapper.*

5) *There was an equipment leasing agreement entered into between Leasing Finance Company and the Second Respondents which revealed that the total rental due is USD807,300.00 plus VAT. The agreement was signed by one Arulanandum Ramesh, managing director on behalf of the leasing company and the Third Respondents as managing director of the Second Respondent.*

6) *Zambia Bata Shoe Company offered the Bata - Tannery at Kafue to the Third Respondent at a cost of USD300,000.00. The Tannery was purchased by the Second Respondents by way of an assets purchased agreement witnessed by Arjunan Ammayappan and signed by the Third Respondents. Further that there is a credit facility between Finance Bank and the Second Respondents for the sum of USD300,000.00 secured by a debenture over the fixed and floating assets of the Second Respondent.*

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7) *There is a credit facility between Development Bank of Zambia and the First Respondent in the sum of USD450,000.00 signed by the Third Respondent and Arjunan Ammyappan, for and on behalf of the First Respondent*

8) *There was a lease agreement between the First Respondent and Chilanga Cement Plc and evidence to the effect that the shareholders in the First Respondent are the Third and Fourth Respondents*

9) *Certificate of title to the nine flats indicates that they are owned by the First Respondent and that there was evidence of loss of income for the nine flats by the First Respondent in the sum of USD761,600.00*

10) *There was a handwritten note by the First Appellant which revealed that he posed as a representative of the First Respondent and he received the sum of USD16,800.00 for flat number 1, which amount was not paid into the First Respondent's account. The First Appellant was neither a share-holder or officer of the First Respondent, as such his acts amounted to theft from the First Respondent*

11) *There was evidence of a credit facility offer and acceptance between Finance Bank Limited and the First Respondent in the sum of USD1,750,000.00*

12) *The share-holding of the Second Respondent is as follows:*

11.1 Vangelatos Alexandros - Zambian

11.2 Likiardopoulou Anna Maria - Greek

11.3 Vangelatos Demetre - Greek

11.4 Vangelatos Epthimios - Zambian

13) That the First Respondent was acquired by funds borrowed from Development Bank of Zambia while the Second Respondent was acquired from funds borrowed from Leasing Finance Company Limited and Finance Bank

14) There is evidence revealing that the promoters of the Second Respondent were one Evangelos Andrew Tattis and the Third Respondent. The former later transferred his shares to Anna Maria Likiardouplou. As such, the First Appellant was never a party to the conception of the Second Respondent nor did he make any capital contribution because the money used to purchase the Second Respondent was borrowed from leasing Finance Company Limited in the sum of USD763,750.00 and secured by the assets

15) The cattle at Lukali Farm was taken there in the year 2001, whilst the First Defendant was in Zambia. He did not however know the number of cattle that was at the said farm

16) The two Appellants had failed to show their interest in the First and Second Respondents.

The Learned High Court Judge effectively found that the First Appellant was a trespasser on the property known as stand 29390

Chila road, Lusaka. He also found that neither the company nor the First Appellant had interests in the First and Second Respondents and that the two Respondents were not subsidiaries of the company. As a consequence of the said findings, the Learned High Court Judge held that the Respondents had proved their claim and consequently he upheld it. On the other hand, he found that the Appellants had failed to prove their counter-claim and he accordingly dismissed it.

In upholding the Respondents' claim he ordered as follows:

1) *The [Appellants] are not share-holders or directors in the First and Second [respondents] companies and therefore, have nothing to do with these companies assets;*
2) *Immediate possession of the [First Respondent's] properties for which [it] holds conclusive title and the title is invidate [sic] save and except as provided by section 33 of the Lands and Deeds Registry Act*
3) *Immediate accounting to the [First Respondent] [of] all the [rental the] First and Second [Appellants] received;*
4) *Immediate removal of caveats on properties belonging to the First, Second Third and Fourth [Respondents];*

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5) *The Deputy Registrar to assess damages to the [Respondents] for the unlawful interference with the properties;*

6) *The Police Commissioner Lusaka Province is ordered to give escort to the bailiffs to take possession as the [appellant] appears to be a vident disposition*

7) *The dollar rents collected will attract 8 percent from the filing date of the action until judgment thereafter 2 percent; and*

8) *The damages in Kwacha will attract the long term deposit rate from the filing date of the action until judgment, thereafter 6 percent that is damages claimed under head VII damages for non use of funds under head VII fall away as interest has been awarded on rent collectable.*

The Appellants are aggrieved by the foregoing decision and have appealed on six grounds as follows:

1) *The Learned Supreme Court Judge erred in law by assuming jurisdiction in running litigation in the High Court when S17A merely contemplates completing proceedings already began, that is, which are partly heard and could not conveniently be taken by another Judge of the High Court.*

2) *The Learned trial Judge was wrong at law by finding that the 1st Defendant Aristogerasimos Vengelatos was a trespasser and inter meddler in the affairs of Metro Investments Limited the 1st Plaintiff.*

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3) *The Learned trial Judge was in error when he dismissed the 1st Defendant's claim to assets and companies acquired by the family business Dar Farms and Transport Limited on the initiative of his brother.*

4) *The Learned trial judge misdirected himself by failing to consider the resulting trust which rose in law and equity when the family company Dar Farms and Transport Limited and its funds or credit were used to purchase shares in Metro Investments Limited and King Quality Meat Products Limited, the 1st and 2nd Plaintiff respectively and when allegedly "personal" assets were co-mingled and operated under a company (DAR) in which the 3rd Plaintiff and 1st Defendant were indisputably equal share-holders.*

5) *The Learned trial Judge erred in law when he found that the 1st Defendant Aristrogenasimos Vangelatos was not a share-holder in the 1st Plaintiff company Metro Investments Limited thereby contradicting earlier finding by Hon. Justice C. Kajimanga in cause No.2005/HPC/0276 and by Hon. Lady Justice H. Chibomba in cause No.2005/HPC/0110 and by Hon. Justice N.M. Mwanza in cause No.2007/HP/056 involving the same parties and on the same issue.*

6) *The Learned trial Judge misdirected himself in hearing and determining the matter between the parties when the dispute should have been referred to arbitration pursuant to the order of this Honorable Court in*

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Appeal No.07/2006 between Demetre Vangelatos and Aristogerasimos Vangelatos.

Prior to the hearing of the appeal, the parties filed heads of argument which they augmented at the hearing of the appeal with *viva voce* arguments.

In relation to ground 1, the Appellants' argument was that the Learned High Court Judge had no jurisdiction to adjudicate upon the matter. It was argued that section 17A(2) of the ***High Court Act*** is instructive on when a matter can be concluded by a Judge other than the one who heard it. Further that once a Judge has been promoted, he cannot be allocated new matters in the High Court but rather he should hear matters that are on appeal. This, it was argued, is in accordance with Article 92 of the ***Constitution*** which does not empower a Supreme Court Judge to hear a matter at first instance. It was, therefore, argued that the court below erred in law when it sat as a High Court Judge hearing a matter at first instance other than on appeal.

As regards ground 2, the gist of the Appellants' arguments was that the Learned High Court Judge misdirected himself in law

and fact when he made a finding that the First Appellant was a trespasser and intermeddler in the affairs of the First Respondent.

It was argued that there was no evidence adduced in the court below to show that the First Appellant executed a form of transfer of fully paid up shares thereby effecting their transfer. Further that there was no evidence led in the court below to show that the First Appellant's shares were ever registered in the name of a new share-holder. Reliance was made on sections 57 and 6 of the ***Companies Act***.

It was argued further that on two occasions the Third Respondent in a letter addressed to "*whom it may concern,*" confirmed that the First Respondent is a subsidiary of the company. That the accounts of the company which were confirmed by both the First Appellant and Third Respondent also reflected that the First Respondent was wholly owned by the company.

In arguing ground 3, the Appellants challenged the Learned High Court Judge's dismissal of the First Appellant's claim to assets and companies acquired by the family business. It was contended

that the Learned High Court Judge misdirected himself by failing to take into account the Third Respondent's evidence which revealed that he had entered into transactions and bought assets using the family company, which assets he retains for his personal use. It was argued that, as shareholders in the company, the First Appellant and Third Respondent had no right to claim ownership to company property or any assets bought using the company's funds. Reliance was made on the case of ***Macaura vs Northern Assurance Co. Ltd.***[1] It was contended further that the Learned High Court Judge was biased in his decision when he failed to recognize that the First Appellant and Third Respondent stood on equal footing because they had equal share-holding in the company.

Under ground 4, it was argued that it is a well established principle that where property is purchased in the name of a person who did not provide the purchase money, that person will be presumed to hold the property in trust for the person who provided the purchase money. In advancing the said argument, reliance was made on the cases of ***Dyer vs Dyer***[2], ***Venture***[3] and ***Gravesend Corporation vs Kent County Council***[4].

The gist of the arguments under ground 5 was that the Learned High Court Judge erred at law when he ruled that the First Appellant was not a share-holder in the First Respondent, because he had lost his beneficial interest in the shares by signing a set of accounts and balance sheets. That the decision of the Learned High Court Judge overruled the decision of Mwanza J (retired) to the effect that the First Appellant is a share-holder in the First Respondent. It was argued that in terms of section 4 of the ***High Court Act***, all judges of High Court enjoy the same power. As such, the Learned High Court Judge had no jurisdiction to overrule the decision of Mwanza J, Chibomba J, (as she then was) and Kajimanga J, (as he then was) whose decisions were to the contrary. Reliance was made on the case of ***Rahim Obaid vs The People***[5]**.** It was argued further that we have also made a determination in appeal No.7 of 2006 that the First and Second Respondents are subsidiaries of the company. This, action, it was argued, therefore, amounts to a multiplicity of actions which this court frowns upon because it is re-litigating a matter already litigated upon. Reference was made to a plethora of authorities on the issue as follows: ***Byrne***

vs Brown, Montgomery vs Foy[6], Development Bank of Zambia and KPMG Peat Marwick vs Sunvest Ltd and Sun Pharmaceuticals Ltd[7], BP Zambia Plc vs Interland Motors Ltd[8] and ***Simbeye Enterprises Ltd and Investrust Bank (Z) Ltd vs Ibrahim Yousuf[9].***

The gist of the argument under ground 6 was that Article 24 of the Articles of Association of the company provides for disputes between members, directors, or members and directors, to be resolved through arbitration. That this court in its judgment dated 18th March 2008, in appeal No.7 of 2006, between the Third Respondent and First Appellant stayed the proceedings in the High Court and referred the parties to arbitration. It was argued that the issues that Kajimanga J (as he then was) determined that came up in appeal number 07/2006 and were referred to arbitration are the same issues that were before the Learned High Court Judge. The litigation of the said issues, therefore, amounted to an abuse of court process.

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In the *viva voce* arguments, counsel for the Appellants Mr. S.S. Zulu SC advanced arguments in respect of grounds 5 and 6. In doing so he restated the arguments we have summarized in the preceding paragraph. State counsel also conceded that the contention that the matter had been re-litigated upon and the parties referred to arbitration had not been raised in the court below. That notwithstanding this fact, we are still obliged to consider it on appeal as the issues raised were legal issues.

Counsel further conceded that the matter before Kajimanga J (as he then was) was an action by way of a petition to windup the company whilst the matter from which this appeal arose is a dispute relating to ownership of the First and Second Respondents, how they were acquired and if indeed the First Appellant and the company have interests in them.

We were urged to allow the appeal.

In reply under ground 1, the Respondents argued that the ground was misconceived and incompetent because the issue of want of jurisdiction by the Learned High Court Judge had not been

raised in the court below. It was argued, that the record of the proceedings in the court below does not reveal a reference to the issue of jurisdiction and as such it can not be raised on appeal in accordance with the following authorities: ***Wilheim Roman Buchman vs Attorney General***[10], ***Mususu Kalenga Building Limited and another vs Richman's Money Lenders Enterprises***[11], ***Milorad Saban (Being sued as Administrator of the Estate of the late Savo Saban) Mechanist Engineering Limited vs Gordic Milan***[12], and the ***Attorney General vs Nigel Kalonde Mutuna, Charles Kajimanga and Phillip Musonda***[13].

The other limb of the argument under this ground related to the contention by the Appellants that by the time the Learned High Court Judge commenced trial, he had been appointed to the Supreme Court. It was argued that there is no evidence on record to support the said contention and it, therefore, amounted to eliciting evidence from the Bar. This, it was argued, is frowned upon by this court as was expressed in the cases of ***Chikuta vs Chipata Rural Council***[14], ***Kafue District Council vs James Chipulu***[15] and

Jamas Milling Company Limited vs Imex International (PTY) Limited[16].

Grounds 2 and 3 were argued together. It was argued that the Learned High Court Judge was on firm ground when he made a finding that the Appellants do not have any legal rights to the assets of the First and Second Respondents. The basis of the said argument was that the evidence on record clearly shows that the Appellants have never offered any consideration for equity in the First and Second Respondents. As such, they are not listed as share-holders or directors because they were not promoters of the two companies. It was argued further that, the First Appellant's evidence reveals that he and the Second Appellant were not in Zambia when the Third and Fourth Respondents bought the First Respondent.

In respect of the arguments advanced by the Appellants to the effect that there is no valid transfer of shares of the First Respondent by the company, it was argued that the said arguments are at variance with the evidence on record. There is no evidence on

record to show that the Appellants executed any document including Companies Form 27 to warrant the Appellants asserting any right over the affairs of the First and Second Respondents. That the Respondents discharged their burden of proof in demonstrating that the Appellants have no legal interest in the First and Second Respondents by producing the appropriate extracts from the PACRA files. Reliance was made on section 374 of the ***Companies Act***.

As a consequence of the arguments advanced in the preceding paragraph, the Respondents submitted that the act of taking over the assets of the First Respondent by the First Appellant amounts to intermeddling by the Appellants. It was argued further that the basis upon which the First Appellant claims an interest in the said assets is the contention that they were purchased from the company's funds and that he is a brother to the Third Respondent. The first reason, it was argued, was not proved because the witnesses called by the Appellants led evidence to the contrary.

Concluding submissions under these two grounds, it was argued that the case of ***Macaura vs Northern Assurance Co. Ltd***[1]

cited by the Appellants does not aid their case because they have no interest in the First and Second Respondents.

As regards ground 4 it was argued that the Appellants have contended the existence of a trust in the assets of the First and Second Respondents by the company because the First Appellant and Third Respondent have common equity in the company. It was argued that these arguments are misleading because in considering whether there is a trust created, one must investigate the intentions of the parties. Reliance was made on the cases of ***Re: Pan Electronics Limited and Savvas Panayiotides and Others vs Andereas Miltiadous and Others***[17] and ***Enesi Banda vs Abigail Mwanza***[18]. It was further argued, and in the alternative, that for one to substantiate a claim that he is a share-holder in a company he must, in the absence of proof that he is one of the initial share-holders or promoter of the company, prove that there is an allotment of shares made to him in accordance with section 64 of the ***Companies Act***. That the evidence on record clearly shows that the Third Respondent at all material times executed share transfer

forms which are duly registered with PACRA. Further, one Evangelos Andrew Tattis sold his share-holding in the Second Respondent to the Fourth Respondent in May 2002, pursuant to which a share transfer agreement was duly registered in accordance with the ***Companies Act***. The Third and Fourth Respondents, therefore, demonstrated to the Learned High Court Judge how their interest in the First and Second Respondents arose. Consequently, they are members in the First and Second Respondents. Reliance was made on the texts ***Mayson, French and Ryan on Company Law*** and ***Gower's Principles of Modern Company Law***. The Appellants on the other hand, it was argued, have failed to demonstrate in any way that they are indeed members in the First and Second Respondents and as such they have no right to participate in the affairs of these two Respondents.

In relation to ground 5, it was argued firstly, that the issues raised under that ground had not been raised in the court below. They cannot, therefore, be raised on appeal. Secondly and arguing in the alternative, it was submitted that the Appellants have failed

to successfully plead the defence of *res judicata* because they have failed to address the following:

1) To identify the issues in any earlier case with a view of satisfying the test that it must be the same matters as between the same parties

2) Whether the issues were settled after a full hearing on the merits; and

3) The time when these conflicting decisions were made.

Reliance was made on the cases of ***Allan Mulemwa Kandala vs Zambia National Commercial Bank***[19], ***Amber Louise Guest Milan Tribonic vs Beatrice Mulako Mukinga***[20] and ***Attorney General*** and ***Bank of Zambia vs Jonas Tembo and Others***[21], which authorities set out the test to be satisfied for a successful plea of *res judicata*. It was argued that the Appellants, not only failed to plead the defence of *res judicata*, but the record of appeal is also devoid of the judgments it is alleged have determined the issues in this matter. That the only ruling in the record of appeal is dated 16th July 2005, delivered by Kajimanga, J (as he then was) under cause number 2005/HPC/0276. That in the said ruling there is no finding at all that the First Appellant is a share-holder in the

First and Second Respondents. Further, the ruling relates to an application to stay proceedings and was not a determination of the matter on the merits. It was also argued that the judgment rendered by Chibomba J (as she then was) exhibited in the record of appeal relates to an action commenced by Finance Bank Zambia Limited in respect of a facility extended to the company. That the parties to that action are not parties to this action and neither did the judgment determine the First Appellant's interest in the First and Second Respondents.

As regards the contention that a decision was made by Mwanza, J (retired) on the issues that were before the learned High Court Judge, it was argued that the arguments by the Appellants make no reference to the record of appeal or such decision.

In reply to the Appellants' contention that the First and Second Respondents are subsidiaries of the company, it was argued that the same did not have the support of section 43 of the ***Companies Act*** which sets out the test for what constitutes a

subsidiary. Further, that the evidence on record does not also support the said contention. It was, therefore, argued that the Learned High Court Judge was on firm ground when he found that the First and Second Respondents are not subsidiaries of the company. That the jurisdiction of this court is limited in as far as interference with findings of fact by a trial court to the instances set out in the cases of ***Nkhata and Four Others vs Attorney General of Zambia***[22], ***Wilson Masauso Zulu vs Avondale Housing Project Limited***[23] and ***Attorney General vs Marcus Kampumba Achiume***[24], which, it was argued, are not satisfied in this case.

In the *viva voce* arguments counsel for the Respondents, Mr. L. Linyama, in reply to the argument advanced by the Appellants under ground 6 referred us to the Respondents' arguments advanced under grounds 1 and 5. He argued as follows: the issue of want of jurisdiction by the Learned High Court Judge can not be raised on appeal because it was not raised in the court below; although the jurisdictional issue raises a point of law it cannot be presented before us because it was not specifically pleaded and neither were facts led in the court below; the manner in which it

was presented by the Appellants' counsel amounts to giving evidence from the Bar; the matter before Kajimanga J (as he then was) and Chibomba J (as she then was) did not determine the matters before their courts on the merits but at interlocutory stage; and the Appellants did not plead *res judicata* in the court below.

In reply, counsel for the Appellants Mr. S.S. Zulu SC argued in relation to ground 1 that the appointment of the Learned High Court Judge to the Supreme Court was a notorious fact which did not require to be proved.

We have considered the record of appeal, arguments by counsel and the judgment appealed against. In considering this appeal we will begin by considering ground 1. We will then consider grounds 2 and 3 together as they address the same issue. Grounds 4, 5 and 6 will be considered thereafter.

Ground 1 questions the jurisdiction of the Learned High Court Judge in adjudicating upon the matter. It has been contended by the Appellants that section 17A (2) sets out instances where a Judge of the High Court can conclude the hearing of a matter began

by another judge. That at the time the Learned High Court Judge assumed jurisdiction of this matter he had already been appointed to the Supreme Court and as such he ought not to have conducted the trial of the matter. It was argued that, in terms of section 17A of the ***High Court Act***, a judge who has been promoted to the Supreme Court can only continue adjudicating upon matters before the High Court which he commenced trials in for purposes of concluding such trials. The Appellants cited section 17A (2) of the ***High Court Act*** as follows:

"In any case where a Judge has been appointed (whether before or after the commencement of Act No.3 of 1972) to be or act as the Supreme Court Judge, he shall complete any proceedings already commenced before him, and for this purpose he shall be deemed to retain the position and powers which he held immediately before his being so appointed".

The Respondents have argued that the facts as contained in the contention under this ground were not pleaded or led in the court below, as such raising them now amounts to counsel

testifying from the Bar which this and other courts frown upon. Further that the issue of jurisdiction was not raised in the court below, as such it cannot be raised on appeal.

Whilst we agree with the argument raised by counsel for the Respondents that the attempt by the Appellants to adduce facts in relation to when the Learned High Court Judge was appointed to the Supreme Court amounts to tendering evidence from the Bar, we cannot shut our eyes to the fact that, as a court, we know when the Learned High Court Judge was appointed to the Supreme Court. This is on account of the fact that he was one of our number and it would, therefore, be preposterous for anyone to assume that we do not know when he joined our court. Further, we are of the view that, given the contentions raised in the ground, it would be a travesty of justice for us not to volunteer information on when exactly the Learned High Court Judge was appointed a Supreme Court Judge because, the determination of this ground, subject to what we will say in the paragraphs that follow, hinges on the said information. We, therefore, state for the record, and take judicial

notice that the Learned High Court Judge, one, the Hon Mr. Justice Phillip Musonda, was appointed to the position of Supreme Court Judge on 5th May 2011.

We also agree with the argument by counsel for the Respondents that a matter that has not been raised in the court below, cannot be the subject of an appeal. We accordingly endorse the authorities cited by counsel in this regard.

It is not in dispute that the Appellants did not challenge the Learned High Court Judge's jurisdiction when the matter came up before him. Therefore, the issue was not before the court below. However, 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. In arriving at this decision we are guided by the learned authors of ***Halsbury's Laws of England***, 4th edition, volume 10, at paragraph 717, who states as follows:

"It is the duty of an appellate court to entertain a plea as to jurisdiction at any stage, even if the point was not raised in the court below".

This authority clearly places an obligation upon us to allow a plea of want of jurisdiction to be raised, even where, as in this case, the issue was not raised in the court below. The rationale for this lies in the consequence of the court exercising jurisdiction which it does not possess. ***Halsbury's*** at paragraph 715 states, in this regard, that where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

It can be discerned from the foregoing position of the law, that the absence of jurisdiction nullifies whatever decision follows from such proceedings. This is the position because, the power of this court (like that of any other court created by the Constitution) to adjudicate upon matters in terms of Articles 118 and 119 of the ***Constitution of Zambia Act*** is vested in it by the people of Zambia to be exercised justly in accordance with the ***Constitution*** and any other laws. The exercise of such power, in the absence of

jurisdiction, amounts to an abrogation of the confidence reposed in the courts by the people and a contravention of the ***Constitution*** and other laws. There is, therefore, need to cure such a defect at any adjudicative level and on appeal, whether or not it was an issue in the court below.

The observations we have made in the preceding paragraphs in relation to a challenge of jurisdiction were expressed by the Privy Council when it dealt with an appeal from the Western African Court of Appeal in the case of ***Chief Kwame Asante vs Chief Kwame Tawia***[25]**.** The facts of the case were that the appeal related to ownership of land in the Kumasi State or Division of Ashanti Treolehene, which was claimed on the one hand by the Appellant Chief, Kwame Asante Tredehene, on behalf of his Stool, and on the other by the Chief Kwame Tawia, on behalf of the Asafu (or Akwamu) Stool Kumasi. The latter Chief was substituted by his predecessor Asafu Boakyi II Akwamuhene later on in the proceedings.

Since the dispute related to ownership of land in Kumasi State of Ashanti, it was dealt with by a Native Court, the Asantehene's Divisional Court, a court of the *"B"* Grade which was constituted under the Native Courts (Ashanti) Ordinance 1935. The court on 1st April 1936 decided in favour of Chief Asafu against the Appellant. After an unsuccessful appeal to Court *"A"* (another Native Court established under the same Ordinance) the Appellant appealed to the Chief Commissioner's Court which on 17th December 1936 sent the case back to Court *"B"* for rehearing. The rehearing was held and on 1st July 1937 and Court *"B"* decided once again in favour of Chief Asafu. The Appellant appealed to Court *"A"* which on 16th December 1937 dismissed the appeal. Later, his appeals to the Chief Commissioner's Court and the West African Court of Appeal were unsuccessful and accordingly dismissed.

When the matter was before the West African Court of Appeal the Appellant presented a ground of appeal and argued, for the first time, that the trial court, Court *"B"* was not validly constituted for

the rehearing of the case because certain Chiefs had sat as Judges in that court who were disqualified to sit. The Appellant prayed for the nullification of the judgment rendered by Court *"B"*. The West African Court of Appeal observed that the additional ground of appeal challenging the jurisdiction of the court below, was filed without the leave of court and that it was too late in the proceedings to raise the point as it was not raised in any of the three courts below or at the beginning of the hearing of the appeal in that court. When the Privy Council considered the decision of the West African Court of Appeal on jurisdiction, it refused to agree with the West African Court of Appeal. It held that if it appears to an appellate court that an order against which an appeal is brought is made without jurisdiction, in can never be too late to admit and give effect to the plea that the order is a nullity.

We find the decision in the said case to be good law and we are compelled to be guided by it.

The findings we have made in the preceding paragraphs effectively mean that ground 1 is properly before us and we now proceed to determine it.

By way of recapping, it has been argued by the Appellants that at the time the Learned High Court Judge took conduct of the matter in the court below, he had already been appointed to the Supreme Court. He therefore should not have adjudicated upon the matter. Reliance was made on section 17A (2) of the ***High Court Act*** which, it was argued, permits a judge appointed to the Supreme Court to only conclude those matters in which trial has commenced.

We have had opportunity to revisit the provisions of section 17A (2) of the ***High Court Act*** and agree with the interpretation given to it by the Appellants. Indeed, a judge of the High Court upon assuming the office of Supreme Court Judge can only continue adjudicating upon High Court matters in which trial has commenced. He cannot assume jurisdiction in any fresh matter in

the test we laid down in the case of ***Attorney General vs Marcus Kampumba Achiume***[24] as follows:

> *" ...an appellate court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make".*

The issue, therefore, is are the findings of fact that the Learned High Court Judge made on the share-holding, acquisition and status of the First and Second Respondents and on ownership of the other properties, such that we should disturb them, in line with the authority stated in the preceding paragraph?

In arriving at the findings that the Learned High Court Judge made he relied on both the documentary evidence and that of the witnesses by the parties. The documentary evidence sets out the share-holding in the First and Second Respondents which does not include the Appellants or indeed the company. The documentary

evidence reveals further that the assets in dispute are registered in the names of the First and Second Respondents. This evidence was in the form of certificates of title to real estate which form conclusive evidence as to ownership in terms of section 33 of the ***Lands and Deeds Registry Act***. The section states as follows:

> *"33. A Certificate of Title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts III to VII might be held to be paramount or to have priority; the Registered Proprietor of the land comprised in such Certificate shall, except in case of fraud, hold the same subject only to such encumbrances , liens estates or interests created after the issue of such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever ..."*

The documentary evidence also revealed, the various loan facilities the Third Respondent obtained from Leasing Finance

Company, Development Bank of Zambia and Finance Bank (Z) Limited for the purchase of the assets of the First and Second Respondents.

As regards the *viva voce* evidence, the Third Respondent's testimony and that of the two witnesses, Arjunan Ammayappan and Lloyd Musonda from PACRA, supported the Respondents' case and was unshaken. The latter evidence, revealed the share-holding in both the First and Second Respondents which did not include the Appellants or indeed the company. It also revealed that First Respondent is not a subsidiary of the company. This witness testified as the custodian of records of companies registered at PACRA which is the only registry that maintains records of companies. As such his evidence was accepted by the court below as *prima facie,* evidence of the share-holders, directorship and indeed ownership of the companies in dispute.

The evidence of Arjunan Ammayappan on the hand, explained the error made in posting the First Appellant in the accounts of the company as its asset (we can only comment here that it is the

company's shares in the First Appellant which represented its assets and not the First Appellant itself). It also revealed how the error was corrected by both the First Appellant and Third Respondent.

The evidence of the First Appellant in cross examination confirms that: he did not find any document showing that the company bought the Second Respondent; there was evidence in the form of a share transfer showing movement of shares from one Evangelos Andrew Tattis to the Fourth Respondent; the documents produced by the witness from PACRA made no mention of the company in respect of the Second Respondent; and he confirmed taking over the Acropolis flats at plot 29390 Chila road, belonging to the First Respondent and collecting rental from the tenants. The foregoing evidence supported the Respondents' claim and essentially negated the Appellants' defence and counter-claim. This was compounded by the fact that the evidence of all the witnesses called by the Appellants did not lend credence to the defence and counter-claim but rather the claim by the Respondents. This can be

discerned from the summary we have given in the earlier parts of this judgment of the said evidence. The Learned High Court Judge cannot, therefore, be faulted in making the findings of fact that he made, in view of the evidence presented before him. We cannot, therefore, disturb his findings.

The matters however, do not end there because the Appellants' ill fate in the appeal is compounded by the fact that the First Appellant's *locus standi* in the court below as it related to the counterclaim was questionable. The nature of the counter-claim he launched questioned the Third Respondent's dealings in relation to the company. It, in this regard, *inter alia*, alleged misappropriation of company funds on the part of the Third Respondent as director and share-holder and the First Appellant, therefore, sought to protect the company's interest. An action of such a nature is a derivative action which is taken out by one or more share-holders of a company on behalf of the company. The First Appellant is a share-holder in the company and as such can take out a derivative action on behalf of the company. However, although the First

Appellant legitimately took out the counter-claim on behalf of the company, he did not comply with the rules of court subsequent to laying the claim. Order 15 rule 12A of the ***White book*** sets out the steps to be followed after taking out originating process in a derivative action, thus:

> *(1) This rule applies to every action began by writ by one or more share-holders of a company where the cause of action is vested in the company*
>
> *(2) Where a defendant in a derivative action has given notice of intention to defend, the plaintiff must apply to the court for leave to continue the action*
>
> *(3) The application must be supported by an affidavit verifying the facts on which the claim and the entitlement to sue on behalf of the company are based ..."*

The effect of this rule, as it relates to the First Appellant's counter-claim in the court below, is that he was obliged as Plaintiff in the counter-claim, to apply to the court below for leave to continue with the counter-claim, after the Respondents, as Defendants in relation to the counter-claim, filed their defence to counter-claim. The record of appeal reveals that this was not done

and as such, the counter-claim was improperly before the Learned High Court Judge.

In view of the findings we have made in the preceding paragraphs, we find no merit in grounds 2 and 3.

We now turn to consider ground 4. The contention under this ground is that the family company and its funds were used to purchase shares and assets in other companies. As a consequence of this, a trust arose both in law and equity.

This ground in predicated on the contention by the Appellants that the Third Respondent misapplied the funds of the company to the purchase of the assets of the First and Second Respondents. Its fate, therefore, rests on the finding by the Learned High Court Judge, which we cannot fault, that the Third Respondent did not use the company's funds when he acquired the First and Second Respondents. We have demonstrated in the earlier parts of this judgment that the Learned High Court Judge found that the funds used to purchase the interest and assets in the First and Second

Respondents were not from the coffers of the company but from loans acquired by the Third Respondent and indeed the First and Second Respondents. We have not disturbed the said finding because the Learned High Court Judge was on firm ground when he made it.

Ground 4 must therefore, fail.

Ground 5 challenges the judgment of the Learned High Court Judge on the ground that the finding that the First Appellant is not a share-holder in the First Respondent, contradicts earlier decisions of the High Court which involved the same parties and issues.

We are of the considered view that this ground is not properly before us because the issue it raises was not raised in the court below. We are fortified in the view we have taken by the fact that a perusal of the record of appeal reveals that it is bereft of any reference to the issue. Further, counsel for the Appellants, Mr. S.S. Zulu SC was not in any way helpful to the court as he appeared to have been at sea not only with regard to whether or not the issue in

question was raised in the court below but in relation to several other issues relating to this appeal.

We have stated on number of occasions that at appeal stage, a party cannot advance a ground of appeal which raises an issue that was not raised in the court below. In determining this ground we stand by that position and state that it is no answer to state, as counsel for the Appellants stated, that the issue raises a point of law which we must consider regardless of the fact that it may not have been raised in the court below. This argument has not been convincing because: there is no evidence on record to show that indeed the reliefs sought in the other matters were similar to the reliefs sought in this matter; that the parties in those matters were the same as the parties in this matter; and the issues were determined on the merits and not at interlocutory stage. This ground must, therefore, also fail.

Finally, we turn to consider ground 6 which contends that it was a misdirection on the part of the Learned High Court Judge to hear the mater when it should have been referred to arbitration

pursuant to the order of this court in the matter between the Third Respondent and First Appellant under Appeal number 07 of 2006.

The fate of this ground is similar to the fate suffered by ground 5, because the issue raised in the ground was not raised in the court below.

In terms of section 10 of the ***Arbitration Act***, a court is obliged to stay proceedings and refer parties to arbitration if their dispute is presented to the court in contravention of an arbitration agreement. However, in order for a court to make such a referral order, there must be a specific request made by one of the parties to the dispute to stay the court proceedings and refer the parties to arbitration. The relevant portion of section 10 of the ***Arbitration Act***, in this regard, states as follows:

> *"A court before which legal proceedings are brought in a matter which is the subject of an arbitration agreement* ***shall, if a party so requests*** *..., stay those proceedings and refer the parties to arbitration ..."*

(The bold and underlining is ours for emphasis only).

We have perused the record of appeal and have not found any request by any of the parties in the court below for a stay of proceeding and referral of the parties to arbitration in terms of section 10 of the ***Arbitration Act***. Further, the contention and argument by the Appellants that the referral was made in the matter before this court between the Third Respondent and First Appellant under appeal No.07 of 2006, is untenable, in as far as it is suggests that it is a referral order. The reason for this is that, the wording of section 10 of the ***Arbitration Act*** is such that the request for a stay of proceedings and referral of the parties to arbitration must be made in the cause or matter that is currently before the court. The referral cannot arise out of earlier proceedings as alleged, which could not have anticipated the later dispute.

Therefore, since the issue of stay of proceedings and referral of the parties to arbitration was not raised in the court below, it cannot be raised in this appeal. This is quite apart from the fact that counsel for the Appellants conceded that the dispute from

which the referral order was made was in respect of the petition to wind up the company. Therefore, this is the dispute that the parties should have taken to arbitration and not the disputed before us which relates to ownership, share-holding and status of the First and Second Respondents. Consequently, ground 6 also lacks merit and must fail.

Having found that all six grounds lack merit and have failed, we dismiss the appeal with costs, both in this and the court below.

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I.C. MAMBILIMA
CHIEF JUSTICE

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M. MUSONDA SC
SUPREME COURT JUDGE

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N.K. MUTUNA
SUPREME COURT JUDGE