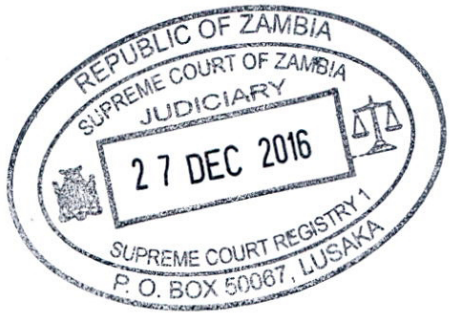
IN THE SUPREME COURT OF ZAMBIA **Appeal No. 232/2013**
HOLDEN AT LUSAKA **SCZ/8/84/2013**
(Civil Jurisdiction)



BETWEEN:

MORGAN KALABA **APPELLANT**

AND

ABRAHAM MULENGA **RESPONDENT**

Coram: Phiri, Hamaundu and Chinyama, JJS.
On 24th May, 2016 and on 23rd December, 2016.

For the Appellant: Mr. G. Nyirongo of Nyirongo & Co.

For the Respondent: Mr. J. Mataliro with Mrs. D.N. Chibombe, both of Mumba Malila and Partners.

J U D G M E N T

Chinyama, **JS**, delivered the Judgment of the Court.

Cases referred to:-

1. **Agip Zambia Limited v L.K. Motors and Another, Appeal No. 26 of 2002.**
2. **Stanley Mwambazi v Morester Farms Limited (1977) ZR 108**
3. **Shilling Bob Zinka v Attorney General (1990-1992) ZR 70**
4. **NFC Africa Mining PLC vs Techro Zambia Limited (2009) ZR 236**

Statutes referred to:-

1. **The High Court Act, Chapter 27 of the Laws of Zambia, Orders 35 and 47.**
2. **The Supreme Court Act, Chapter 25 of the Laws of Zambia, Rule 58.**

This is an appeal, according to the Notice of Appeal dated 24th January, 2011, against the ruling of the High Court delivered on 19th October, 2010, in which the judge declined to set aside judgment which he delivered after hearing an appeal from the subordinate court in the absence of the appellant. It is stated in the Notice of Appeal that the appeal was against the ruling as decided that the appellant was not the bona fide purchaser of house number 240 c4 (otherwise C4-240) Wusakile, Kitwe. A Memorandum of Appeal was filed on 13th December, 2013 couched in the following terms:-

> "...
> **The Appellant Morgan Kalaba appeals to the Supreme Court against the whole judgment delivered on 24th June, 2010 on the following grounds;**
>
> **GROUND ONE**
> **The Lower Court erred at law and fact when it held that the Appellant had not demonstrated any defence on the merits when in fact there is a plethora of evidence on the record.**"

Although the Notice of Appeal indicates that it is an appeal against the ruling of the court below, the Memorandum of Appeal,

however, shows that the appeal is against the judgment of the High Court dated 24th June, 2010.

In the court below the appellant was the respondent while the respondent was the appellant. For the avoidance of confusion, we shall, in this judgment, refer to the parties by their designations here in the Supreme Court.

The background to this appeal as disclosed by the record of appeal is that the appellant, Morgan Kalaba, commenced an action in the subordinate court for a restraining order on the basis that he had bought the house, number C4-240 Wusakile, Kitwe and that the court should order the defendants who included the respondent, Abraham Mulenga, to release the documents for the house and effect change of ownership.

Events leading to the subordinate court proceedings, as disclosed in the record of appeal, were that the respondent was a tenant of the Zambia Consolidated Copper Mines Limited (ZCCM) at house number D6-4 Wusakile, Kitwe since 1992. When ZCCM started selling its houses following the announcement of Government's home empowerment programme, the respondent was relocated to house number C4-240 so that house number D6-4

could be allocated to a ZCCM employee who was to buy it. On 19th August, 1999 the respondent was offered house number C4-240 Wusakile, Kitwe by ZCCM to purchase at K600,000.00. Thereafter, the respondent allowed the appellant to occupy house number C4-240 while he went to live elsewhere.

On 11th July, 2000 the respondent agreed in writing to sell the house number C4-240 at K200,000 to the appellant who immediately made an initial payment of K70,000.00. There is disagreement whether or not the purchase price agreed between the parties was ever settled in full. This issue was contended in both the subordinate court and the High Court. The appellant, while in occupation of the house, however, went on to renovate and extend it.

Meanwhile on the 20th May, 2008, the respondent paid ZCCM K600,000.00 being the purchase price for house number C4-240. The foregoing were the matters leading to the proceedings in the subordinate court.

In the subordinate court the magistrate found in favour of the appellant and ordered the change of ownership of the house to be

effected into his name. The respondent was displeased. He appealed to the High Court.

On 10th June, 2010 the date set for the hearing, however, the appellant was not present. He sent his uncle or nephew, McGil Langi, to court with instructions that the court may proceed to render judgment in his absence. The court decided to hear the matter afresh obviously in conformity with Order 47/20 of the **High Court Rules** (**HCR**). The respondent was, therefore, the only witness in those proceedings. He told the court that the appellant had agreed to settle the balance of the purchase price (K130,000.00) in two days' time and that he had told the appellant that if this was not done he would call off the deal and keep the K70,000.00. The appellant did not honour the deal and differences ensued. He stated that on 20th May, 2008, he learnt that ZCCM had not sold the house number C4-240 to anyone. He went and paid the K600,000.00.

In its judgment dated 24th June, 2010, the High Court appeared to accept the evidence of the respondent. The judge went on to find as a fact that ZCCM had offered the respondent house number C4-240 to purchase at K600,000.00 and he paid the said

amount as consideration. The judge also found that the appellant had breached the agreement between the parties of 11th July, 2000 (regarding the payment of the balance for the house). The judge consequently reversed the magistrate's decision and ordered the appellant to vacate the house within fourteen (14) days from the date of judgment.

Disenchanted by the High Court's action in hearing the matter in his absence and proceeding to render judgment, the appellant applied to set aside the said judgment before the judge. In the ruling on the application delivered on 19th October, 2010, the learned judge determined, on the evidence before him, that the appellant had not rebutted the respondent's evidence that he (appellant) had not paid the full purchase price before he took vacant possession of the house. Conversely, that the respondent's affidavit evidence had shown an offer from ZCCM, a contract of sale for the house and a receipt evidencing his payment of the purchase price to ZCCM. The judge ruled that no "defence on the merits" was disclosed by the appellant. The application to set aside judgment was dismissed with costs.

The appellant was once more disconsolate about the ruling of the court below dismissing his application to set aside judgment of the High Court, hence this appeal. The foregoing is the background to this appeal.

At the hearing of the appeal, Counsel for the appellant, Mr. Nyirongo, relied on the Appellants' Heads of Argument which he augmented with oral submissions. It was submitted that the lower court erred at law and in fact in rejecting the application to set aside the judgment of 24th June, 2010 when the evidence on record and the circumstances surrounding the proceedings of 10th June, 2010 clearly do not support the position adopted by the court. It was contended that the appellant was not heard even though the reasons for his non-availability were given to the court through his representative. The case of **AGIP Zambia Limited v L.K. Motors**[1] was cited in which we stated that any judgment not on the merits was liable to be set aside. The case of **Stanley Mwambazi v Morester Farms Limited**[2] was also relied upon in which we held that:-

> **"It is the practice in dealing with bona fide interlocutory applications for courts to allow triable issues to come to trial despite the default of the parties; where a party is in default he may**

be ordered to pay costs, but it is not in the interest of justice to deny him the right to have his case heard."

It was submitted that the appellant's affidavit in support of summons to set aside judgment obtained in his absence demonstrate strong evidence that the appellant would have loved to be present before the court had he been accorded the chance.

Mr. Nyirongo submitted that it was not proper for the court below to proceed in the absence of the appellant in the manner it did as there is no procedure in the High Court whereby a litigant can indicate through a third party that the court could proceed in his absence. It was argued that according to **Order 35/3** of the **HCR**, the High Court can only proceed in the absence of a defendant if his/her absence is not sufficiently explained. It was submitted that in this case, the appellant's absence from the proceedings was sufficiently explained as he had sent his uncle or nephew to explain to the court that he was unable to attend because he did not obtain permission from his employers. Moreover, it was argued that since the judge had ordered a re-trial, the appellant should have been heard especially that the case was coming up for the first time in the High Court.

In opposing the appeal, Mr. Mataliro, counsel for the respondent, relied on the Heads of Argument which he also augmented with oral submissions. It was submitted that it is not clear what is being appealed against between the ruling and the judgment of the court below as the Notice of Appeal indicates that it is an appeal against the High Court ruling while the Memorandum of Appeal states that it is an appeal against the judgment.

As regards the argument that the appellant was not heard, it was contended that he was given sufficient opportunity to be heard as shown by the fact that being aware of the hearing of the appeal, he sent his nephew to court with the message that the appeal hearing could proceed and judgment rendered. It was argued that in civil appeals the court is not barred from proceeding ex-parte upon proof of service as provided under Order 47/16 of the **HCR**. Therefore, that the rules of natural justice as we espoused in the case of **Attorney General V. Shilling Bob Zinka**[3] were observed; that the appellant cannot say that he was not heard and the judge cannot be faulted for refusing to set aside the judgment.

On **Order 35** of the **HCR,** Mr. Mataliro submitted that it relates to proceedings in the High Court when it sits at first

instance and not as an appellate court. He argued that Order 47 of the **HCR** is what applies to appeal proceedings. Counsel highlighted Order 47 (17), (18) and (20) of the **HCR** which deals with procedure in the absence of a party. It was, therefore, submitted that the judge in the court below was on firm ground when he relied on the representation made by the appellant's uncle/nephew.

Regarding the appellant's submission that the matter ought to have been determined on its merits, counsel responded that the learned judge considered the merits of the defence which he found wanting and that he actually reviewed his own judgment in the ruling. It was submitted that although the appellant argued that he had paid the purchase price for the house in full the evidence on record shows that he did not pay the balance of K130,000.00 thereby breaching the contract of sale with the effect that the contract was repudiated and the deposit paid forfeited.

It was finally, though not least, submitted that it was the merits of the defence rather than the reasons for non-attendance that were considered and the judge found no merit in the defence. We were, accordingly, urged sustain the findings by the court below and to dismiss the appeal with costs.

In reply, Mr. Nyirongo insisted that **Order 35** of the **HCR** ought to have regulated the proceedings in the court below since a re-trial had been ordered in which case **Order 47** of the **HCR** could not apply to the proceedings.

We have considered the appeal as well as the parties' arguments and the authorities cited. We have also considered the Ruling and the judgment of the Court below.

The issues that beg determination in our view are:

(i) whether the appeal in this matter is competent bearing in mind Mr. Mataliro's point that the Notice of Appeal and the Memorandum of Appeal are at variance; and

(ii) whether the court below should have set aside its judgment on the ground that the respondent was not heard; that the court below having decided to hear the evidence afresh should have proceeded in terms of Rule 35 of the HCR and given an opportunity to the appellant to state his case.

Regarding the first issue, it is clear that the notice of appeal addressed the decision in the ruling while the memorandum of appeal addressed the judgment of the court. Rule 58 (2) of the

Supreme Court Rules (**SCR**) requires a memorandum of appeal to "**set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the judgment appealed against**" and to "**specify the points of law or fact which are alleged to have been wrongly decided**..." It goes without saying that the memorandum of appeal states the distinct grounds of appeal relied upon and complements the notice of appeal. The intention stated in the notice of appeal and the grounds of appeal stated in the memorandum of appeal must refer to the same decision. The two cannot refer to different decisions even if they are in the same cause. In the case of **NFC Africa Mining Plc vs Techpro Zambia Limited**[4] we held to the effect that where there was no memorandum of appeal against a ruling, the record of appeal had not been drawn up in the prescribed manner and the appeal was incompetent. In circumstances such as the present in which there is a notice of appeal and a memorandum of appeal which are at variance, the outcome must be that the record of appeal has equally not been drawn up in the prescribed manner and, therefore, that the appeal is incompetent.

Having so ruled, it is otiose to resolve the rest of the issues we posed for ourselves. We accordingly, dismiss the appeal for being incompetent with costs to the respondent.

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G.S. PHIRI
SUPREME COURT JUDGE

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE