

**IN THE COURT OF APPEAL  
HOLDEN AT NDOLA  
(Civil Jurisdiction)**

**APPEAL NO 46/2017**

**MOTALA WHOLESALERS**

**APPELLANT**

**AND**

**PROFESSIONAL INSURANCE CORPORATION ZAMBIA PLC**

**RESPONDENT**



**Coram: Chisanga, JP, Chashi and Mulongoti, JJA**

**On the 2<sup>nd</sup> day of August 2017 and 6<sup>th</sup> November 2017**

*For the Appellant: L.C. Zulu, Messrs Malambo & Company*

*For the Respondent: Mrs B. Banda In-house counsel of PICZ*

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**JUDGMENT**

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**Chisanga, JP**, delivered the judgment of the court.

Cases referred to:

1. *Kearney & Company Limited vs Agip (Z) Limited and others* (1985) ZR 7
2. *Omar vs Zambia Airways Corporation* (1986) ZR 23
3. *Munali Insurance Brokers & Author vs Attorney General and others* (2010) 2 ZR 60
4. *Evans vs Bartlam* (1937) *The Law Reports* page 473

Legislation Referred to:

1. *Order XXX Rule 10 of the High Court Rules CAP 27 of the Laws of Zambia*

This appeal arises from an order made by the learned judge in the court below, wherein she stated that she had no jurisdiction to hear an appeal from the deputy registrar, as the order appealed against had been executed by the respondent who is plaintiff in the court below.

The background to that order is that the plaintiff, now respondent, commenced an action against the defendant, now appellant, for recovery of the replacement value of a motor vehicle, namely Honda CRV registration number ALK 5214, belonging to the plaintiff's insured, one George Imbuwa. Said insured was involved in an accident with the alleged servant, employee or agent of the defendant, one Bauti Mwanza who allegedly negligently drove the defendant's vehicle, a volvo truck registration No ALC 5789. The plaintiff paid its insured the replacement value of his vehicle, and sought to recover the amount so paid by the action brought against the defendant.

Upon being served with the originating process the defendant's advocate entered conditional appearance and took out an application to set aside that originating process, on the grounds that the Writ of Summons and Statement of Claim were irregular, as the defendant had never owned motor vehicle volvo truck registration No. ALC 5789, and that therefore, the action disclosed no reasonable cause of action, was frivolous, vexatious and otherwise an abuse of court process. The other ground on which it was sought to set aside the process were that the defendant was a business name, thus wanting in capacity, and that the Writ of Summons was not endorsed with the electronic mail address.

The affidavit in support of the application was sworn by one Ahmed Ishmail Motala, proprietor of the defendant. He deposed that the defendant had never owned motor vehicle volvo truck registration No. ALC 5789, and that the defendant was a business name. He also deposed that he had been advised that

the action did not disclose a cause of action and was frivolous, vexatious and an abuse of court process.

The application was opposed through affidavit sworn by one Moses Kaunjika legal manager in the plaintiff company. The deponent observed that the defendant had not produced any evidence to support its claim that it was not the owner of the truck in question. He also asserted that a search had been conducted at the Patents and Company Registry Agency, but the entity known as Motala Enterprises was revealed by the search. He expressed the view that the defect was not fatal to the originating process as it was curable. So was the omission to endorse the email address on the originating process by the plaintiff.

Upon hearing the application, the learned deputy registrar held that a cause of action had been disclosed by the plaintiff, and the issues raised should be dealt with at trial, where the judge would determine whether or not the defendant owned the truck. It was her view that it would be highly irregular to dismiss or strike out the action at that stage. Further, the learned deputy registrar ordered that the amended writ be filed and served on the defendant within fourteen days, and condemned the plaintiff in costs. This order was made on 24<sup>th</sup> November, 2016.

The appellant was dissatisfied with the decision of the deputy register, and took out a Notice of Appeal to a judge in chambers on 11<sup>th</sup> January, 2017. The grounds of appeal were that the deputy registrar erred in law and fact when she



ordered the plaintiff to submit an amended Writ of Summons and Statement of Claim within 14 days, and in declining to set aside the originating process.

When the matter was called for hearing, learned counsel appearing for the defendant, who was appellant to that appeal, noted that the motion before the court was required to be filed within seven days after the order appealed against. He explained that they were served belatedly, and he was now applying for leave.

The judge, without hearing from the plaintiff who was respondent to the appeal before her, made a ruling dismissing the appeal for being improperly before the court, as the defendant's advocate did not stay the learned deputy registrar's ruling, the matter having been overtaken by events as a result.

It is that order that is appealed against by the appellant, on the ground that the court misdirected itself on the facts and law, in deciding that it had no jurisdiction to hear the appeal.

The arguments advanced in the appellant's heads of argument are to the following effect. As established by authority an appeal from a deputy registrar to a Judge in chambers is a rehearing. Parties may even file supplementary affidavits, as held in ***Kearney & Company Limited vs AGIP (Z) Limited and Others***<sup>1</sup>, ***Omar vs Zambia Airways Corporation***<sup>2</sup>. That being the case, the learned judge, in rehearing the application, should have considered whether a

cause of action had indeed been disclosed. Support for this argument is derived from ***Munali Insurance Brokers & Another vs Attorney General***<sup>3</sup>.

It is contended that the court misdirected itself in declining to rehear an application properly before it, particularly the assertion that a cause of action had not been disclosed. It is further argued that a judge sitting in appeal can overrule the holding of the deputy registrar whether or not the Order of the deputy registrar has been complied with. We were urged to uphold the appeal, and order that the appeal be reheard before another judge.

The respondent's arguments as stated in its heads of argument are that the appeal in the court below was improperly before that court, as the order that was being appealed against had already been executed. It is contended that the appellant did not obtain a stay of execution, and that an appeal to the judge did not act as a stay. Therefore, the appeal before the learned judge was overtaken by events and could not be heard on its merits. The court was thus on firm ground in ordering that it did not have jurisdiction to hear the appeal.

At the hearing learned counsel for the appellant placed reliance on the heads of argument. He pointed out that although the names of the party were amended, the claim was not amended, and did not disclose a cause of action. Therefore, according to learned counsel, the learned trial judge should have heard and determined the objection raised by the appellant.

Learned counsel for the respondent equally placed reliance on the heads of argument and drew the court's attention to page 32 of the record of appeal where the deputy registrar held that a cause of action was disclosed by the respondent.

The response from learned counsel for the appellant was that even though the deputy registrar had found a cause of action disclosed, this did not preclude the learned judge from rehearing the matter, as she was not bound by the deputy registrar's ruling. Learned counsel conceded that the issue relating to the parties by the writ had been taken care of by the amendment, but the question whether or not a cause of action had been disclosed remained to be heard and determined by the learned judge, and this, she ought to have done, and not declined jurisdiction as she did.

We have considered the arguments of both parties. **Order XXX rule 10 of the High Court Rules CAP 27 of the Laws of Zambia**<sup>1</sup> enacts the following:

*10 (1) Any person affected by any decision, order or direction of the registrar may appeal therefrom to a judge at chambers. Such appeal shall be by notice in writing to attend before the judge without a fresh summon, written seven days after the decision, order or direction complained of, or such further time as may be allowed by a judge or the registrar. Unless otherwise ordered, there shall be at least one clear day between service of the notice of appeal and the day of hearing. An appeal from the decision, order or direction of the registrar shall be no stay of proceedings unless so ordered by a judge or the registrar.*



The appeal to the judge from the decision of the deputy registrar was thus made pursuant to this provision. It is established that a judge hearing an appeal on a decision made by a deputy registrar exercises unfettered discretion in instances as the present one. This is because the proceedings are by way of a rehearing, and the judge's exercise of discretion is not circumscribed by the test which applies to appeals in an appellate court.

The Supreme Court of Zambia restated this position in ***Kearney & Company Limited vs Agip Limited and others*** *supra*, where it held inter alia that an appeal from a deputy registrar to a judge in chambers is an entirely fresh application and it is not improper, to lodge further affidavits which should be taken note of by the appellate judge. This decision echoes ***Evans vs Bartlam***<sup>4</sup>, a decision of the House of Lords.

In that case the defendant had betting transactions with, resulting in indebtedness to, the plaintiff. The latter's agent threatened to report the defendant as a defaulter if he failed to pay the losses. Thereupon the defendant, as the plaintiff alleged, promised to pay. The defendant not having paid, the plaintiff brought an action against him for the amount, but the defendant failed to enter an appearance within the stipulated time and judgment was signed against him by default. In reply to an application by the plaintiff's solicitor for payment of the amount of the judgment, the defendant asked for time so that he could make arrangements to pay, and time was given to him. Subsequently, the defendant entered an appearance to the writ, applied to have the judgment set

aside, and for leave to defend. The master dismissed the application, but Greaves-Lord J. in chambers set aside the judgment and gave leave to defend upon terms.

On appeal, the Court of Appeal came to the conclusion that the judge was precluded from exercising his discretion to set aside the judgment by the fact that with the knowledge of the judgment the defendant applied for the matter to stand over for him to see if he could arrange to pay, and the plaintiff had consented to let it stand over for seven days.

On appeal to the House of Lords, it was held that:

***“Where a discretionary jurisdiction is given to the court or a judge, the judge in chambers is in no way fettered by the previous exercise of discretion by the master, although no doubt he will give the weight it deserves to that decision.***

***A judgment debtor who asks for and obtains a stay of execution does not thereby approbate the judgment or elect to treat it as binding so as to preclude him from thereafter seeking to set it aside whether on appeal or otherwise.***

***While the Court of Appeal will not normally interfere except on grounds of law with the exercise of the judge’s discretion, if injustice is being done, the Court of Appeal has both the power and the duty to remedy it”.***

Turning to the present case, the cited cases define the parameters of the jurisdiction of a judge hearing an appeal from the deputy registrar. Although he will have regard to, and give weight to the exercise of discretion by the deputy



registrar, he exercises discretion afresh. Nor is that exercise of discretion affected by the execution of an order made by the deputy registrar by the affected party. This is manifest from rule 10 itself. The rule states in effect that where an appeal is made to the judge, there is no automatic stay of the proceedings, unless so ordered by the judge or registrar. The wording of the rule portends that steps will continue to be taken in the action, notwithstanding that an appeal is pending, if a stay of proceedings is not ordered. This includes execution of the order or direction appealed against.

As the judge is to exercise unfettered discretion on appeal, we fail to discern how execution of the deputy registrar's order or direction would have the effect of fettering his discretion. This is on account of the intendment of the rule in question, which is that the judge is to determine the parties' rights, and he or she is entitled to exercise his or her discretion as though the matter came before the judge for the first time. If by the time the judge is exercising their discretion the order or direction of the deputy registrar would have been effected and the judge's decision overturns that of the deputy registrar, no insurmountable obstacle is put in the way of the successful party. We would liken the situation to the reversal of a decision of a trial judge by an appellate court, after the judgment of the trial judge has been executed. In such an instance, the appellate court will direct the respondent to restore to the appellant the property transferred under the overturned judgment or money paid pursuant to the said judgment. It will be


noticed that in such instances, the appellate court's exercise of its jurisdiction is not hampered by the execution of the judgment appealed against.

Likewise in the present case. The learned judge erred in declining to hear and determine the appeal, as she had jurisdiction to exercise her discretion, and determine the rights of the parties *denovo*.

We thus allow the appeal and remit the case back to the High Court for hearing of the appeal before another High Court judge. Each party will bear own costs.

Dated the .....day of .....,2017.

  
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**J. CHASHI**  
**COURT OF APPEAL JUDGE**

  
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**F. M. CHISANGA**  
**JUDGE PRESIDENT**  
**COURT OF APPEAL**

  
.....  
**J. Z MULONGOTI**  
**COURT OF APPEAL JUDGE**