

IN THE CONSTITUTIONAL COURT OF ZAMBIA

2017/CCZ/0006

AT LUSAKA

*(Constitutional Jurisdiction)*

IN THE MATTER OF ARTICLE 128 OF THE CONSTITUTION

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLE 134 OF THE  
CONSTITUTION OF ZAMBIA

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLE 125 OF THE  
CONSTITUTION OF ZAMBIA

IN THE MATTER OF SECTION 123(1) OF THE CRIMINAL PROCEDURE CODE CHAPTER  
88 OF THE LAWS OF ZAMBIA

BETWEEN:

HAKAINDE HICHILEMA  
HAMUSONDE HAMALEKA  
MULEYA HACHINDA  
MULILANDUBA LASTON  
HALOBA PRETORIUS  
CHAKAWA WALLACE  
AND

GOVERNMENT OF THE REPUBLIC OF ZAMBIA



1<sup>ST</sup> PETITIONER  
2<sup>ND</sup> PETITIONER  
3<sup>RD</sup> PETITIONER  
4<sup>TH</sup> PETITIONER  
5<sup>TH</sup> PETITIONER  
6<sup>TH</sup> PETITIONER

RESPONDENT

Coram: Chibomba PC, Sitali, Mulenga, Mulembe and Munalula, JJC on 14<sup>th</sup> July, 2017  
and 28<sup>th</sup> March, 2018.

*For the Petitioners:* Mr. J. Sangwa, SC, of Simeza, Sangwa & Associates

*For Respondent:* Mr. L. Kalaluka, SC, Attorney General and Mr. F. K. Mwale,  
Principal State Advocate.

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## RULING

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Mulembe, JC, delivered the Ruling of the Court.

Cases referred to:

1. Samuel Kamau Macharia and another v KCB Limited and 2 others, Application No.2 of 2011

Legislation referred to:

1. The Supreme Court Rules, Chapter 25 of the Laws of Zambia
2. Constitutional Court Rules, Statutory Instrument No.37 of 2016
3. Constitutional Court Act No. 8 of 2016

This is the Petitioners' application to reopen and rehear the Respondent's Motion to dismiss the Petitioners' Petition made pursuant to Order IX rule 20 of the Constitutional Court Rules 2016.

According to the Affidavit in Support of the application deposed to by John Sangwa, State Counsel, the facts leading to this application are that on 5<sup>th</sup> June, 2017 two petitions were filed against the Republic of Zambia – one in this Court pursuant to Article 128 of the Constitution of Zambia and the other in the High Court for Zambia pursuant to Article 28 of the Constitution. That on 7<sup>th</sup> June, 2017 the Attorney General filed two motions, one before this Court and the other before the High Court. It was averred that the Attorney-General's application before this Court was to dismiss the Petition on the premise that the filing of the same by the Petitioners was an abuse of the court process and that it amounted to multiplicity of actions. That before the High Court, the Attorney-General's

application was that the proceedings before it be stayed pending the hearing and determination of the application before this Court.

It was further averred that the application before the High Court was heard on 12<sup>th</sup> June, 2017 and the Ruling was delivered on 16<sup>th</sup> June, 2017 whereas the application before this Court was heard on 15<sup>th</sup> June, 2017 and the Ruling was yet to be delivered. That although the application before the High Court by the Attorney-General was for those proceedings to be stayed pending the outcome of the Attorney General's application before this Court, the High Court in its Ruling dismissed the Petitioners' petition.

It was averred that the High Court had effectively extinguished the basis of the Attorney-General's application before this Court, hence this application.

In his oral submissions at the hearing of the instant application, learned State Counsel, Mr. Sangwa, reiterated what was stated in the affidavit in support of the application. In addition, Mr. Sangwa, SC, submitted that he had received the Affidavit in Opposition from the Attorney-General and that the only ground he could decipher from the said affidavit is that an appeal had been lodged against the Ruling



of the High Court. State Counsel Sangwa argued that he got the impression that if there had been no such appeal then there would have been no cause to oppose the instant application. He contended that the fact that a notice of appeal had been filed did not undermine the application before this Court. Mr. Sangwa, SC, referred to Rule 51 of the Rules of the Supreme Court, which reads:

**“An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.”**

Mr. Sangwa, SC, contended that there was no order staying the decision of the High Court. That it was the Petitioners' position that there was no cause before the High Court and, further, that the fact that there was a notice of appeal had no bearing or impact on the application before this Court. Mr. Sangwa, SC, submitted that this was an appropriate case in which the Court can reopen and rehear the matter based on the facts submitted.

In the Affidavit in Opposition to summons to reopen and rehear the Respondent's Motion to dismiss the petition deposed to by Frederick Imasiku, Principal State Advocate, it was averred that contrary to assertions in the Petitioners' affidavit, the Petitioners had filed a

Notice of Appeal together with a Memorandum of Appeal into the Supreme Court dated 22<sup>nd</sup> June, 2017 against the Ruling of the High Court dated 16<sup>th</sup> June, 2017.

Learned Attorney-General, Mr. Kalaluka, SC, in his oral submissions opposing the application to reopen and rehear the Respondent's Motion to dismiss the petition argued that Order IX rule 20 of the Constitutional Court Rules, the provision pursuant to which this application had been brought, provides for filing of an interlocutory application. Mr. Kalaluka, SC, submitted that the Court should address and pronounce itself on whether an application such as the instant one can be premised on Order IX rule 20.

It was the Attorney General's view that the application was not supported by law in that there is no law which allows the reopening or rehearing of an application before the Court delivers its ruling. Mr. Kalaluka, SC, contended that the Petitioners ought to have waited for the Ruling of this Court and then thereafter requested for a review. He proceeded to submit that this Court has authority or discretion to take judicial notice of the Ruling of the High Court. Mr. Kalaluka, SC, submitted that the fact that the Petitioners had appealed against

the High Court's decision meant that the basis upon which this application was made was no longer there. It was his contention that the appeal had given life to the dismissed proceedings and there were proceedings, whether in the High Court or Supreme Court, dealing with the same issues raised in the petition. Mr. Kalaluka, SC, asserted that the reasons for dismissal of the petition before this Court still applied as there was the possibility that the High Court matter ought not to be dismissed, meaning, there was no change in the possibility of two conflicting decisions.

In reply, Mr. Sangwa, SC, argued that there was no way the Petitioners could have anticipated that an application to stay would result into a dismissal of the matter before the High Court. Learned State Counsel contended that other than referring to Order IX rule 20, the Court should exercise its inherent jurisdiction and reopen the application to dismiss as the Court has to do justice. In countering the Attorney-General's position that the Petitioners should have waited for a Ruling from the Court before filing the instant application, Mr. Sangwa, SC, argued that the Petitioners were of the view that this was the right thing to do.



On the Attorney General's argument that the Petitioners' appeal had given life to the proceedings in the High Court, Mr. Sangwa, SC, contended that the matter before the High Court was dismissed and there was no cause or petition before that court. That it would remain the position unless the Supreme Court says otherwise. He submitted that the Court has to pronounce itself on the facts as they stood and not on what was likely to turn out in the future.

We have given due consideration to the submissions and the affidavit evidence in this application. The key question for our consideration is whether this Court can reopen and rehear an application in which a decision or ruling is pending. However, before we address that question, it is imperative that we establish whether this Court has jurisdiction to entertain the instant application.

This application was brought pursuant to Order IX rule 20 of the Constitutional Court Rules. Rule 20(1) is in the following terms:

**"An interlocutory application under the Act shall be by summons or notice of motion, as the case may be."**

Mr. Kalaluka, SC, submitted that the Court needed to address and pronounce itself on whether an application of this nature can be premised on Order IX rule 20 of the Constitutional Court Rules.

From the record, we note that the Court did not have the benefit of a reaction on this particular aspect from Mr. Sangwa, SC. Be that as it may, our view on this point is brief. This application, by its very nature, is interlocutory. Order IX rule 20(1), as we have noted, provides guidance on the commencement of interlocutory applications. In our considered view, this application is properly before this Court.

We now turn to the main issue that falls for our consideration. As noted in the submissions *supra*, this application, brought by the Petitioners, was preceded by the Respondent's application to dismiss the Petition on the grounds that a similar or identical petition had been filed in the High Court for Zambia and that the filing of the same was an abuse of court process and a multiplicity of actions. Before we could render our decision on the Respondent's application, the Petitioners initiated this application premised on the argument that the High Court had dismissed the petition filed before it and the grounds for the Respondent's application to dismiss the Petition in this Court no longer subsist. The counter-argument from the Respondent is that the Petitioners have lodged an appeal in the



Supreme Court against the dismissal of the petition in the High Court and that the appeal has given life to the dismissed proceedings.

We note that both parties to this application did not provide any authorities in support of their arguments upon which this Court can reflect in respect of their contesting positions. We further note that the Constitutional Court Rules, which guide the practice and procedure of this Court, are silent on whether this Court can reopen and rehear a matter on which it is yet to render a verdict. Neither is there any guidance from the Constitutional Court Act on reopening and rehearing matters where a ruling is pending. We are mindful of, though not bound by, the sentiments expressed by the Supreme Court of Kenya in **Samuel Kamau Macharia and another v KCB Limited and 2 others** that:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

Mr. Sangwa, SC, urged this Court to invoke its inherent jurisdiction and reopen the application to dismiss so as to do justice. In the circumstances of this application, we do not see any strong basis or convincing grounds upon which we can summon this Court’s

inherent powers. In this regard, we agree with the learned Attorney-General that, since the Petitioners have launched an appeal in the Supreme Court, the grounds upon which the application to dismiss the Petition was premised still stand. Although the petition that was commenced in the High Court was dismissed by that court, it is still active in the litigation process through the appeal lodged in the Supreme Court. In our considered view, the issues upon which the Respondent's application to dismiss the Petition in this Court was based still remain and it is incumbent upon this Court that we pronounce ourselves on those issues.

This application is unmeritorious and is accordingly dismissed. Each party shall bear its own costs.



H. Chibomba

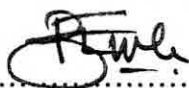
President

Constitutional Court



A. M. Sitali

Constitutional Court Judge



E. Mulembe

Constitutional Court Judge



M. S. Mulenga

Constitutional Court Judge



M. M. Munalula

Constitutional Court Judge