IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 225 OF 2019

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

ZAMBIA NATIONAL COMMERCIAL BANK PLC **APPELLANT**

AND

SIWILA INVESTMENTS LIMITED **1st RESPONDENT**

EVERLIGHTER NDHLOVU (Suing as Administratrix of the estate of the late Christopher Siwila Ndhlovu) **2nd RESPONDENT**

AGRO FUEL INVESTMENTS LIMITED **3rd RESPONDENT**

CORAM: Chashi, Lengalenga and Ngulube, JJA

ON: 18th February and 23rd April 2021

For the Appellant: *A. Mwalula (Mrs.), Messrs Ndemanga Mwalula and Associates*

For the 1st and 2nd Respondent: *A. Banda, Messrs Apton and Partners*

For the 3rd Respondent: *D. Mtonga, Messrs Paul Norah Advocates*

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. **Simeza and Three (3) Others v Mzyeche - SCZ Appeal No. 87 of 2011**
2. **Shocked and Another v Goldschmidt and Others (1998) 1 All ER, 372**
3. **Chifuti Maxwell v Chafingwa Rodney Mwansa and Another - SCZ Judgment No. 9 of 1999**
4. **Allen v Alfred McAlpine and Sons Limited (1968) All ER, 543**
5. **Brian Musonda (Receiver of First Merchant Bank Zambia Limited (In Receivership)) v Hyper Food Products Limited and Others (1999) ZR, 124**
6. **Tata Zambia Limited v Shilling Zinka (1986) ZR, 51**
7. **Zambia National Commercial Bank and Agro Fuel Investments Limited v Everlighter Ndhlovu** (Suing as

Administratrix of the estate of the late Christopher Siwila Ndhlovu) - **SCZ Appeal No. 189 of 2014**

8. **New Plast Industries v The Commissioner of Lands and The Attorney General - SCZ Judgment No. 8 of 2001**

Rules referred to:

1. **The High Court Rules, Chapter 27 of The Laws of Zambia**
2. **The Supreme Court Practice (White Book), 1999**

1.0 INTRODUCTION

1.1 When we heard this appeal in Ndola on 18th February 2021, we sat with Honourable Mrs. Justice F. M. Lengalenga. She has since retired. Therefore, this Judgment is by the majority.

1.2 This appeal emanates from the Ruling of Honourable Mr. Justice Mathew L. Zulu delivered on 3rd September 2020, in which the learned Judge set aside the ruling (Judgment) of Hon. Mr. Justice E. E. Chulu which was delivered on 29th November 1999.

2.0 BACKGROUND

2.1 On 30th April 1999, Zambia National Commercial Bank Limited, as it then was, now the Appellant, commenced an action by way of Originating Summons, accompanied by an affidavit against Siwila Investments Limited, the 1st Respondent and Christopher Siwila Ndhlovu.

2.2 In the said summons, the Appellant was seeking the following reliefs:

(1) Delivery up by Christopher Siwila Ndhlovu to the Appellant of possession of the property comprised in the mortgage dated 4th November 1992 made in favour of the Appellant

(2) Payment of all monies due to the Appellant under the credit facility which stood at K8,523,049.04 as at 28th February 1999 and such costs as would be payable if this claim were not the only relief granted.

(3) That the said mortgage be enforced by foreclosure on the property.

(4) For the Appellant to exercise a power of sale over the property.

2.3 In its affidavit, deposed to by George Siziya, Senior Manager, Debt Recovery Department, in the employ of the Appellant, the deponent asserted that, the 1st Respondent obtained a loan from the Appellant which was guaranteed by Christopher Siwila Ndhlovu, who at the same time mortgaged his property, namely Lot No. 3976/M Ngwerere, Lusaka (the Property) as Security for the loan. The guarantee and the mortgage were executed on 4th November 1992 and accordingly registered. The action was commenced by the Appellant following the 1st Respondent's default in paying the loan.

2.4 The Originating Summons was opposed by the Respondents through an affidavit in opposition. When the matter came up for hearing before Chulu J, the Respondents were not before court. After considering the affidavit evidence and examination of the exhibited documents, the learned Judge found that there was an equitable mortgage created in favour of the Appellant over the Property and that Christopher Siwila Ndhlovu guaranteed the credit facility.

The learned Judge also found as a fact that the Respondents despite being reminded of their obligation to pay the debt, failed or neglected to do so without any justifiable cause.

2.5 The learned Judge consequently entered Judgment in favour of the Appellant and ordered the Respondent to liquidate the amounts owing within three (3) months. That if the Respondents defaulted in making the payment, the Respondents were obligated to deliver vacant possession of the Property and the Appellant was obligated to be at liberty to foreclose without further notice.

2.6 The Appellant on 11th April 2001 issued a Writ of Possession of the Property and subsequently sold the Property to the 3rd Respondent in 2002, who went on to obtain a Certificate of title in its name.

2.7 About eight (8) years later, after the Judgment of Chulu, J, Everlighter Soneni Ndhlovu, the widow to the late Christopher Siwila Ndhlovu (the Deceased) appeared on the scene as Administratrix of the Deceased's estate and issued an Originating Summons in February 2007 under cause No. **2007/HP/0168** against the now 3rd Respondent for removal of

caveat which had been placed on the Property on grounds that the Deceased was the registered owner of the Property. She also obtained an ex parte order for an injunction restraining the 3rd Respondent from occupying or doing any work on the Property. Honourable Mr. Justice P. Musonda, as he then was, on 26th February 2007 discharged the ex parte order of injunction, which had earlier been granted.

Musonda J, on 2nd March 2007 ruled that the issue of ownership of the Property had been determined in the foreclosure proceedings before Chulu, J wherein the Property was transferred to the Appellant, which in turn, sold the Property to the 3rd Respondent. The 3rd Respondent according to Musonda, J was a *bona fide* purchaser for value without notice of any encumbrance. The action was accordingly dismissed.

2.8 What then followed is that, the now 2nd Respondent took out another Originating Summons, this time against the Appellant under cause No. **2007/HP/0439** before Honourable Mrs. Justice C. B. Phiri. In the said action, she sought an order that there be no change of ownership of the Property. She alleged

that the Judgment by Chulu J, given on 29th November 1999 was irregularly obtained as no notice of hearing was served on the Deceased. Furthermore, that the Judgment was never served on her as Administratrix of the estate after it was delivered. That therefore, she was not aware of the court action. That in any case, there was a mortgage over the Property in favour of Leasing Finance Company Limited which had possession of title deeds at the time of the purported equitable mortgage in favour of the Appellant in respect of the Property.

2.9 Further that the Appellant only had an order of foreclosure *nisi* and not an order absolute and could not therefore sell the Property on that basis. The 2nd Respondent prayed that the Judgment of Chulu J, as well as the foreclosure be set aside.

2.10 After hearing the matter, Phiri J, held that the foreclosure process which culminated in the sale of the Property was irregular, unconscionable and was done in bad faith. The learned Judge rejected any suggestion by the Appellant that the action was *res judicata*, maintaining that the parties to the

action before her were different and the relief being sought was different.

The learned Judge further held that the action was not statute barred.

It was after that Judgment, that the 3rd Respondent applied for and was granted leave to join the proceedings.

2.11 Dissatisfied with the Judgment, the Appellant appealed to the Supreme Court against the Judgment of Phiri, J advancing six grounds of appeal. In its Judgment delivered on 11th August 2017, the Supreme Court noted that although Phiri, J, went on an extensive foray in determining many questions before she delivered her magistral Judgment in which she arrogated to herself the power to determine certain questions touching on the Property; that the real and only issue in the case was jurisdictional; did Phiri, J as High Court Judge have the power to make the orders that she did to torpedo or overrule the Judgment on foreclosure that was made by another High Court Judge involving the same property?

2.12 According to the Supreme Court, the question was not whether or not Chulu J, was procedurally or substantively right in

arriving at his Judgment of 29th November 1999. It was how a party aggrieved by that Judgment should further engage the judicial process to address any perceived transgressions of either procedural or substantive law.

2.13 The Supreme Court ruled that Phiri, J had no power to make the orders she made since Judges of coordinate jurisdiction should not overrule each other's decision or Judgments. The Supreme Court opined that, the 2nd Respondent chose a totally wrong forum to ventilate her grievances. They further stated that:

> *"All her complaints could have been channelled to the same cause in which Chulu, J, made the Judgment which she finds disagreeable or should have appealed that Judgment to us."*

The Supreme Court upheld the appeal by the Appellant with costs.

2.14 After the Supreme Court Judgment, the 1st and 2nd Respondents on 24th July 2017, applied by summons to set aside the Judgment of Chulu, J alleging that the Deceased died on 21st May 1999 before Chulu, J heard the matter and that

after being appointed as administratrix, she was never served with the Judgment nor was the 1st Respondent served at its registered office. According to the 2nd Respondent, she only learned of the Judgment much later in 2009; consequently, she found the Judgment sum and proceeded to make payment into court on 9th April 2009.

2.15 The 2nd Respondent further asserted that, the Appellant had never been in possession of the title deeds relating to the Property as they were with Finance Bank Zambia Limited, who had a legal mortgage over the Property.

3.0 DECISION OF THE LOWER COURT

3.1 The learned Judge in the court below was of the view that, the only issue for determination was whether this was a proper case warranting the exercise of the courts discretion to set aside the Judgment of Chulu J, dated 29th November 1999 made in the absence of the 1st Respondent and the Deceased.

3.2 The learned Judge referred to Order 35/5 of The High Court Rules (**HCR**) under which the application was made, which provides that Judgment obtained against a party in the

absence of that party may on sufficient cause be set aside by the court on such terms as may seem fit. The court also sought solace in the case of **Simeza and Three (3) Others v Mzyeche**[1] where the Supreme Court highlighted the following considerations in setting aside a Judgment under Order 35 **HCR**:

(1) Where a party with notice of proceedings has disregarded the opportunity of appearing and participating in the trial, he will normally be bound by the decision.

(2) Where Judgment has been given after a trial, it is the explanation for the absence of the absent party that is most important, unless the absence was not deliberate, but was due to accident or mistake, the court will be unlikely to allow the hearing.

(3) Where the setting aside of Judgment would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are strong reasons for doing so.

(4) The court will not consider setting aside Judgment regularly obtained unless the party applying enjoys real prospects of success.

3.3 The learned Judge was of the view that the 1st and 2nd Respondents had a valid excuse for not having been present as the principal officer of the 1st Respondent had died prior to the hearing of the matter that culminated into the Judgment of 29th November 1999.

Further that there was no evidence of service of the hearing date on the Respondents.

3.4 Although the learned Judge was alive to the other factors to be taken into consideration as highlighted in the case of **Shocked and Another v Goldschmidt and Others**[2], such as prospects of success if a retrial is ordered; the delay in making the application to set aside the Judgment; and the prejudice to the other party if the Judgment or Judgment is set aside, the learned Judge took the view that he was constrained by the case of **Chifuti Maxwell v Chafingwa Rodney Mwansa and Another**[3] in delving into the merits of the case.

3.5 At the end of the day, the learned Judge was of the considered view that, that was a proper case to set aside the Judgment of the court dated 29th November 1999 and accordingly set it aside.

4.0 THE APPEAL

4.1 Dissatisfied with the decision of the court below, the Appellant has appealed to this Court advancing two (2) grounds of appeal, namely:

(1) That the court below erred in law by setting aside a Judgment which was rendered 18 years ago as the action was out of time.

(2) That the court below erred in law by adjudicating on a matter that was *res judicata* as it had been competently adjudicated on by the Supreme Court.

5.0 ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 Mrs. Mwalula, Counsel for the Appellant, at the hearing of the appeal relied on the Appellant's heads of argument which she augmented with brief oral submissions. In arguing the first ground

of appeal, Counsel submitted that, the court below erred when it set aside the Judgment dated 29th November 1999 despite the application to set aside being out of time. That the Judgment was set aside eighteen (18) years later. That the lower court proceeded to set aside the Judgment despite the Appellant bringing to the court's attention the fact that based on the Judgment, the Appellant had sold the Property to the 3rd Respondent. Our attention was drawn to Order 35/1/1 of **The Rules of the Supreme Court**[2] (**RSC**) which sets out the general indications to be taken into account when the court is considering to set aside a Judgment when a party failed to appear at the hearing.

5.2 Counsel further submitted that the considerations under Order 35/1/1 **RSC** were endorsed in the **Simeza** case. It was submitted that due to the inordinate delay of 18 years, the court below should not have set aside the Judgment especially as the Judgment had been executed and the Property sold to a third party. Reliance in that respect was placed on the case of **Allan v Alfred McAlpine and Sons Limited**[4] where Salmon LJ, had the following to say:

> *"When delay in the conduct of action is prolonged or inordinate and is inexcusable, and there is substantial risk by reason for*

the delay that a fair trial of the issue will no longer be possible, or that grave injustice will be done to one party or the other or both parties, the court may in its discretion dismiss the action straight away, without giving the plaintiff opportunity to remedy the default but leaving him to his remedy against his solicitors for negligence... In order to exercise this discretion justly, the court will consider the circumstances of the particular case."

5.3 It was Counsel's submission that, by the Respondents waiting 18 years to bring their application, they slept on their rights and the court below should not have entertained their application. It was further submitted that the court below neglected to consider the inordinate delay of the Respondents and the prejudice the setting aside of the Judgment of 29th November 1999 would occasion on the Appellants who had taken steps in executing the Judgment. Counsel referred to the **Shocked** case, where the court at page 380 stated that:

"These authorities about setting aside Judgment after trial indicate that each case depends on its own facts and that the weight to be accorded to the relevant factors will alter accordingly. But from

them I derive the following propositions or general indications as Lord Wright might have called them ...

(5) Delay in applying to set aside is relevant, particularly if during the period of delay, the successful party has acted on the Judgment, or third parties have acquired rights by reference to it.

(6) In considering justice between parties, the conduct of the person applying to set aside the Judgment has to be considered; where he has failed to comply with orders of the court, the court will be less ready to exercise in his favour.

(7) A material consideration is whether the successful party would be prejudiced by the Judgment being set aside, especially if he cannot be protected against the financial consequences."

5.4 It was submitted that the learned Judge in the court below neglected to consider the inordinate delay and that the Appellant had acted on the Judgment and sold the Property to a third party. According to Counsel, the Respondents had not shown any strong reason for re-opening of the matter which would show that the court may have reached a different outcome as to the Deceased's indebtedness.

5.5 In arguing the second ground of appeal, the Appellant brought to the attention of the court below, that the Supreme Court had the occasion to decide in favour of the Appellant concerning the issues pertaining to the Judgment of 29th November 1999, and the events that subsequently followed. That in fact it was not until the Supreme Court pointed out the steps the Respondent's had neglected to take at their own peril, that the 1st and 2nd Respondents decided to return to the High Court with the application to set aside the Judgment.

5.6 Counsel further submitted that the court below erred in setting aside the Judgment as the same was *res judicata* having been determined by the Supreme Court. According to Counsel, after the same Judgment of 29th November 1999 was delivered, the Respondents did not take any steps to challenge or appeal the Judgment. That in the intervening 18 years, the Respondents instead commenced a flurry of actions against the Appellants and the 3rd Respondent.

6.0 THE 1st AND 2nd RESPONDENTS RESPONSE TO THE APPEAL

6.1 In response, Mr. Banda, Counsel for the 1st and 2nd Respondents relied on the 1st and 2nd Respondents heads of argument and Respondents further heads of argument filed into court on 23rd

January and 30th January 2020, respectively. In response to the first ground of appeal, Counsel submitted that there was no authority brought out to show that the application to set aside the Judgment was brought out of time. Counsel contended and reiterated that the Respondent's argument has been that the notice of hearing and the Judgment of 29th November 1999 was never served on the Respondents, as there was no proof of service.

6.2 On the allegation that the Property was sold to a third party, it was contended that the Appellant had no power to sell the Property as the Judgment did not grant any power to the Appellants to sell the Property as mortgagee. It was further argued that no equitable mortgage was created in favour of the Appellant as the Appellant did not take possession of the deeds, as such the Appellant could not assume the power to sell the Property.

6.3 It was the Respondent's argument that the alleged sale to a third party cannot be a bar to the court to set aside the Judgment. According to Counsel, at the time of the Appellant's commencing of the action, there was a legal mortgage in favour of Leasing Finance Bank Limited which was registered. That therefore, the Appellant had no legal right to sell the Property. Furthermore, that based on

the High Court authority of **Pemba Lapidaries v Industrial Credit Company Limited** (**2008/HN/330**), an equitable mortgage does not convey any legal title in the mortgaged property to the mortgagee and consequently no power of sale vests in the mortgagee.

6.4 Counsel further drew our attention to the case of **Brian Musonda** (Receiver of First Merchant Bank Zambia Limited (In Receivership)) **v Hyper Food Products Limited and Others**[5] and submitted that being an equitable mortgagee, the Appellant could not sell the Property to a third party without an order from the court.

6.5 On reference to Order 35/1/1 **RSC**, Counsel submitted that the provision deals with a situation where a defendant applies to set aside a regular Judgment. That the situation in this case is that the Judgment was irregular. That the situation is very different from what happened in the **Allen** case. Reliance was also placed on the case of **Tata Zambia Limited v Shilling Zinka**[6] where it was held that:

> *"There is no law preventing the setting aside of a default Judgment which appears to have been perfected."*

6.6 In respect to the second ground of appeal, it was submitted that the Supreme Court did not decide on the issues in respect to the Judgment of 29th November 1999, as they did not consider the grounds of appeal individually, but only looked at the jurisdictional aspect. That *res judicata* does not arise as the court below was asked to look at the issue of setting aside the Judgment and did not deal with the merits of the case. It was further submitted that, the matter before the Supreme Court emanated from cause No. **2007/HP/0439** and not **1999/HP/0766** and the Supreme Court therefore never touched on the merits of the case under cause No. **1999/HP/0766**.

7.0 3rd RESPONDENTS RESPONSE TO THE APPEAL

7.1 In response to the appeal, Mr. Mtonga Counsel for the 3rd Respondent relied on the 3rd Respondents heads argument filed on 9th February, 2021. Counsel drew our attention to the Supreme Court Judgment of **Zambia National Commercial Bank and Agro Fuel Investments Limited v Everlighter Ndhlovu** (Suing as Administratrix for the estate of the late Christopher Siwila Ndhlovu)[7] and in particular page 6, where they observed that the

issue of ownership of the property was *res judicata* as the 3rd Respondent was a *bona fide* purchaser. According to Counsel, the 1st and 2nd Respondents action to proceed to set aside the Judgment was irregular and without legal basis, as the Supreme Court had already warned against actions that may lead to this court rendering conflicting decisions which may disturb the orderly development of the law. Counsel accordingly supported the Appellant's appeal.

8.0 CONSIDERATION AND DECISION OF THIS COURT

8.1 We have considered the Judgment being impugned and the arguments by the parties. The first ground of appeal attacks the decision by the court below to set aside a Judgment which was rendered 18 years ago as the action was out of time.

The second ground of appeal attacks the court below for adjudicating on a matter which according to the Appellant had been competently adjudicated on by the Supreme Court. We shall consider the two grounds of appeal concurrently.

8.2 Indeed, each case must be decided upon its own peculiar facts and circumstances. It is therefore imperative to assess the

circumstances leading up to the decision of Chulu, J dated 29th November 1999. We note that the matter before Chulu, J in cause No. **1999/HP/799** was commenced by way of originating summons and was supported by an affidavit. The Respondents in opposing the application filed an affidavit in opposition. The matter was therefore to be adjudicated upon affidavit evidence, which amounts to a hearing. Unless the court was of the view, that contentious issues had been raised, which would require adducing of oral evidence, which was not the case. Although the Respondents were not in attendance at the hearing, the Judgment by Chulu J, shows that the affidavits by both parties were taken into consideration in arriving at the court's decision. Therefore, in our view, the Judgment by Chulu J, was not a default Judgment but a regular Judgment as both parties were heard.

In the case of **New Plast Industries v The Commissioner of Lands and The Attorney General**[8] the Supreme Court held as follows:

> *"...The contents of what amounts to the hearing of the parties in any proceedings can take either the form of oral or written evidence. Where the evidence in support of an application is by way of affidavit, the deponent cannot be heard to say that he*

was denied the right of hearing simply because he had not adduced oral evidence."

8.3 Chulu J, entered Judgment in favour of the Appellant and ordered that the Respondents should liquidate the amounts owing within three (3) months from the date of Judgment, in default the Respondent shall deliver vacant possession of the mortgaged property. The Judge further ordered that the Appellant shall be at liberty to foreclose without further notice. This Judgment remained unchallenged.

8.4 The allegation by the 2nd Respondent as evidenced by paragraph (8) of the affidavit in support of summons to set aside the Judgment by Chulu J, is that she only became aware of the Judgment in 2009, ten (10) years later and as soon as she got to know about the Judgment, she went ahead and paid into court the Judgment sum on 9th April 2009.

8.5 The allegation by the 2nd Respondent is against the evidence on record. The evidence on record which is also reflected in the Supreme Court Judgment in the case of **Zambia National Commercial Bank and Another**[7] is that, in February 2007, which was eight years after the Judgment by Chulu J, the 2nd

Respondent issued an Originating Summons against the now 3rd Respondent under cause No. **2007/HP/0168** for the removal of the caveat which had been placed on the Property on the grounds that her late husband was the registered owner of the Property.

Attendant to that, she also obtained an *ex parte* injunction against the 3rd Respondent restraining it from occupying or doing any work on the Property.

8.6 The Judgment further shows that this matter was allocated to Musonda, J as he then was. On 26th February 2007, Musonda J, discharged the *ex parte* order of injunction he had earlier granted. Musonda J, ruled that the issue of ownership of the subject Property had been determined in foreclosure proceedings before Chulu, J wherein the Property was transferred to the now Appellant, which in turn sold it to the now 3rd Respondent. The latter according to the Judge was the *bona fide* purchaser for value without encumbrance. The action was dismissed. We note that the Judgement by Musonda J, has to date remained unchallenged. We note the suppression of facts on the part of the 2nd Respondent as to when she became aware of the Judgment by Chulu J. it is clear

that she became aware of the Judgment by Chulu J, in 2007 and not 2009, yet she did nothing to challenge the same.

8.7 The Supreme Court at page J5 (page 74 of the record of appeal) observed that:

> *"Notwithstanding the clear implication of the Judgment of Musonda J, and regardless of the fact that she did not avail herself of the option to appeal it, Everlighter Soneni Ndhlovu placed a caveat over the property to prevent the second appellant (now the 3rd respondent) from obtaining title in its name."*

8.8 The aforestated caveat was subsequently removed under cause No. **2013/HP/103** and the 3rd Respondent proceeded to obtain a certificate of title to the Property in its name.

8.9 What followed then is that the 2nd Respondent then took out originating summons against the Appellant under cause No. **2007/HP/0439** which was allocated to Phiri J. In that action she sought an order that there be no change of ownership of the Property. The 2nd Respondent also challenged the Judgment of Chulu J, and asked that it be set aside.

Phiri, J in her Judgment dated 30th October 2013, held that the foreclosure process culminating in the sale of the Property was

irregular, unconcionable and was done in bad faith and proceeded to make fresh orders reversing those earlier made by Chulu J.

8.10 The Appellant then appealed to the Supreme Court, leading to the Judgment of the Supreme Court (Appeal No. 189 of 2014) earlier alluded to, which was delivered on 11th August 2017. The Supreme Court observed that while admitting that her powers were circumscribed, Phiri J. defined and asserted jurisdiction in the circumstances. The Supreme Court further observed as follows:

"Although the learned trial Judge went on an extensive foray in determining many questions before she delivered her magistral Judgment in which she arrogated to herself the power to determine certain questions touching on the subject property, we are of the view that the real and only issue in this case is jurisdictional; did the trial Judge, as High Court Judge have the power to make orders that she did in her Judgment whose effect was to torpedo or overrule the Judgment on foreclosure that was made by another High Court Judge involving the same property? Interesting and stimulating as the issues the learned trial Judge dealt with are, it seems to us that it is the jurisdictional elephant

that stand in the path of the present appeal. The question is not whether or not Chulu, J was procedurally or substantively right in arriving at his Judgment of November 29, 2009.

It is how a party aggrieved by that Judgment should further engage the judicial process to address any perceived transgressions of either procedural or substantive law. Addressing the issue should, in our considered view dispose of the whole appeal."

8.11 According to the Supreme Court the effect of determination of the issues raised in the action before Phiri J, in favour of the movant of the originating summons, would have the effect of reversing the Judgment of Chulu J. that this would invariably provoke the coordinate jurisdiction rule, by which principle Judges of coordinate jurisdiction should not overrule each other's decision.

8.12 The Supreme court went on to state that:

"A person aggrieved by a decision of that court should therefore avail himself/herself with the right of appeal which is ordinarily available to them.

Yet an appeal is not the only one option available to such a party. At least two other options exist. One of these is to apply for the matter to be reviewed by the same court.

Upon such review, the earlier Judgment could either be varied, set aside or indeed retained unchanged...The Other option available is to apply to set aside the Judgment or order obtained in the absence of the respondent. The respondent could in this regard have resorted to Order 35 (5) of ***The High Court Rules (HCR)****... All her complaints could and should in fact have been channelled to the High Court through the same cause in which Chulu J, made the Judgment which she finds disagreeable, or should have appealed that Judgment to us."*

8.13 Its only after that Supreme Court Judgment, that the 1st and 2nd Respondent applied to set aside the Judgment of Chulu J, as alluded to under paragraph 2.14 of this Judgment.

8.14 Order 35 (5) **HCR** provides as follows:

"Any Judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the court upon such terms as may seem fit."

We note that under Order 35 (5) **HCR**, there is no time limit within which the application should be made. In default therefore, we have to rely on **The Rules of the Supreme Court** (**RSC**). Order 35/2 **RSC** provides as follows:

> "2 - (1) Any judgment, order or verdict obtained where one party does not appear at the trial may be set aside by the court, on the application of that party, on such terms as it thinks just.
>
> (2) An application under this rule must be made within 7 days after the trial."

8.15 The considerations set out by the Supreme Court in the case of **Simeza and Others**[1] on setting aside Judgment are premised on the provisions of Order 35/1/1 **RSC** which provides the "general indications" which should be taken into account when the court is considering to set aside a Judgment when a party failed to appear as follows:

(1) Where a party with notice of proceedings has disregarded the opportunity of appearing and participating in the trial, he will normally be bound by the decision.

(2) Where Judgment has been given after a trial, it is the explanation for the absence of the absent party that is most important; unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a re-hearing.

(3) Where the setting aside of Judgment would entail a complete retrial on matters of fact which have already been investigated by the court, the application will not be granted unless there are very strong reasons for doing so.

(4) The court will not consider setting aside Judgment regularly obtained unless the party applying enjoys real prospects of success.

(5) Delay in applying to set aside is relevant, particularly, if during the period of the delay, the successful party has acted on the Judgment, or third parties have acquired rights by reference to it.

(6) In considering justice between parties, the conduct of the person applying to set aside the Judgment, has to be considered; where he has failed to comply with orders of

the court, the court will be less ready to exercise its discretion in his favour.

(7) A material consideration is whether the successful party would be prejudiced by the Judgment being set aside, especially if he cannot be protected against the financial consequences.

(8) There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if none is short

8.16 In **Simeza and Others**[1] case, as earlier alluded to, the Supreme Court made reference to the "general indications" under Order 35 **RSC** and considered the attitude of the 1st Appellant, in the manner he approached the proceedings, as he appeared to be seized with the notion that he must drive the litigation and not the Judges. The Supreme Court also in confirming the refusal by the Deputy Registrar to set aside the assessment which was done in the absence of a party took the view that the prospects of success of the appeal were dim.

8.17 Coming back to the case before us, the learned Judge in the court below by refusing to take into account the "general indications" in

has not offered a plausible and satisfactory explanation as to why the application was not made when she became aware of the Judgment in 2007.

8.19 We also note that the Appellant acted on the Judgment by Chulu J, and sold the Property to the 3rd Respondent in 2002, who subsequently acquired a certificate of title in its name and thereby acquiring rights to the Property.

8.20 As earlier alluded to, Musonda J, in dismissing the action in cause No. **2007/HP/0168** ruled that the issue of ownership had been determined in the foreclosure proceedings wherein the property was transferred to the Appellant, which in turn sold it to the third party, the 3rd Respondent. The Judgment by Musonda J, confirmed the Judgment of Chulu J. Both Judgments have never been appealed. There was therefore no basis for setting aside the Judgment of Chulu J. the effect the setting aside would have, is that, it would torpedo the Judgment of Musonda J which in essence is what the Supreme Court was guarding and warning against.

8.21 Taking into consideration the Judgment of Musonda J, any action to question the ownership of the Property is *res judicata.*

considering to set aside the Judgment fell into grave error and failed to exercise his discretion properly, thereby taking a very narrow view of the application.

8.18 As earlier alluded to, the Judgment by Chulu J, was regular as both parties were heard. The application to set aside the Judgment should have been made within seven (7) days of Judgment as provided for under Order 35/2 (2) **RSC**. Assuming the 1st and 2nd Respondents were not aware of the Judgment, the application should have been made promptly upon being aware which was in 2007.

Instead of doing that, the 2nd Respondent engaged in unlikely and dilatory conduct by making a flurry of unnecessary court applications, one of which ended up in the Supreme Court.

The 2nd Respondent only made the application to set aside the Judgment by Chulu J, in 2017. There was inertia on the part of the 2nd Respondent which led to inordinate and unexcusable delay. As stated under "general indication" (5), delay in making the application is relevant, particularly if during the period of the delay the successful party has acted on the Judgment or third parties have acquired rights in reference to it. The 2nd Respondent

has not offered a plausible and satisfactory explanation as to why the application was not made when she became aware of the Judgment in 2007.

8.19 We also note that the Appellant acted on the Judgment by Chulu J, and sold the Property to the 3rd Respondent in 2002, who subsequently acquired a certificate of title in its name and thereby acquiring rights to the Property.

8.20 As earlier alluded to, Musonda J, in dismissing the action in cause No. **2007/HP/0168** ruled that the issue of ownership had been determined in the foreclosure proceedings wherein the property was transferred to the Appellant, which in turn sold it to the third party, the 3rd Respondent. The Judgment by Musonda J, confirmed the Judgment of Chulu J. Both Judgments have never been appealed. There was therefore no basis for setting aside the Judgment of Chulu J. the effect the setting aside would have, is that, it would torpedo the Judgment of Musonda J which in essence is what the Supreme Court was guarding and warning against.

8.21 Taking into consideration the Judgment of Musonda J, any action to question the ownership of the Property is *res judicata.*

8.22 In our view, there was no compelling reason to warrant setting aside a Judgment rendered eighteen (18) years earlier. Furthermore, we are of the view that the Judgment having been regularly obtained and looking at the reasons advanced in the application to set aside the Judgment the 1st and 2nd Respondents do not enjoy real prospects of success.

As guided by the Supreme Court in **Simeza and 3 Others**[1] case, it is undesirable to set aside a decision of the court if the import would be a re-hearing of the matter already determined.

8.23 Based on the facts and circumstances of this case, both grounds of appeal by the Appellant are upheld. The order of the learned Judge in the court below to set side the Judgment of 29th November 1999 is accordingly set aside and in doing so we uphold the tenet of public interest that there should be an end to litigation.

8.24 We shall grant costs in both the court below and in this Court to the Appellant and the 3rd Respondent.

Costs are to be borne by the 1st and 2nd Respondents and are to be paid forthwith. In default of agreement, same are to be taxed.

J. CHASHI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE

P. C. M. NGULUBE
COURT OF APPEAL JUDGE