IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 064 OF 2022**

HOLDEN AT NDOLA

(Civil Jurisdiction)

B E T W E E N:

YANGTS JIANG ENTERPRISES LIMITED (IN RECEIVERSHIP) **APPELLANT**

AND

SOCIETY HOUSE DEVELOPMENT COMPANY LIMITED **RESPONDENT**

CORAM: SIAVWAPA JP, CHASHI and BANDA-BOBO, JJA

ON: 21st February and 5th April 2023

For the Appellant: *M. Nkunika, Messrs Simeza Sangwa Associates*

For the Respondent: *C. Sakala (Ms), Messrs August Hill & Associates*

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court

Cases referred to:

1. ***African Banking Corporation v Mubende Country Lodge - SCZ Appeal No. 116 of 2016***
2. ***John Lemm v. Thomas Alexander Mitchell (1912) AC, 400***
3. ***Boddington v Wisson (1951) 1 All ER, 166***
4. ***Keymar v Reddy (1912) KB, 215***
5. ***Megha Engineering and Infrastructure Limited & Attorney General v Marks Industries Limited - CAZ Appeal No. 270 of 2021***

Rules referred to:

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

1.0 INTRODUCTION

1.1 This is an appeal against the Ruling of Honourable Mr. Justice L. Mwale, delivered on 26th January, 2022. In the said Ruling, the learned Judge dismissed the Appellant's application for an Order to set aside conditional memorandum of appearance for irregularity.

2.0 BACKGROUND

2.1 The brief facts are that, on 26th May, 2011, the Appellant and the Respondent entered into a contract for the design, supervision and re-development of Society House and Central Arcades, Lusaka at the sum of K407, 776,661,303.10 (unrebased).

2.2 However, following a dispute on the terms of the contract, the Appellant on 27th September, 2021, commenced an action in the court below by way of writ of summons and statement of claim seeking various reliefs.

2.3 On 11th October 2021, the Respondent entered a conditional memorandum of appearance with a view to setting aside the writ for want of jurisdiction. On 20th October, 2021, the Appellant reacted by filing an application to set aside the conditional memorandum of appearance for irregularity pursuant to Order 2 Rule 2 of the **Rules of the Supreme Court (RSC)** on grounds that the **High Court Rules (HCR)**, in their current form as amended by **Statutory Instrument No. 58 of 2020 (S.I. 58)**, do not provide for the entering of a conditional memorandum of appearance.

2.4 That prior to the amendment, a defendant could enter a conditional memorandum of appearance, where such defendant intends to set aside the writ of summons for irregularity or that the court has no jurisdiction. It was argued that **S.I. 58** did away with this requirement.

2.5 That the effect of an amendment to a provision of the law is that the said provision ceases to exist and is no longer part of the statute. Consequently, the Respondents' filing of a conditional memorandum of appearance is irregular and improperly before the court.

2.6 In response, the Respondent contended that, when the conditional memorandum of appearance was filed on 11th October, 2021, it was accepted at the Registry and endorsed by the District Registrar (DR) on 13th October, 2021. This entails that the filing of a conditional memorandum of appearance is still the accepted practice.

2.7 Following the endorsement by the DR, the Respondent proceeded to prepare the requisite application challenging the validity of the proceedings.

2.8 That despite the amendments to **HCR** effected by **S.I. 58**, a Defendant still has an absolute right to appear under protest which in essence has the same effect as a conditional appearance. That had the Respondent entered a memorandum of appearance and a defence, it would have amounted to a waiver of its right to challenge the validity of the proceedings and would in effect have been defending the case on its merit.

3.0 DECISION OF THE LOWER COURT

3.1 Upon considering the application and the arguments, both in support and opposing the application, the learned Judge took note of the fact that Order 11 Rule

1 **HCR** in its current form as amended by **S.I. 58** does not provide for the entry of a conditional memorandum of appearance.

3.2 The learned Judge, by virtue of Section 10 (1) of **the High Court Act**, proceeded to look at Order 12 **RSC** which revealed that the entering of conditional appearance was done away with and in its place, introduced an acknowledgment of service. The learned Judge went on to state that in England, if a person intends to contest the proceedings on the merits or on a point of jurisdiction or regularity, he must return the acknowledgment of service to the court which issued the writ and must by ticking the appropriate box, give notice that he intends to contest the proceedings which by definition is a notice of intention to defend.

3.3 The learned Judge then proceeded to state that in this jurisdiction, the Supreme Court in the case of **African Banking Corporation v Mubende Country Lodge**[1] had occasion to address the procedure applicable where a defendant wishes to contest the validity of the proceedings with a view to applying to set aside a writ. It was held as follows:

"The filing of a conditional memorandum of appearance without a defence is only applicable in circumstances where a defendant wishes to contest the validity of the proceedings with a view to applying to set aside the writ."

3.4 According to the Judge, the Respondent, after filing the conditional memorandum of appearance, proceeded to prepare the requisite application challenging the validity of the proceedings, which application was heard and determined by the court. As such, the learned Judge opined that, had the Respondent filed a defence and unconditional memorandum of appearance, it would have meant waiving the irregularity and the Respondent would have taken a fresh step.

3.5 According to the learned Judge, the Respondent was on firm ground to enter conditional memorandum of appearance without a defence with a view to challenging the proceedings for irregularity and/or want of jurisdiction.

4.0 THE APPEAL

4.1 Dissatisfied with the decision of the lower court, the Appellant has appealed to this Court advancing two grounds of appeal couched as follows:

1. **The lower court erred in law and fact by holding that the High Court Rules do provide for entering appearance by way of conditional memorandum of appearance.**
2. **The lower court erred in law and fact by holding that a Defendant that seeks to bring an application to challenge the originating process for want of jurisdiction should file a notice of intention to defend before bringing the application.**

5.0 ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 At the hearing of the appeal, Mr Nkunika, Counsel for the Appellant relied on the Appellant's heads of argument dated 28th March 2022 which he augmented with oral submissions. In arguing the first ground, Counsel submitted that **HCR** in its current form does

not provide for the entering of conditional memorandum of appearance.

5.2 The gist of the argument on this ground is that **SI. 58** dispensed with the requirement to enter conditional memorandum of appearance to a writ of summons. Reference was made to a number of authorities such as **John Lemm v. Thomas Alexander Mitchell**[2] and **Boddington v Wisson**[3] on the effect of repealing statutory provisions, which is that, the said provisions cease to form part of the statute and have no force of law.

5.3 It was submitted that the filing of the conditional memorandum of appearance was irregular and contrary to the rules of court. That the Ruling by the lower court attempts to revive a repealed provision of **HCR**.

5.4 In arguing the second ground, Counsel submitted that a defendant who seeks to challenge the originating process for want of jurisdiction, does not necessarily need to file a notice of intention to defend before bringing the application contrary to the holding by the

court below, as there is no such requirement under **HCR**.

5.5 It was submitted that the notice of intention to defend only arises where a party seeks to raise a preliminary issue under Order 14A **RSC**. That the issue before the court below was for an application to set aside conditional memorandum of appearance for irregularity pursuant to Order 2/2 **RSC** and therefore the court's reliance on the case of **African Banking Corporation v Mubende Country Lodge**[1] was misplaced and that in any case, the case was decided prior to the coming in of **SI. 58**

6.0 ARGUMENTS OPPOSING THE APPEAL

6.1 The Respondent filed into Court heads of argument on 17th February 2023 which Ms Sakala, Counsel for the Respondent relied on and briefly augmented with oral submissions. In response to the first ground, Counsel submitted that inspite of the amendments to Order 11/1 **HCR,** a defendant to an action has the right to enter conditional appearance where such a party wishes to challenge or raise an objection to the

regularity of the action or proceedings and the jurisdiction of the court.

6.2 Our attention was drawn to the learned authors of **Halsbury's Laws of England**[1] and the case of **Keymar v Reddy**[4] on the right of the defendant who objects to the jurisdiction to enter under protest which has the same effect as a conditional appearance. Counsel then took us through a journey from pre-codification of the High Court Rules in 1998 to date, which we did not find necessary for purposes of the appeal.

6.3 We were referred to Order 2/2/4 **RSC** and in particular the explanatory note which states as follows:

> ***"...thus steps taken, with knowledge of an irregularity, either with a view to defending the case on the merits, will waive irregularities in the institution or service of the proceeding since they could only usefully be taken on the basis that the proceedings were valid... but steps reasonably taken to assert an objection cannot amount to a waiver of it. Entering (as was formerly***

possible) a conditional appearance did not amount to a waiver."

6.4 It was submitted that the rationale behind conditional appearance is to prevent a party that has an objection to the regularity of the proceedings or the jurisdiction of the court from having to employ the formal procedures required to defend a suit to which they have a valid objection.

6.5 In response to the second ground, it was contended that the Appellant's main contention is that there is no requirement under **HCR** for a defendant that seeks to challenge the originating process for want of jurisdiction to file a notice of intention to defend. Counsel submitted that, whilst she agreed with that contention, she invited us to note that the **HCR**, does however, go on to make provisions regarding the practice and procedure to be employed in instances or circumstances that are not provided for by **HCR**. That section 10 of the High Court Act, speaks to the practice and procedure to that effect.

6.6 It was submitted that **S.I 58** created a *lacuna* with regard to the procedure to be adopted by a defendant

who seeks to challenge a writ for irregularity or want of jurisdiction or asserts that there has been an irregularity in the issuance of the writ. That in this regard we have to look up to **RSC.** We were invited to note in particular Order 12/8 **RSC** for setting aside of writs. It was submitted that whilst the **Mubende** case considered the meaning of *"a notice of intention to defend"*, it is worth noting that it did consider the question of what amounted to a notice of intention to defend in relation to an application under Order 33 and 14A **RSC** where the Supreme Court stated as follows:

> **"...The answer to the question whether a conditional memorandum of appearance amounts to a notice of intention to defend, in our view, seems to lie in reconciling the provisions of the RSC with our High Court Rules. As provided by Counsel for the Appellant, Order 1 Rule 4 RSC defines a notice of intention to defend as-**
>
> > **'an acknowledgment of service containing a statement to that effect that**

the person by whom or on whose behalf it is signed intends to contest the proceedings to which the acknowledgement relates."

6.7 That the Supreme Court went further at page J34 to state as follows:

"...The filing of conditional appearance without a defence is only applicable in circumstances where a defendant wishes to contest the validity of the proceedings."

6.8 According to Counsel, the court below was on firm ground when it held that in an instance where a party wishes to challenge proceedings or the jurisdiction of the court in line with Order 12/8 **RSC**, filing of a conditional memorandum of appearance would satisfy the requirement for a notice of intention to defend in this jurisdiction.

7.0 ARGUMENTS IN REPLY

7.1 In reply, Counsel for the Appellant referred us to our case of **Megha Engineering and Infrastructure Limited & Attorney General v Marks Industries Limited**[5] and submitted that whilst it is agreed that

there is no longer provision for entering a conditional memorandum of appearance, the parties in the aforestated case did not address the court on why they moved the court under Order 18/19 **RSC**, which speaks to striking out pleadings as opposed to Order 11/21 **HCR**.

7.2 It was submitted that under Order 11/21 **HCR**, a party can take out an application to set aside a service of the writ without the need to have entered a memorandum of appearance. We were implored to look at our decision in **Megha Engineering** case regarding the need to file a memorandum of appearance for setting aside for irregularity or challenging the originating process.

8.0 OUR ANALYSIS AND DECISION

8.1 We have considered the arguments by the parties and the Ruling being impugned. The first ground attacks the holding by the learned Judge in the court below that **HCR** do provide for entering appearance by way of conditional memorandum of appearance. The second ground attacks the holding by the learned Judge that a defendant that seeks to bring an application to

challenge the originating process for want of jurisdiction should file a notice of intention to defend before bringing the application. We shall address both grounds in one breath as they are entwined and also in view of our decision in **Megha Engineering** case. In our view, the appeal raises two issues as follows:

(i) **Whether HCR provides for entering of a conditional memorandum of appearance and**

(ii) **What option is currently available to a defendant who intends to challenge the validity of proceedings on grounds of irregularity or want of jurisdiction in light of S.I 58**

8.2 It is not in contention that **SI 58** amended Order 11 **HCR**. Before the amendment, Order 11/1 (4) **HCR** provided as follows:

> **"Any person served with a writ under Order 6 of these rules may enter conditional appearance and apply by summons to the court to set aside the writ on grounds that the writ is irregular or that the court has no jurisdiction."**

8.3 The amendment to Order 11 **HCR** reads as follows:

"Order 11 of the principal Rules is amended by the deletion of Rule 1 and the substitution thereof of the following:

1 (1) A defendant shall enter appearance to a writ of summons by delivering to a proper officer, in writing or electronically, sufficient copies of the –

(a) Memorandum of appearance dated on the day of delivery and stating, as the case may be –

(i) The name of the defendant's advocate; or

(ii) that the defendant is defending in person; and

(b) defence and counterclaim, if any together with a list of -

(i) Description of documents to be relied on by the defendant at trial; and

(ii) List of witnesses to be called by the defendant at trial"

8.4 In the **Megha Engineering** case, we had occasion to address the effect of the amendment to Order 11 **HCR** and this is what we opined at page J15

> " **(1) it is evident that at the time the 1st Appellant was making the application to strike out the action on 28th June 2021, the learned Judge was not aware that Statutory Instrument No. 58 of 2020, which came into effect on 19th June 2020 had amended Order 11 by deleting Order 11/1 HCR and substituting with a new provision in respect to the mode of entering appearance.**
>
> **(2) Under the current Order 11/1 there is no requirement for entering of a conditional memorandum of appearance. What that entails is that, if a party wishes to apply to court for setting aside the writ on grounds that the writ is irregular or that the court has no jurisdiction, has to do so, by entering a memorandum of appearance and defence in accordance**

with the current Order 11 (1) (a) and (b) and promptly make the necessary application to challenge the writ

(3) It follows therefore that for purposes of challenging the writ for irregularity or that the court has no jurisdiction, the filing of a defence will not amount to a *"fresh step"* taken to waive the irregularity, as the law now requires that there must be a defence on the record before an application to challenge the writ can be made

8.5 The **Megha Engineering** case in our view takes care of the first issue. Order 11 **HCR** specifically deals with, and is concerned with mode of appearance by a person served with a writ under Order 6 **HCR.** Where one previously needed to enter conditional appearance with a view of applying by summons to set aside the writ on grounds that the writ is irregular or that the court has no jurisdiction, now has to file into Court a memorandum of appearance and defence and thereafter promptly make the necessary application

8.6 In the view that we have taken, the first ground of appeal succeeds, it therefore follows that the Ruling by the learned Judge in the court below, dismissing the Appellants application to set aside conditional appearance was wrong and as such is accordingly set aside. Consequently, the learned Judge erred when he proceeded to hear the Respondents application to set aside the writ when he had not determined the Appellant's application on the mode of appearance. The effect that the setting aside will have is that it invalidates the subsequent proceedings on the Respondent's application to set aside the writ.

8.7 As regards the second issue, in view of the position we have taken in respect to the first issue, a defendant who has been served with a writ and intends to apply by summons to the court to set aside the writ on grounds that the writ is irregular or that the court has no jurisdiction, where previously that defendant would have entered conditional appearance, now has no option but to enter a memorandum of appearance and a defence

8.8 We do note that **SI 58** in respect to the amendment to the mode of appearance has indeed created an overly burdensome process, but it cannot be said to have created a *lacuna* in the law. As earlier alluded to, Order 11 **HCR** is strictly concerned with the mode of appearance to the writ. Counsel for the Appellant in his arguments brought to our attention Order 11/21 **HCR** which provides as follows:

> **"A defendant before appearing shall be at liberty, without obtaining an Order to enter or entering conditional appearance to take out a summons or serve notice of motion to set aside the service upon him of the writ or notice of the writ or to discharge the Order authorizing such service."**

8.9 Order 11/21 **HCR** provides for setting aside service of a writ, notice of the writ or to discharge the Order authorizing such service. It provides that an application for setting aside service does not have to be preceded by a conditional memorandum of appearance. With the amendment of Order 11 **HCR** on the mode of appearance, it follows that an application to set aside service of the writ, notice of the writ or to

discharge the Order authorizing such service does not have to be preceded by a memorandum of appearance and defence. We however note that service of the writ was not an issue in *casu*.

9.0 CONCLUSION

9.1 This appeal having succeeded, we remit the matter back to the same Judge in the court below. The Respondent is hereby Ordered to file into court below a memorandum of appearance and defence within fourteen (14) days from the date of this Judgment in accordance with Order 11 (1) (a) and (b) **HCR**. The Respondent will thereafter be at liberty to make the application to set aside the writ on grounds of irregularity or that the court has no jurisdiction. Costs to abide the outcome of the matter in the court below.

M.J SIAVWAPA
JUDGE PRESIDENT

J. CHASHI
COURT OF APPEAL JUDGE

A.M. BANDA-BOBO
COURT OF APPEAL JUDGE