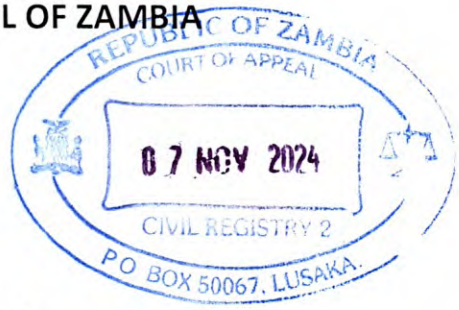
IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 42 of 2024**

HOLDEN AT KABWE

(Civil Jurisdiction)



BETWEEN:

MOFFAT FUNGAMWANGO **APPELLANT**

AND

CHARL AND BASIL FARMS LIMITED **1st RESPONDENT**

THE ATTORNEY GENERAL **2nd RESPONDENT**

CORAM: SIAVWAPA JP, CHISHIMBA & PATEL, JJA

On 14th October & 7th November 2024

For the Appellant: Mr. P.C. Muya of Messrs. Muya & Co with
Mr. A. Ramsey of Messrs. Central Chambers

For the 1st Respondent: No Appearance

For the 2nd Respondent: No Appearance

JUDGMENT

Patel, JA, delivered the Judgment of the Court

Cases Referred to:

1. Kangwa Simpasa and Yu Huizhen v Lackson Mwabi Mwanza -SCZ Appeal No. 13/12/2012 (unreported)
2. Jamas Milling Company Limited v Imex International (PTY) Limited – SCZ Appeal No. 20 of 2002
3. Finsbury Investments Limited and another v Antonio Ventriglia and Manuel Ventriglia- Appeal No 11 of 2009
4. Zambia Telecommunications Company Limited (Zamtel) v. Aaron Mweene Mulwanda and Paul Ngandwe (2012) ZLR, Vol. 1, 404
5. Fearnought Systems Limited v Fearnought and Robinson Kaleb Zulu- Appeal No. 035 of 2015
6. Lisulo v Lisulo (1998) Z.R.75
7. Paul Evans Kasonde v Finance Building Society and Another -SCZ Appeal No. 64 of 2016

Legislation & Rules referred to:

1. The Rules of the High Court, Chapter 27, Volume 3 of the Laws of Zambia.
2. The Constitution of Zambia (Amendment) Act, No. 2 of 2016.

1.0 INTRODUCTION

1.1 This is an appeal by the Appellant, (the 1st Defendant in the court below) against the Ruling of **M. Mapani-Kawimbe, J,** of the High Court, (as she then was), delivered on 7th March 2023, on an application made by the Appellant in the lower court seeking an order for special leave to review the Court's Judgment dated 30th June 2022.

1.2 This Appeal arises out of a post-judgment interlocutory Ruling and interrogates the law and procedure on an application for special leave to review pursuant to **Order 39 rule 1 and 2** of the Rules of the High Court [1].

2.0 BACKGROUND

2.1 For the purposes of this section, and the next, we will refer to the Appellant and 1st Respondent, as 1st Defendant and Plaintiff respectively, as they were in the Court below.

2.2 Whilst it is noted that the Record of Appeal does not contain copies of the originating action, the Judgment of the lower Court exhibited as '**MF1'** to the affidavit in support of summons for special leave to review Judgment of the Court, does provide detail and context of the action, the subject of these proceedings. The Judgment is seen at **pages 31 to 66** of the Record of Appeal.

2.3 It is clear that the dispute between the Parties related to boundary disputes between the Plaintiff and the 1st Defendant who had both acquired customary land from Chief Kakumbi. On 1st October 2003, the Ministry of Lands issued a Certificate of Title for land numbered as Lot No. 16490/M to

the Plaintiff. The 1st Defendant subsequently obtained Title Deeds for Lot No. 21969/M on 23rd November 2017.

2.4 Having failed to resolve their boundary dispute, the Plaintiff, commenced an action by Writ of Summons and Statement of Claim dated 3rd September 2021 seeking the following orders:

i. A declaration that the Plaintiff is the lawful owner of property known as L/16490/M situate in Mfuwe.

ii. An order to cancel certificate of title No. 38331 of Lot No. 21969/M

iii. An order compelling the defendants to demolish their respective structures built on and intruding onto the plaintiff's property in total disregard of the boundary thereby encroaching on the plaintiff's land.

iv. Damages for trespass and inconvenience caused to the plaintiff.

v. Any other relief as the Court deems fit; and

vi. Costs

2.5 As we have noted, the Record does not contain the Writ, defence, or any orders of the lower Court. We are minded that this being an appeal against a Ruling of the lower Court, we can only work with what has been placed before us.

3.0 DECISION OF THE COURT BELOW

3.1 The lower Court, after hearing the matter, delivered its judgment on 30th June 2022, which is seen at **pages 31 to 66** of the Record of Appeal. On 22nd December 2022, the 1st Defendant filed its Summons for an order for special

leave to review Judgment of the Court dated 30th June 2022. This was accompanied with a supporting affidavit sworn by Moffat Fungamwango in his capacity as the 1st Defendant. Skeleton Arguments were also filed on the said date. These are seen at **pages 23**, **25** and **88** of the Record of Appeal respectively.

3.2 On 12th January 2023, (though date stamped 12 Jan 2022) the Plaintiff filed its Affidavit in opposition sworn by **Charl Julien Buekes,** together with its attendant list of authorities and skeleton arguments. These are seen at **pages 93 to 101** of the Record of Appeal.

3.3 The 1st Defendant filed his Affidavit and skeleton arguments in reply on 13th February 2023, which appear at **pages 102 and 164** respectively of the Record of Appeal.

3.4 The lower Court thereafter heard the 1st Defendant's application for special leave to review Judgment, on 8th February 2023 and its Ruling was delivered on 7th March 2023. A copy of the Ruling is seen on **pages 15 to 22** of the Record of Appeal.

3.5 The learned Judge considered the provisions of **Order 39** of the High Court Rules[1] which she noted allowed a Court to review a Judgment or decision rendered in a case if the applicant makes the appropriate application within 14 days of the decision, failing which, the party must seek special leave of Court.

3.6 She considered the conditions upon which an application for special leave to review rests as laid down by the Supreme Court in the case of **Kangwa Simpasa and Yu Huizhen v Lackson Mwabi Mwanza[1].**

3.7 She further considered the principle that a party seeking special leave to review must give reasons for the delay in failing to pursue the remedy within the prescribed mandatory period of 14 days. In her considered view, the reasons advanced by the 1st Defendant, fell short of satisfying the Court of the reasons for the delay.

3.8 The lower Court dismissed the 1st Defendant's application for review with costs to the Plaintiff.

4.0 THE APPEAL

4.1 Aggrieved with the Ruling of the lower Court, the Appellant filed a Notice of Appeal and Memorandum of Appeal on 8th November 2023, advancing two (2) grounds of appeal:

i. *The learned High Court Judge erred in law and fact when she held that the 1st Defendant failed to give any reason for the delay in bringing the application for special leave when the 1st Defendant stated the reasons for delay in his affidavit in support.*

ii. *The learned High Court judge misapprehended the law when she declined to deal with the 1st defendant's application on merit electing instead to dismiss it on a technicality.*

5.0 APPELLANTS' ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 We have duly considered and appreciated the Appellants' Heads of Argument filed on 21st February 2024.

5.2 In relation to ground one, it is the Appellant's submission that the Appellant did explain why the application for special leave for review could not be submitted within the stipulated 14 days.

5.3 It is the further submission that the reasons given for failure to bring the application earlier were clear. It was argued that the Appellant only discovered the documents which demonstrate that his plot does not encroach on that of the First Respondent, in December 2022, and promptly made his application.

5.4 The Appellant referred to **Order 39 Rules 1** and **2**[1] and the case of **Jamas Milling Company Limited v Imex International (PTY) Limited** [2] in which case, the Supreme Court had occasion to interpret **Order 39 rule 2** of the High Court Rules.

5.5 It is the submission that the Court ought to have looked at the evidence as opposed to dismissing the Appellant's case on the basis that no explanation was proffered for bringing the application late.

5.6 It was further submitted that what triggers an application for special leave to review, is the discovery of fresh material evidence which has material effect on the decision being impugned. Without the fresh material evidence, an application for leave to review cannot be sustained. It is the submission that the fresh material evidence led to the Surveyor General canceling the Diagrams for the First Respondent's property as the same was not properly planned. It was argued that further evidence would be brought before the Court through an application to admit new evidence.

5.7 It is the Appellants submission that the Court below should have heard his case and not dismissed it on a technicality.

5.8 In relation to ground two, it is the Appellant's submission that the learned High Court Judge misapprehended the law when she declined to deal with the 1st Defendant's (Appellant's) application on merit electing instead to dismiss it on a technicality.

5.9 It is the argument that although the matter referred to above was dealing with the filing of a record of appeal, the principle with regards to Courts dealing with cases on their substance and merit applies to his case.

5.10 It is the Appellant's submission that the Court below misapprehended the law when it insisted on the Appellant giving reasons for bringing the application late as opposed to dealing with the merits of his case.

5.11 The Appellant further submitted that there is jurisprudence in our jurisdiction and many other common law jurisdictions, that where a party has been subjected to an unfair procedure, the court has power to reopen and rehear the case and reverse, vary or set aside an earlier decision.

5.12 The Appellant referred to **Finsbury Investments Limited and another v Antonio Ventriglia and Manuel Ventriglia**[3] in which their Lordships expounded as follows: -

> *"In Chibote Limited, Mazembe Tractor Co. Limited, Minestone (Z) Limited v Meridian BIOA (Z) Limited (In Liquidation), we stated that an appeal determined by the Supreme Court will only be re-opened where a party, through no fault of his own has been subjected to an unfair procedure and will not be varied or rescinded merely because it is*

subsequently thought to be wrong. In re-opening a case, the interest of justice has to be weighed against it equally."

5.13 It was submitted that the documents at **pages 65 to 66** of the Record of Appeal, demonstrated that the Appellant's property did not encroach on the First Respondent's property. It is the argument that the cardinal point to note is that there was no encroachment in the first place and the First Respondent's case should not have been started in the High Court.

6.0 1st RESPONDENT'S HEADS OF ARGUMENT

6.1 We have equally considered and appreciated the 1st Respondent's Heads of Argument filed on 11th April 2024.

6.2 In opposing the argument of the Appellant, the 1st Respondent has challenged the Appellant's purported new evidence in his Affidavit in opposition as appearing at **pages 93, 94, 95** and **97** of the Appellant's Record of Appeal particularly in clause 9, 10 and 12 of the said Affidavit in opposition.

6.3 The 1st Respondent further noted page 3 of the Appellant's Heads of Arguments in clause 1.2.4 lines 11 and 12, the Appellant states that he could not with reasonable diligence have discovered the purported new evidence before because they were not in their usual place of location.

6.4 It is the argument that documents of this nature are notoriously known to be kept at the Ministry of Lands which houses the Department of Survey. It is also the submission that the Appellant is on record of having been to the

Surveyors office as shown at **page 70** of the Record of Appeal when he unilaterally caused to be conducted a re-survey to justify his boundaries.

6.5 It was submitted that this assertion is an afterthought with the aim of misleading the honourable Court, and the Appellant had the same documents which were not part of the filed bundle of documents but loosely held by the Appellant.

6.6 It was further submitted that the act by the Surveyor General to cancel the 1st Respondent's Survey diagrams in the absence of an appeal or order of Court is irregular and contemptuous. The Appellant referred to a plethora of cases such as **Zambia Telecommunications Company Limited v Aaron Mweenge Mulwanda and Paul Ng'andwe**[4] which settled the principle that review has very limited scope. In the case of **Fearnought Systems Limited v Fearnought and Robinson Kaleb Zulu**[5] the Apex Court cautioned that when it comes to the actual review , care must be taken to ensure that the same is premised on determining what material effect, if any, the fresh evidence may have had on the judgment or decision; otherwise the whole exercise would amount to merely providing a dissatisfied litigant an opportunity to have a second bite and argue for alteration of the judgment in order to bring about a result that he considers more acceptable.

6.7 In relation to ground two, it is the 1st Respondent's submission that the learned trial Judge was correct in declining to determine the merits of this matter, given that she did not find a ground or grounds considered to be sufficient on which to base the application for review of her judgment, that being the first stage in the two staged process of review under **Order 39** of the High Court Rules.

6.8 It is the submission that the learned Judge of the High Court was not under any obligation to delve into the merits of the Appellant's application and that the argument based on **Article 118 (2) (e)** of the Constitution[2] as argued by the Appellant is misapplied in *casu.*

6.9 The 1st Respondent concluded its argument by submitting that the Appellant had not met the threshold of seeking review under **Order 39** of the High Court Rules[1], and the Court below rightly dismissed the Appellant's application for special review.

7.0 THE HEARING

7.1 At the hearing, Counsel for the Appellant relied on the Record of Appeal and its Heads of Argument which they briefly augmented. Counsel Ramsey urged the Court to pay close attention to the contents of the Affidavit in Support of the application for special leave to review which he submitted showed the reason upon which the Appellant based his application. It was his argument that case law in the jurisdiction supports the principle that matters must be heard on merit and prayed that the appeal be upheld.

8.0 DECISION OF THE COURT

8.1 We have carefully considered the grounds of appeal reproduced in *paragraph 4* above, the impugned Ruling, and the arguments and submissions of the Parties.

8.2 We note however that both grounds of appeal speak to the refusal of the learned Judge to allow the application for special leave to review the Judgment of the lower Court and we intend to deal with them collectively.

8.3 The law and procedure on applications for review are well settled in the Jurisdiction without us having to "*re-invent the wheel*" so to speak. What is not in issue is that the Appellant's application for special leave to review, having been filed out of time, needed firstly to satisfy the lower Court of the reasons that led to the delay in making the application.

8.4 It is trite that at this stage, the lower Court needed firstly to be satisfied of the reasons advanced by the Appellant, before it could even proceed to consider and possibly thereafter, review the Judgment, the subject of the application. The Record is also clear that the Judgment of the lower Court was delivered on 30th June 2022, and the Appellant's application was filed on 22nd December 2022, thereby the necessity to prove and show the reasons for a delay of almost 6 months from the date of the Judgment.

8.5 The Supreme Court did in the case of **Zambia Telecommunications Company Limited (Zamtel) v. Aaron Mweene Mulwanda and Paul Ngandwe**[4] guide that Review under **Order 39, rule 1** of the High Court Rules[1] has very limited scope. In our considered view, the limited scope is intended to curtail the prospect of abuse which would be occasioned by litigants seeking the proverbial second bite at the cherry. In **Lisulo v Lisulo**[6] the Supreme Court pronounced that **Order 39** [1] is not designed for parties to have a second bite as litigation must come to an end.

8.6 In our considered view, the latitude given to the lower Court to review its decision where fresh material evidence seeks to be relied on, is limited to fresh evidence that is discovered after the ruling/judgment sought to be reviewed, has been rendered. In addition, it must be demonstrated that the discovery of the fresh evidence could not, with reasonable diligence, have been made before. Our determination on this point, rests on the holding of the Supreme Court in the cited case of **Zamtel**[4] which quoting from its judgment in the case of **Jamas Milling Company Limited v Amex International PTY Limited** [2] stated as follows:

> *"For review under Order 39, rule 2 of the High Court Rules to be available, the party seeking it must show that he has discovered fresh material evidence, which would have material effect upon the decision of the Court and has been discovered since the decision but could not with reasonable diligence, have been discovered before."*

8.7 The Appellant has argued that paragraphs 9, 10, 13, 14 15, 20, 21 and 22 of his Affidavit in Support seen at **pages 23 to 27** of the Record of Appeal state the reasons for his failure to bring the application on time. It was his further argument that he only discovered material documents in December 2022 on which his application was based.

8.8 The 1st Respondent has countered this line of submission and has argued that paragraphs 9, 10 and 12 of his opposing affidavit which is noted at **pages 93 to 97** of the Record of Appeal clearly dispute that the discovery of the evidence was new as stated by the Appellant. To the contrary, the 1st Respondent has submitted that the appellant was in fact in possession of the same documents during the trial, and that the lower Court did not allow him

to make reference to those same documents as they had not been produced in his bundle of documents.

8.9 The 1st Respondent has also argued that the so-called new documentary evidence in the form of site plans do not differ from those on the Court record and which were subjected to examination by the Assistant Surveyor General, which evidence formed the basis of the determination made by the lower Court.

8.10 It is strongly argued by the 1st Respondent that the attempt by the Appellant to seek special leave to review is nothing but an attempt to re-litigate a matter in the hope of achieving a successful outcome which practice is frowned upon by the Courts.

8.11 We have had occasion to reflect deeply on the Record of Appeal before us and have noted the evidence placed before the lower Court which evidence was subjected to cross examination. We have noted that the lower Court relied on the evidence of SW1 and SW2, being the Commissioner of Lands and the Assistant Surveyor General.

8.12 We have also noted the meticulous and thorough consideration by the learned Judge of the evidence and documents before the lower Court as well as the lower Court having relied on the issues settled by the Parties for determination in the dispute. These are seen at J23, **page 53** of the Record of Appeal.

8.13 The learned Judge, in considering whether the application before her fell within the provisions of the Rules relied on, considered the conditions upon which an application for special leave to review would be met. She placed

reliance on a decision of the Supreme Court in the case of **Kangwa Simpasa and Yu Huizhen v Lackson Mwabi Mwanza** [1] which echoed the principle that the power of the trial Court to review its own judgment is discretionary.

8.14 She went on the consider that in the event of delay, the Apex Court, in the case of **Paul Evans Kasonde v Finance Building Society and Another** [7], guided that:

> *"....in an application for special leave to review a party is bound to disclose the reasons why the application is being made outside the mandatory 14 days stipulated in Order 39 (2) of the High Court Rules Cap 27. .....**If the Court is satisfied that there were sufficient grounds for the delay then it would move on to the next level which would be to consider the application to review itself.** (emphasis added).*

8.15 We have considered the reasoning of the Court and find no way in which to disagree with the exercise of judicial discretion of the lower Court in the circumstances that came before her. The lower Court concluded that no reasons having been advanced, she would not entertain the application for special leave to review. We accordingly dismiss ground 1 of the appeal.

8.16 In response to ground 2 of the appeal, wherein the Appellant appears to canvass the argument that the learned Judge misapprehended the law when she declined to deal with the Appellant's application on merit electing instead to dismiss it on a technicality.

8.17 It is immediately clear to us that the Appellant appears to have misunderstood the import and sequence to be followed when mounting an

application under **Order 39 rule 2** of the High Court Rules [1]. It is clear and the law is settled that applications of this nature will meet a two-pronged approach. The first being for the lower Court to satisfy itself of the reasons or new evidence that has surfaced and which was not, and could not, have been available despite diligent search. The trial Court will only move to the next step of considering the matter on the merits of the newly discovered evidence after it has allowed the applicant leave to review the original decision. The decision of the Supreme Court in the cited case of **Paul Evans Kasonde**[7] is on all fours here.

8.18 In *casu*, the lower Court not being satisfied of any reasons advanced by the Appellant, was not required to consider the merits of the argument. To argue otherwise, is to put the proverbial cart before the horse.

We accordingly find no merit in ground 2 of the appeal and dismiss it.

9.0 CONCLUSION

9.1 The appeal being bereft of merit, it is dismissed in its entirety.

9.2 We award costs to the 1st Respondent, to be agreed or taxed in default.

M. J. SIAVWAPA
JUDGE PRESIDENT

F.M. CHISHIMBA
COURT OF APPEAL JUDGE

A.N. PATEL S.C.
COURT OF APPEAL JUDGE