

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2020/HP/0742

BETWEEN:

ROSEMARY BWALYA

AND

**THE ATTORNEY GENERAL
COMMISSIONER OF LANDS**

GRAND PALACE HOTEL ZAMBIA

YETISUN ZAMBIA LIMITED

MISOZI BANDA

ALL OTHER DEVELOPERS AND INTENDING

DEVELOPERS ON STAND NO. LUS/11868

ALICK NKHATA ROAD-LUSAKA



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

3RD DEFENDANT

4TH DEFENDANT

5TH DEFENDANT

6TH DEFENDANT

Before the Honourable Mrs Justice Ruth Chibbabbuka on the 6th day of February, 2025

For the plaintiff:

In person

For the 5th defendant:

Ms M. Banda, Messrs Nchito & Nchito Advocates

RULING

Cases referred to:

1. ZEGA Limited Vs Zambia Revenue Authority (96 of 2018) [2019] ZMCA 40
2. Kelvin Hangandu & Company Vs Febby Mulubisha 2008 (2) ZR 82
3. Lapemba Trading Limited vs Pemba Lapidaries and Industries Credit Company Selected Judgment No. 27 of 2016
4. Donald Ngwira vs The Attorney General 2014/HP/1560
5. Ernest Kabwe Chiombe Vs Sampa Kasongo Mulilo Chiombe Appeal No. 12/2016

6. Morgan Naik Vs Simon David Burgess and others Appeal No. 45/2020
7. *Crossland Mutinta and Others v. Donovan Chipanda (Selected Judgment No. 53 of 2018)*
8. *Antonio Ventriglia and Emmanuel Ventriglia v. Finsbury Investments Limited (SCZ Appeal No. 2 of 2019)*
9. *Owner of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Limited (1989) KLR 1*
10. Codeco Limited Vs Elias Kangwa and Others Appeal No. 199/2012
11. Access Bank Zambia Limited Vs. Group Five/Zcon Business Park Joint Venture (SCZ/8/52/2014)
12. Chikuta vs Chipata Rural Council (1974) Z.R 241
13. Kafue District Council vs Chipulu (1995/1997) Z.R

Legislation referred to:

The High Court Rules Chapter 27 of the Laws of Zambia

The Rules of the Supreme Court, White Book, 1999 Edition

1.0 Introduction

The 5th defendant in this matter on the 27th May, 2024 filed summons to raise a preliminary issue pursuant to *Order 14A of the Rules of the Supreme Court of England, (White Book) 1999 Edition*. This application was made as a result of an application made by the plaintiff on the 10th April, 2024 to review this courts' Ruling delivered on the 20th February, 2024. The preliminary issue is couched in the following manner:

1. Whether this Court has the requisite jurisdiction to hear the plaintiff's application to review the Ruling of the Court dated 20th February, 2024, in the absence of special leave to file the application outside the requisite 14 days; and

that costs of and incidental to this application be in the cause.

2.0 The 5th defendant's affidavit evidence

The 5th defendant on even date filed an affidavit in support of the Preliminary Issue raised deposed to by one Dhozinta ZewelANJI Mphuka, counsel for the 5th defendant who avers as follows:

The plaintiff commenced this action by way of writ of summons and statement of claim on 21st July, 2020. The plaintiff's claim was dismissed by this Court's Ruling dated 20th February, 2024 for the reason that the plaintiff does not have the requisite *locus standi* to sue the defendants in this matter. The plaintiff applied to this Court for Review of its Ruling by way of summons and affidavit in support almost two (2) months after the delivery of the Court's Ruling.

2.1 The 5th defendant's skeleton arguments and list of authorities

Counsel made reference to *Order 14A of the Rules of the Supreme Court of England (White Book) 1999 Edition* for the argument that this court is clothed with jurisdiction to determine the preliminary issue which may finally determine the matter. The Court was also referred to *Order 39 Rule 1 of the High Court Rules Chapter 27 of the Laws of Zambia* which provides that:

“(1) Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision....”

Counsel argued that the foregoing provision is subject to *Subsection 2 of Order 39 of the High Court Rules* which provides that:

“(2) Any application for review of any judgment or decision must be made not later than fourteen days after such judgment or decision. After the expiration of fourteen days, any application for review shall not be admitted, except by special leave of the Judge on such terms as seem just.”

Placing reliance on the above provisions counsel vehemently contended that this Court cannot hear an application for review that is brought outside the fourteen-

day period as prescribed by the foregoing provisions, save for instances where special leave of the Judge has been obtained. That without special leave of Court, the plaintiff's application is not properly before this Court and therefore a nullity for want of jurisdiction. To buttress this argument, reliance was placed on the case of **ZEGA Limited Vs Zambia Revenue Authority**¹ where the Court of Appeal held:

".....what we believe however, is that the principle is the same. Whenever the legislature prescribes a time frame within which an act is to be done, doing it outside that time frame renders the act done a nullity for want of jurisdiction."

It was counsel's considered view that based on the foregoing authorities, this Court does not have jurisdiction to hear the plaintiff's application for review.

3.0 The plaintiff's affidavit in opposition

The plaintiff filed an affidavit in opposition on the 13th June, 2024 wherein she avers that she agrees that she applied for a Review of the Ruling after 2 months because the matter had proceeded on appeal in the Court of Appeal. That she could not file an application for Review of the Ruling because at the time that the Ruling was delivered, she did not have access to the evidence that she has availed to the Court as she only obtained it on the 8th April, 2024 upon being reliably informed by the Lands and Deeds Registry that the caveat was in fact still outstanding and in her favour.

Upon payment to the Ministry of Lands she obtained a computer printout on the 8th April, 2024 which she served on the 5th defendant. Once she obtained this evidence, she applied for a stay of proceedings in the Court of Appeal and applied for a Review of the Ruling.

3.1 The plaintiff's skeleton arguments and list of authorities

The plaintiff placed reliance on *Order 39* of the *High Court Rules* of the *High Court Act Chapter 27* of the *Laws of Zambia*. The plaintiff argued that the issue raised is that an application for review which is made after 14 days shall be with leave of Court. That in this case although she did not obtain leave of Court, this situation can be remedied at anytime by applying for leave and that this Court allow her to do so as this will not disadvantage the 5th defendant in anyway.

It was the plaintiff's contention that the application for a preliminary issue was irregular as the application is supported by an affidavit sworn by counsel in conduct of the matter and not the 5th defendant as required by law. That in that regard this affidavit be expunged from the proceedings. For this argument reliance was place on the case of **Kelvin Hangandu & Company Vs Febby Mulubisha**². The plaintiff contended further that the 5th defendant does not have *locus standi* to prosecute this application or this cause of action as she has not shown an interest in the matter or whether she is a beneficial owner of the land in question or a licensee.

The plaintiff argued that the new evidence she is relying on came into her possession on 8th April, 2024 which was 47 days after the Ruling of the Court and therefore she could not make the same within 14 days. That the said Ruling was delivered one year and some months instead of the 90 days stipulated by law. Further that these facts would be critical when applying for leave to review and any reasonable Court would grant the leave to apply for Review as the Court itself delayed the delivery of the Ruling thereby denying the plaintiff expedient justice.

On the foregoing arguments the plaintiff prayed that this Court dismiss the 5th defendant's application.

4.0 The hearing

At the hearing both the 5th defendant and the plaintiff placed reliance on their respective documents.

5.0 The decision of the Court

I am indebted to counsel for the 5th defendant and the plaintiff for their arguments which I have carefully considered. The main bone of contention is whether this court has jurisdiction to hear the plaintiff's application to Review this Court's Ruling delivered on the 20th February, 2024.

Order 39 Subsection 2 of the High Court Rules of the High Court Act, Chapter 27 of the Laws of Zambia provides that:

"(2) Any application for review of any judgment or decision must be made not later than fourteen days after such judgment or decision. After the expiration of fourteen days, any application for review shall not be admitted, except by special leave of the Judge on such terms as seem just."

The Supreme Court in the case of **Lapemba Trading Limited vs Pemba Lapidaries and Industries Credit Company**³ gave guidance on what a court should consider in granting special leave for review when it held that:

"A court considering an application for special leave to review is not expected to grant every application as a matter of course. The purpose of the rules insisting that those seeking special leave to review should do so through an application supported by an affidavit, is to ensure that the applicant furnishes to the court reasons for the failure to review within the time prescribed. It follows that such reasons must be veritable, verifiable and should, in any case, offer a reasonable account for the delay."

This guidance was echoed in the case of **Donald Ngwira vs The Attorney General**⁴ where the Court in citing the **Lapemba Trading Limited** case held that:

“From the foregoing authority, I am of the considered view that when determining an application for special leave to review a judgement or order of the court, the court is not concerned with the reasons the applicant seeks to have a judgement or order reviewed but rather with the reasons the application to review the judgement or order was not made within 14 days from the date of the judgement. The application for special leave to review a judgement or order of the court constitutes the first hurdle or challenge an applicant seeking to review a judgement or order of the court reviewed after the expiry of 14 days from the date of the judgement must overcome. In the event that the court is satisfied with the reasons advanced for the delay, the next step is for the applicant to show that there is sufficient reason to warrant the court reviewing its judgement or order by way of an application for leave to review the judgement or order of the court.

From the foregoing authorities it is evident that the application to a court for it to review its judgment or ruling requires that an application for leave ought to be made first which is to be done within 14 days of the said judgment or ruling. Further that when the time within which to make the application has run out, a party has to apply for special leave to review, the purpose of which is to show the court why that party was unable to make the application within the 14-day time limit. It is also to be noted that the special leave to review is not granted as of right, it is discretionary, and based on the plausibility of the applicant's reasons for not making the application for review within the prescribed time.

In *casu*, the plaintiff has admitted that she did not make the application for special leave to review and has asked this court that she be allowed to rectify

this situation as she has reasons for the non-adherence to the *Rules of Court*. The 5th defendant has argued that without the application for special leave to review, this court has no jurisdiction to entertain the plaintiff's application. The Court of Appeal in the case of **Ernest Kabwe Chiombe Vs Sampa Kasongo Mulilo Chiombe**⁵ when dealing with the question whether in an appeal from the Subordinate Court to the High Court, a High Court Judge had jurisdiction to proceed to review a judgment of the Subordinate Court in the absence of special leave to review which application was declined by the Magistrate, held that:

“Grounds 1, 4, and 5 essentially all argued that the appeal before the High Court was against the refusal to grant the application for special leave to review the judgment of the Magistrate Court and not the actual review application under Order 39 (1), nor an appeal against the judgment. We agree that the learned Judge had no jurisdiction to proceed to review in the absence of special leave to review judgment made by the Magistrate.”

(Underlining mine for emphasis)

From the foregoing **Ernest Kabwe Chiombe** case it is evident that where there is no special leave to review a Court cannot proceed to entertain an application for Review for want of jurisdiction. The Court of Appeal in citing the Supreme Court explained the meaning of want or lack of jurisdiction and its effect on a matter before Court in the case of **Morgan Naik Vs Simon David Burgess and others**⁶ where it held that:

*“We are guided by the case of **Crossland Mutinta and Others v. Donovan Chipanda**⁷ and the case of **Antonio Ventriglia and Emmanuel Ventriglia v. Finsbury Investments Limited**⁸ where the Supreme Court asked the question whether, having regard to the fact that the respondent had purported to apply for leave to appeal at a time when the applicable period within which they could lawfully have done*

so had long expired, the decision or outcome of that purported application could possibly stand. Their Lordships and Ladyships response was that it could not stand. The Court went on to express the view, based on the latin maxim translation that: -

'out of nothing, comes nothing' and held that what the Court of Appeal did in proceeding to hear the respondents application in the circumstances amounted to nothing, from the stand point of both the means (i.e the process) and the end (i.e the outcome).

.....It was in the same case that the Supreme Court cited with approval the Kenyan Court of Appeal's observation in the case of **Owner of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Limited**⁹ which held that:-

"Jurisdiction is everything (and that) without it, a court has no power to make one more step".

And also, that: -

"where the Court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing."

On a clear reading of the above authorities, I agree with the 5th defendant's argument that this court is bereft of jurisdiction to entertain the plaintiff's application as the same is incompetently before this court.

Before I conclude the matter, the plaintiff has prayed that she be allowed to rectify the situation and that due to the reasons she has given any reasonable Court will grant her this application so that she attains justice, more so that the Court delayed in delivering the said Ruling that she wants reviewed. In assessing this argument, in the first limb, the Supreme Court in the case of **Codeco Limited Vs Elias Kangwa and Others**¹⁰ held that there are two important points

to note in *Order 39 Rule 2* of the *High Court Rules* of the *High Court Act* as it stated that:

“Firstly, the power of the Judge of the High Court, to review his own judgment or decision, is discretionary. Secondly, the law prescribes a limited time frame of fourteen days from the date of the judgment or decision to be reviewed within which the application for review may be made. Thereafter, prior special leave of the Court is required and is in the discretion of the Court.”

From the aforementioned authority it can be gleaned that the granting of an application for review of a judgment or order whether within the stipulated time or out of time through special leave is not as of right but in the discretion of the Court. Additionally, time is of the essence as the Supreme Court in the said **Codeco Limited** case held that:

“According to the record in this case, the appellants summons for Review was filed in the Court below on 17th January, 2012. The judgment of the Court, which the appellant sought to be reviewed, was dated 21st October, 2011. The Summons for Review also included a provision for the appellant to seek special leave of the Court to apply for review. In essence therefore, the application for special leave to review was filed into Court on 17th January, 2012. Clearly the application for review was, in terms of Order 39, Rule 2 of the High Court Act, way out of time as it was made almost three months from the date of the judgment which was to be reviewed.

In dismissing the appellant’s application, the Judge in the Court below stated, among other things, that the delay by the appellant was inordinate and inexcusable. We agree with the learned Judge.”

With regard to the case before this Court, while the plaintiff made an application for Review on the 10th April, 2024 which was almost two months after this Court

delivered the Ruling that she seeks to have reviewed, which was on the 20th February, 2024, this time frame also amounts to inordinate delay in terms of the *Rules*. To add salt injury however, when the plaintiff finally decided to make the application, the application that she made was the wrong one which does not aid her situation at all. Further, in the second limb, the Supreme Court in the case of **Access Bank Zambia Limited Vs. Group Five/Zcon Business Park Joint Venture**¹¹ in response to an argument that matters should be heard on their merits as *Article 118 (2)* of the *Constitution* guarantees this right, held that:

“...all we can say is that the Constitution never meant to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts.”

In adopting the aforementioned position, the plaintiff as a litigant is not exonerated from following the *Rules of Court* in relation to the obligations of litigants to comply with procedural imperatives. Consequently, this argument advanced by the plaintiff lacks merit, and her request is denied.

Another argument advanced by the plaintiff was that the 5th defendant has no *locus standi* to defend this cause of action. I find this to be a curious and strange argument as the record shows that the parties to this cause of action, which includes the plaintiff, and the 5th defendant signed a Consent Order on the 28th September, 2020 wherein the 5th defendant and the 3rd and 4th defendants were joined to this cause of action. The same accordingly has no merit, and is dismissed.

Last but not the least the plaintiff argued that the 5th defendant’s affidavit should be expunged as it was sworn by counsel for the 5th defendant and not the 5th defendant herself. The cases of **Chikuta vs Chipata Rural Council**¹² and **Kafue District Council vs Chipulu**¹³ reveal the Courts position, that is the disapproval of the action of counsel who swear affidavits on substantive or contentious issues. The key terms to note are that this pertains to substantive or contentious

issues. In *casu* the contents sworn to by counsel for the 5th defendant do not contain contentious issues as the same relate to facts that occurred in the sequence of events in relation to procedural matters before the courts, which the plaintiff has admitted to. Equally, I find no merit in this line of argument, and dismiss it.

The upshot of the matter is that the 5th defendant's application by way of preliminary issue succeeds and the application for Review is dismissed for incompetently being before the Court.

The 5th defendant is awarded costs for this application which costs are to be paid forthwith, that is before the plaintiff takes any further steps in this cause of action. The said costs are to be taxed in default of agreement.

Leave to appeal is granted.

Dated the.....th day of February.....2025



R.H Chibbabbuka
HIGH COURT JUDGE