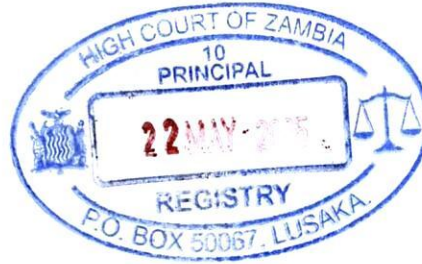


**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2024/HP/0070

BETWEEN:

SAMUEL NYIRONGO



PLAINTIFF

AND

**JUDITH KOMBE CHIYENDE
APEX MALO ZAMBIA LIMITED**

1ST DEFENDANT

2ND DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THE 22ND
DAY OF MAY, 2025**

For the Plaintiff : Mr. A. Simutowe, Messrs Chilao Nyirongo Muwinde
Legal Practitioners

For the 1st Defendant : Ms. L.C Kasonde & Ms. G. Nalwimba, Messrs LCK
Chambers

For the 2nd Defendant : Mr. A. Siame, Messrs Kims Banda Legal Practitioners

R U L I N G

CASES REFERRED TO:

- 1. Allen v Sir Alfred Mc Alpine and Sons Limited and another 1968 2 QB 229**
- 2. Robert Lawrence Roy v Chitakata Ranching Company Limited 1980 ZR 198**
- 3. Industrial Finance Company Limited v Jaques and Partners 1981 ZR 75**
- 4. Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kambaila, Dean Namulya Mungomba, Sebastian Saizi Zulu, Jennifer Mwaba v Frederick Jacob Titus Chiluba SCZ No 14 of 1998**
- 5. Shocked and another v Goldschmidt 1998 1 ALL ER 372**
- 6. Zambia Telecommunications Company Limited v Aaron Mweene Mulwanda and Paul Ngandwe 2012 Vol 2 ZR 404**
- 7. JCN Holdings & others v Development Bank of Zambia SCZ Judgment No 22 of 2013**
- 8. New Horizon Printing Press Limited v Waterfield Estate Limited, Commissioner of Lands SCZ No 58 of 2015 124 (unreported)**

9. ***Crossland Mutinta and others v Donovan Chipanda Selected Judgment No 53 of 2018***
10. ***Jackson Mooya v Nchimunya Mweemba Appeal No 268 of 2020***
11. ***Lukasu Properties Limited v African Banking Corporation Zambia Limited Appeal No 5 of 2023***
12. ***Mercy Mangwato v Great North Credit Zambia Limited & two others Appeal No 220/2023***

LEGISLATION REFERRED TO:

1. ***The High Court Rules Chapter 27 of the Laws of Zambia***
2. ***The Rules of the Supreme Court of England, 1965, 1999 Edition***

OTHER WORKS REFERRED TO:

1. ***Halsbury's Laws of England, 3rd Edition, Vol. 22***
2. ***Jackson and Powell on Professional Liability Seventh Edition Sweet and Maxwell 2012***
3. ***Zambian Civil Procedure: Commentary and Cases Vol 2 by Patrick Matibini, Lexis Nexis 2017***

1. INTRODUCTION

- 1.1 This Ruling is on a Notice of Motion, raising preliminary issues to the application that was filed by the Plaintiff, Samuel Nyirongo, on 26th November, 2024, to review this Court's Order dated 20th November, 2024.
- 1.2 The Notice of Motion was filed on 19th February, 2025 by Judith Kombe Chiyende, the 1st Defendant herein, pursuant to ***Order 33 Rule (3) of the Rules of the Supreme Court of England, 1965, 1999 Edition***, as read with ***Order 6 Rules 1 and 4, Order 35 Rule 2 and Order 39 Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia***.
- 1.3 The Notice of Motion was supported by an affidavit and a List of Authorities and Skeleton Arguments in support.

2. BACKGROUND

- 2.1 Samuel Nyirongo, commenced this matter against Judith Kombe Chiyende and Appex Malo Zambia Limited on 17th January, 2024, by Writ of Summons which was accompanied by a statement of claim and the other documents. Appex Malo Zambia Limited on 6th February, 2024, entered appearance and filed its' defence and the other documents.
- 2.2 Orders for Directions were issued on 19th April, 2024, and on 29th May, 2024, Judith Kombe Chiyende applied to set aside service of the Writ of Summons on herself.
- 2.3 In an extempore Ruling which I delivered on 17th June, 2024, I agreed that service of the letter of demand on Judith Kombe Chiyende was irregular, as it was not personal. However, I found that the irregularity in service was curable, and I directed personal service of the said letter of demand on Judith Kombe Chiyende by 19th July, 2024, failure to which the proceedings would be set aside for irregularity.
- 2.4 Service of the letter of demand was done on 3rd July, 2024, as evidenced by the affidavit of service which is dated 11th July, 2024.
- 2.5 Judith Kombe Chiyende entered appearance and filed her defence on 31st July, 2024, and in the meantime, Samuel Nyirongo and Appex Malo Zambia Limited complied with the Orders for Directions.
- 2.6 Then on 10th September, 2024, Judith Kombe Chiyende filed summons to dismiss the matter for incompetence, pursuant

to ***Order VI Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia***. The basis of that application was that no letter of demand was served on Judith Kombe Chiyende.

- 2.7 An application to dismiss that application was filed on the same 10th September, 2024, by Samuel Nyirongo which was opposed. That application was adjourned to 20th November 2024, on 8th November 2024, as Counsel of Samuel Nyirongo wished to file an affidavit in reply to the opposition.
- 2.8 On 20th November, 2024, only Counsel for Judith Kombe Chiyende was before Court, and she proceeded to make the application to dismiss the matter for incompetence, as Counsel for Samuel Nyirongo was not before Court to make the application to dismiss the application, which had been made by Judith Kombe Chiyende as applied for. The Order dismissing the matter for incompetence was granted.
- 2.9 Thereafter, on 26th November, 2024, Samuel Nyirongo applied for review of my Order dated 20th November, 2024. A Notice of Motion to that application, was filed by Judith Kombe Chiyende as already seen, which is the subject of this Ruling.

3. SUBMISSIONS AT THE HEARING

SUBMISSIONS BY COUNSEL FOR JUDITH KOMBE CHIYENDE

- 3.1 Counsel for Judith Kombe Chiyende, in making the application, stated that they relied on the affidavit which was

filed in support of the application, together with the List of Authorities and Skeleton Arguments in support.

- 3.2 In augmenting, she stated that the first issue for determination, was whether failure by Counsel for Samuel Nyirongo to attend the hearing on 20th November, 2024 was reasonable ground to review the Order. Counsel still in submission, stated that the record showed that on 5th November, 2024, when the matter was adjourned to 20th November, 2024, it was at the request of Counsel for Samuel Nyirongo.
- 3.3 Further submission was made, that in the affidavit which was filed in support of the summons for review, it had been deposed that Counsel for Samuel Nyirongo woke up sick at 08:30 hours on 20th November, 2024.
- 3.4 The contention was that as the matter was scheduled to be heard at 09:00 hours on 20th November, 2024, there was enough time for Counsel to have informed both the Court and Counsel for Judith Kombe Chiyende.
- 3.5 Reference was made to the learned author **Patrick Matibini** in the book **Zambian Civil Procedure: Commentary and Cases** as stating at page 1039, that as a general principle, a party who fails to attend a hearing for which he has adequate notice, may be taken to have waived their right to participate in the hearing.
- 3.6 Still in submission, Counsel stated that from 5th November, 2024 to 20th November, 2024 was Fifteen (15) days, which amounted to adequate notice. Addition was made, that on

20th November, 2024, Counsel for Samuel Nyirongo had at least Thirty (30) minutes to even informally tell the Court of his illness. It was stated that there was no medical evidence before the Court to show that Counsel was unwell.

- 3.7 Counsel also submitted that **Order 35 Rule 2 of the High Court Rules** and **Order 35 Rule 1 (2) of the Rules of the Supreme Court of England**, allow a Court to proceed with trial or a hearing where one party does not attend.
- 3.8 The case of ***New Horizon Printing Press Limited v Waterfield Estate Limited, Commissioner of Lands*** ⁽⁸⁾ which had been cited in the Skeleton Arguments, was stated as having guided that where a Plaintiff does not appear at a hearing, unless the Court sees good reason, it may strike out the matter except a Defendant's counterclaim, and make such Order as to costs in favour of a Defendant who has appeared.
- 3.9 Continuing with the submission, Counsel stated that in the affidavit which was filed in support of the summons for review, and which was deposed to by Counsel, averment had been made, that what should have been dismissed was the preliminary application, rather than the entire matter.
- 3.10 However, Counsel took the view, in line with the decision in the case of ***New Horizon Printing Press Limited v Waterfield Estate Limited, Commissioner of Lands*** ⁽⁸⁾, that this Court acted in accordance with the law by proceeding to hear the application which was filed by Judith

Kombe Chiyende, to dismiss the matter for incompetence, and determining the said application.

- 3.11 Thus, the contention was that the grounds upon which review of the Court's Order dated 20th November, 2024 was sought, were insufficient.
- 3.12 As to the second ground of the application, Counsel stated that it was premised on the argument that Samuel Nyirongo had not raised fresh evidence upon which this Court could review its' Order. The submission was that **Order 39 of the High Court Rules**, allows the Court to review its' decisions for purposes of taking fresh evidence, and to vary, reverse or confirm its' previous decision.
- 3.13 As authority, the case of **Lewanika and others v Chiluba** which had been cited by all the parties was relied on, stating that the holding in that matter, was that review is a two staged process, with the first being to show a ground or finding which was sufficient, which then opened the door for review.
- 3.14 Thus, going by the submissions which had been made, the first step had not been met, and the Court should not open the door to the next step, which was the actual review.
- 3.15 Submission was also made, that this Court had no jurisdiction to hear the matter due to the failure by Samuel Nyirongo to adhere to the provisions of **Order 6 of the High Court Rules**.
- 3.16 Counsel added that the record showed a pattern of behaviour, where the matter had not been taken seriously.

In that regard, submission was made, that this Court struck out the application for review on 25th January, 2025. Therefore, Samuel Nyirongo was not entitled to the application being granted, based on the grounds which had been advanced.

SUBMISSIONS BY COUNSEL FOR APPEX MALO ZAMBIA LIMITED

3.17 Counsel supported the preliminary issue that had been raised.

RESPONSE BY COUNSEL FOR SAMUEL NYIRONGO

3.18 Counsel informed the Court that they had not filed anything in opposition to the application, as they had not obtained instructions from their client. Counsel did however submit that as the matter involved land, it was in the best interests of justice that it was heard on its' merits. He sought an adjournment to file the opposition to the application.

REPLY BY COUNSEL FOR JUDITH KOMBE CHIYENDE

3.19 Counsel's submission in reply, was that Counsel was burying his own grave, as he was demonstrating lack of seriousness on the part of Samuel Nyirongo. It was also submitted that Counsel for Samuel Nyirongo, was from the firm Chilao Nyirongo Mwiinde Legal Practitioners.

3.20 The submission was that in other words, Samuel Nyirongo worked for that firm, and he was with Counsel every day. Thus, no reasons had been given for the failure to obtain instructions, and Counsel had ample time to review the

documents that Judith Kombe Chiyende filed on 19th February, 2025, which was a month earlier.

3.21 The prayer was that the preliminary application which had been raised be determined.

4. DECISION OF THIS COURT

4.1 I have considered the application. It was made pursuant to ***Order 33 Rule (3) of the Rules of the Supreme Court of England*** and ***Order 6 Rules (1) and 4, Order 35 Rule 2 and Order 39 Rule (1) of the High Court Rules, Chapter 27 of the Laws of Zambia.***

4.2 ***Order 33 Rule 3 of the Rules of the Supreme Court of England*** states that:

“The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.”

4.3 The provisions of ***Order 6 Rules 1 and 4 of the High Court Rules*** are:

“(1) Except as otherwise provided by any written law or these rules, an action in the High Court shall be commenced in writing or electronically by writ of summons endorsed and accompanied by-
(a) statement of claim;

(b) list and description of documents to be relied on at trial;

(c) list of witnesses to be called by the Plaintiff at trial;

(d) letter of demand whose receipt shall be acknowledged by the defendant or an affidavit of service attesting to the service of the letter of demand, which shall set out the claim and circumstances surrounding the case.

(4) The proper officer shall-

(a) seal with the official seal, the writ of summons and the statement of claim where the statement of claim is on a separate sheet;

(b) stamp the accompanying documents with the official stamp; and

(c) return copies of the writ of summons statement of claim and the accompanying documents to the person commencing the action.”

4.4 **Order 35 Rule 2 of the said High Court Rules** on the other hand states that:

“2. If the plaintiff does not appear, the Court shall, unless it sees good reason to the contrary, strike out the cause (except as to any counter-claim by the defendant), and make such order as to costs,

in favour of any defendant appearing, as seems just:

Provided that, if the defendant shall admit the cause of action to the full amount claimed, the Court may, if it thinks fit, give judgment as if the plaintiff had appeared.”

4.5 **Order 39 Rule 1 of the High Court Rules** 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:

Provided that where the judge who was seized of the matter has since died or ceased to have jurisdiction for any reason, another judge may review the matter.”

4.6 In the affidavit which was filed in support of the application, Linda Kasonde, Counsel who is seized with conduct of the matter on behalf of Judith Kombe Chiyende, stated that she had read the affidavit which was filed in support of the summons for review of this Court’s Order dated 20th November, 2024.

- 4.7 Her response to the assertion that Counsel fell sick on the morning of 20th November, 2024, was that the same was within his peculiar knowledge, as there was no evidence of a medical sick note or report which had been produced before this Court.
- 4.8 The assertion that this Court should have only dismissed the application which Samuel Nyirongo filed on 10th September 2024, and not the entire matter for incompetence, was said to be within Counsel's peculiar knowledge. The same was said as regards the assertion that Samuel Nyirongo had not appealed this Court's Order dated 20th November, 2024.
- 4.9 The averment was that indulging Counsel's plea in the affidavit which was filed in support of an Order for review, that the matter be reviewed, would be to allow Samuel Nyirongo a second bite at the cherry, as he would re-litigate a matter which he had neglected to do.
- 4.10 It was also deposed that when the matter came up on 4th November, 2024, Counsel for Samuel Nyirongo had requested the Court for leave to file an affidavit in reply to the affidavit in opposition, to the application which had raised preliminary issues. Counsel stated that this Court granted the application, and the matter was adjourned to 20th November, 2024 at 09:00 hours.
- 4.11 However, on that date, neither Samuel Nyirongo nor his Counsel were before Court, and they did not give any reason for their absence. Thus, the Court proceeded to determine the substantive application on the merits, and gave a Ruling

on the same 20th November, 2024. It was stated that by that Ruling, the originating process was set aside for irregularity and incompetence.

4.12 In the List of Authorities and Skeleton Arguments in support, the law which had been relied on in making the application was cited.

4.13 Further reliance was placed on the learned author, **Dr Patrick Matibini** in the book **Zambian Civil Procedure: Commentary and Cases** at page 1039, stating that he states the following with regard to a party not appearing before Court for a hearing:

“As a general principle, a party who fails to attend a hearing of which he has adequate notice may be taken to have waived his right to participate in the hearing.”

4.14 The case of ***New Horizon Printing Press Limited v Waterfield Estate Limited, Commissioner of Lands*** ⁽⁸⁾ was further relied on as having held that:

“We have carefully examined Order 35 Rule 1(2) of the Rules of the Supreme Court of England 1999 and Order 35 Rule 2 of the High Court Rules that the learned Judge relied on when he heard the case in the Court below. Order 35 Rule 2 of the High Court Rules is couched in the following terms:

“2. If the plaintiff does not appear, the Court shall, unless it sees good reason to the contrary, strike out the cause (except as to

any counter-claim by the defendant), and make such order as to costs, in favour of any defendant appearing, as seems just:

Provided that, if the defendant shall admit the cause of action to the full amount claimed, the Court may, if it thinks fit, give judgment as if the plaintiff had appeared.”

4.15 Further argument was made, that the Supreme Court in that matter, went on to state the following as regards **Order 35 Rule 2 of the High Court Rules**:

“Properly, construed, this provision does not give the Court the discretion to proceed to hear the action in the absence of the plaintiff. The Court is obliged...unless it sees good reason to the contrary, to strike out the matter. This provision is recognizance of the possibility that there must be understandable and compelling reasons for the Court by the Plaintiff, in which case the matter may be adjourned to another date.

Order 35 Rule 1(2) of the Rules of the Supreme Court of England 1999 Edition on the other hand provides as follows:

“(1) If, when the trial of an action is called on, neither party appears, the action may be struck out of the list, without prejudice, however, to the restoration thereof, on the direction of a Judge.

(2) If, when the trial of an action is called on, one party does not appear, the Judge may proceed with the trial of the action or any counterclaim in the absence of that party.”

One party in this case could be either the Plaintiff or the Defendant. Prima facie therefore, this rule does not give a Judge discretion to proceed with the trial or an action if anyone of the parties to the action does not appear at trial.”

4.16 Further argument was made, that the Supreme Court in that matter, went on to consider the effect of the Rule as stated in the explanatory notes to **Order 35 Rule 1 (2)** with regard to the non-attendance by the Plaintiff.

4.17 Those explanatory notes state that:

“On the other hand, if the plaintiff does not appear, but the defendant does appear at the trial, the defendant is entitled to judgment dismissing the claim, and if he has a counterclaim, he may prove such counterclaim, so far as the burden of proof lies on him. The effect of this judgment is the same as if it were a judgment dismissing the action on the merits, i.e. the Court will give the whole costs of the action and counterclaim to the defendant.”

4.18 It was stated that the holding by the Supreme Court in relation to the same was:

“These explanatory notes, in our view seem to add another dimension to the issue. This is that, even without conducting a trial, a Judge can enter Judgment dismissing the action and the effect of such Judgment is the same as if the cause was dismissed.”

- 4.19 Premised on the decision as seen above, it was argued that this Court acted within the law in the ***High Court Rules*** and the ***Rules of the Supreme Court of England***, when it proceeded to hear the application which was filed by Judith Kombe Chiyende due to Samuel Nyirongo and his Counsel having been absent at the hearing.
- 4.20 Further argument was made, that Counsel with conduct of the matter on behalf of Samuel Nyirongo, in the affidavit which was filed in support of the application for review, had deposed at paragraph 3 (xi), that he woke up sick on 20th November, 2024 at 08:30 hours. Thus, he could not attend Court.
- 4.21 The submission was that Judith Kombe Chiyende wondered how seriously ill Counsel was, that he could not have informed Counsel for Judith Kombe Chiyende or the Court in the Thirty (30) minutes prior to the hearing.
- 4.22 The case of ***Shocked and another v Goldschmidt*** ⁽⁵⁾ was relied on, as having held the following:

“On an application to set aside a judgment given after a trial, in the absence of the applicant, different considerations applied than on an

application to set aside a default judgment. In particular, the predominant consideration for the court was not whether there was a defence on the merits but the reason why the applicant had absented himself, and if the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a rehearing. Other relevant considerations included the prospects of success of the applicant in a retrial, the delay in applying to set aside, the conduct of the applicant, whether the successful party would be prejudiced by the judgment being set aside and the public interest in there being an end to litigation.”

- 4.23 It was argued that in the case of *Mercy Mangwato v Great North Credit Zambia Limited & two others* ⁽¹²⁾, the Court accepted the reasons advanced for the non-attendance at the hearing in the lower Court, as she advanced medical evidence to show that she was diagnosed with COVID 19, and she was placed in quarantine at a health facility for Fourteen (14) days, and a further Fourteen (14) days after that.
- 4.24 In still arguing, it was stated that the Court in the case of *Industrial Finance Company Limited v Jaques and Partners* ⁽³⁾ guided that where a lawyer had instructions, they had a professional duty to protect the client, and that where it was shown that an advocate had failed to exercise

their duty at the expense of the client, then the lawyer must make good and pay for the damage.

4.25 **Jackson and Powell on Professional Liability Seventh Edition Sweet and Maxwell 2012 at paragraph 11-98 at page 850** was further relied on, as stating that:

“Once proceedings are underway, the claimant’s solicitor has a duty to prosecute the action with reasonable diligence. If therefore, the action is struck out for delay such as failing to comply with time limits, he will have no defence to an action for breach of duty, unless the client has caused or consented to the delay. It appears that delay by counsel does not afford a solicitor a defence. If Counsel is dilatory, the solicitor should regularly chase up, and if no response is forthcoming he should withdraw his instructions and pass them to another barrister for a more ready response....”

4.26 Further authority was sought from the decision in the case of **Allen v Sir Alfred Mc Alpine and Sons Limited and another** ⁽¹⁾.

4.27 With regard to this Court’s power to review its’ Judgment or Orders, the provisions of **Order 39 Rule 1 of the High Court Rules** were cited. Relying on the case of **Jackson Mooya v Nchimunya Mweemba** ⁽¹⁰⁾, it was argued that the Court of Appeal in that matter, stated that the above provision is not obligatory, but had been couched in such a

manner, that it places discretion on the Court in exercising powers of review.

- 4.28 The case of ***Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kambaila, Dean Namulya Mungomba, Sebastian Saizi Zulu, Jennifer Mwaba v Frederick Jacob Titus Chiluba*** ⁽⁴⁾ was further relied on.
- 4.29 In line with the decision in that case, it was argued that review is a two-staged process, with the first being where an applicant demonstrates grounds that justify the need for revision of a decision. Then once the Court finds that the grounds are meritorious, it then reviews its' Judgment or decision.
- 4.30 Citing the case of ***Zambia Telecommunications Company Limited v Aaron Mweene Mulwanda and Paul Ngandwe*** ⁽⁶⁾, the argument was that the law does not give carte blanche power to entertain applications for review, except as stated in ***Order 39 of the High Court Rules***.
- 4.31 The argument was that going by the decision in that case, review will only be done, where fresh evidence is available, which was reasonably not available during the proceedings, and has a material effect on the Court's decision, and to correct mistakes, errors and omissions.
- 4.32 It was argued that Samuel Nyirongo had not furnished any new evidence that was likely to have a material effect on this Court's Ruling dated 20th November, 2024.
- 4.33 Further submission was made, that the Supreme Court in the case of ***Lukasu Properties Limited v African Banking***

Corporation Zambia Limited ⁽¹¹⁾ held that failure to serve a letter of demand was a fundamental and fatal omission, and undermined **Order VI Rule 1 of the High Court Rules** as amended. It was stated that it was held in that matter, that on that account, the action was improperly before Court, and it was bound to be dismissed.

- 4.34 Premised on the above, the argument was that this Court has no jurisdiction to hear the matter, and reliance was placed on the case of **JCN Holdings Limited v Development Bank of Zambia** ⁽⁷⁾, where the Court held that where a matter is improperly before Court, the Court has no jurisdiction to make any orders or grant any reliefs.
- 4.35 It was further stated that this position was adopted in the case of **Crossland Mutinta and others v Donovan Chipanda** ⁽⁹⁾, among several other authorities.
- 4.36 I note that Counsel for Samuel Nyirongo asked this Court to allow him time to respond to the application. However, a perusal of the application that was made by Judith Kombe Chiyende which is the subject of this Ruling, reveals that it is in fact an opposition to the application that Samuel Nyirongo filed to review the matter.
- 4.37 As such I will consider that application as a response to the application that Samuel Nyirongo filed.
- 4.38 In the application for review, Counsel for Samuel Nyirongo, Aaron Simutowe, a legal practitioner practicing under the name and style Chilao Nyirongo Mwiinde Practitioners gave

a background to how this matter was commenced, and the various actions that were thereafter taken in the matter.

- 4.39 He further stated that on 10th September, 2024, Judith Kombe Chiyende filed an application to dismiss the matter, as no letter of demand was served on her.
- 4.40 It was further deposed that on 21st October, 2024, Samuel Nyirongo filed a notice of motion to that application, which Judith Kombe Chiyende opposed on 5th November, 2024. The averment was that as evidenced by the Notice of Hearing which was exhibited as 'AS2', 20th November, 2024 was set as the date of hearing for the Notice of Motion at 09:00 hours.
- 4.41 Counsel averred that on the said date, he woke up very ill at 08:30 hours, and he was unable to attend Court that day. Then on the same day, he was served an Order dated the same day, which dismissed the matter.
- 4.42 It was deposed that upon studying the law, and researching, Counsel had realised that what should have been dismissed due to his absence, was the preliminary application, and not the entire matter. He further stated Judith Kombe Chiyende's application to dismiss had been overtaken by the preliminary application.
- 4.43 Counsel averred that Samuel Nyirongo had not appealed the Order dated 20th November, 2024.
- 4.44 In the List of Authorities and Skeleton Arguments in support, the law in **Order 39 Rule 1 of the High Court Rules** was cited.

- 4.45 The case of ***Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kambaila, Dean Namulya Mungomba, Sebastian Saizi Zulu, Jennifer Mwaba v Frederick Jacob Titus Chiluba*** ⁽⁴⁾ was also relied on.
- 4.46 It was argued that Counsel for Samuel Nyirongo had demonstrated in the affidavit which he had filed in support of the application for review, that it was difficult for him to attend the hearing of the preliminary application. Thus, that opened the Court to review its' order dated 20th November, 2024.
- 4.47 I have cited the provisions of ***Order 39 Rule 1 of the High Court Rules***. That Order empowers this Court upon such grounds that they shall consider sufficient, to review any Judgment or Order that they have given.
- 4.48 It will further be observed from the provision, that the Court may review their Judgment or Order upon grounds that they consider sufficient. There is nothing in the Rule, that has qualified what those sufficient grounds amount to.
- 4.49 Indeed, as rightly submitted, review is a two staged process. The first requires an applicant to demonstrate that there are good grounds upon which the matter may be reviewed. Upon being satisfied of such grounds, the Court then opens the door to review its' Judgment or Order.
- 4.50 Counsel for Samuel Nyirongo stated in the affidavit that he filed in support of the application, that he woke up very ill at 08:30 hours on 20th November, 2024. Thus, his non-attendance at Court.

- 4.51 In response, Counsel for Judith Kombe Chiyende contended that the hearing was scheduled for 09:00 hours on the material day. Thus, the very least that Counsel could have done, was to inform her or even the Court informally.
- 4.52 Further argument was made in relation to the dilatory conduct on the part of Counsel for Samuel Nyirongo in this matter, by highlighting that this Court on 21st January, 2025 struck out the application for review due to the non-attendance by Counsel for Samuel Nyirongo, in addition to his failure to attend Court on 20th November, 2024 to prosecute the preliminary application to the application to dismiss the matter.
- 4.53 It was also stated that no medical evidence was produced to support the assertion that Counsel woke up ill on the morning of 20th November, 2024.
- 4.54 Indeed, no medical evidence was adduced to show that Counsel woke up unwell, especially that Counsel contended in the affidavit which was filed in support of the application, that he woke up very ill. That having been the assertion, it was expected that he went to seek medical attention, and he was given a medical report to support his illness.
- 4.55 Further, the record shows that indeed Counsel for Samuel Nyirongo failed to attend Court on 21st January 2025 to prosecute the application for review of my Order dated 20th November, 2025. I accordingly struck the application. An application to restore the application was made on 27th January, 2025, advancing the reason for non-attendance, in

the affidavit which was filed in support of the application, as inadvertent mis-diarising of the matter.

- 4.56 While error does occur, in view of the previous failure to attend Court, the excuse of having mis-diarised the matter, supports the allegations of dilatory conduct on the part of Counsel for Samuel Nyirongo.
- 4.57 The only evidence that is on record that supports the assertion that Samuel Nyirongo is a lawyer from the firm Chilao Nyirongo Mwiinde Legal Practitioners, is an affidavit dated 21st October, 2024 which he deposed in support of the Notice to Raise Preliminary issues. In that affidavit, Samuel Nyirongo averred that he is a lawyer by profession. However, he did not state that he practices at the firm Chilao Nyirongo Mwiinde Legal Practitioners.
- 4.58 Thus, the assertion that Samuel Nyirongo practices in the firm Chilao Nyirongo Mwiinde Legal Practitioners was not sufficiently established, such that the request to obtain further instructions by his Counsel, Aaron Simutowe, would have amounted to evidence of further dilatory conduct on the part of Aaron Simutowe, as he worked with Samuel Nyirongo every day.
- 4.59 I will therefore give Counsel for Samuel Nyirongo a benefit of doubt.
- 4.60 Thus, the next question is whether there are grounds upon which I can review my Order dated 20th November, 2024?
- 4.61 In the affidavit which was filed in support of the application for review, Aaron Simutowe deposed that his research of the

law had revealed that what should have been dismissed, was the application which had raised preliminary issues to the application to dismiss the matter, and not the whole matter, as he was absent.

- 4.62 In response, reliance was placed on the explanatory notes in **Order 35/1/1 of the Rules of the Supreme Court of England**, which have been seen above. The gist of those explanatory notes, is that where a Defendant appears and the plaintiff does not, the Court is entitled to dismiss the Plaintiff's case and proceed to hear the Defendant's counterclaim.
- 4.63 What was before Court, was not trial, but with an interlocutory application. Samuel Nyirongo did not appear to prosecute his preliminary application, and I proceeded to hear the application to dismiss the matter, and I dismissed it.
- 4.64 As to whether, that Order can be reviewed, Judith Kombe Chiyende argued that Samuel Nyirongo had not adduced fresh evidence upon which this Court can review its' Order dated 20th November, 2024.
- 4.65 In the book, **Zambian Civil Procedure: Commentary and Cases Vol 2 by Patrick Matibini Lexis Nexis 2017 at page 1143** the learned author states as follows with regard to review of decisions:

"In Blenheim Lesiure Restaurants Limited No 3 Neuberger gave us examples of circumstances in which the Court might justifiably exercise its'

jurisdiction to reconsider and amend or vary its'

Judgments and Orders:

- (a) where there is a plain mistake on the part of the Court;***
- (b) Where there was failure of the parties to draw the Court's attention to a fact or points of law that was plainly relevant;***
- (c) Where there was discovery of new facts subsequent to the Judgment being given; or***
- (d) Where a party could argue that he was taken by surprise by a particular application from which the Court ruled adversely to him and which he did not have a fair opportunity to consider."***

4.66 Therefore, going by the above, fresh evidence is just but one of the grounds upon which a Judgment or Order may be reviewed.

4.67 This is further reinforced by the decision in the case of ***Robert Lawrence Roy v Chitakata Ranching Company Limited*** ⁽²⁾ where it was held that:

"Setting aside a judgment on fresh evidence will lie on the ground of the discovery of material evidence which would have had 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."

4.68 In arriving that decision, the Court considered the provisions of **Halsbury's Laws of England, 3rd Edition, Vol. 22, p. 791, para. 1670**, which reads as follows:

“1670 SETTING ASIDE A JUDGMENT ON FRESH EVIDENCE.

An action will lie to rescind a judgment on the ground of the discovery of new evidence which would have had a material effect upon the decision of the court. It must be shown that such evidence is a discovery of something material in the sense that it would be a reason for setting aside the judgment if it were established by proof; that the discovery is new, and that it could not with reasonable diligence have been discovered before. A mere suspicion of fresh evidence is not sufficient.”

4.69 When Judith Kombe Chiyende made the application to dismiss the proceedings for being incompetent on 20th November, 2024, she relied on the case of **Lukasu Properties Limited v African Banking Corporation Zambia Limited** ⁽¹¹⁾.

4.70 In that case, the Supreme Court stated the following with regard to failure to serve a demand letter on a Defendant before issuing a Writ of Summons:

“This is the first time the meaning of Order VI Rules 1, 2 and 4 as amended is being interrogated in this Court. The issue that arises is whether the

failure to serve a letter of demand on the defendant before the writ is issued is fatal.....

Rule 1 (i) (d) of Order VI in paragraph 1 above leaves no doubt that the plaintiff is required to serve a letter of demand on the defendant. The letter must set out the claims and the circumstances that surround it in detail. When commencing the action, the Plaintiff is required to include the letter of demand with an acknowledgment of its' receipt by the defendant, or an affidavit attesting to service of the letter of demand.

Thus, the writ will be accompanied by a statement of claim, a list and description of documents to be relied on at trial, a list of witnesses to be called by the plaintiff at trial and the said letter of demand.....”

4.71 It was further stated as follows in that matter:

“The rule refers to the defendant as the party on whom the letter of demand must be served....

Our considered view is that when the literal rule of interpretation is applied, the word defendant means a defendant that is cited to an action and does not include associated companies....

A statutory instrument is interpreted as written law, in Section 3 of the Act. Order VI Rule (i) (d) should be in light of these provisions be read as referring to a plural of defendants where there are

more defendants than one. It follows that a plaintiff is required to serve a letter of demand on every defendant before issuing a writ of summons...

The first is that Order VI of the High Court Act has undergone a number of amendments before Statutory Instrument number 58 of 2020. These amendments have never addressed the effect of failure to comply with the Order. It is only in Statutory Instrument No 58 of 2020 that the Order now forbids the acceptance of a writ of summons when the documents that should accompany the writ are missing.....

In stark contrast to this position, a reading of Order VI of our High Court Rules clearly reveals that the intention behind sub rule 2 of Order VI is that a writ of summons that is unaccompanied by the list of documents enumerated in the Order is incompetent. It is not to be accepted by the Court under any circumstances. This proscription demolishes the argument that the failure to serve a letter of demand on a defendant is an irregularity that will be countenanced by the Court.”

4.72 The further holding in that matter was:

“It is true that a letter of demand serves the purpose of bringing a claim to the notice of the

intended defendant. It is now required of a plaintiff to state the claim in detail and explain the circumstances in which it arises. It is our considered view that this is intended to drive home to the prospective defendant the claim that they will meet should an action be brought against them. They may decide to settle the claim even before the plaintiff issues process against them.....

On this view, the argument that issuing a letter of demand to some of the defendants is sufficient compliance with the rule collapses. This is on account of the requirement to inform each and every defendant of the claim against them, thereby affording them opportunity to decide to settle the matter or litigate the claim....

We stand by our sentiments in Standard Chartered Bank Zambia Plc v John M. Banda that rules should generally not be used as a mine field for parties who make fairly inadvertent mistakes that translate into no tangible prejudice to the other party, and that if an irregularity can be cured without undue prejudice, then it is desirable that such irregularity be put right subject to an order as to costs against the erring party.

However, our considered view is the cited case is not applicable to this case. The reason is that

currently it is not possible for one to issue a writ of summons without strict adherence to the requirements stipulated in Order VI if the documents outlined in Order VI do not accompany the writ of summons, but it is nonetheless issued as was done in the instant case, such a writ is improperly issued.”

4.73 In conclusion, the Supreme Court stated that:

“In sum, the plaintiff is required to serve a letter of demand on each and every defendant before commencing the action. The failure to serve the letter of demand on the appellant was fundamental and fatal omission. It undermined the intention of Order VI Rules 1, 2 and 4 as amended. The action was improperly brought before Court and was bound to be set aside. We accordingly allow the appeal and set aside the writ of summons for incompetence.”

4.74 As seen above, the decision sets out the law with regard to the failure to comply with the provisions of **Order 6 Rule (1) of the High Court Rules**. The authorities mentioned in the case with respect to irregularities outside the provisions of **Order 6 of the High Court Rules** were distinguished. Thus, my Order dated 17th June, 2024 which treated the irregularity in failing to serve the letter of demand on Judith Kombe Chiyende as not fatal but curable, was rendered otiose, in light of the above decision.

5. CONCLUSION

- 5.1 Consequently, there are no grounds upon which I can exercise my discretion to review my decision dated 20th November, 2024. I accordingly decline to review the Order, and dismiss the application with costs to Judith Kombe Chiyende and Apex Mallo Zambia Limited, which shall be taxed in default of agreement.
- 5.2 Leave to appeal is granted.

DATED AT LUSAKA THE 22nd DAY OF MAY 2025

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE

