

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

Appeal No. 216/2025

BETWEEN

**MOSES BANDA
WILLIS YANDISH
PRIDE KALELA**



**1ST APPELLANT
2ND APPELLANT
3RD APPELLANT**

AND

**RAM AUERBACH
MITONDO MINING COMPANY LTD
(In Liquidation)**

**1ST RESPONDENT
2ND RESPONDENT**

**CORAM: Mchenga, DJP, Majula and Muzenga, JJA
on 14th October, 2025 and 27th February 2026**

For the 1st Appellant:

Mr. D. Kabwela Kabanshi, Messrs
Leonard Tembo Legal Practitioners

For the 2nd and 3rd Appellants:

No appearance

For the 1st and 2nd Respondents:

Mr. L. Mudenda and Ms. J. Namute,
Lumamba Legal Practitioners

J U D G M E N T

Muzenga, JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Megha Engineering and Infrastructure Ltd v. Attorney General and Another (Appeal 270 of 2021).**
- 2. Lafarge Cement Zambia Limited Plc v. Sinkamba (Citizens for a Better Environment) – SCZ Appeal No. 169 of 2009.**

3. **Access Bank (Z) Limited v. Group Five Z Business Part Joint Venture – SCZ/8/52/2014.**
4. **National Breweries Plc v. Chakama Investments Ltd – CAZ Appeal No. 6 of 2022.**
5. **Nkhata and Four Others v. Attorney General of Zambia (1966) Z.R. 124.**
6. **HDFC Bank Ltd and Ors v. Union of India and Others – No. 1159 of 2019.**
7. **Copperbelt Energy Corporation Plc v. Patrick Mwila and Others – CAZ Appeal No. 190 of 2021.**
8. **Yangst Jiang Enterprises Limited (In Receivership) v. Society House Development Company Limited – CAZ Appeal No. 64/2022.**
9. **Wilson Masauso Zulu v Avondale Housing Project (1982) Z.R. 172.**

Statutes referred to:

1. **High Court (Amendment) Rules, S.I. No. 58 of 2020.**
2. **Rules of the Supreme Court of England, 1999 Edition.**

1.0 INTRODUCTION

1.1 This is an appeal against the decision of the learned Honourable Justice B. G. Shonga delivered on 3rd February 2025 in which she declined to accede to the 1st appellant's application to dismiss the action for want of cause of action.

2.0 BACKGROUND

2.1 The parties in this matter have been at each other's necks involved in long-winded legal battles as far back as in cause number 1997/HP/1440 and subsequently under cause number

2004/HP/0037 wherein the court ordered that the shareholding and directorship in the 2nd respondent be regularised under the guidance of a court appointed referee. The appellants launched another action against themselves under cause number 2020/HK/465 wherein judgment was entered against the 2nd respondent. On learning of the matter, the 2nd respondent applied to be joined to the proceedings as an interested party whose application was denied.

2.2 Meanwhile, the 1st appellant proceeded to commence another action under cause number 2024/HN/124 wherein a consent order dated 24th May 2024 was entered into between and among the appellants placing the 2nd respondent in liquidation together with the subsequent winding up order concluded pursuant to the said consent order.

2.3 Alleging fraud in the manner in which the consent order was entered into, the 1st respondent, a shareholder in the 2nd respondent company commenced this action seeking an order to, *inter alia*, set aside the said consent order, damages for loss of business and for the 1st appellant to render an account of the profits made by the mine from 12th May 2023 to 30th November 2023.

- 2.4 The 1st appellant took out an application to dismiss the matter for irregularity and for want of cause of action. The 1st appellant's argument being that the period for appearance endorsed on the writ of summons was 14 days instead of 21 days considering that the 1st appellant's address is in Kitwe which is more than 300 kilometres from the issuing Lusaka High Court Registry against the direction provided by Practice Direction Number 4 of 1977. It was averred that the matter was also commenced in the wrong forum when it did not arise from any business transaction between the parties.
- 2.5 It was further averred that the 1st respondent lacks the capacity to sue as he is not a registered director of the company and thus has no *locus standi* against the 1st appellant. That the current action is an abuse of court process as the 1st respondent should have made the application under cause number 2024/HN/124 in Ndola rather than commencing a fresh action.
- 2.6 The 1st appellant contended that the 2nd respondent (company) is in liquidation with the mining license sold off and all actions against the appellants have been discontinued, leaving the 1st respondent without a valid cause of action.
- 2.7 In opposing the application, the 1st respondent averred that the 1st appellant always had an office in Lusaka and that he commenced

this action as a shareholder and in the name of the 2nd respondent. The 1st respondent argued that **Order 53 of the High Court Rules** allows filing of claims in the commercial court in relation to any action of a business nature. He contended that he had a cause of action against the appellants.

3.0 DECISION OF THE COURT BELOW

- 3.1 The learned trial court considered the application and reasoned that the issue was whether the 1st respondent's actions against the 1st appellant was bereft of any cause of action, resulting in dismissal of the action. The court observed that having been moved pursuant to **Order 2 Rule 2 of the White Book**, the 1st appellant's act of filing a defence to parry the claims against him amounted to a fresh step taking away the jurisdiction to hear the application.
- 3.2 In light of the fact that the 2nd appellant cast his net wide and also relied on **Order 18 rule 19 of the White Book** to persuade the court to dismiss the action, the court proceeded to determine the application and was of the considered view that the 1st respondent's pleadings raised a cause of action and consequently dismissed the application for lack of merit.

4.0 GROUNDS OF APPEAL

4.1 Dissatisfied with the decision of the court below, the appellants have launched an appeal to this court, advancing the following grounds of appeal:

- 1) **The court below erred in fact and in law when it ruled that by entering a defence to the action the 1st defendant waived its rights to challenge the action for irregularity of the originating process. When in fact for any party to challenge any irregularity in the originating process they need to show their intention to defend.**

- 2) **The court below erred in fact and in law when it ruled that the originating process was properly served on the 1st defendant when initial service of originating process was done on a non-party at the time of service to the proceedings who had not entered appearance for them to receive court process on behalf of the 1st defendant. Furthermore, the court failed to consider the other submissions filed by the 1st defendant.**

5.0 APPELLANTS' ARGUMENTS

5.1 In ground one, it was submitted that Practice Directions are designed to ensure fairness, efficiency and consistency in legal proceedings. Strict adherence to Practice Directions is crucial for parties involved in litigation to avoid negative consequences.

5.2 Reference was made to **Order 11 rule 1(a)(b) of the High Court Rules** for the submission that for one to challenge anything in a matter before the High Court, they need to enter appearance. That

the defendant was required to file a memorandum of appearance, defence and counter claim if any, description of documents and list of witnesses, as an intention to defend.

- 5.3 Reliance was placed on the case of **Megha Engineering and Infrastructure Ltd v. Attorney General and Another**¹ where we guided as follows:

"It follows therefore, that for purposes of challenging the writ for irregularity, the filing of the 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 maybe made."

- 5.4 It was submitted that the defendant does not relinquish their rights to challenge any irregularity that have formed part of the originating process.
- 5.5 In ground two, reference was made to **Practice Direction No. 4 of 1977** which sets the time within which appearance may be entered as follows: **"A distance of less than 300 kilometres the days are 14 days. A distance of more than 300 kilometres but less than 500 kilometres the days are 21 days."**
- 5.6 It was argued that the days for appearance as stated in the **Practice Direction No. 4 of 1977** concerns the filing of documents and adherence to court orders and relevant when

assessing the consequences for failing to comply with such requirements. That specifically, this practice direction, combined with other rules of court, can lead to the entry of default judgments or other sanctions for non-compliance. That it is therefore important that the correct number of days is endorsed in the writ of summons. Reliance was placed on the case of **Lafarge Cement Zambia Limited Plc v. Sinkamba (Citizens for a Better Environment)**² which stated as follows:

“It was irregular for the plaintiff to endorse 14 days as the period for entry of appearance because the distance between Kitwe where the writ was issued and Lusaka where the defendant is based is more than 100 kilometres but less than 500 kilometres.”

5.7 It was thus submitted that the writ of summons by the 1st respondent was irregular. That the 1st respondent alleges that they have always known that the 1st appellant advocates have always had an office in Lusaka hence validating their 14 days to enter appearance; thereby stating that it is correct to serve fresh court process on a non-party to the action, specifically the lawyer and not the actual defendant appearing on the originating process.

5.8 Reliance was placed on **Order 10 Rule 4 of the High Court Rules**, in submitting that the 1st respondent has not shown that he had any notice from the 1st appellant to serve process on the

advocates instead of serving on the 1st appellant in person. That only after the defendant has filed a memorandum of appearance will the plaintiff know whether the defendant has elected to use an advocate or will appear in person.

- 5.9 Further, relying on **Order 2 rule 1 of the RSC**, it was submitted that failure to follow court rules on service of court process has an effect on the originating process wherein the court is permitted to set aside the proceedings which have offended the originating rules.
- 5.10 Learned counsel for the appellant referred us to a number of authorities on the effect of failing to follow court rules including **Access Bank (Z) Limited v. Group Five Z Business Part Joint Venture**³ and our decision in **National Breweries Plc v. Chakama Investments Ltd.**⁴
- 5.11 On the strength of the authorities, counsel contended that the matter can be set aside for failure to adhere to court rules and prayed that the matter be set aside for being irregular against the 1st appellant since he is the only one who has challenged the originating process.

6.0 RESPONDENTS' ARGUMENTS

- 6.1 The respondents' argument in opposing ground one was that for any party to challenge any irregularity in the originating process

they need to show their intention to defend. That the real issue for determination of the court was whether or not the pleadings revealed a serious question to be tried or cause of action and consequently made findings of fact as illustrated at paragraphs 4.6, 4.8 and 4.17 of the ruling of the court below. Relying on the case of **Nkhata and Four Others v. Attorney General of Zambia**⁵ on reversal of findings of facts of a trial court, it was submitted that this ground of appeal lacked merit and ought to be dismissed.

- 6.2 In ground two, it was submitted that the Record of Appeal will demonstrate that the writ of summons was filed on 10th June 2024. There was no default judgment, or any prejudice suffered by the appellants because they filed and entered appearance and defence on 4th July 2024.
- 6.3 The respondent's argument was that a review of the appellant's advocates letter demonstrated that the law firm had offices both in Kitwe and Woodlands, Lusaka. It was argued that the appellants have not in any way demonstrated how they were prejudiced by the endorsement of 14 days as opposed to 21 days on the writ of summons.
- 6.4 We were referred to the words of Justice B. R. Gavai and Justice C. T. Ravikmar in the case of **HDFC Bank Ltd and Ors v. Union of**

India and Others⁶ that rules of procedure are handmaidens of justice, not its mistress. That the overriding objective remains the just, efficient and timely resolution of disputes. It was counsel's argument that the courts have consistently held that justice must not be sacrificed at the altar of technicalities. Reliance was also placed on **Copperbelt Energy Corporation Plc v. Patrick Mwila and Others**⁷ where the above principle was illustrated.

- 6.5 It was the respondent's contention that this ground was considered by the court below and she formed the opinion that the issue did not go to the root of the matter as all the parties filed their pleadings and that the real issue was whether or not there was a cause of action revealed to warrant the matter proceed to trial.
- 6.6 On the appellant's second limb, it was submitted that the same is bereft of merit as the advocates who were served process on behalf of the appellant were the same advocates who entered appearance and representing the appellants. That the appearance and defence were filed in good time and there was no default judgment.
- 6.7 On that basis, it was argued that the appellant's argument cannot be used as a basis to dismiss a matter as originally prayed for by the 1st appellant in the court below. It was contended that this ground be dismissed for being devoid of any leg to stand on.

6.8 All in all, we were urged to dismiss the appeal with costs.

7.0 HEARING

7.1 At the hearing of this appeal, the learned counsel for the appellants informed the Court that they would rely on the filed heads of argument and the learned counsel for the respondents informed the Court that he would equally rely on the filed arguments. Counsel briefly augmented their arguments.

8.0 DECISION OF THE COURT

8.1 We have considered the grounds of appeal and the arguments advanced by the parties. The issue in ground one is whether the filing of a memorandum of appearance and defence deprives a party of the right to challenge any irregularity in the originating process.

8.2 Previously, pursuant to **Order 11 rule 4 of the HCR**, where a party wished to contest the validity of proceedings with a view to set aside the originating process, the requirement was to file a conditional memorandum of appearance. This meant that a party who filed a defence, took a fresh step and waived the right to challenge any irregularities.

8.3 Following the amendment of the High Court Rules, through **Statutory Instrument No. 58 of 2020**, there is no requirement for entering of a conditional appearance under **Order 11 of the**

HCR. In **Megha Engineering** *supra* we addressed the effect of the amendment of **Order 11 of HCR** under the current **Order 11/1 of the High Court (Amendment) Rules, S. I. No. 58 of 2020**, wherein we stated that:

"... for purposes of challenging the writ for irregularity, the filing of the 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 may be made."

8.4 We further elucidated on this principle in **Yangst Jiang Enterprises Limited (In Receivership) v. Society House Development Company Limited**⁸ when we stated that:

"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 defence."

8.5 Flowing from this, a defendant filing a defence with a view to challenge the regularity of the proceedings or originating process does not therefore waive their right to do so.

8.6 It was therefore a misdirection on the part of the trial court to find that by filing a defence to parry the claims made against him, the 1st appellant made a fresh step, taking away her jurisdiction to hear

the application. We therefore set aside this finding and consequently find merit in the first ground of appeal.

8.7 We note that despite stating her position as aforesaid, the learned judge nonetheless proceeded to consider the application under **Order 18 Rule 19 of the RSC**. However, out of the three issues which were raised in the summons for an order to dismiss the matter for irregularity, only one was considered by the trial court, namely the allegation for failure to disclose a reasonable cause of action. The two issues which remained unresolved by the trial court was the regularity of the writ being endorsed with 14 days instead of 21 days for the period of entering appearance and the Commercial Division of the High Court not being the correct forum instead of the General Division.

8.8 We must state that the trial judge fell in grave error when she glossed over the issues raised by the 1st appellant and only pronounced herself on one issue. Probably the trial court failed to consider the other issues because of having found that the 1st appellant waived his right to challenge the regularity of the writ having entered appearance. We have already stated above that the position taken by the trial court was wrong. The duty of trial courts to adjudicate on every aspect of the suit between the parties cannot

be overemphasised as aptly put in **Wilson Masauso Zulu v. Avondale Housing Project**,⁹ wherein Ngulube, D.C.J., as he then was had this to say:

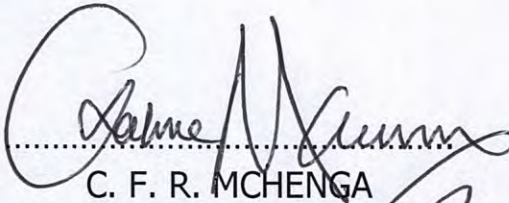
"I would express the hope that trial courts will always bear in mind that it is their duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality. A decision which, because of uncertainty or want of finality, leaves the doors open for further litigation over the same issues between the same parties can and should be avoided."

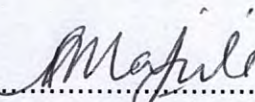
8.9 In the circumstances, we find merit in the appeal.

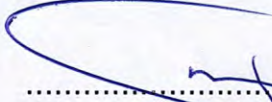
9.0 CONCLUSION

9.1 Having found merit in the appeal, we allow it. We refer the matter back to the trial court to determine the unresolved issues.

9.2 We award costs to the 1st defendant, to be taxed in default of agreement.


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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT


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B. M. MAJULA
COURT OF APPEAL JUDGE


.....
K. MUZENGA
COURT OF APPEAL JUDGE