

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

APPEAL NO. 216 OF 2021

18 MAY 2022

BETWEEN:

MURRAY AND ROBERTS CONSTRUCTION 1ST APPELLANT

KADDOURA CONSTRUCTION LIMITED 2ND APPELLANT

AND

FINSBURY INVESTMENTS LIMITED 1ST RESPONDENT

**LUSAKA PREMIER HEALTH CLINIC
LIMITED 2ND RESPONDENT**
(in Receivership)

CORAM: CHISHIMBA, SIAVWAPA AND SHARPE-PHIRI, JJA

On 17th February and 18th May 2022

For the Appellants: Mr. C. M. Sianondo of Messrs Malambo
and Co.

✓ For the 1st Respondent: Mr. M. Mando of Messrs Mando and Pasi
Advocates.

For the 2nd Respondent: Mr. J. Ilunga of Messrs Ilunga and Co.

J U D G M E N T

SIAVWAPA JA, delivered the Judgment of the Court.

Cases referred to:

1. *Mpande Limestone Limited v Wadi Fanda Poultry Limited and Idriss Motala – Appeal No. 002/2020*
2. *Fred M'membe and Post Newspaper Limited (in liquidation) v Abel Mboози and Others – Appeal No. 175/2019*
3. *Antonio Ventriglia & Others v ESAT & DBZ & Others – Appeal No. 109/2019*
4. *Scarfe v Morgan [1835 – 1842) ALL ER 43*
5. *Chalmers v Pardol [1963] 3 ALL ER 552*
6. *Development Bank of Zambia and KPMG Marwick v Sunvest Limited and Sun Pharmaceuticals Limited (1997) SJ 10(SC)*
7. *Mukumbuta Mukumbuta, Sam Mukamamba, Kweleka Mubita, Mooto Mooto, and Kandumba Munganga v Nkwilimba Choobana, Lubinda Richard Mbikusita Munyinda Rosalyn Mukelabai and Mongu Meat Corporation Limited – SCZ Judgment No. 8 of 2003*
8. *Rae Zambia v Attorney-General and Tallow Zambia Bv – Appeal No. 112 of 2018*
9. *Gibson Tembo v Alizwani – SCZ Judgment No. 6 of 1996*
10. *Appleton v Appleton [1965] 1 ALL ER 44*
11. *Zambia Seed Company v Chartered International (PVT) Limited – SCZ No. 20 of 1999*
12. *London Ngoma and Others v LCM Company and Another – SCZ Judgment No. 22 of 1999*

Legislation referred to:

1. *The Rules of the Supreme Court, 1999 Edition*
2. *High Court Rules pursuant to the High Court Act Chapter 27 of the Laws of Zambia*

Other works referred to:

1. *Black's Law Dictionary, 11th Edition.*
2. *Halsbury's Laws of England 4th Edition Volume 28*
3. *Land Law in Zambia, Cases and Materials, University of Zambia Press, 2007 – Frederick S. Mudenda.*

1.0 INTRODUCTION

- 1.1 The appeal is against the Ruling of the Honourable Mr. Justice E. L. Musona, Judge of the High Court delivered on 15th July, 2021.
- 1.2 The learned Judge dismissed the Appellant's application to be joined to a matter between the 1st Respondent and the 2nd Respondent which had been resolved by Consent Judgment.
- 1.3 The purpose for which joinder to the matter was made was to enable the Appellants to commence an action in the Court below to challenge the Consent Judgment.

2.0 THE BACKGROUND

- 2.1 The 2nd Respondent herein obtained a credit facility from the Industrial Development Corporation of South Africa in the sum of USD21,390,000.00 in November, 2008. The facility was secured by a First Legal Mortgage relating to Stand No. 1292 Chelstone, Lusaka, executed by the 2nd Respondent in favour of the lender.

- 2.2 Having secured the facility, the 2nd Respondent executed a Joint Building Contracts Committee Building Agreement with the Appellants for the construction of a clinic on Stand No. 1292 Chelstone, Lusaka, which was the subject of the First Legal Mortgage.
- 2.3 Once construction works commenced, several payment certificates were issued in March, 2010.
- 2.4 The 2nd Respondent was duly notified of the due certificates but defaulted on certificates No. 5, 6, 7 and 8 as of 24th March, 2010 in the sum of USD2,068,219.98 without interest.
- 2.5 The default prompted the Appellants to issue Notice of lien over Stand No. 1292 Chelston, Lusaka. The 2nd Respondent responded that the said property was the subject of a First Legal Mortgage as security for the USD21,390,000.00 in favour of the Industrial Development Corporation of South Africa.
- 2.6 The Appellants then commenced an action before the High Court of South Africa against the Industrial Development Corporation and the 2nd Respondent.

- 2.7 On 8th September, 2011, Judgment was given in favour of the Appellants with respect to all the certificates due in the sum of USD6,509,266.72 inclusive of interest.
- 2.8 When all efforts to recover the money adjudged due by the High Court of South Africa failed, the Appellants took out an action in November, 2015 in the High Court of Zambia to enforce the Judgment of the High Court of South Africa.
- 2.9 This suit was settled by way of Judgment in default of appearance and among the remedies granted by the Judgment were the following:
- ***Payment by the defendants of the sum of USD6,507,266.72 inclusive of interest due under the respective certificates and owing to the Plaintiffs as at 31st May, 2011 as evidenced and ascertained by the Judgment of the High Court of the Republic of South Africa handed down on 8th September, 2011.***
 - ***A declaration that the Plaintiffs' lien crystalized upon the default by the Defendant in payment of the certified amounts and that the Plaintiffs are entitled to exercise all rights available to them in respect of Stand No. 1292 Chelstone, Lusaka as Lien holders.***
 - ***An order for possession and sale of Stand No. 1292 Chelstone, Lusaka by the Plaintiffs.***

- ***An order that the proceeds from the sale be applied in the first place towards liquidation of sums due, if any, to the 2nd Defendant as mortgage with prior registered interest and that the balance thereafter be applied towards liquidation of the debt due to the Plaintiffs.***

- ***An order that the Judgment of the High Court of the Republic of South Africa handed down on 8th September, 2011 is enforceable in the Republic of Zambia.***

2.10 The Respondents, in turn, filed summons for an order to set aside the Judgment in default of appearance and defence.

2.11 By ruling dated 6th June, 2016 the Court below set aside the Judgment in default and dismissed the entire action for being an abuse of court process.

2.12 Upon dismissal of the matter, the 1st Respondent invoked clause 6.3(2) of the Settlement Agreement and the Industrial Development Corporation ceded the mortgage to the 1st Respondent.

2.13 A Deed of Transfer was subsequently executed and lodged with the Lands and Deeds Registry as well as with PACRA on 18th and 22nd August, 2016 respectively.

- 2.14 In the meantime, the Appellants had appealed against the ruling of the High Court setting aside the Judgment in default and dismissing the entire action for being an abuse of court process.
- 2.15 By ruling dated 17th November, 2017, the Supreme Court reversed the ruling of the High Court setting aside the default Judgment and dismissing the cause.
- 2.16 Motivated by the ruling of the Supreme Court, the Appellants, on 18th January, 2018, applied to the High Court *ex-parte* for leave to issue a Writ of Possession of Stand No 1292 Lusaka. The order was duly granted by the Court on 28th January, 2018.
- 2.17 On 26th February, 2018, the Appellants made an *ex-parte* application to the High Court for leave to sell Stand No 1292 Lusaka, and the Court granted the order on 7th May, 2018.
- 2.18 In what may be termed a pre-emptive move, the 1st Respondent took out originating process on 20th May, 2020 pursuant to Order XXX Rule 14 of the High Court Rules in a mortgage action seeking an order for repayment of the sum of USD10,453,486.25 and ZAR750,000.00 with interest from the 2nd Respondent.

- 2.19 An order for foreclosure, possession and sale of Stand No. 1292, Chelstone, Lusaka or, transfer of ownership of Stand No. 1292, Chelstone, Lusaka to the Applicant in full, and final satisfaction of the mortgage amount in the alternative.
- 2.20 The originating summons was filed on 13th May, 2020 and subsequent to that, the 1st Respondent appointed Mr. Mwenya Andrew Mukupa as Receiver and Manager of Lusaka Premier Health Clinic Limited on 15th August, 2018 pursuant to the Mortgage Deed.
- 2.21 The parties to the originating summons herein entered into a consent judgment on 29th June, 2020. The consent judgment resulted in the transfer of Stand No. 1292 Lusaka, from the 2nd Respondent to the 1st Respondent. This action effectively rendered Cause No. 2015/HPC/0520 academic as the property had left the hands of the debtor, the 2nd Respondent.
- 2.22 In an effort to reclaim the property from the hands of the 1st Respondent, the Appellants, on 1st March, 2021, made an application in the Court below to join the action that gave rise to the consent judgment to which they were not parties. This was with a view to having the consent judgment set aside.
- 2.23 As stated in the introduction, the application to join the proceedings was dismissed giving birth to this appeal.

3.0 REASONS FOR THE DISMISSAL

3.1 In his reasoning, the learned Judge took the view that the Appellants had not demonstrated that they had sufficient interest in the subject property, namely, Stand No. 1292 Chelstone, Lusaka.

3.2 The learned Judge also found the Appellants to have contravened the law by not registering their interest in the subject property as required by sections 4, 5, 6 and 7 of the Lands and Deeds Registry Act.

4.0 THE APPEAL

4.1 Unsettled by the decision of the High Court, the Appellant filed a Notice of Appeal and Memorandum of Appeal on 9th August, 2021.

4.2 The Memorandum of Appeal contains the following grounds of appeal:

1. The court below erred in law and fact in refusing to join the Appellants to the proceedings despite there being evidence of their interest in the subject matter and being affected by the consent judgment in issue.

2. The court erred in finding that the Appellants do not have sufficient interest and loans stand in the matter.

3. *The court erred both in law and in fact in holding that the challenge of the consent judgment would lead to multiplicity and possible conflicting court decisions.*
4. *The court erred in law and in fact in holding that the only interest which can be protected is that which is registered and without examining the circumstances of this case and the documents on record.*
5. *The court misapprehended the circumstances of this case and thereby reaching an incorrect decision when it held that no justification has been advanced by the Appellants for their failure to register their interest in the affected property.*

5.0 ARGUMENTS IN SUPPORT

- 5.1 The Appellants filed their Heads of Argument on 21st September, 2021 and Arguments in Reply on 16th February, 2022. They argued grounds 1 and 2 together as well as grounds 4 and 5.
- 5.2 The essence of the arguments on grounds 1 and 2 is that the Appellants had demonstrated sufficient interest in Stand No. 1292 Chelstone, Lusaka and the Consent Judgment had affected that interest.
- 5.3 In support of their argument, they cited a number of authorities among them, **Mpande Limestone Limited v Wadi**

Fanda Poultry Limited and Idriss Motala¹ in which the Court set out the law as follows:

“For a party to be joined to the proceedings, they must meet any of the three requirements being:

- 1. They must be persons who may be entitled to, or claim some share or interest in the subject matter of the suit, or who may be likely to be affected by the result.”*

Only this one is relevant to this appeal.

- 5.4 In ground 3, it is argued that with Cause No. 2015/HPC/520 still active in the court below, pleadings could have been amended to include the setting aside of the consent order.
- 5.5 However, in dealing with setting aside a judgment by a non-party, the Appellants relied on the case of **Fred M'membe and Post Newspaper Limited (in liquidation) v Abel Mboози and Others²**. The judgment held that commencing a fresh action in this case did not apply but that applying to be joined for the purpose of setting aside the Consent Judgment was the solution. They also cited the case of **London Ngoma** among others in which it was held that a person can be joined to the proceedings notwithstanding that there is a Consent Judgment. We affirmed the same principle in **Antonio Ventriglia & Others v ESAT & DBZ & Others³**.

- 5.6 In grounds 4 and 5 the gist of the argument is that the Appellant had taken possession of Stand No. 1292, Lusaka, via a lien, whose notice was given through a newspaper advertisement on 5th March, 2011.
- 5.7 They go further to assert that being an equitable interest, a lien was not subject to registration.
- 5.8 Although a number of cases were cited, we shall only take note of two namely; **Scarfe v Morgan**⁴ and **Chalmers v Pardol**⁵. Both cases underscore the fact that where an owner of property asks another to spend his money, skill and expertise on the improvement of his chattel or land and the task is duly executed, equity will hold the owner liable to pay accordingly failure to which the bailee or workman shall have lien over the property for his charge.

6.0 **1ST RESPONDENT'S ARGUMENTS**

- 6.1 The arguments were filed on 15th February, 2022 and they respond to the grounds of appeal as argued by the Appellants with 1 and 2 as well as 4 and 5 argued together.
- 6.2 In arguing grounds 1 and 2, the 1st Respondent asserts that the Appellants lacked sufficient interest and *locus standi* because the Notice of lien as advertised was not registered as

required by section 6 of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia.

- 6.3 Further, it was argued that the Appellants were not party to the Mortgage Deed which was the subject of the mortgage action between the 1st and 2nd Respondents.
- 6.4 In ground 3, it has been argued that the fact that the Appellants had successfully joined the 1st Respondent to the proceedings in Cause No. 2015/HPC/520 had created a multiplicity of actions with the case that gave rise to this appeal. It is stated that the refusal of an order for joinder in this case had given rise to two contradictory rulings, which is frowned upon by courts. We were referred to the cases of **Development Bank of Zambia and KPMG Marwick v Sunvest Limited and Sun Pharmaceuticals Limited**⁶ and **Mukumbuta Mukumbuta, Sam Mukamamba, Kweleka Mubita, Mooto Mooto, and Kandumba Munganga v Nkwilimba Choobana, Lubinda Richard Mbikusita Munyinda Rosalyn Mukelabai and Mongu Meat Corporation Limited**⁷.
- 6.5 In grounds 4 and 5, the 1st Respondent has argued that the circumstances of the Appellants did not lead to the creation of an equitable lien over Stand No. 1292. They cited Black's Law

Dictionary 11th Edition pages 1108 and 1109 which defines equitable lien as:

“A right enforceable only in equity, to have a demand satisfied from a particular fund or specific property without having possession of the fund or property.”

6.6 In furtherance of the argument, the 1st Respondent has brought into focus the Construction lien, also known as the Mechanic’s lien which, it is argued, is a pure creature of statute. To that extent, it is argued that the Appellants cannot rely on it firstly because the 1821 Act of England which created it is not applicable to Zambia and secondly because no statute has created it in Zambia.

6.7 The Respondent has thus dismissed all the cases relied upon by the Appellants for the reason that they are inapplicable and irrelevant to the matter at hand.

7.0 ARGUMENTS BY THE 2ND RESPONDENT

7.1 The arguments on grounds 1 and 2 are not different from those advanced by the 1st Respondent being that the Appellants did not demonstrate sufficient interest in the subject matter of the dispute being Stand No. 1292, Chelstone, Lusaka.

7.2 It has further been argued that the Appellants’ apparent fear

that they may be unable to enforce Cause No 2015/HPC/520 is unfounded as they can deploy other enforcement mechanisms available should they succeed.

- 7.3 In ground 3, it is argued that allowing the application for joinder through the appeal will enable the Appellants to commence a fresh action to challenge the Consent Judgment. This, it is argued, will result in multiplicity of actions in view of Cause No. 2015/HPC/520 which is still active.
- 7.4 In dismissing ground 4, the 2nd Respondent asserts that allowing the appeal would be contrary to sections 4(1) and 6 of the Lands and Deeds Registry Act which require all documents purporting to grant, convey or transfer land or interest in land to be registered. Therefore, the Appellants' lien interest, not being registered, is not a legally recognized interest for the purpose of joining the Appellants to the action.
- 7.5 In ground 5, it is argued that a lien is a common law right to retain but without power to sell. It is further argued that an equitable lien is inferior to the legal mortgage held by the 1st Respondent over Stand No. 1292 Chelstone.
- 7.6 In support of the arguments, we were referred to various authorities namely; Halsbury's Laws of England 4th Edition Volume 28 paragraphs 502, 519 and 542 which define a lien

at Common Law. Land Law in Zambia Cases and Materials University of Zambia Press, 2007, Lusaka by Mr. Frederick S. Mudenda; to mention but a couple.

8.0 **APPELLANTS' ARGUMENTS IN REPLY**

- 8.1 The Appellants filed separate replies to the 1st and 2nd Respondents' Heads of Argument both filed on 16th February, 2022. We will deal with the two replies together.
- 8.2 In grounds 1 and 2, the Appellants have sought recourse to Orders 15/4(1) and 14/5(1) of the Rules of the Supreme Court 1999 edition and the High Court Rules respectively both of which provide for the joining of persons to a suit either as Plaintiffs or Defendants as elucidated by the Supreme Court of Zambia in **Rae Zambia v Attorney-General and Tallow Zambia Bv**⁸.
- 8.3 The point made is that having spent money on Stand No. 1292, Chelstone, Lusaka, the Appellants have an interest in it through the notice of lien. The case of **Gibson Tembo v Alizwani**⁹ was also referred to, to enforce the argument that an unregistered interest can be enforced against property which is subject of a registered interest. The doctrine of Constructive Notice of Interest was the basis of the argument.
- 8.4 In response to ground 3, the Appellants argue that their application to be joined to the proceedings in the Consent

Judgment cannot be consolidated with Cause No. 2015/HPC/520 as the application is intended to facilitate the challenge to the Consent Judgment.

8.5 In responding to grounds 4 and 5, they argue that the law on entitlement through equitable relief by one who has spent money is settled. **Appleton v Appleton**¹⁰ was the case in point. In that case, the court stated (only relevant portions);

“A percentage of the proceeds ought to go to him (husband) commensurate to the enhancement due to his work in improving the property or properties and getting a better piece on that account. . .”

8.6 They have also argued that the 1st Respondent’s contribution towards the project in the sum of USD10,500,000.00 was sufficient to liquidate the debt owed by the 2nd Respondent.

8.7 On multiplicity of actions, it is their position that the Respondents are the guilty parties for deciding to commence a mortgage action which culminated into a consent while being aware of Cause No. 2015/HPC/520, to which they are both parties.

9.0 **OUR ANALYSIS AND DECISION**

9.1 We have carefully considered the elaborate arguments advanced by all the parties and the ruling by the learned Judge which is the subject of this appeal. We have equally given a keen thought to the authorities cited and we take the

view that, the only issue in dispute is whether or not the Appellants established that they were so affected by the Consent Judgment that their desire to challenge it ought to be allowed.

- 9.2 The learned Judge below refused the application for joinder mainly for the reason that the Appellants had neither interest nor *locus standi* in the subject matter of the Consent Judgment. In addition, the learned Judge expressed fear that allowing the joinder would result in multiplicity of actions and a possibility of conflicting outcomes.
- 9.3 We note that the application in the court below was made pursuant to **Order 14 Rule 5(1) of the High Court Rules** which essentially creates a two-pronged criterion for joining non-parties to a claim namely; share or interest in the subject matter of the suit or likelihood of the applicant being affected by the result.
- 9.4 In the strict sense therefore, only the 1st criterion would apply to the Appellants as the suit had already been resolved by Consent Judgment at the time of the application. They therefore needed to show interest in the subject matter of the Consent Judgment.

9.5 The other limb arising from the second criterion is that rather than a likelihood of being affected, the actual effect from the Judgment must be demonstrated.

9.6 The question then is, not being parties to the action that yielded the Consent Judgment, how would the Appellants assert their interest? The answer lies in case law and the starting point is the case of **Zambia Seed Company v Chartered International (PVT) Limited**¹¹. In that case, the court stated as follows;

“By law the only way to challenge a Judgment by consent would be to start an action specifically to challenge that Consent Judgment.”

9.7 Further, in the case of **London Ngoma and Others v LCM Company and Another**¹², the Supreme Court of Zambia, after considering **Rule 67** of the **Supreme Court Rules** rejected the argument that the application for joinder could not be entertained after Consent Judgment. The Court, instead, asserted that the Appellants, who had paid deposits towards the purchase price had interest in the property and it summoned its inherent jurisdiction and ordered that the Appellants be joined to the action and joined them accordingly.

9.8 This court, has also handed down decisions in line with the Supreme Court decisions, one of which is the case of **Fred**

**M'membe and The Post Newspaper Limited (in liquidation)
v Abel Mboozu and Others** in which we stated as follows;

“The procedure to set aside a Consent Judgment by way of commencement of fresh action on the basis of fraud or mistake or any grounds that would vitiate a contract does not apply to litigants or persons who were not parties to the Consent Judgment or proceedings. In our view, the avenue or option available to the 1st Appellant was to apply under Cause 2016/HPC/0518 (winding up petition) to be joined to the proceedings for the purposes of settling aside the consent Judgment.”

- 9.9 There is therefore, no question that the Appellants' herein were legally entitled to apply to be joined to the action that had resulted in the Consent Judgment to which they were not parties, for the sole purpose of challenging the Consent Judgment.
- 9.10 Commencing a fresh action or resorting to any other procedure by the Appellants would be unlawful unless they are first joined to the action.
- 9.11 The only question that remains to be settled is whether or not the Appellants have the requisite interest and standing to be joined to the action.
- 9.12 From the arguments proffered by the Respondents, the main objection to the Appellants' claim of interest in the subject matter is that their lien was not registered pursuant to sections 4 and 6 of the Lands and Deeds Registry Act. Further

that even if it were, it would not supersede the 1st Respondent's priority mortgage interest in the property.

9.13 In their arguments in opposition, the Respondents have extensively discussed what is referred to as a construction or mechanic's lien in the construction industry referred to earlier.

9.14 According to Will Kenton in an article published online on Investopedia.com simply entitled: Construction Lien, updated on February 28, 2021, a Construction Lien is defined as follows:

“A construction lien is a claim made against a property by a contractor or subcontractor who has not been paid for work done on that property. Construction liens are designed to protect professionals from the risk of not being paid for services rendered.”

9.15 In arguing against the construction lien's applicability to the Appellants, the Respondents have sought the definition rendered by Black's Law Dictionary 11th Edition page 1109 given as follows;

“Mechanic's Lien (1821) A statutory lien that secures payment for labour or materials supplied in improving, repairing, or maintaining real or personal property, such as a building, an automobile, or the like. Also termed lien of the mechanic's, artisan's lien; chattel's lien (for personal property) construction lien (for labour), garage man's lien (for repaired vehicles); labourer's lien (for labour) material man's lien (for materials).”

9.16 The definition goes on to state as follows;

“The lien of the mechanic here treated of, is a remedy in the nature of a charge on land, given by statute to the persons

named therein, to secure a priority or preference of payment for the performance of labour or supply of materials to buildings or other improvements to be enforced against the particular property. . . It is exclusively the creature of statute deriving its existence only from positive enactment and not arising out of, or of the essence, of the contract for labour, or dependent on the motives which suggest its being enforced. . .”

9.17 Based on the above, the Respondents have forcefully argued that the Appellants cannot benefit from the Mechanic’s lien as no such law exists in Zambia.

9.18 It is not in dispute that no statute in Zambia creates the Mechanic’s lien. We are however, prepared to state that it is not so much about codification but the principle behind the lien and the mischief it intends to cure.

9.19 In this case, it is not in dispute that the Appellants had entered into a Joint Construction contract with the 2nd Respondent for the construction of a clinic on Stand No. 1292, Chelstone Lusaka, which was the subject of a first legal mortgage in favour of the Industrial Development Company of South Africa.

9.20 The Appellants commenced the construction works and presented duly certified certificates for payment but the 2nd Respondent failed to pay.

- 9.21 In pursuit of their payments, the Appellants sued the 2nd Respondent and the Industrial Development Company in the High Court of South Africa and obtained Judgment.
- 9.22 The Appellants further sought to enforce the South African Judgment enforced by the High Court of Zambia and they were granted the order.
- 9.23 The peculiarity of this case, however, is that the 1st Respondent, who is also the major shareholder, in the 2nd Respondent redeemed the mortgage from the Industrial Development Company and subsequently purported to transfer the said mortgage to itself as the new mortgagee.
- 9.24 This transfer was effected after the Appellants had already obtained Judgment against the 2nd Respondent and while Cause No. 2015/HPC/520 was pending.
- 9.25 It is further to be noted that at the time the Respondents executed a Consent Judgment by which Stand No.1292 Chelstone vested in the 1st Respondent, the Appellants had an order of possession of the same and were in possession, which the 1st Respondent referred to as a self-barricade.
- 9.26 Given all this background, we do not think that the Appellants' possession of Stand No. 1292, Chelstone, Lusaka

was only supported by their lien but it was backed by a court order which was upheld by the Supreme Court on appeal.

- 9.27 It is therefore, our firm view that not only do the Appellants have an interest in Stand No. 1292, Chelstone, Lusaka by virtue of their lien by reason of being owed by the 2nd Respondent but also by court order which granted them the right of possession.
- 9.28 It was therefore, misdirection on the part of the learned Judge to find that the Appellants lacked the requisite interest and *locus standi* in the face of the evidence on record.
- 9.29 In the view we have taken, we find that the Appellants have the requisite interest in the subject matter and they are affected by the Consent Judgment executed between the 1st and the 2nd Respondent and therefore, entitled to be joined to the action to enable them challenge the said Consent Judgment.
- 9.30 We now turn to the other reason for which the learned Judge based his refusal to join the Appellants to the cause, being that it would lead to a multiplicity of actions.
- 9.31 Granted that multiplicity of actions is frowned upon, it is not every commencement of an action that amounts to a multiplicity of actions. For an action to cause a multiplicity of actions it must meet the following tests namely; that the

parties in the new action are the same as those in the existing one, the issues in dispute are the same or that the issues raised in the new action can be determined completely in the existing action.

9.32 In determining this issue, it must always be had in mind that the mode of commencing an action is as determined by statute. In this case, the Supreme Court, riding on **Rule 65 of the Supreme Court Rules** which is similar to **Order 14/5/1 of the High Court Rules** in the London Ngoma case, invoked its inherent jurisdiction to hold that the only way to challenge a Consent Judgment was by commencing a fresh action.

9.33 It follows therefore, that, commencing a fresh action is the legal way to challenge a Consent Judgment and it cannot therefore, lead to a multiplicity of actions.

9.34 Further, it is also settled that where a party seeking to challenge a Consent Judgment was not a party to the action that gave rise to the Consent Judgment, he cannot commence a fresh action to set it aside. He must instead apply to be joined to the action even after Consent Judgment has been entered.

9.35 The Appellants herein meet all the criteria for an order to be joined as parties to the Consent Judgment in order to challenge it.

9.36 We accordingly find merit in the appeal and order that the Appellants be and are hereby joined to the action

9.37 We order costs in favour of the Appellants to be taxed in default of agreement.



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F. M. CHISHIMBA
COURT OF APPEAL JUDGE



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M. J. SIAVWAPA
COURT OF APPEAL JUDGE



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N. A. SHARPE-PHIRI
COURT OF APPEAL JUDGE