IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.106/2000**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN :

DR. ARNOLD MAAMBO CHOOKA **APPELLANT**

AND

JOSEPHINE AND FLORENCE MUNTHALI **RESPONDENT**

(As joint administrators of the estate of the late Rev. Wellins M. Munthali)

Coram: Sakala, CJ, Lewanika, DCJ, and Chibesakunda, JS
23rd May and 11th October, 2007

For the Appellant: Mr. M. J. M. Pikiti of Pikiti and Company
For the Respondent: N/A

J U D G M E N T

Sakala, CJ, delivered the Judgment of the Court.

This is an Application, by way of a Notice of Motion, in respect of the Judgment of this court delivered at Lusaka on 19th July 2002. The application was made on behalf of the Respondent for an order that, consequent upon failure by the parties to reach an out of court settlement regarding their mutual indebtedness, the matter be remitted back to the High Court for determination of the parties

mutual indebtedness pursuant to the observations made by this Court in its judgment of 19th July 2002.

The Application is supported by an affidavit. The summary of the affidavit in support of the Application is that by the judgment of this court, this court held that the issue of the Appellant owing the Respondent money was not in dispute and that the learned Judge in the court below erred in ignoring the Appellant's defence contained in a separate action that was severed from the Respondent's action; and that since the facts in the matter were not in dispute; and there are documents to which the parties can speak to, in order to do justice, this court must remit the matter to the High Court for the determination of the parties mutual indebtedness.

The affidavit in opposition was sworn by the Advocate. Paragraph 5 of that affidavit reads as follows:

> ***"That I am deeply shocked by the blatant misinformation made as contained in the said JOSEPHINE MUNTHALI'S Affidavit, particularly its paragraph 6, where she alleges that she and her "joint administrator made several efforts to engage the administrator of the estate of the Appellant in discussion with a view to reach an amicable out of court settlement., but the Appellant's administrator has been unreceptive and uncooperative."***

The Appellant's Advocate in his affidavit has set out several correspondence showing that it was the Respondent who was not responding positively to the matter. At the hearing of this motion, the parties relied on written heads of arguments filed with the court.

The gist of the Respondent's heads of argument is that this Court in its judgment of 19th July 2002, held that the trial Judge erred in ordering the severance of Cause No. 1996/HP/4740 from the case before this court; and that it should have taken into consideration the defence raised in the counterclaim in that case; that the court further noted that in each case, the facts appear not in dispute and suggested that the representatives of the deceased parties reach an amicable out of court settlement; that the court observed that the case was a proper case in which retrial should have been ordered but for the fact that both parties were now deceased.

It was contended that in the interest of justice, the parties having failed to follow the suggestion of this court for an amicable out of court settlement, this court should order the two consolidated matters to be remitted to the High Court to determine the parties mutual indebtedness.

The Appellant's response to the Respondent's heads of argument in support of the motion was that he was shocked to read the written heads of argument, claiming that the Appellant had failed

to reach an amicable settlement, when it was the Respondent who had deliberately worked to frustrate the efforts to settle the matter conclusively.

We have considered the Application, the affidavit evidence and the submissions and arguments of both learned counsel. In this court's judgment dated 19th July 2002, we said:

> ***"We are satisfied that had the learned trial Judge considered the defence to the originating summons raised by the Defendant , she would not have entered judgment in favour of the Plaintiff. On this ground alone, this appeal ought to succeed. It therefore becomes unnecessary for us to consider the second ground relating to interest. The appeal is allowed with costs to be taxed in default of agreement".***

We went further in that judgment to observe that:

"This was a proper case in which a retrial should have been ordered but for the fact that both parties are now deceased, an order for retrial may not be practical. However, since in each case the facts appear not to be in dispute, the respective Administrators of the deceased parties' estate may wish to reach an amicable out of court settlement".

It would appear that it is the foregoing observations that militated this notice of motion. The basis for the motion is that the parties have failed to reach the out of court settlement as suggested by this court and in the wisdom of the Respondent, this court must revisit its judgment and order a retrial.

Our short answer is that this notice of motion is not only frivolous but misconceived. The Respondent is requesting this Court to review its own judgment. This as we have said in many cases before, this court can not do. The net result of the appeal that was before us was that we allowed the appeal with costs. The reference to a retrial was merely **obiter dictum**. In other words, we never ordered a retrial.

The application is, therefore, misconceived. We dismiss it with costs to be taxed in default of agreement.

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E.L. SAKALA

CHIEF JUSTICE

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D.M. LEWANIKA

DEPUTY CHIEF JUSTICE

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L.P. CHIBESAKUNDA

SUPREME COURT JUDGE