IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 049/2018**

HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

NKOSI BREWERIES LIMITED **1st APPELLANT**

PATRICK DINGAYO BANDA **2nd APPELLANT**

AND

CITIZEN ECONOMIC EMPOWERMENT COMMISSION **RESPONDENT**

CORAM: CHISANGA *JP*, MAJULA AND NGULUBE, JJA

This day of 16th October 2019 and 2nd June 2020

For the 1st & 271d Appellants: *Mr. F. S. Kachamba of Messrs EBM Chambers*
For the Respondent: *Mr. R. Musumali of Messrs S L MLegal Practitioners*

JUDGMENT

CHISANGA JP delivered the judgment of the Court

Cases Referred to:

1. ***Kingfarm Products Limited, Mwanamuto Investments Limited vs Dipto Rain Sen (Executrix and Administratrix of the Estate of Ajit Barab Sen) 2008 ZR 72 Vol 2 (S.C.)***
2. ***Zambia Consolidated Copper Mines Limited vs Reddy Daka and David Kantumoyo. (1998) S. J. 9 (S.C.)***
3. ***Ruth Kumbi vs Robinson Kaleb S.C.Z Judgment No. 19 of 2009***
4. **Zulu vs Avondale Housing Project Limited (1982) ZR 172**

5. ***Hamalambo vs Zambia National Building Society Appeal No 64 of 2013***
6. ***Re Wright (deceased) B lizard and Another vs Lockhard and Another[6] (1954) 1 ALL ER P 867***
7. ***Re Wright (deceased) B lizard and Another vs Lockhard and Another[6] (1954) 2ALLER 98***
8. **Anisminic Limited v. The Foreign Compensation Commission and Another (1969) 1 All ER 208 at page 213**
9. **Mwinga and Another vs Kashawindo and Another Appeal No. 95/2019 CAZ**

INTRODUCTION

This appeal is against a decision to dismiss an application for assessment of receipts for payments purportedly made to the Respondent by the Appellant to discharge a mortgage over Stand No *7757.*

BACKGROUND

The [1st] Appellant was availed a loan facility in the sum of ZMW 100,000,000.00 (unrebased) at *12%* per annum, to be charged and recovered monthly in arrears on the outstanding balances. As security for the said facility, the *2'* Appellant's property was mortgaged. In addition, the directors of the Appellant Company gave personal guarantees for the facility.

The 1st Appellant defaulted on the repayments, and this prompted the Respondent to commence an action for recovery of its dues, consequent on which it obtained judgment for the sum of *K565,674.32 plus* interest. The

judgment debt was to be liquidated within 60 days failure which vacant possession of the secured property was to be rendered.

The 1st Appellant failed to liquidate its indebtedness as ordered, whereupon the Respondent took out a writ of possession, foreclosure and sale in an attempt to enforce the judgment. The Appellants applied for leave to liquidate the debt in installments whereupon the court suspended the writ of possession for six months from 28th January 2014, on condition that the appellants liquidate the judgment sum in that period. The judgment debtors failed to liquidate the debt, and the Respondent refused to hand the Certificate of Title over to the Appellants.

The Appellants sought the intervention of the court as a result, by Originating Summons issued pursuant to Order 30 r 14 of the High Court Rules. They sought an Order for possession and surrender of title deed for Stand No 7757, Woodlands, Lusaka along with the deeds of discharge of mortgage. The premise of this action was the alleged liquidation of the Appellant's indebtedness to the Respondent.

The Respondent opposed the application, asserting that proof of payments allegedly made by the Appellants had never been availed to the Respondents, to enable them reconcile their accounts and discharge the mortgage. In addition

to this, the payments indicated in the statement from the Respondent were not verified against bank statements. As such, they could not be reconciled.

Upon considering the application before him, the learned trial judge found that the appellants had failed to prove that they had liquidated the debt. He therefore refused to grant the application for an order for possession and surrender of the Certificate of Title for Stand No 7757 Lusaka. He also made this statement:

> ***"the respondents are at liberty to realise the property to recover the balance together with interest unless the applicants can provide documentary proof of the full liquidation of the debt as at the date of this action."***

14 days after delivery of this decision, the appellants filed an application for its review. The affidavit in support was sworn by the 2nd appellant. He averred as follows:

> ***"That I humbly seek leave of this Honourable Court to review its Judgment dated 29th March 2017, as the Applicants are able to produce documentary evidence as proof of full payment of the outstanding balance of K284,088.85 as at April 2014. Now produced and shown to me marked "PDB1" to "PDB1 2" are copies of official CEEC receipts for payments from the 1 st April 2004 to 22nd August, 2014 amounting to K295,000.00."***

The Record of Appeal does not contain the affidavit in opposition to this application. The learned judge considered the application and made the following ruling:

"In paragraph 3 of the ruling sought to be in review at R9 I provided that the applicants could escape liability if they provided proof of full payment of the sum deposed and now they contend that they have proof of that. I do not find this an appropriate case for review given that provision in my ruling.

I accordingly order that the parties go before the Registrar who will scruitinise the purported new evidence of payment and determine whether or not they constitute proof of payment. Stay shall remain in force until DR disposes of the matter."

This ruling was rendered on 2nd June 2017. On 9th June 2017 the appellants took out a summons for assessment of receipts pursuant to the Order of the Court dated 2d June, 2017 and the inherent jurisdiction of the court. The assessment was to be conducted by the Deputy Registrar.

The 2nd Appellant averred, in the affidavit in support as follows:

"5. That I verily believe that the Applicants are able to provide documentary evidence as proof of full payment of the outstanding balance of K284,088.85 as at April 2014. Now produced and shown tome marked "PDB1" to "PDB 12" are copies of official CEEC receipts for payments made between the 1st April 2014 to 22's" August 2014 by the Applicants and amounting to K295, 000. 00.

6. That I verily believe that the Honourable Court in its judgment/ruling dated the 29th March 2017, at page R5 paragraph 3, the Honourable Court directed and stated that the "Respondents are at liberty to realize the property to recover the balance together with interest unless the Applicants can provide documentary proof of the full liquidation of the debt as at the date of this action."

The application was heard, and considered by the then Deputy Registrar, Mr. Mulife. At R3 of his ruling, he said this:

"The record further discloses that on 91h May 2017, the honourable Judge endorsed an Exparte Order staying execution *of his mentioned ruling pending determination of* ***the applicant's application for leave to review the Judge's ruling. There is no indication that the Judge has reviewed this ruling and thereby directing me to conduct the sought assessment*** *of* ***receipts. Under the circumstances, the important question is whether or not I have Jurisdiction to conduct the sought assessment. My answer is that I have no Jurisdiction to conduct the assessment since doing so would be tantamount to reviewing the ruling*** *of* ***the honourable judge delivered on 29th March 2017 and thereby aid the Applicants circumvent their similar application which is still pending before the honourable trial judge. It is startling why the applicants abandoned their similar application before the honourable Judge only to review it before a District Registrar".***

APPEAL

It is this ruling that has prompted the appeal now before us, on two grounds as follows:

1. The District Registrar misdirected himself in law and fact by holding that he has no power to review an order of a judge or the decision of another Registrar including his own when in fact the application before him was not an application for review but rather, was an application for assessment of receipts made pursuant to the Order of the High Court trial judge dated 2nd June 2017.
2. The District Registrar misdirected himself in law and fact by dismissing the appellants' application for assessment of receipts with costs to the Respondent when in fact when the matter came up for the hearing of the Appellant's application for review of the trial judges' ruling/judgment on the

2nd June 2017, the trial judge ordered and directed that the District Registrar assess the receipts and therefore the appellants did nothing wrong to warrant a dismissal of their application for assessment of receipts and to be condemned in costs.

ARGUMENTS

The arguments made on behalf of the appellants are that the learned judge made an Unless Order, and it was on this basis that the application for review of the ruling/judgment was made, as the appellants had managed to find and provide documentary proof of full liquidation of the debt as at the date of the action. Support for the arguments, according to the appellant, is found in these *cases:* ***Kingfarm Products Limited, Mwanamuto Investments Limited vs Dipto Rain Sen***[1]*,* ***Zambia Consolidated Copper Mines Limited vs Reddy Daka and David Kantumoy&,*** and ***Ruth Kumbi vs Robinson Kaleb***[3].

It was contended that the affidavit in support had copies of official receipts issued by the Respondent to the Appellants, for payments made between the 1st April 2014 to 22d August 2014, amounting to the sum of K295,000.00 as proof of full payment of the outstanding balance of K284.088.85 as at April 2014, and which receipts were never tendered or produced before the court as at the date of ruling /judgment.

It was argued that the learned judge ordered the parties to go before the Registrar who was ordered to scrutinise the receipts/new evidence and determine whether or not they constitute proof of payment. It was submitted that the learned judge did not find it an appropriate case for review given the provision in his ruling. This position therefore confirmed that the court left room for the appellants to provide evidence to show and prove otherwise, that they had paid the respondents in full.

It was also submitted that a Deputy Registrar cannot vary an order made by a judge whether in chambers or in open court. Learned counsel premised his argument on these words uttered in the *Kin gfarm Products Limited case* supra:

> "...***the other exception is that a Deputy Registrar cannot vary an order made by a judge, whether in chambers or in open court. It was therefore, a misdirection on the part of the District Registrar to decline to entertain the application to examine the judgment debtor under the pretext that he had no Jurisdiction to do so.***''

Other arguments address the merits of the application for assessment, which we will not regurgitate as it is unnecessary to do so.

In opposing the appeal, the respondent contended that the high court judge made a finding of fact that the appellants had failed to demonstrate by documentary proof that they had fully liquidated the facility. It was on the premise of that finding that the court held that the respondent was at liberty to

realize the property to recover the balance together with interest unless the applicant can provide documentary proof of full liquidation of the facility.

It was submitted that the finding of fact was final and cannot be revisited by the Deputy Registrar or this court, per ***Zulu vs Avondale Housing Project Limited.***[4] The pronouncement being final, it is res judicata. We were referred *to* ***Hamalambo vs Zambia National Building Society***[5], where the following was stated:

> ***"Res judicata means a matter that has been adjudicated upon. It is a matter that has been heard and determined between the same parties. The principle of Res Judicata states that once a matter has been heard between the same parties, by a court of any competent Jurisdiction, the same should not be re-opened."***

It was argued that the appellant's application for review of the judgment of the court was declined. It was not the intention of the judge to revisit his judgment. In light of the judgment and ruling of the judge on the application for review, the Deputy Registrar was on firm ground to decline the appellant's application. In the application before the Deputy Registrar the appellants asserted that they have paid a sum of K353,996.90 between April 2014 to August 2015 to the Respondents.

The period the appellants claimed to have liquidated the debt, and the evidence adduced were not fresh evidence as the court had already considered the same in the judgment of 29th May 2017. It was contended that the failure to provide

fresh evidence of full payment by the Appellant was critical, as it went to the jurisdiction of the Deputy Registrar to hear the application for assessment of receipts as he risked interfering with the holding in the main judgment.

Learned counsel went on the state that the Deputy Registrar was legally precluded from hearing the application for assessment of receipts as the evidence the appellants tendered was not proof of payment and would have likely interfered with the judgment of the High Court. This is on account of the principle that a Deputy Registrar cannot vary, alter or disturb the decision of a judge of the High Court for Zambia, per ***Kingfarm Products Limited,*** supra. Learned counsel argued that the Deputy Registrar had no jurisdiction to entertain evidence or matters that the court had already dealt with. We were urged to dismiss the appeal.

DECISION

We have considered the record of appeal, as well as the arguments. Our considered opinion is that our decision turns on jurisdiction. The respondent's arguments relate to the finality of the initial ruling of the learned judge, which was rendered on 29th March, 2017.

We observe that although the decision was headed as a ruling, it was a judgment as it was handed down upon considering Originating Summons. This type of summons is employed when commencing an action determinable in

chambers. An action commenced in this manner is determined by considering the evidence, normally given through affidavits, and thereafter rendering a final judgment. During the course of such proceedings, a party may issue summons for an interim Order. The court would render a ruling after hearing the parties. The learned judge did not indicate why the decision he rendered after considering the application was styled as a ruling. We should point out here that it is competent for a court to stand the main matter over pending an interim enquiry. After the enquiry has been done, the court would then consider the main application and render a judgment. In ***Re WRIGHT (deceased) B lizard and Another vs Lockhart and Others***[5] Roxburgh J said this:

> ***"...counsel for the Attorney General has convinced me, though by a very narrow margin, that an order or an inquiry ought not to be regarded as a decision in a case where the very question to which the enquiry relates is, by the very order directing the enquiry, directed to stand over***

This approach was affirmed on appeal by the Court of Appeal in the same case where it was held inter alia as follows:

> *"1. The Order of* ***Jan.27/1 948, directing the inquiry was intended only to be an approach towards the main question asked by the summons, viz, whether the gift of residue to found and maintain the convalescent constituted a good and effective charitable gift, and was not intended to be a final answer to that question, which was directed to stand over with a view to being disposed*** *of at a later date, and therefore, the doctrine of* ***resfudicata by implication did not apply to issues that could have been raised in the action, but were inadvertently omitted."***

In our considered view, the principle of *res judicata* cannot be side-stepped by an order in a decision that deals with the main application, considers the evidence, and draws inferences leading to determination of the very issues sought to be determined by the Originating Summons. It would be different if an enquiry had been ordered, while the main matter was stood over, to be heard and determined after the enquiry had been concluded.

It will be noticed that the Respondent did not appeal against the reference of the payments for assessment to the Deputy Registrar, when that reference had the effect of re-opening an issue that was disposed of in the judgment of 29th March, 2017. It submitted to the assessment without protest, and has sought to raise the argument of *resjudicata* before this court.

In this particular case, this omission is not fatal. This is on account of the principle that an issue of jurisdiction can be raised at any time, as an order made without jurisdiction is incompetent. In ***Anisminic Limited v. the Foreign Compensation Commission and Anothei***[8] the court stated that an order made without jurisdiction is a nullity. See also ***Mwinga and Another vs Kashawindo and Another***[9]. Thus, the order to reopen the matter on purported new evidence is a nullity. The proceedings before the Deputy Registrar, were similarly affected, having ensued from a nullity.

Although the Deputy Registrar misapprehended the matter before him, characterizing it as a review when it had in fact been referred to him by the learned judge, the fact remains that even had he properly directed himself, the principle of *res judicata* would have dealt a fatal blow to the proceedings before him.

On the foregoing discussion, this appeal fails on grounds of *resjudicata.*

It is otiose to consider the other grounds. We award the respondent costs to be agreed and in default taxed.

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F. M. CHISANGA
JUDGE PRESIDENT

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B. M. AJULA
COURT OF APPEAL JUDGE

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P. C. M. NGULUBE
COURT OF APPEAL JUDGE