

**IN THE COURT OF APPEAL OF ZAMBIA      APPEAL NO. 57 OF 2021**

**HOLDEN AT NDOLA**

*(Civil Jurisdiction)*

**IN THE MATTER OF:                    SECTIONS 5, 6, 11, 87 & 89 OF THE  
LANDS AND DEEDS REGISTRY ACT,  
CHAPTER 185 OF THE LAWS OF  
ZAMBIA**

**AND**

**IN THE MATTER OF:                    THE REGISTRATION OF HIGH COURT  
JUDGMENT DATED 30<sup>TH</sup> MARCH 2006  
OUT OF TIME IN RESPECT OF STAND  
NO. LUS/10494**

**AND**

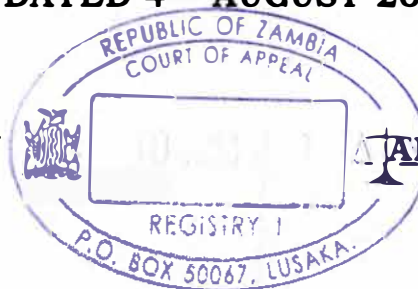
**IN THE MATTER OF :                    AN APPEAL AGAINST THE DECISION  
OF THE REGISTRAR OF LANDS AND  
DEEDS PURSUANT TO O.47, R.25 HCR  
CAP 27 & O.44 CAP 28 SUBORDINATE  
COURT RULES OF THE LAWS OF  
ZAMBIA**

**AND**

**IN THE MATTER OF :                    THE RULING OF THE HIGH COURT  
DATED 4<sup>TH</sup> AUGUST 2015**

**B E T W E E N:**

**MOHAMED AZIM TICKLAY**



**APPELLANT**

**AND**

**ATTORNEY GENERAL  
ABDUL MAJID TICKLAY  
RIFS PROPERTIES LIMITED**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT**

**CORAM:    Chashi, Majula and Patel, JJA**

**ON:    23<sup>rd</sup> and 30<sup>th</sup> August 2023**

*For the Appellant:*

*W. Mwenya, Messrs Lukona Chambers*

*For the 1<sup>st</sup> Respondent:*

*M. Katolo (Ms) and C. Watopa, Assistant  
Senior State Advocates*

*For the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents: (1) G. Hakainsi, Messrs L.M Chambers*

(2) *M. Chileshe, Messrs Eric Silwamba,  
Jalasi & Linyama Legal Practitioners*

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## **J U D G M E N T**

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**CHASHI, JA** delivered the Judgment of the Court.

***Cases referred to:***

- 1. *New Plast Industries v The Commissioner of Lands and The Attorney General (2001) ZR, 51***
- 2. *BP Zambia Plc v Zambia Competition Commission & 2 Others – SCZ Judgment No. 22 of 2011***
- 3. *Crossland Mutinta and Bashir Seedat v Donovan Chipanda – SCZ Judgment No. 53 of 2018***
- 4. *Costa Tembo v Hybrid Poultry Farm (Z) Limited – (2003) ZR, 98***

***Legislation referred to:***

- 1. *The Lands and Deeds Registry Act, Chapter 183 of the Laws of Zambia***
- 2. *The Subordinate Court Act, Chapter 28 of the Laws of Zambia***

***Rules referred to:***

- 1. *The High Court Rules, Chapter 27 of the Laws of Zambia***
- 2. *The Supreme Court Rules, Chapter 25 of the Laws of Zambia***

### **1.0 INTRODUCTION**

- 1.1 This is an appeal against the Ruling of A.M Banda-Bobo, J as she then was, which was delivered on 8<sup>th</sup>**

October 2020 in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, consequently dismissing the Appellant's matter (appeal).

- 1.2 In the said Ruling, the learned Judge opined that there was no leave to appeal the decision of the Registrar of Lands and Deeds obtained and as such the matter was incompetently before her. Furthermore, that Kondolo, J as he then was, had directed the Appellant on how to proceed, but the Appellant chose to ignore the directive.

## **2.0 BACKGROUND**

- 2.1 This matter has had an elongated legal history. We will from a glean of the four volumes of the record of appeal only capture and restrict ourselves to the background relevant to the appeal herein.
- 2.2 On 7<sup>th</sup> November 2000, the 2<sup>nd</sup> Respondent who was then based in Zimbabwe, gave the Appellant a power of attorney to deal with his properties in Zambia. It was out of the powers conferred therein, that he placed a caveat on stand no. 10494 Lusaka (*the Property*) on 29<sup>th</sup> November 2004. It was in that respect as well that the Appellant executed a contract of sale with E.

Hatembo who paid K10,000,000 (unrebased) for the sale of the said Property.

2.3 On 28<sup>th</sup> June 2005, the 2<sup>nd</sup> Respondent, who had then offered the Property to M.R.I Mulla on 9<sup>th</sup> November 2004, commenced proceedings against the Appellant by way of originating summons, for removal of the caveat under cause No. 2005/HP/365. In his Judgment dated 30<sup>th</sup> March 2006, Simachela, J refused to remove the caveat at that stage, as he was of the view that the contract of sale between the Appellant and Hatembo was complete. The Judge ordered that the Appellant be allowed to complete the transaction and thereafter account to the 2<sup>nd</sup> Respondent as the principal. That thereafter the power of attorney will stand revoked and the power and all rights will revert to the 2<sup>nd</sup> Respondent.

2.4 Dissatisfied with the Judgment, the 2<sup>nd</sup> Respondent, appealed to the Supreme Court on 27<sup>th</sup> April 2006; which appeal he withdrew on 21<sup>st</sup> December 2007. On 6<sup>th</sup> June 2008, more than two (2) years later, the Appellant filed the Simachela J, Judgment at Lands and Deeds Registry for registration. However, the Registrar of Lands on 14<sup>th</sup> November 2008, cancelled

the registration on the ground that it had been filed out of time.

- 2.5 Upon discovering the cancellation, the Appellant then applied for leave to register the Judgment out of time before the Deputy Registrar (DR) of the High Court, pursuant to Section 6 of **The Lands and Deeds Registry Act**<sup>1</sup>, under the same cause number 2005/HP/365. The learned DR in his ruling of 8<sup>th</sup> February 2010, granted the Appellant liberty to register the Judgment out of time with an extension of 30 days. The 2<sup>nd</sup> Respondent appealed against this ruling.
- 2.6 Eventually, the appeal was heard by Kondolo, J who in his ruling of 4<sup>th</sup> August 2015, in upholding one of the preliminary issues raised by Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, held that the Appellant employed an incorrect procedure when commencing the action before the DR and therefore the DR was wanting in jurisdiction, when he heard the applications and his rulings and Orders had no effect.
- 2.7 Kondolo J, However, notwithstanding the default, granted the Appellant leave to commence a fresh action for registration of the Judgment out of time,

using the correct procedure, subject to payment of costs in the dismissed matter.

2.8 On 26<sup>th</sup> April 2016, in total disregard of the ruling by Kondolo J, the Appellant filed into court under cause No. 2016/HP/A21 against the 1<sup>st</sup> Respondent, an appeal against the decision of The Registrar of Lands, on 14<sup>th</sup> November 2008, to cancel registration of the Judgment. This was accompanied by an affidavit in support and grounds of appeal. Simultaneously under the same appeal cause number, the Appellant filed an application for leave to register the Simachela, J Judgment out of time. Consequently, Banda-Bobo, J on 2<sup>nd</sup> June 2016 and 27<sup>th</sup> July 2016 signed Orders granting leave to the Appellant to register the Judgment out of time.

2.9 Subsequently the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were joined to these proceedings and on 17<sup>th</sup> August 2016, there was an application by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for special leave to review the Orders of Banda- Bobo J. Although there is some disconnect on the record of appeal between this application and the Judgment by Banda- Bobo, J of 8<sup>th</sup> October 2020, we are of the view



that it is this application which culminated into the Judgment being impugned.

### **3.0 DECISION OF THE COURT BELOW**

3.1 After giving a background to the matter and analyzing the affidavit evidence, the grounds of appeal and heads of argument, the learned Judge formulated the main issue for determination as “*whether the matter was rightly and competently before the court.*”

3.2 After considering the provisions of the law, in particular **Order 47 of The High Court Rules (HCR)<sup>1</sup>, Order 50 (1) and (2) of The Supreme Court Rules (SCR)<sup>2</sup>**, Sections 87 and 89 of **The Lands and Deeds Registry Act<sup>1</sup>** and several Supreme Court decisions on the mode of commencement of actions, such as **New Plast Industries v The Commissioner of Lands and The Attorney General<sup>1</sup>** and **BP Zambia Plc v Zambia Competition Commission & 2 Others<sup>2</sup>** the learned Judge opined that, a party that wishes to appeal out of time, ought to seek leave to appeal out of time. That therefore, the Appellant ought to have applied for leave to appeal within thirty (30) days after the date of the decision. The learned Judge noted that, contrary to the Appellant’s assertion that leave was obtained, there

was no such evidence on record, that revealed that an Order for leave to appeal was granted.

3.3 That furthermore, the Appellant did not comply with the Order by Kondolo, J in which he granted leave to commence fresh proceedings for registration of the Judgment out of time. That there was therefore, by bringing the appeal, an abuse of the court process.

#### **4.0 THE APPEAL**

4.1 Dissatisfied with the Judgment, the Appellant appealed to this court advancing four (4) grounds of appeal couched as follows;

**(1) The honourable court below erred both in law and fact when at page J38 paragraph 13.11 of the Judgment held that, from the cited law above the appellant ought to have applied for leave to appeal 30 days after the decision or action appealed against. Contrary to the appellant's assertion that leave was obtained there is no such evidence on record that reveals that an Order for leave to appeal was granted. At J40 paragraph 13.15 of the Judgment the honourable court below went on and held that, the mode of commencement of**



**this application was incorrect as leave to appeal was not obtained by failure to take into account that on or about the 2<sup>nd</sup> day of June 2016 the honourable court below granted leave to the Appellant to appeal out of time.**

- (2) The honourable court below erred both in law and fact when at page J39 paragraph 13.12 of the Judgment held that, it is therefore my finding that leave to appeal was not obtained and that this matter is irregularly before this Court, as it ought to have been commenced by way of a fresh action and not an appeal by failure to take into account that an appeal against the decision of the Registrar of Lands is a fresh action.**
- (3) The honourable court below erred both in law and fact when at page J39 paragraph 13.13 of the Judgment held that, further Section 89 of the Lands and Deeds Registry Act provides a timeline within which one can appeal to the High Court. It is clear that the appellant fell short of the timeline within which to appeal to extend the time within which to register the**

**Judgment by failure to take into account that this fresh cause of action is premised on seeking leave of court to register the Judgment under Cause No. 2005/HP/635 out of time.**

- (4) The honourable court below erred both in law and fact when at page J40 paragraphs 13.15 and 13.16 of the Judgment held that, therefore, this appeal is misconceived and is dismissed for lack of merit and the appellant is condemned to costs by failure to take into account that the appellant complied with the procedure to obtain leave to appeal out of time and that this action was not a misconceived one as it was a fresh action.**

## **5.0 ARGUMENTS IN SUPPORT OF THE APPEAL**

5.1 In arguing the appeal, Mr Mwenya, Counsel for the Appellant relied entirely on the Appellant's heads of argument. In arguing the first ground, it was submitted that jurisdiction of the court is cardinal and is required before the court can determine a matter. That an Order for leave to appeal must be obtained in order to clothe the court with jurisdiction to determine

a matter. Where such leave is required and is not obtained, the court has no jurisdiction to hear the matter. Our attention in that respect was drawn to the case of **Crossland Mutinta and Bashir Seedat v Donovan Chipanda**.<sup>3</sup>

5.2 According to the Appellant, where the decision of the Registrar of Lands is to be challenged, it is a requirement that leave of the court must be obtained before an appeal can be heard. Reliance in that respect was placed on Section 89 of **The Lands and Deeds Registry Act**<sup>1</sup> which provides as follows:

**“In the conduct of appeals from the Registrar to the court, the same rules shall apply as are in force or exist for the time being in respect of ordinary appeals to the court from the subordinate court.”**

5.3 Reliance was also placed on Section 28 (1) of **The Subordinate Court Act**<sup>2</sup> which provides for leave to be obtained in an appeal from the Subordinate Court to the High Court. It was further submitted that, where an applicant is out of time to do an act, no steps

should be taken before obtaining leave of the court to do such act out of time.

5.4 According to the Appellant, contrary to the findings of the court that there was no leave obtained to appeal, the Appellant having been out of time to appeal the decision of the Registrar of Lands, applied for leave of the court to have the appeal heard out of time and the court below granted leave to the Appellant to appeal out of time. It was submitted that the court below having granted leave to appeal out of time, as evidenced by the Order at pages 118-119 (Volume 1) of the record of appeal (the record), the court proceeded to grant another Order to the Appellant to register the Judgment out of time as appears at pages 120-121 of the record.

5.5 It was the Appellants submission that there was therefore evidence to show that leave was obtained by the Appellant to have the appeal heard and determined. It was the Appellant's contention that this is a proper case, where this Court ought to interfere with the finding of the court below.

- 5.6 In respect to the second ground, it was submitted that since the court below held that it had no jurisdiction, it should not have made any other decisions on the appeal except for the issue of costs. That the court therefore lacked jurisdiction and should not have proceeded to pronounce itself on the procedure on commencement of proceedings.
- 5.7 As regards the third ground, it was repeatedly submitted that since, the court below lacked jurisdiction, the court could not determine any issue that was before it.
- 5.8 In arguing the fourth ground, it was the Appellant's submission that costs are awarded at the discretion of the court. That however, there must be grounds upon which the court must exercise that discretion and judiciously. It was the Appellants contention that having granted leave to the Appellant to have the appeal heard out of time and also to register the Judgment, the court below arrived at a wrong conclusion in the face of the evidence on record. That there was therefore no justification to condemn the

Appellant's Counsel in the manner the court did for disregard to procedure.

5.9 It was further argued that the court below erred when it awarded costs to the Respondents on the premise that the application was misconceived as leave was never granted. According to the Appellant, the court below wrongfully and unjudicially exercised its discretion, based on the error that the Appellant never obtained leave to appeal out of time. It was the Appellants prayer that the Order for costs be reversed as it was manifest injustice.

## **6.0 ARGUMENTS IN OPPOSITION BY THE 1<sup>ST</sup> RESPONDENT**

6.1 The 1<sup>st</sup> Respondent did not file heads of argument.

Although Counsel for the Respondent were before court, they were for that omission not allowed to take part in the appeal.

## **7.0 ARGUMENTS IN OPPOSITION BY THE 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS**

7.1 In response, Mr Hakainsi, co-Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents also relied entirely on the heads of argument filed into court on 21<sup>st</sup> July 2021.

7.2 In respect to the first ground, it was submitted that the court below cannot be faulted, as indeed as the court

correctly observed, the Appellant did not apply for leave to appeal out of time, as they never made any such application. That in any case, leave to appeal is supposed to be made before filing any notice of appeal. That however, the Appellant herein filed the substantive appeal documents for the determination of the appeal at the same time of filing the ill-fated summons for leave to hear the appeal. That the court below was therefore well premised when it dismissed the appeal for lack of leave to appeal.

7.3 In response to the second ground, it was submitted that the Appellant's application in the court below was for registration of the Judgment out of time. The same issue was earlier heard by Kondolo, J who rendered a ruling directing the Appellant to commence a fresh action using the correct procedure and the Appellant did not appeal the said ruling.

7.4 According to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the Appellant made two fundamental mistakes. Firstly, it went against the ruling of Kondolo, J and secondly, the Registrar of Lands has no power to extend time to register documents or to allow registration of documents out of time. It was submitted that the



power in accordance with section 6 (1) of **The Lands and Deeds Registry Act**, can only be exercised by the High Court. That the alleged appeal was therefore ill conceived.

7.5 In response to the third ground, it was submitted that it is paradoxical that the Appellant can claim that the application in the court below was for leave of the court to register the Judgment, whilst appealing against the cancellation of the registration by the Registrar of Lands. According to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the explanation given for the delay to register the Judgment cannot be entertained by the Registrar of Lands without a court Order, because he has no powers to authorise or allow registration of a document outside the prescribed period. That it was therefore irregular to ask the Registrar to exercise powers which he does not have.

7.6 As regards the fourth ground, it was submitted that the ground must fail as it lacks merit. That it is trite law that costs are awarded at the discretion of the court. Our attention was drawn to Order 50/6 **HCR** and the case of **Costa Tembo v Hybrid Poultry Farm (Z) Limited**<sup>4</sup> to cement the argument. It was contended

that the learned Judge was on *terra firma*, when she condemned the Appellant in costs.

## **8.0 OUR ANALYSIS AND DECISION**

8.1 We have considered the arguments and the records, in particular the Ruling being impugned. We will address the first, second and third grounds together as they are entwined. The issue these grounds raise for determination is whether the learned Judge, in the court below erred in law and fact, in holding that the matter was incompetently before her and as a consequence dismissing it.

8.2 A recap of the evidence shows that the Judgment by Simachela, J delivered on 30<sup>th</sup> March 2006 was not registered until more than two years later, on 6<sup>th</sup> June 2008, when the Appellant filed it at Lands and Deeds Registry. Therefore, at the time of registration, the Judgment in accordance with Section 6 of **The Lands and Deeds Act**<sup>1</sup> was void for want of registration. It was in our view for that reason that the Registrar of Lands and Deeds executed his administrative powers to rectify the register in accordance with section 11(1) of the Act by cancelling the registration.

8.3 Section 4 of the Act provides for registration of documents. Section 4/3 (c) of the Act provides as follows:

**“Any person aggrieved by an Order of the Registrar under this subsection may appeal to the court which may annul or confirm the Order of the Registrar with or without modification.”**

8.4 Evidently, the Appellant upon discovering the cancellation, did not appeal the decision of the Registrar. The Appellant instead made an application before the DR under cause number 2005/HP/635, pursuant to Section 6 of the Act. The learned DR on 8<sup>th</sup> February 2010 granted the Appellant the liberty to register the Judgment out of time on condition that it was registered within thirty (30) days.

8.5 The ruling by the DR was however set aside by Kondolo, J who opined that the Appellant had employed an incorrect procedure when commencing the action, and therefore the DR lacked jurisdiction and the Ruling and Orders by the DR had no effect. Kondolo, J then despite the holding, granted the

Appellant leave to commence a fresh action for registration out of time, subject to payment of costs.

8.6 Evidently for some unknown reasons, the Appellant decided to ignore the directive by Kondolo, J and decided to appeal the decision by the Registrar of Lands for cancellation of the Register, which cancellation had been done nearly eight (8) years prior to the appeal.

8.7 The Appellant drew our attention to the two Orders signed by Banda Bobo, J on pages 118 and 120 of the record which was couched as follows:

**“UPON HEARING Counsel and UPON READING the documents filed in support of the application. IT IS HEREBY ORDERED that LEAVE BE AND IS HEREBY GRANTED to hear the appeal by the Appellant to register the High Court Judgment dated 30<sup>th</sup> March 2006 under cause number 2005/HP/635 out of time at the Lands and Deeds Registry...”**

8.8 In our view, there is nothing in that Order speaking to granting of leave to the Appellant for leave to appeal and to appeal out of time against the decision of the Registrar of Lands and Deeds. Equally the Order at

page 120 does not speak to the same as it merely speaks to granting of leave to the Appellant to register the Judgment within (30) days.

8.9 The confusion which culminated into the signing of these Orders as observed by Banda Bobo, J in her introductory remarks, was created by the Appellant filing an appeal against the decision by the Registrar of Lands simultaneously with an application to register the Judgment out of time. The two Orders which were signed by the learned Judge related to the latter application, which was made and Orders granted under the appeal cause number 2016/HP/A21, which cause was before the court without leave of the court. As earlier alluded to under paragraph 2.9 of our Judgment, this led to the learned Judge's review of the two Orders on the applications made by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

8.10 In the view that we have taken, there was no leave granted by the court to appeal the cancellation of the registration of the Judgment by the Registrar of Lands and Deeds. We see no basis on which to fault the learned Judge for the finding that there was no leave obtained to appeal the decision of the Registrar of

Lands and Deeds and to do so out of time. The three grounds of appeal therefore lack merit and are accordingly dismissed.

8.11 The fourth ground attacks the learned Judge's award of costs to the Respondents mainly on the ground that the Appellant having sought and granted leave by the learned Judge to appeal and to appeal out of time; the learned Judge should not have awarded costs to the Respondents.

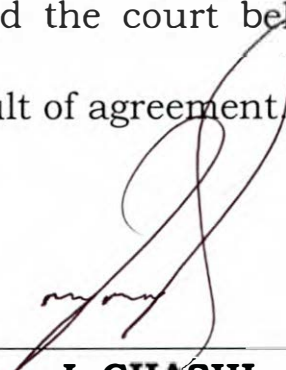
8.12 Having dismissed the arguments on grounds one, two and three in respect to the issue of leave, the arguments under this ground become muffled, and the Appellant is therefore deprived of that argument. The general principle that, costs follow the event is applicable herein and it is for the party that was successful, to be paid the costs.

8.13 In the court below, the appeal by the Appellant was dismissed. Therefore, the Respondents were successful. In addition, the learned Judge observed and rightly so, the Appellant's incessant disregard for procedural law, even when directed as to the right procedures. There was indeed as observed by the learned Judge an abuse of the court process. In our

view, we see no ground on which the learned Judge could have departed from the general principles applicable on award of costs. This ground equally has no merit and is accordingly dismissed.

## 9.0 CONCLUSION

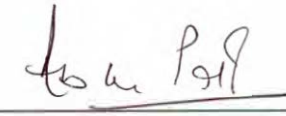
9.1 All the four grounds of appeal having been dismissed for lack of merit, the appeal fails and is accordingly dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, in this court and the court below. The costs are to be taxed in default of agreement.



**J. CHASHI**  
**COURT OF APPEAL JUDGE**



**B.M. MAJULA**  
**COURT OF APPEAL JUDGE**



**A.N. PATEL, SC**  
**COURT OF APPEAL JUDGE**