

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

Appeal No. 181 of 2023



BETWEEN:

ZAMBIA NATIONAL COMMERCIAL BANK PLC	1ST APPELLANT
EDGAR HAMUWELE (<i>Sued in his capacity as Receiver and Manager of Top Star Breweries Limited (In Receivership)</i>)	2ND APPELLANT
CHRISTOPHER MULENGA (<i>Sued in his capacity as Receiver And Manager of Top Star Breweries Limited</i>)	3RD APPELLANT
GRANT THORNTON ASSOCIATES LIMITED	4TH APPELLANT
AND	
ALLAN MULEMWA KANDALA	1ST RESPONDENT
ITOS HARDWARE LIMITED	2ND RESPONDENT
RED SEA GENERAL IMPORT & EXPORT LIMITED	3RD RESPONDENT

CORAM: SIAVWAPA JP, CHISHIMBA & PATEL, JJA

On 19th August 2024 & 30th January 2025

For the Appellants:	Mr. R.M. Simeza S.C. & Mr. N. Nkunika Messrs. Simeza Sangwa & Associates & Mr. N. Sianondo- In House Counsel ZNCB Plc
For the 1 st Respondent:	Mr. M. Katolo Messrs. Milner & Paul Legal Practitioners

For the 2nd Respondent:

Mr. E.B. Mwansa S.C. & Ms. M. Chilembo

Messrs. EBM Chambers & Messrs T.S. Chilembo
Chambers

For the 3rd Respondent:

Mr. N. Okware & Mr. D. Simusamba

Messrs. Okware & Associates &

Messrs. Simusamba & Associates

J U D G M E N T

Patel, JA, delivered the Judgment of the Court.

Cases referred to:

1. Diego Casili v Access Bank and others -CAZ Appeal No. 259 of 2022
2. Foss v Harbottle (1843) 67 ER 189
3. Avalon Motors Limited (In receivership) v Bernard Leigh Gadsden and Motor City Limited - SCZ Judgment No. 7 of 1998
4. Robert Mbonani Simeza (sued as Receiver/Manager of Ital Terrazo Limited, Finance Bank (Z) Limited and Ital Terrazo Limited (2018) ZR Special Edition p.97 and SCZ Judgment No. 194 of 2009
5. Magnum (Zambia) Limited v Quadri (Receiver/Manager) and Another (1981) ZR 141
6. Antonio Ventriglia and Another v Finsbury Investments Limited SCZ- Appeal No.02/2019.
7. Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited (1989) KLR.19
8. Salomon v Salomon & Co (1897) AC 22
9. ZCCM Investments Holdings Plc v First Quantum Minerals and six Others, -CAZ Appeal No. 92 of 2020
10. Chrispin Daka & Chikumbutso Phiri v Elliot International Limited & Anne Valerie Patricia Wilkie – CAZ Appeal No. 153 of 2021
11. John Mukoma Kasanga and 2 others v Development Bank of Zambia and Others- CAZ Appeal No. 59 of 2020 and 94 of 2019
12. Emmanuel Mwamba (suing in his capacity as Director and Shareholder of Rephidim Mining supplies and Technical Services Limited v Cosmas Tembo and 2 others -CAZ Appeal No. 40 of 2023
13. Finsbury Investments Limited v Antonio Ventriglia, Manuela Ventriglia and Ital Terrazo Limited (In receivership) -SCZ Judgment No. 42 of 2016

14. Indeni Petroleum Company limited v Kafco Oil Limited and Others- SCZ Selected Judgment No. 29 of 2017
15. JCN Holdings Limited v Development Bank of Zambia, (2013) 3 ZR 299
16. Maaji Galadima v Alhaji Adamu Tambai & Others S.C. 217/1994
17. AMG Global Trust Limited v Administrator General & Caladams Properties Limited -SCZ Appeal No. 25 of 2020
18. J.K. Rambhai Patel v Mukesh Kumar Patel (1985) ZR 220 (SC)
19. YB & F Transport Limited v Supersonic Motors Limited -SCZ Judgment No.3 of 2000
20. Griever Chola Sikasote v Southern Cross Motors Limited -CAZ Appeal No. 62 of 2018

Legislation referred to:

1. The Court of Appeal Rules Statutory Instrument No. 65 of 2016
2. The Companies Act No. 10 of 2017
3. The Corporate Insolvency Act, No. 9 of 2017
4. The Rules of the Supreme Court of England 1965 (White Book) (1999) Edition

Other Works:

1. Minority Shareholders - Law, Practice and Procedure- 4th Edition- Oxford University Press.

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1.0 INTRODUCTION

- 1.1. This is an appeal against the Judgment of **Mbewe I.Z. J**; delivered on 28th February 2023, in respect of an action commenced by the 1st Respondent (*the Plaintiff in the lower court*), against seven (7) Defendants and one Intervener as cited in the Judgment of the lower Court.
- 1.2. The action in the lower Court and the now assailed Judgment, appears to have had a checkered history since the commencement of the action under cause number 2012/HPC/0381, and has sat in the judicial system since 2012. It has seen its way (on various applications) to the Supreme Court, back to the trial Court and has now weaved its way to this Court.
- 1.3. It is noted that arising out of the Judgment of the lower Court, there are three sets of appeals for us to unravel and address. The appeal of 14th June 2023 by the 1st to 4th Appellants, the 1st Respondent's cross appeal of 15th August 2023, and the 3rd Respondent's second cross appeal of 29th August 2023.
- 1.4. We note that the 1st to 4th Appellants have floated 14 grounds of appeal and that their heads of argument filed on 14th June 2023 and heads of argument in reply to the 1st Respondent's heads of argument of 28th June 2024 are in excess of 54 and 48 pages respectively. The opposing arguments by the 1st Respondent filed on 15th August 2023 are in excess of 85 pages. The 2nd Respondent has also caused its heads of argument to be filed in response dated 26th September 2023. The 1st Respondent has filed a cross appeal dated 15th August 2023 raising eleven (11) grounds of appeal, and whose heads of argument refer to 57 cases and span in extent of 71 pages. The 2nd Respondent has filed its arguments in response dated 12th October 2023. Not unsurprisingly, the Appellants have filed

extensive heads of argument in opposition dated 28th June 2024, spanning 50 pages, in reply to the 1st Respondent's arguments. Not to be out done, the 1st Respondent has filed heads of argument in reply to the Appellants arguments in opposition dated 7th August 2024, in excess of 56 pages and citing 46 cases.

- 1.5. The 3rd Respondent has also filed a cross appeal and stands on its arguments filed on 29th August 2023 which have been responded to by the 2nd Respondent's heads of argument of 1st November 2023.
- 1.6. The 3rd Respondent also purported to file supplementary heads of argument in support of the cross appeal dated 14th August 2024. These being filed without leave or Order of the Court will not be considered.
- 1.7. The Appellants' record of appeal (the Record) is presented in three (3) volumes, while the 1st and 3rd Respondents have filed a supplementary record of appeal each, bringing the total number of volumes of the record of appeal, to five.
- 1.8. From the narration above, and from the sheer volume of arguments presented, we will not recite or attempt to summarize the arguments of the Parties, save to confirm that we have painstakingly absorbed the arguments in an effort to appreciate the three appeals that confront us. We will refer to the arguments where appropriate in the reasoning of the Court.
- 1.9. From the onset, we echo our displeasure at the unnecessary bulk of the arguments presented and grounds of appeal canvassed by the Parties respectively. As we have noted, a lot of the arguments are a repetition and add little or no value to the substance of the issues before the Court. We have in previous decisions frowned upon the verbosity of arguments which also offends

the provisions of **Order X, rule 9 (10)** of the Rules of the Court¹. A case in point is that of **Diego Casili v Access Bank and others**¹.

- 1.10. A similar sentiment was equally reflected by the lower Court at page J30 **page 58** of the Record of Appeal (The Record) when the learned Judge stated:

"This matter had lengthy pleadings particularly filed by the Plaintiff, 1st, 2nd, 3rd and 5th Defendants."

- 1.11. The issues in the main appeal before us are not new, the law having been settled on these issues, save to note that every party in the appeal appears dissatisfied and is bent on re-litigating issues that have been the subject of judicial pronouncement seeking only a more favorable outcome for itself.
- 1.12. Although, as we have narrated in the detailed introduction above, the appeal appears to raise a multitude of issues, the first issue of substance that stares us in the face, is a jurisdictional issue, being one of the requirements of leave prior to commencing a derivative action. Depending on the position we espouse, the remaining issues may become otiose.
- 1.13. When we heard the appeal, we informed Counsel that there may be a delay in the delivery of this Judgment. Nonetheless, we regret the delay caused mainly due to the volume of the Record and pressure of the Court combined.

2.0 BACKGROUND

- 2.1 For the purpose of this section, the parties shall be referred to as they are in this Court, or as otherwise identified, to prevent confusion due to the nature of the appeal and cross appeal.
- 2.2 It is not disputed that in June 2005, the 1st Respondent Allan M. Kandala, (the Plaintiff in the lower Court), as shareholder and director of a company known as Top Star Breweries Limited (Top Star), obtained an overdraft facility from the 1st Appellant Bank. (The Bank). It is also not disputed that the facilities were secured by a Floating Debenture dated 3rd August 2005 and a legal mortgage over Stand 194 Matero. The facility was also secured by equitable mortgages over Stand 345 and 346 Matero and the Bank registered caveats over the two properties in March 2006. (collectively the three properties).
- 2.3 The record reveals that during their banker-customer relationship, the facilities were enhanced, and various banking facilities were availed to Top Star to include a cheque guarantee and a credit facility.
- 2.4 Sooner rather than later, the facilities not performing well, Top Star and the Bank agreed to restructure the facilities. It is at this point that the Parties differed in the timelines and in the applicable security documents.
- 2.5 The Bank, acting in accordance with the securities held, did appoint the 2nd and 3rd Appellant as Receiver/Manager of Top Star, and placed it under receivership. It proceeded to collect the assets under the security and disposed of the three properties referred to in **paragraph 2.2** above.

2.6 Displeased with the turn of events, the 1st Respondent commenced an action in the lower Court in or about 2012. The action which culminated in the now assailed Judgment was subsequently amended, and a writ of summons and statement of claim filed on 22nd May 2018 under cause No. 2012/HPC/0381.

2.7 The 1st Respondent (Allan Kandala as Plaintiff), sought twenty-two reliefs as follows:

1. A declaration that the substantive agreement in place and enforceable between the 1st Defendant and the Plaintiff (Top Star Breweries Limited) is the facility letter dated 5th October 2007 and not any other agreement against Top Star Breweries Limited including the purported floating debenture pursuant to which the 2nd and 3rd Defendants were appointed as joint receivers and manager of Top Star Breweries Limited (in Receivership).
2. A declaration and order that the placement of Top Star Breweries Limited into receivership by the 1st Defendant without any event of default following the restructuring of the facilities was irregular and null and void.
3. A declaration that the appointment of the 2nd and 3rd Defendants as joint receivers and manager executed on 17th October 2007 without the 1st Defendant's seal is null and void.
4. An Order that the purported appointment of the 2nd and 3rd Defendants by the 1st Defendant as receivers and managers for Top Star Breweries Limited was a nullity and null and void *ab-initio*.
5. A declaration that the advertisement by the 5th Defendant for the sale of Top Star Breweries properties was done without authority and therefore null and void.

6. An Order for damages for ZMW15,000,000.00 for advertisement of Top Star Breweries Limited (In Receivership) by the 5th Defendant.
7. A declaration that the erasure of Top Star Breweries Limited a title holders and mortgagors of Stand No. 194 and the inserting of the 2nd and 3rd Defendants as title holders and mortgagors on the same property was illegal, fraudulent and null and void.
8. A declaration that the conveyance of Stand 194 and 345 to the Intervener by the 2nd and 3rd Defendants was illegal, fraudulent and null and void.
9. A declaration that the Intervener is not a bona fide purchaser for value without any notice of defect whatsoever in obtaining the transfer of suit properties being MAT Stand 194, MAT 345 and MAT 346 from the 2nd and 3rd Defendants.
10. An Order cancelling any title issued to the Intervener and the 6th Defendant.
11. An Order that the original land comprising MAT Stand No. 194, 345 and 346 be resurveyed and to be restored to its original boundaries within 30 days of this Order.
12. An Order directing the 4th Defendant, the Commissioner of Lands and the Chief Registrar to reinstate the original entries on the land Register relating to Stand No. MAT 194, 345 and 346.
13. An Order for vacant possession and delivery of the suit land being MAT Stand No. MAT 194, 345 and 346.
14. An Order for return of the brewery equipment valued at ZMW2,000,000.00 by the 1st Defendant as of 5th October 2007 with interest.

15. An Order for payment of business value of ZMW102,600,000.00 by 1st, 2nd and 3rd Defendants based on the projections submitted to the 1st Defendant by the Plaintiff (TSB) the basis on the facility letter 5th October 2007 was approved.
16. An Order for general damages for conversion and trespass by the 1st, 2nd and 3rd Defendants.
17. An Order for aggravated, punitive and exemplary damages of ZMW5,000,000.00.
18. An Order for damages for pain, mental anguish and suffering by the directors and shareholders of the TSB in the sum of ZMW5,000,000.00.
19. As against the 7th Defendant an Order for damages for breach of duty of care and professional negligence arising from the failure to safeguard the title deeds in respect of MAT 345 and MAT 346.
20. Interest on any amount that may be found due.
21. Any other relief
22. Costs.

3.0 DECISION OF THE LOWER COURT

- 3.1 The lower Court, in dealing with the issue of *locus*, raised by Counsel for the Appellants, made a finding that this being a derivative action, the 1st Respondent, was in order to bring an action in his capacity as shareholder and director. For this finding, the learned Judge placed reliance on the case of **Foss v Harbottle**².

3.2 The lower Court also placed reliance on the decisions of the Supreme Court of Zambia in the cases of **Avalon Motors v Bernard Gasden**³, **R.M Simeza (sued as receiver/manager of Ital Terrazzo Limited) Finance Bank (Zambia) Limited v Ital Terrazzo**⁴, and **Magnum Zambia Limited v Quadri (Receiver/Manager) and Another**⁵.

3.3 Having found as above on what can be referred to as the preliminary issue on jurisdiction, the learned Judge proceeded to determine the substantive claims in dispute. The Judgment of the lower Court has been thoroughly considered from **pages 29 to 133** of the Record.

4.0 1st, 2nd 3rd & 4th APPELLANTS APPEAL

4.1 Dissatisfied with the outcome in the Court below, the Appellants filed a Notice and Memorandum of Appeal, on 20th March 2023, fronting fourteen (14) grounds of appeal, namely;

1. The Lower Court erred in law and fact when it assumed jurisdiction to proceed with the derivative action brought by the Respondent on behalf of Top Star Breweries Limited a company, without first seeking leave of Court;
2. The Lower Court misdirected itself both in law and fact when it held that there was no event of default to trigger the appointment of the Second and Third Appellants as Joint Receivers/Managers of Top Star Breweries Limited;
3. The Lower Court erred in law and fact when it held that the First Appellant was required to give written notice to the Respondent to convert the

- Floating Charge into a Specific Charge before the First Appellant could appoint the Second and Third Appellants as Joint Receivers/Managers;
4. The Lower Court erred in law and fact when it held that the First Appellant as Debenture Holder was required to issue a demand notice to Top Star Breweries Limited with regards the events of default before it could appoint the Second and Third Appellants as Joint Receivers/Managers of Top Star Breweries Limited;
 5. The Lower Court misdirected itself both in law and fact when after accepting that it would be absurd for a lender to wait whilst its assets are in jeopardy of execution and that the lender in such a situation should be in a position to protect its secured assets, the Lower Court nonetheless went on to hold that the First Appellant fell into grave error when it failed to give reasonable notice even if the clause in the Debenture did not expressly provide for it;
 6. The Lower Court erred in law and fact when it held that the First Appellant acted outside the terms of the Debenture by its failure to give Top Star Breweries Limited notice of crystallization and notice of an event of default contemplated in clause 6(e) of the Floating Debenture;
 7. The Lower Court misdirected itself both in law and fact when it held that the appointment of the Second and Third Appellants as Joint Receivers/Managers for Top Star Breweries Limited was null and void because there was no event of default and that there was no written notice under clause 6(e) of the Debenture of crystallization of the Floating charge under clause 4 of the said Debenture;
 8. The Lower Court erred both in law and fact when it held that the erasure of Top Star Breweries Limited as title holder and Mortgagor for Stand No.

MAT 194 Lusaka and inserting the Second and Third Appellants as title holders and Mortgagors on the property was illegal, fraudulent and null and void;

9. The Court below erred in law and fact when it held that the conveyance of Stand MAT 194 Lusaka by the Second and Third Appellants to the intervenor was illegal, null and void *ab-initio*;
10. The Lower Court erred both in law and fact when it held that it found that the whole conveyance process was fraught with illegalities and misconduct on the part of the First, Second and Third Appellants;
11. The Lower Court erred when it granted a declaratory order that the conveyance of Stands No. MAT 194 and 345 to the intervenor by the Second and Third Appellants as Joint Receiver/Managers was illegal, fraudulent and null and void;
12. The Lower Court erred in law and fact when it held that there was no plausible explanation for the First, Second and Third Appellants as to how the conveyance was completed when the consent was withdrawn by the Commissioner of Lands and never renewed;
13. The Lower Court erred both in law and fact when it held that Stands MAT 194, 345 and 346 were fraudulently and illegally sold by the Second and Third Respondents; and
14. The Lower Court erred in law and fact when it totally ignored submissions made on behalf of the Fourth Appellant in its Judgment.

5.0 1st RESPONDENT'S CROSS APPEAL

5.1 Equally disenchanted with the Judgment of the lower Court, the 1st Respondent did on 29th March 2023, file its Memorandum of Cross Appeal on the following eleven (11) grounds:

1. The Lower Court below misdirected and contradicted itself both in law and fact when it held that the 1st Respondent though commencing the action on behalf of Top Star Breweries Limited as a derivative action against the 1st, 2nd and 3rd Appellants, was not entitled to the derivative reliefs sought as a director/shareholder of Top Star Breweries Limited;
2. The Lower Court below misdirected itself both in law and fact when it declined to grant an order to cancel the Titles issued to the 2nd and 3rd Respondents and subsequent purchasers despite her finding that the suit was *lis pendens*, that whatever the 2nd and 3rd Appellants had done was null and void on account that they were not validly appointed as Receiver Managers and that their actions surrounding the sale of the suit properties was fraudulent and null and void;
3. The Lower Court below misdirected itself both in law and fact when it held that the suit properties was *lis pendens* but declined to grant an order for vacant possession and delivery of the suit properties being MAT Stand Nos. 194, 345 and 346;
4. The Lower Court below misdirected itself both in law and in fact and when it held that the subsequent purchasers of the Properties MAT Stand Nos. 194, 345 and 346 from the 2nd and 3rd Respondents were bona fide purchasers for value without notice and refused to cancel the Certificates

of Title relating to the said properties after finding that the 1st to 3rd Appellants' actions were null and void while 2nd and 3rd Respondent were not bona fide purchasers for value and in light of the registration on the Land Register of the Consent Judgment between the 1st Respondent and the Attorney General;

5. The Lower Court below misdirected itself both in law and fact when it declined to grant an order that the original land comprising Stand Nos. MAT 194, MAT 345 and MAT 346 be re-surveyed and restored to its original boundaries within 30 days after granting the declaration that the conveyance of the said suit properties was illegal, fraudulent and null and void.
6. The Lower Court below misdirected itself both in law and fact when she declined to award damages for trespass to the 1st Respondent on behalf of Top Star Breweries Limited for the illegal and void actions of the Appellants and 2nd and 3rd Respondents despite her finding that in this regards it is Top Star Breweries Limited that suffered;
7. The Lower Court misdirected itself both in law and fact when it declined to grant the Appellant an order for aggravated and punitive damages despite her finding that the 1st Respondent violated the terms of the Debenture by its failure to give Notice to the Borrower Top Star Breweries Limited and that its conduct caused grave and irrevocable consequences to the business of Top Star Breweries Limited or whatever was left of it.

8. The Lower Court below misdirected itself both in law and fact when it declined to order for the return of the Brewery equipment by the Appellants valued at ZMW2,800,000.00 as of 5th October 2007.
9. The Lower Court erred in law and fact when she declined to award the payment of business value of ZMW102,600,000.00 by the 1st, 2nd and 3rd Appellants and refer the same for assessment stating that it was not specifically pleaded and cannot accrue to an individual director and shareholder when the action was by the 1st Respondent was a derivative action and the same was being sought by the 1st Respondent on behalf of and for Top Star Breweries Limited.
10. The Lower Court misdirected itself both in law and fact when she declined to grant the Appellant damages for pain and mental anguish and suffering by the directors and Shareholders of Top Star Breweries Limited in the some ZMW5,000,000.00 and in its place awarded nominal damages of ZM35,000.00 to the Appellant at two conflicting interest rates.
11. The Lower Court erred both in law and fact when she held that the claims against the 4th Appellant failed and condemned the 1st Respondent in costs in relation to costs in favour of the 4th Appellant when there was sufficient evidence on record that the 4th Appellant did advertise the sale of the suit properties and 2nd and 3rd Appellants are connected to the 4th Appellant.

6.0 3rd RESPONDENT'S CROSS APPEAL

6.1 On 21st April 2023, the 3rd Respondent, dissatisfied with the said Judgment filed its Memorandum of Cross- Appeal raising six (6) grounds of appeal as follows:

1. The trial court below misdirected itself and erred in law when it erroneously proceeded to hear the matter against the 3rd Respondent who was an intervener in the court below without proof of service of all applicable notices of hearing for the determination of issues under cause No. 2012/HPC/381.
2. The trial Court below misdirected itself and erred in fact and in law when it totally misapplied and shifted rules of evidence as to who between the Plaintiff (1st Respondent herein) and the 1st Defendant (1st Appellant herein) should have proven issues relating to whether or not seven (7 days) agreed under the relevant security had lapsed at the time of the appointment of the 1st and 2nd Appellants herein who were 2nd and 3rd Defendants respectively in the court below when it held at page J53 that:

"In the absence of cogent evidence, I find there is nothing shown to support the assertion that 7 days had lapsed from date of execution to warrant the appointment of the 2nd and 3rd Defendant as receivers/managers by the 1st Defendant. Since the 2nd Step was not satisfied by the 1st Defendant, the overall effect is that there was no event of default to trigger the appointment of the receiver/manager" when it was supposed to be the duty of the Plaintiff (the 1st Respondent herein) to prove his allegation that the receivers/managers were appointed before 7 days elapsed by showing that all the 23 executions that were levied against it were already set aside at the time of such appointment.

3. The trial court below misdirected itself and erred in facts and in law when it totally failed to appreciate the fact that it **exonerated the 3rd Respondent** herein (intervener in the court below) from all **alleged illegalities** relating to the sale transactions over the properties otherwise known as MAT 184, MAT 345 and MAT 346 when it held at page J73, paragraph 20.29 that:

"The whole process was fraught with illegalities and misconduct on the part of 1st, 2nd and 3rd Defendants" but then the court contradicted itself and held at the same page J73 that:

"From the chronology of events I do not believe the 1st, 2nd, 3rd Defendants and the intervener have proved they conducted the conveyance in a transparent manner."

4. The trial court below misdirected itself and erred in facts and in law when the court erroneously held at page J79, paragraphs 21.19 and 21.20 that:

"In my opinion the intervener had constructive and actual knowledge of the court case and purchased the property at his peril" and that *"for the foregoing reasons, I grant a declaration that the intervener is not a bona fide purchaser for value without any notice of defect whatsoever in obtaining the transfer of suit properties being **Stand No. Mat 194, Mat 345, Mat 346 Lusaka** from the 2nd and 3rd Defendants"* when no evidence was adduced at trial to show that the intervener (3rd Respondent herein) was already a party to the proceedings under cause No. 2012/HPC381 at the time it became the owner of the properties on 27th February 2015

for the court to draw an assumption that the 3rd Respondent (intervener below) was aware of the controversy in court over the said properties.

5. The trial court below misdirected itself and erred in facts and in law when it erroneously failed to appreciate the fact that the case of **Audrey Wafwa Gondwe Vs Supa Banking Company Ltd (In Liquidation) and V.U Akubati (No. 9 of 2001)** which the court below relied upon on page J85, paragraph 22.19 of its judgment in holding the 6th Defendant in the court below as a Bonafide purchaser for value without Notice of any defects in the properties in question and whose holding was that:

“where the property has already moved to the 3rd party is an innocent purchaser for value without notice of any adverse claim” should have also appropriately applied to the 3rd Respondent’s case because it was a 3rd party as far as the wrangle between the 1st Appellant and the 1st Respondent were concerned and the property had already moved to it.

6. The Trial Court below misdirected itself and erred in fact and law when it erroneously issued a blanket order as to costs (at page J105, paragraph xxi of its Judgment), against the 3rd Respondent (Intervener in the court below) together with the 1st, 2nd, 3rd, 4th and 5th Defendants in that matter when the plaintiff’s partial success in the matter did not meet the test established whereby success should be substantial to entitle a party to costs (because 14 of its claims were dismissed and only seven (7) succeeded), and also whereby the court below failed to apportion the said cost order according to the degree of civil wrongs or breaches allegedly committed by each one of the various parties thereto.

7.0 APPELLANTS' HEADS OF ARGUMENT IN SUPPORT OF THE APPEAL

- 7.1 As has been noted the 1st to 4th Appellants have floated 14 grounds of appeal which have been stated in **paragraph 4** above. The overarching principle canvassed by the Appellants in its heads of argument and those filed in reply, rests on the issue of jurisdiction of the lower Court to have proceeded with the action in the form and manner it did, which it is argued deprived the Court below of jurisdiction.
- 7.2 We have also noted that these arguments were stoutly opposed by the 1st Respondent in its opposing arguments on 15th August 2023. The 85 pages of the arguments in opposition have been considered.
- 7.3 The 2nd Respondent's heads of argument dated 26th September 2023 have also been noted as appropriate.
- 7.4 The 1st, 2nd and 3rd Appellants' heads of argument in reply to the 1st Respondent's heads of argument were filed on 28th June 2024 and duly considered.

8.0 1st RESPONDENT'S HEADS OF ARGUMENT IN SUPPORT OF THE CROSS APPEAL

- 8.1 The 1st Respondent has caused to be filed a cross appeal dated 15th August 2023 raising eleven (11) grounds of appeal which are noted at **paragraph 5** above. We have also noted that in its heads of argument, the 1st Respondent has made reference to 57 cases. Its arguments span in excess of 71 pages
- 8.2 The 2nd Respondent has filed its arguments in response dated 12th October 2023.

8.3 Characteristically, the 1st to 4th Appellants have filed extensive arguments in opposition dated 28th June 2024.

9.0 3RD RESPONDENT'S HEADS OF ARGUMENT IN SUPPORT OF THE CROSS APPEAL

9.1 The 3rd Respondent has also filed a cross appeal on grounds noted at **paragraph 6** above and stands on its arguments filed on 29th August 2023.

9.2 The 2nd Respondent has responded by its heads of argument of 1st November 2023.

9.3 As already noted, we have not recast the arguments of Counsel, or attempted to summarize them, save to state that they have been fully considered and referred to where necessary.

10.0 THE HEARING

10.1 At the hearing, Counsel for the Appellants, State Counsel Simeza, opened with the remark that the Appellants, having filed extensive and detailed arguments, it would be close to impossible to attempt to summarize the arguments before the Court. We could not agree more with his sentiments as the Court has equally opted not to summarize the arguments of the Parties. He argued ground 1 on jurisdiction of the lower Court to have heard this matter, and the other twelve (12) grounds were argued in the alternative.

10.2 When questioned by the Court on the propriety of the figures as they appeared in the Appellant's heads of argument of 14th June 2023, State Counsel Simeza immediately conceded the error, in that some of the figures cited were un-rebased and others, rebased. He applied that the Court allow an amendment

such that all figures appearing in the heads of argument be read as re-based, wherever they appeared un-rebased. There being no objection, this was allowed for proper flow and consistency.

- 10.3 Counsel Katolo, on behalf of the 1st Respondent, placed reliance on its arguments of 15th August 2023 as well as those in reply of 7th August 2024. He attempted to argue on the propriety of the appointment by the 1st Appellant of the 2nd and 3rd Appellant as Receivers, as well as to cavass the argument as to whether there was default as envisaged by the terms of the floating debenture.
- 10.4 On the argument on jurisdiction, Counsel Katolo was of the view that the 1st Respondent was entitled to sue in his name, and in his submissions, he argued that this was the settled position at law.
- 10.5 On behalf of the 2nd Respondent, State Counsel E.B. Mwansa relied on the heads of argument filed in response to the appeal and cross appeal and further submitted that the 2nd Respondent supported the arguments filed by the Appellants' and the 3rd Respondent.
- 10.6 Counsel Okware for the 3rd Respondent placed reliance on its cross appeal and arguments filed on 21st August 2023. He attempted to place further reliance on the supplementary arguments filed on 14th August 2024. These, having been filed without leave, were not considered. It was the submission of Counsel Okware based on the supplementary record of appeal, that the lower Court simply proceeded as if the 3rd Respondent (the Intervenor) in the Court below was not a party. He urged the Court to allow the 3rd Respondent's cross appeal.

11.0 ANALYSIS AND DECISION OF THE COURT

- 11.1 As noted, the competing grounds of appeal and cross appeals, the respective heads of argument and reply, will be considered in the context of the assailed Judgment and the extensive arguments filed have only been stated in summary and to give context and a fuller understanding of the competing issues. We will speak to the extensive arguments later in the Judgment.
- 11.2 The fourteen (14) grounds of appeal assail various findings of fact made by the lower Court such as *inter alia*, in its determination of which security document was applicable, whether notice was given, whether there was an event to trigger the appointment of the Receivers, whether the security documents had crystallized and the consequent actions of selling the properties to third parties. On a proper view of the grounds scrupulously and exhaustively examined, it is immediately clear that the issue of jurisdiction must assume center stage in the appeal.
- 11.3 It is imperative that we examine and resolve the issue of jurisdiction as guided by the Supreme Court in the case of **Antonio Ventriglia and Another v Finsbury Investments Limited** ⁶. In taking this position, we are not saying anything new or peculiar to our jurisdiction. The Court of Appeal of Kenya, also a common law jurisdiction, in the well cited case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited** ⁷ stated:

"It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step.

Where a court has no jurisdiction, there would be no basis for a continuation of proceedings....A court of law does not in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....

Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing.....”

11.4 In its first ground of appeal, the Appellants have submitted that the lower Court erred in law and fact when it assumed jurisdiction to proceed with the derivative action brought by the 1st Respondent (the Plaintiff), on behalf of Top Star Breweries Limited a Company, without first seeking leave of Court. We take immediate cognizance of the fact that at the material time, both the current **Companies Act**² and the **Corporate Insolvency Act** of 2017³ were not applicable

11.5 The 1st Respondent has challenged this ground of appeal in its lengthy arguments in opposition filed on 15th August 2023. **Pages 8 to 24** of the said Heads of Argument are devoted to forcefully argue the submission that the lower Court did not err in assuming jurisdiction in *casu*. We have also taken time to reflect on the matters submitted under the heading “**background**” at *page 5* of the heads of argument and cannot help but agree with the submission of Counsel for the Appellants in its heads of argument in reply, that the 1st Respondent has veered off path and gone into issues that were not pronounced upon by the lower Court. We accept the argument that if indeed the 1st Respondent intended to support the decision of the lower Court, but on grounds other than those relied upon by the Court, then it ought to have given notice to that effect. **Order 59 rule 6**⁴ of the Rules of the Supreme Court is instructive.

- 11.6 We observe that the 1st Respondent in its heads of argument in opposition to the appeal, appears to add color to the appeal and in fact the record, with his own understanding to add context such as explaining how the facility letters were executed, how the restructuring (of facilities) was completed and the movement of the dispute in various other Courts under cause numbers **2008/HPC/0111** and **2010/HPC/0766**. Notwithstanding the attempt at a misplaced narrative, we are of the considered opinion, that these issues are not part of the appeal before this Court, and neither do these historical narratives find any place in the Record before us. **Paragraphs numbered 8.1 to 8.7** are the offensive submissions of the 1st Respondent, which are tantamount to tendering evidence in the form of submissions. Needless to say, these have not been considered.
- 11.7 The critical issue at the fore of this appeal, is a jurisdictional issue and we will not be detracted or swayed by the typical *'he said-she said'* arguments, of what transpired in which Court prior to the events the subject of this appeal. Without a doubt, the facts narrated in the introductory part of this Judgment confirm that the issue of leave was a cardinal issue having been raised in the lower Court. We have noted that the 1st Respondent has argued that the challenge was not mounted as required but was simply canvassed in the submissions of the Appellants in the lower Court.
- 11.8 We have upon careful scrutiny of the Record of Appeal, noted that at **page 153** of Volume 1 of the Record, in **paragraph 30**, the Bank in its defence pleaded as follows:

"The 1st Defendant will specifically say in respect of paragraph 33 of the Statement of Claim that the Plaintiff is not entitled to the reliefs sought

... ranging from declaratory reliefs, special and general damages and the various orders sought for and on behalf of Top Star Breweries Limited a corporate sale. The first Defendant will seek a preliminary determination of this issue before trial."

11.9 We will examine the position of the law as has been settled in our jurisdiction with regards to the requirement of leave before the commencement of what is referred to as a derivative action.

11.10 It is a trite principle of law established by the seminal case of **Foss v Harbottle**², that any loss suffered by the company by fraudulent actions of its members or outsiders, that the action in respect of such actions shall be brought by the company itself. This is referred to as the rule in **Foss v Harbottle** or the 'proper Plaintiff' rule. There is little doubt that this rule emerged from the principle of separability which states that a company is separate and distinct from its shareholders or directors established by the celebrated decision of the House of Lords in the case of **Salomon v Salomon & Co**⁸. It is also without doubt where a shareholder may bring an action in the form of a derivative action, as an exception to the rule in **Foss v Harbottle**², the same being dependent on being granted leave of court, the alleged wrongdoer(s) and the company must be made defendants to the action and the company may not appear as a plaintiff but a nominal defendant.

11.11 The Learned Authors of **Minority Shareholders- Law, Practice and Procedure**¹ in respect to derivative claims state that:

"In such circumstances, a shareholder was able at common law to bring a claim on behalf of and for the benefit of the company in respect of which

a wrong had been done to the company. The claim was called a derivative claim as the shareholder's right to claim is derived from a right of the company to claim in respect of a wrong done to it ... the company was joined to the proceedings as nominal defendant so that relief could be ordered in its favour."

11.12 We are alive to the fact that the cause of action in *casu*, arose before the passing of the **Corporate Insolvency Act**³ and before the provisions relating to derivative actions under **section 331** of the **Companies Act 2017**². We have had occasion to pronounce on the effect of derivative actions that had commenced before the passing of the said Acts. In our Judgment, rendered in the case of **ZCCM Investments Holdings Plc v First Quantum Minerals and six Others**⁹ (albeit a decision of the Court emanating from applications before an Arbitral Tribunal which culminated in a Ruling on leave for the commencement of a derivative action as well as a Judgment of the High Court of England and Wales, which confirmed the requirement of leave), we are of the considered opinion that the pronouncements made in that Judgment are equally applicable in *casu*.

11.13 In our said Judgment, we stated as follows:

*"We note that, the Appellant in their arguments made reference to Section 331 of **The Companies Act**² and endeavored to cast fault on the learned Judge for failure to express her views on the same. The arbitral proceedings and the proceedings in the court below, having been commenced in 2016, Section 331 of **The Companies Act**² which came into effect in 2017, in our view was not applicable, as it was not in force at the material time. Therefore, the learned Judge cannot be faulted for not expressing her views on the same.*

The applicable provisions of the law, which was adopted by the Tribunal, which was also applicable to the court below and which the court was under a mandate to adopt, is Order 15/12A RSC. The relevant parts of the rule provide as follows:

"Derivative actions (0.15, r12A).

- (1) This rule applies to every action begun by writ by one or more shareholders of the company where the cause of action is vested in the company and relief is accordingly sought on its behalf (referred to in this rules as a derivative action.)"*
- (2) Where a defendant in a derivative action has given a notice of intention to defend, the plaintiff must apply to the court for leave to continue the action.*
- (3) The application must be supported by an affidavit verifying the facts on which the claim and the entitlement to sue on behalf of the company are based.*
- (4) Unless the court otherwise, orders, the application must be issued within 21 days after the relevant date and must be served, together with the affidavit in support and any exhibits to the affidavit not less than 10 clear days before the return day on all the defendants who have given notice of intention to defend; any defendant so served may show cause against the application or otherwise.*

11.14 Order 15/12A/1 RSC on effect of the rule goes on to state as follows:

*“This rule gives effect to the practice of bringing such actions which formerly caused difficulties; resolution of these must now be sought immediately after notice of intention to defend. **Although leave is not required to start a derivative action, the new rule requires leave to be obtained to continue the action before service of a defence becomes due.** The method of obtaining such leave is specified in the rule.*

The purpose of such actions is to permit a member of the company to sue on behalf of a company for a wrong done to the company where there has been a fraud on a minority of shareholders extends beyond fraud at common law and includes an abuse or misuse of power by the majority, whether acting as directors or shareholders...” (emphasis is ours).

11.15 The need to obtain leave or permission is thus added to the standing requirements of **Foss v Harbottle** case and is a way of controlling unnecessary costs being incurred in the ensuing proceedings and also reducing the possibilities for “gold digging” claims against the company. This gives the court control over derivative actions.

11.16 We also stated:

“The court at leave stage, will consider whether the shareholder’s application for permission and the evidence filed in support show that the shareholder has a prima facie case. The shareholder cannot take any steps in the action until the court determines this question. If the court determines that no prima facie case exists, then it will dismiss the

shareholder's application and the action cannot proceed.” (emphasis is ours)

11.17 In the said Judgment, we noted the sequence of events to be followed as per the requirements of **Order 15/12A RSC** ⁴. After service of the derivative action, the defendants must give their notice of intention to defend. Thereafter, within 21 days of the relevant date, the plaintiff must apply to the court for leave to continue the action. As alluded to earlier and concluded, no further action can be taken in the cause until the issue of leave is determined.

11.18 In a subsequent Judgment of the Court, rendered in the case of **Chrispin Daka & Chikumbutso Phiri v Elliot International Limited & Anne Valerie Patricia Wilkie**¹⁰, we referred to the guidance issued in the cited case of **ZCCM Investments Holdings Plc v First Quantum Minerals and Others**, on derivative actions. We quoted from the **ZCCM IH Judgment** as follows:

*“It is not in dispute that the claims before the Tribunal and those in the court below were derivative claims. The proper claimant principle was laid down in the case of **Foss v Harbottle**. The rule being that, if a wrong is done to the company, the proper person to sue the wrongdoer is the company itself. The disadvantage of the rule is that it could allow the majority to plunder the company, leaving the minority without a remedy. Exceptions to the rule have therefore been developed as enunciated in the **Foss** case.*

A shareholder may now bring a claim by way of a derivative action seeking relief on behalf of a company for a wrong done to a company. A derivative claim is one where the right of action is derived from the company and is

exercised on behalf of the company. It is therefore an exception to the proper claimant principle.”

11.19 In *casu*, the lower Court in its Judgment at Paragraph 14.5 at **page 59** volume 1 of the Record of Appeal stated as follows:

“Notwithstanding, I agree with Mr. Katolo that I need not embark on determining this particular issue as the record shows a Ruling was rendered allowing the Plaintiff to sue.”

11.20 It is trite that any or all arguments extensively canvassed by the 1st Respondent that the lower Court had granted leave by its Ruling on the issue are misplaced as no such Ruling was placed on the Record, neither by the Appellants, nor by the 1st Respondent. In fact, we go as far as to note that a detailed scrutiny of all five volumes of the Record of Appeal, have in fact revealed that not only was there no such Ruling on the grant of leave, but there was in fact no application that we have seen made by the 1st Respondent, the Plaintiff in the lower Court, as required by **Order 15/12A rule 1 & 2 RSC⁴**.

11.21 We have also noted **paragraphs 14.6, 14.7 & 14.8** of the Judgment of the lower Court which appear to quote from the Judgments of the Supreme Court in the cited cases of **Avalon Motors, Magnum Zambia Limited and Robert Mbonani Simeza (sued as Receiver/Manager of Ital Terrazo Limited, Finance Bank (Z) Limited and Ital Terrazo Limited**, the principle that directors and shareholders of a company under receivership, can sue a wrongdoing receiver or former receiver, in their own names and in their own right. We are of the considered view for reasons below, that such quotations are misplaced in the context of the case in *casu* where the issue of prior leave was fundamental.

11.22 In our view, the Judgments referred to in the preceding paragraphs did not address the issue of leave and the consequences of not obtaining leave. The issues that were discussed in those cases, as amplified in the **Robert Mbonani Simeza** case, were whether it was reasonable for the directors of the company, to ask the Receiver to institute an action in the name of the company to challenge his own appointment. It is clear therefore that those decisions are not applicable in *casu* and are distinguishable from the case currently before us.

11.23 The Supreme Court in the cited case of **Robert Mbonani Simeza**, stated at page **105 to 106** as follows:

*"In Avalon Motors, the question was, when can the directors and shareholders of the company under receivership be allowed to maintain an action in the name of the company? This court upheld the decision in **Magnum (Zambia) Limited v. Quadri (Receiver/Manager) and Another**. It then held that directors and shareholders of a company under receivership as well as anybody who is properly interested who has beneficial interest to protect, can sue a wrongdoing receiver or former receiver, in their own names and in their own right...we do not accept the argument...that the directors should have first asked the Receiver to institute an action in the name of the company and only institute one themselves if he refuses to do so. The reason is simple: What this action challenges are the Deed of Appointment of the 1st defendant, as Receiver and the Mortgage Debenture Deed, under which he was appointed. It would not have been reasonable for the directors of the plaintiff, to ask the Receiver to institute an action in the name of the company to challenge his own appointment".*

11.24 We refer to another Judgment of the Court, which we believe sits on all fours with the case at hand, being our decision in the case of **John Mukoma Kasanga and 2 others v Development Bank of Zambia and Others**¹¹, where we stated the mandatory nature of leave prior to the commencement of a derivative action. In that Judgment, while noting that derivative actions are an exception to the general rule as stated by the case of **Foss v Harbottle**, we pronounced that the Appellants in that case, ought to have sought leave of the Court to bring the said action on behalf of the Company.

11.25 To the extent that the appeal in the **John Mukoma Kasanga** case, emanated from a company that was in receivership at the instance of a debenture holder of securities both floating and fixed, the alleged actions of the Receiver could only be challenged in the name of the company and by leave of the Court.

We therefore dismiss the strong argument, albeit mistakenly canvassed by the 1st Respondent in his attempt to distinguish our pronouncement on the mandatory requirement of leave, in the **ZCCM IH** case, by submitting that it was only applicable to disputes between various classes of shareholders. This is a misguided argument, and we find no support for that line of submission.

In any event, with the passing of the new **Companies Act**², section 331 clearly provides for the obtaining of leave prior to commencing a derivative action. This was the holding in the cited case of **Chrispin Daka**.

11.26 In a recent Judgment of the Court delivered on 15th March 2024, in the case of **Emmanuel Mwamba (suing in his capacity as Director and Shareholder of Rephidim Mining supplies and Technical Services Limited) v Cosmas Tembo and 2 others**¹², we guided on the mandatory requirement of leave in order to

bring a derivative action. The dispute in this case also arose after the passing of the new Companies Act.

11.27 The Supreme Court, in the cited case of **Avalon motors Limited (In receivership) v Bernard Leigh Gadsden & Motor City Limited** also guided that in an action to challenge the appointment of a receiver, the proper Plaintiff is the company itself.

11.28 It can be noted that the Supreme Court in the cited case of **Avalon Motors** referred to a decision of the High Court rendered in the case of **Magnum Zambia Limited v Basif Quadri (Receiver/Manager)** and guided that the directors should be entitled to use the name of the company to litigate. It is imperative to note that any pronouncements ascribed to the Supreme Court by the cases cited must be taken in context of the Apex Court being conservative in its comments, as the cases were on-going in the Court below.

11.29 The 1st Respondent also appears to canvass the argument that the 1st to 4th Appellants acquiesced to the matter in the lower Court proceeding to be determined on its merits and thereby suggesting that they waived their rights to any defect in the action. We have noted from the heads of argument that this position was purportedly arrived at by the Appellants' plea in its application to set aside the default judgment that had apparently been entered by the lower Court. We have interrogated **pages 297 to 359** of the Supplementary Record of Appeal filed by the 1st Respondent on 15th August 2023, which reflect the default Judgment and the various applications and Rulings in the lower Court to set aside the default Judgment.

11.30 We maintain our reservations on the entry of the default judgment but noting that this was not a ground of appeal, we shall refrain from further discourse on the propriety of such default judgment.

11.31 While the argument on acquiescence may appear to have a charm of its own, and may assume an ingenious exertion, we must dismiss the argument immediately. No amount of acquiescence, consent and or waiver of a Party can give rise to issue estoppel on a jurisdictional issue, that lies in the preserve of the Court. In any event, we have already determined that it was incumbent on the 1st Respondent to apply for leave to continue with the action, upon the 1st, 2nd and 3rd Appellants having given notice of intention to defend. We have stated this in **paragraph 11.8** above.

11.32 The issue of leave being a non-issue in the cases relied upon by the 1st Respondent, (**Robert Simeza, Avalon Motors, Quadri**) cannot by any degree of imagination be colored with the same paint brush. The arguments and issues are not the same and are distinguishable in *casu*. The attempt by the 1st Respondent to regurgitate arguments placed before the lower Court and place reliance on 57 cases, most of which are simply not applicable, is frowned upon. Simply speaking, our decision on derivative actions and the mandatory nature of leave rests on the Judgments of this Court, namely the cited cases of **ZCCM IH, John Mukoma Kasanga and Chrispin Daka**.

11.33 In support of our determination above, we recall the guidance to trial Courts issued by the Apex Court in the case of **Finsbury Investments Limited v Antonio Ventriglia, Manuela Ventriglia and Ital Terrazo Limited (In receivership)** ¹³. The Supreme Court guided that Courts are Judge driven who should ensure that robust case management is effectively administered for the proper and smooth

movement of disputes through the Court. In the case of **Indeni Petroleum Company limited v Kafco Oil Limited and Others**¹⁴, the Supreme Court repeated what it had said in that case and further stated as follows:

“A robust Judge, such as the learned High Court Judge, must ensure that he is alert and invokes the inherent jurisdiction vested in him of weeding out hopeless, frivolous and vexatious matters and those wrongly presented before him after giving the parties an opportunity to be heard. He is not deprived of the duty of exercising this discretion based on the fact that a party has submitted himself to such proceedings whose commencement has been called into question because the mere fact of submitting to such proceedings does not cure the defect nor does it amount to acquiescence to the defect”. (Emphasis is ours).

11.34 The Plaintiff’s amended statement of claim is seen at **pages 138 to 148** in **volume 1** of the Record of Appeal. It is clear throughout the statement of claim that the Plaintiff appears to be making claims on behalf of Top Star Breweries Limited in receivership.

11.35 We are of the considered opinion that the lower Court fell into grave error in its reasoning that the 1st Respondent was within its rights to bring an action on the basis that he retained residual power and had *locus standi* in the matter. This holding cannot stand in light of our reasoning above.

11.36 We are also of the considered view that had the lower Court directed its mind to the *proper plaintiff principle*, it would not have proceeded to make a cocktail of findings, some in favour of the 1st Respondent, whilst dismissing others claims including claims for damages, on the ground that those reliefs claimed were

reliefs properly for the Company (Top Star Breweries Limited) and could not be awarded to the 1st Respondent.

11.37 In *casu*, we adopt the English translation of the latin expression “*out of nothing, comes nothing*” or the latin maxim “*nihil dat qui non habet*” (*He gives nothing who has nothing*). We echo the pertinent observations on jurisdiction, which we have stated above, made by the Kenyan Court of Appeal in the case of **Owners of the Motor Vessel ‘Lillians’** that:

“jurisdiction is everything. Without it, a court has no power to make one more step.....Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing.”

11.38 In its decision in the cited case of **JCN Holdings Limited v Development Bank of Zambia**¹⁵, the Supreme Court observed as follows:

“It is clear from the Chikuta and New Plast Industries cases that if a court has no jurisdiction to hear and determine a matter, it cannot make any lawful orders or grant any remedies sought by a party to that matter.”

11.39 We stand fortified in this finding and take comfort from the words of the Supreme Court rendered in its judgment in the cited case of **Antonio Ventrigila and Another v Finsbury Investments Limited** where the Apex Court, on the issue of a jurisdictional challenge guided as follows:

“Perhaps, we should also take this opportunity to stress that when a preliminary objection is taken by a party seeking to have a court refrain from taking a particular course of action in relation to a matter, particularly where such an objection is of the nature of a jurisdictional

challenge, such an objection must be dealt with at once. There is no option for the court to choose to defer the revelation of its mind upon the objection to the main judgment or ruling, unless of course such deference is only for the purpose of giving the reasons for having discounted the objection in question. We are, indeed, of the firm and settled view that proceedings in any other way would be defeating the very purpose for which the preliminary objection will have been taken.”

11.40 In proceeding with the matter in the lower Court, it is trite that jurisdiction is a legislative function, and that it may neither be conferred with the consent of the parties nor by a Superior Court. This was equally the reasoning in the **Antonio Ventriglia** matter referred to above such that any orders passed by the lower Court amount to nullity, as the matter went to the root of the cause.

11.41 We have no hesitation in upholding ground 1 of the appeal. The action being a derivative action, its continuity and proceeding to trial was subject to leave being granted. We find that in proceeding with the action in the absence of leave, deprived the lower Court of jurisdiction.

11.42 The effect of a Judgment, pronounced in such circumstances, is the inescapable and inevitable conclusion that the said Judgment be set aside. The Supreme Court of Nigeria in the case of **Maaji Galadima v Alhaji Adamu Tambai & Others**¹⁶ justified this position on the ground that a Court that lacked jurisdiction to entertain a suit, either as a trial court, or appellate court, is incompetent to pronounce a judgment in respect of any aspect of the matter in controversy before it. This reasoning similarly resonated in the cited case of **Antonio Ventriglia**.

11.43 From our determination on the jurisdictional issue, it follows that all the other grounds of appeal numbered from ground 2 through to ground 14, become otiose and need no further pronouncement.

12.0 1ST RESPONDENT'S CROSS APPEAL

12.1 By its cross appeal, the 1st Respondent has raised eleven (11) grounds which have been noted at **paragraph 5** above. He challenges the findings of the lower Court on various issues such as the finding of the Court that although he was entitled to bring a derivative action, he was not entitled to some of the derivative reliefs sought. He also challenged the decision of the lower Court with respect to the Orders he sought against the properties that were sold.

12.2 Our simple reaction to these grounds of appeal, is that the same are rendered otiose based on our determination that the lower Court simply had no jurisdiction to proceed to hear the case or make any orders and award any reliefs that it purported to do.

12.3 To further canvass or make pronouncements on the form and shape the derivative action in the lower Court ought to have proceeded, will be a waste of judicial time and resources, and mostly academic.

12.4 Needless to say, the 1st Respondent's cross appeal is dismissed.

13.0 3RD RESPONDENT'S CROSS APPEAL

13.1 In its cross appeal, the 3rd Respondent raises six (6) grounds of appeal which have been stated at **paragraph 6** above.

- 13.2 The 3rd Respondent has canvassed the argument that by hearing the case against it, as intervener in the lower Court, the Court erred by proceeding without ensuring that it had been served at all. In its quest to prove that it was not served with any of the notices of hearing, and was sidelined completely, the 3rd Respondent has placed reliance on its supplementary record of appeal filed on 12th July 2023.
- 13.3 We are alive to settled case law and the four principles of a *bona fide purchaser* as pronounced by the Supreme Court in the case of **AMG Global Trust Limited v Administrator General & Caladams Properties Limited** ¹⁷. However, we find ourselves constrained and cannot make any pronouncements on the grounds raised by the 3rd Respondent, who canvass a fundamental issue, namely that if the third party was found to be a purchaser without notice, the intervenor who acquired title through the third party, ought to be equally protected.
- 13.4 It was also argued that the aspersions cast by the lower Court as to the swift manner in which conveyances were concluded, cannot be the basis of divesting title from the 3rd Respondent more so that the 3rd Respondent has strongly canvassed the position that it was not heard, it was not a party to the matter in the lower court and no single notice of hearing or affidavit of service showed that it had been served with any process in the court below.
- 13.5 Although both State Counsel Mwansa, and Counsel Okware, appear to canvass the argument and principle regarding the acquisition of property from a title holder and why the 3rd Respondent was and ought to be considered a *bona fide* purchaser of the properties, we shall not be called upon to make pronouncements in a vacuum. In as far as the other grounds of cross appeal are

concerned, they will fall on the same fate and are rendered otiose on account of the reasoning of the Court already settled.

14.0 CONCLUSION

14.1 By way of logical conclusion, we set aside the Judgment of the lower Court in its entirety.

14.2 We stated in **paragraph 11.1** above that we would offer guidance on the subject of heads of argument filed by parties to an appeal. In **paragraphs 1.4 to 1.10** above, we have voiced our displeasure about the extensive and verbose arguments filed. This has since been overtaken by our pronouncement, after conducting an extensive review of practice in the Region, made in a recent Judgment of the Court in the case of **Diego Casili and Access Bank and Others**. Moving forward, we implore litigants to read the said Judgment and note the guidance at **paragraphs 8.4 to 8.14** thereof.

14.3 We now consider the issue of costs. The Supreme Court in the case of **J.K. Rambhai Patel v Mukesh Kumar Patel** ¹⁸ stated as follows:

"We agree... that the costs are in the discretion of the court, but there are certain guidelines which we must follow in exercising that discretion. A successful party will not normally be deprived of his costs unless there is something in the nature of the claim or in the conduct of the party which makes it improper for him to be granted costs."


14.4 Furthermore, the cases of **YB & F Transport Limited v Supersonic Motors Limited**¹⁹ and **Griever Chola Sikasote v Southern Cross Motors Limited**²⁰ are relevant in the exercise of judicial discretion. In the **Griever Chola Sikasote** case, it was stated that:

“The discretion to deprive a successful party of his costs must be exercised judicially, on grounds which are explicable or evident and which disclose something blameworthy in the conduct of the case”.

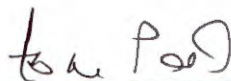
14.5 As did the Supreme Court in the **YB & F Transport** case, the question we ask is ‘*who won the case?*’ The clear answer to that is nobody. Whilst we are alive to the general principle on the issue that costs follow the event, we are of the considered view that in the circumstances of this particular matter, the nature of the transactions and the issues in contention, albeit not novel, this is a matter in which we order, as we now do, that Parties bear their own costs in this Court and in the lower Court.



M. J. SIAVWAPA
JUDGE PRESIDENT



F.M. CHISHIMBA
COURT OF APPEAL JUDGE



A.N. PATEL S.C.
COURT OF APPEAL JUDGE