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

APPEAL NO. 11/2014
SCZ/8/098/2012
SCZ/8/109/2012

BETWEEN:

ALBERT SENDAMA AND OTHERS **APPELLANTS**

AND

ZCCM INVESTMENTS HOLDINGS PLC AND OTHERS **RESPONDENTS**

Coram: Mambilima, CJ, Musonda and Chinyama, JJS.

On 7th June, 2016 and on 13th June, 2016.

For the Appellants : Mrs L. Mbaluku of L.K. Mbaluku and Company. Luso Chambers (No appearance).
For the first Respondent: Mrs J. Ndovi of John Kaite Legal Practitioners.
For other Respondents : No appearance

J U D G M E N T

Chinyama, **JS**, delivered the Judgment of the Court.

Cases and other materials referred to:-

1. ***National Airports Corporation Limited v Pizza Island (suing as a firm), SCZ Appeal No. 61 of 2007.***
2. ***Sentor Motors Limited and 3 Other Companies, S.C.Z. Judgment No. 9 of 1996.***
3. ***Khalid Mohamed v the Attorney-General (1982) ZR 49***
4. ***Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172.***
5. ***Afro Butcheries Limited v Evees Limited (1987) ZR 39***
6. ***Attorney General v Peter Mvaka Ndhlovu (1986) ZR 12***
7. ***Chibote Limited and 3 Others v Meridien BIAO Bank (Zambia) Limited (in liquidation) (2003) ZR***

Legislation and other materials referred to:-

1. ***The Supreme Court Act, Chapter 25 of the Laws of Zambia***
2. ***The High Court Act, Chapter 27 of the Laws of Zambia***
3. ***The Lands and Deeds (Registry) Act, Chapter 185 of the Laws of Zambia***
4. ***Practice Direction, Number 1 of 1993.***

The appeal in this matter arises from actions commenced at the Kitwe High Court District Registry under cause numbers 1997/HK/630, 1997/HK/719, 1998/HK/01, 1998/HK/07 and 1998/HK/31. These cases were consolidated by order of the learned Deputy Registrar on 24th March, 1998 under cause number 1997/HK/630. In this appeal, two groups of Appellants filed their appeals from the decision in the consolidated matter separately under the names **Albert Sendama and Others**, cause number SCZ/8/098/2012 and **John Chibesa and Others**, cause number SCZ/8/109/2012, both against **ZCCM Limited**, as the 1st Respondent initially. The 1st Respondent appears to have been replaced by **ZCCM Investment Holdings Plc**. There are five other Respondents to the appeals who are natural persons or individuals.

For purposes of clarity in the identity of the Appellants in the two groups in the appeal, it is necessary to list their names. It is only the named Appellants who will be affected by any decision(s) that we shall make in this judgment. A perusal of the amended

Notice of Appeal filed under the **Albert Sendama and Others** group shows that the Appellants are ten (10) namely: Albert Sendama, Tonny Musaila, Joy (also spelt "Joe") Bwalya, Derrick Mutale, Frank Musonda, Victoria Kasusu (suing as administratrix of the estate of the late Joshua Kasusu), Charles (also called Walubita) Liyungu, R.K. Kaoma, Maybin Chabula and Charles Moses Kauseni all against **ZCCM Investment Holdings Plc and Others**. This group of Appellants was represented by Messrs Luso Chambers of Chingola. The names of the Appellants under the **John Chibesa and Others** group are three, viz: Medson Batala, Mwangala Mwanamwalye and Charles Moses Kauseni all against **ZCCM Investment Holdings Plc**. Although John Chibesa appears to be the name leading this group of Appellants, he is not part of this Appeal. In fact his name does not even appear in the list of plaintiffs in the judgment from which this Appeal arises. G. Bweupe who is the lead plaintiff named in the High Court judgment is also not part of the Appellants. The second group of Appellants is represented by Messrs L.K. Mbaluku and Company of Kitwe. It is also notable that Charles Moses Kauseni is also named as an Appellant under the **Albert Sendama and Others** group. The number of Appellants altogether is twelve.

The Respondents' names, besides ZCCM Investment Holdings Plc, as they appear from the Record of Proceedings are David Mulenga, Cosmas Mutale, P. A. Chibalamuna also known by the name Haggai (who passed on and was replaced by Harriet Chisenga Chibalamuna as administratrix of his estate), Ignatius Paison Mwape and Alven Naphy Brown Zulu (administrator of the estate of the late Ngoza Zulu who was not a party in the proceedings in the lower court). Mr. Zulu was added as a party belatedly after judgment.

The respective groups had filed separate Notices and Memoranda of Appeal as well as respective Heads of Argument. We have noted from the record of proceedings that the two appeals by the two groups under the said cause numbers SCZ/8/098/2012 and SCZ/8/109/2012 have been consolidated under Appeal number 11 of 2014. We heard the separate appeals from the two groups as one.

The background to this Appeal is that the Appellants, together with the other plaintiffs in the lower court, were all employees of the Zambia Consolidated Copper Mines Limited (here after referred to as "ZCCM"), the forerunner to the current 1st Respondent. They were based at ZCCM's Konkola Division in Chililabombwe. In the

year 1997, ZCCM in compliance with Government's directive to parastatal bodies and other governmental institutions to sell their houses to sitting tenants, embarked on a programme for the sale of much of its housing stock to its employees. Eleven of the Appellants lived in shared ZCCM accommodation while one, Medson Batala, did not share his accommodation. Initially, the policy in place was to offer houses which were not designated institutional houses to the employees who occupied them and were deemed sitting tenants. With respect to the shared accommodation, the policy was to offer the house to the most senior employee. The junior employees could apply to purchase other suitable houses from the ZCCM housing stock at Konkola Division. For those who were not sharing they could apply to purchase the accommodation they occupied. The Appellants were not satisfied with the administration of the policy in the manner in which it affected their entitlements to purchase the desired houses and came to court seeking the following reliefs:-

"a) **A declaration that the Defendant is bound to give priority to sitting tenants in selling its houses as provided for under paragraph 2.1 (i) of the Sale of Company houses rules and to sell the said houses at prices announced by the President of the Republic of Zambia.**

b) **An order of mandatory injunction compelling the Defendant to comply with paragraph 2.1 (i) and 6 of the Sale of Company**

houses rules and paragraph 3 of the circular letter dated 15th September, 1997.

c) An order of injunction restraining the Defendant from selling to non-sitting tenants any of the houses occupied by the Plaintiffs, namely 34 President, 27, 33, 34 and 37 all of Independence, 10 and 29 Hearbeast, 3 Duiker, 9, 18 and 20 Sable Road, 17 Francoline, 6 Luapula, 30 Kudu, 11 Marula, 25, 33 and 39 Kakosa all of Chililabombwe or from revaluing the said houses.

d) Cancellation of the title deeds processed illegally contrary to the terms of injunctions and or by mistake.

e) Further and other relief.

f) Costs."

Having commenced the action, the plaintiffs obtained an ex-parte order of interim injunction on 4th November, 1997 restraining the defendants at the time from offering for sale to non-sitting tenants the following houses; nos. 5, 25, 27, 33, 34, 37 and 38 all of Independence Avenue; nos; 9, 18 and 20 all of Sable Road; no. 4 President Drive; no. 6 Luapula Road; no. 11 Marula Road; no. 17 Frankolin Road; no. 30 Kudu Road; no. 3 Duiker Crescent; no. 29 Heartebeast Road; no. 39 Kakosa Road and the houses occupied by Mwamba and Chabula all of Chililabombwe (at page 78 of the record of appeal). There was another ex-parte order of interim injunction obtained in 1998 (at page 79 of the record of appeal) but it does not state the houses affected by it. It appears from the proceedings in the record of appeal at page 279 that the ex-parte

orders of injunction were confirmed inter-partes but that only five (5) unspecified houses remained affected by the first injunction.

Trial before the High Court closed on 26th August, 2011 and judgment was reserved. On 12th September, 2011 a summons for leave to appeal against certain interlocutory orders of the trial judge under section 24 (1) (e) and Rule 50/2 of the **Supreme Court Act**, Chapter 25 of the Laws of Zambia, was filed supported by four affidavits deposed to by Victoria Mwape Kasusu, Frank Musonda, Derrick Mutale, and Maybin Chabula. On the same day, a summons to arrest judgment and/or stay proceedings pursuant to Rule 51 of the **Supreme Court Rules** (**SCR**), Chapter 25 of the Laws of Zambia, was also filed. We did not see the affidavit(s) in support of the summons to arrest judgment and/or stay proceedings in the record of appeal.

In the summons for leave to appeal against interlocutory orders, the issues contested by the applicants related to alleged pronouncements and other actions attributed to the learned trial judge. Highlights of these are that on 27th June, 2011 in the course of hearing a defence witness, Moses Mwelwa, who testified against Frank Musonda, the learned trial judge ordered the advocate for ZCCM to travel to Chililabombwe to investigate what the witness

had said to enable "the court deal with Mr. Frank Musonda"; that ZCCM carried out the judge's order and Frank Musonda was found to be innocent; that the judge on the same day failed to deal with disobedience of his order of injunction brought to his attention regarding the defendant, Mr. Chibalamuna who had forcibly moved into the house occupied by the Kasususs; and that on the same 27th June, 2011 and 26th August, 2011 the judge refused to record answers solicited from witnesses called by the defendants.

Although we did not find the Affidavit(s) supporting the summons to arrest judgment and/or stay of proceedings, it is obvious from the proceedings on record that the applicants desired to stop the court from rendering a judgment in the matter in the light of the complaints highlighted in the summons for leave to appeal against the alleged interlocutory orders. The record of proceedings does not show that the learned judge ever attended to the two applications. He went on to deliver his judgment in the matter on 28th March, 2012 according to the date indicated in the judgment.

In the judgment, the learned judge made the following findings of fact: that ZCCM decided to sell its houses which were being shared by its employees; that initially the plan was to sell the

shared houses to the most senior occupants of the houses; that because of complaints from the junior employees who were also occupants of the accommodation, the plan was shelved. Instead, the houses were advertised and made open to all the employees of ZCCM. The houses were made open to all applicants including the occupants of the shared houses; that eligibility to be offered the houses was restricted to employees of ZCCM on application. It was not automatic that a sitting tenant would be offered a house; even sitting tenants who wanted to purchase shared houses had to apply; and that each employee was eligible to purchase not more than one house. On the basis of these findings of fact, the learned judge went on to determine for each one of the plaintiffs in the matter before him who included the Appellants that there was no merit in their claims and he dismissed their claims with costs and he discharged the interim orders of injunction.

Following the delivery of the judgment, ten (10) of the now Appellants, namely, Albert Sendama, Tonny Musaila, Joy Bwalya, Derrick Mutale, Frank Musonda, Victoria Kasusu, Charles Liyungu, R.K. Kaoma, Maybin Chabula and Charles Moses Kauseni filed a summons to stay execution of the judgment pursuant to Order 36/7 of the **High Court Rules** (**HCR**) and **High Court**

Practice Direction, No. 1 of 1993 accompanied by an affidavit deposed to by the ten applicants/appellants. It is quite plain on a view of the applications that the applicants sought to revive the matters brought out in their applications of 12th September, 2011 for leave to appeal against what they had termed the judge's interlocutory orders and for the arrest of the delivery of the judgment. The application particularly showed concern that there had been premature celebration of the judgment of the court by the defendants on the 22nd March, 2012 before the judgment was actually delivered on the 28th March, 2012.

The application was opposed and the affidavit in opposition was deposed to by five (5) deponents, namely: Maurice Namakando Muyatwa (DW2 in the trial before the lower court); Cosmas Mutale (a Defendant in the court below); Harriet Chisenga Chibalamuna; Mirriam Sakala and Isaac Chongo. The substance of the opposition was to deny that there was any celebration of the judgment as claimed as the deponents were not aware of the outcome of the said judgment. Other matters alluded to are in the nature of arguments which fall foul of **Order 5 (15)** and **(16)** of the **HCR** which do not permit the inclusion in an affidavit of *"extraneous matters by way of objection or prayer or legal argument or*

conclusion" and requires that only statements of facts be deposed to. This application was heard and the ruling delivered by the learned trial judge on 26th April, 2012, the short of which was that he found no basis to delay the successful party's enjoyment of the fruits of their judgment. He, therefore, refused to stay the judgment for lack of merit with costs against the applicants.

The applicants were not daunted and took the matter before a single judge of this court on 22nd May, 2014. In the affidavit in support of the application (at page 221 of the record of appeal) the applicants through their advocate, Mr. Davison Ndhlovu of Luso Chambers, narrated the various grievances in the conduct of the matter by the trial judge including the non-attendance to the two summonses, one for leave to appeal against interlocutory orders and the other to arrest judgment. We were not able to see the affidavit in opposition to the application in the record of appeal. However, on 11th June, 2012, the single judge of this court rendered a ruling in which it is clear that an affidavit in opposition had been filed in which the opposition was that there was no likelihood in the appeal succeeding for the reasons adverted to in the ruling. The learned single judge of this court summed up the issues in contention in the application as follows: (i) that the

appellants were sitting tenants, (ii) that they were direct employees of the 1st Respondent and (iii) that the learned trial judge ought to have dealt with the summons to arrest judgment before him.

On the third point, the learned judge noted the holding of this court in the case of **National Airports Corporation Limited v Pizza Island (Suing as a firm)**[1] to support his conclusion that it was imperative that the application to arrest judgment before the learned trial judge ought to have been determined one way or the other. In that case we held that the summons to arrest the ruling having been duly filed before the learned Deputy Registrar, should have been heard and determined one way or the other. We set aside the Deputy Registrar's ruling and ordered a re-hearing before another Deputy Registrar. The learned single judge left the rest of the issues to the full court to determine. He granted the application to stay execution of the judgment pending appeal.

We would mention in passing that the Appellants, now before us, did file on 20th August, 2012 a summons for leave to commence contempt proceedings against one of the defendants, Ignatius Paison Mwape, for apparently disregarding the order staying execution of judgment by the learned single judge of this court. It is not clear what has become of that application. Suffice to note that

the Appellants and the Respondents are now before us having respectively prosecuted and defended the Appeal.

As we stated earlier, the Appellants had filed separate Notices and Memoranda of Appeal. A perusal of the grounds of appeal in the two Memoranda of Appeal shows that they address similar issues and we have taken the liberty to summarise them as follows:-

i) **That the learned trial judge erred when he delivered judgment without regard to the appellants' applications to arrest judgment and for leave to appeal against interlocutory rulings which sought to address the incompleteness of the court record before delivery of judgment;**

ii) **That the learned judge showed bias in favour of the Respondents when he made sympathetic comments in favour of the Respondents during trial; he did not record vital evidence; he curtailed questions in cross-examination of the Respondents and ignored ZCCM's errors on the sale of Mine houses. He did not consider why the Appellants rejected problematic houses; he ruled against Charles Moses Kauseni whose house was not contested; and that he entered judgment against the plaintiffs who were offered houses during trial and yet these plaintiffs did not conclusively prosecute their claims;**

iii) **That the trial judge made orders and/or directions against the Appellants on matters which were not pleaded in the case and he also gave advise to the Respondents on extraneous matters;**

iv) **that the judge improperly evaluated the evidence as he ought to have found that the Appellants had first priority to purchase the houses being sitting tenants and employees of ZCCM (senior-most occupants in shared houses); that he completely ignored the Appellants' evidence and that his findings that there was change in the rules in the sale of ZCCM houses is not supported by the evidence on record;**

v) **That the learned judge erred by holding that the title deeds issued to some of the Respondents were validly issued when the same were issued whilst the interlocutory injunction was in operation, an act which circumvented justice.**

It is obvious that grounds one, two and three as summed up above, attack the fairness in which the proceedings were conducted and have the potential to detract from the credibility of the outcome of the proceedings in the court below. We think that we should first address these grounds before tackling those that deal strictly with the merits of the judgment by the lower court if need be.

The learned advocate for the Appellant, Mrs Mbaluku, relied entirely on the Appellants' Heads of Argument. Mr Ndhlovu, co-advocate with Mrs Mbaluku, on behalf of the Appellants arrived late when the Appeal herein had just been concluded and did not participate in the oral submissions. Suffice to say that Mrs Mbaluku's arguments covered all the Appellants.

On the omission by the learned trial judge to hear and determine the summonses for leave to appeal against interlocutory orders and to arrest judgment and/or stay proceedings, the Appellants argued that in their various affidavits in support of summonses, they raised serious allegations concerning the manner in which the judge had openly shown bias in open court in favour of the Respondents and against the Appellants. It was submitted

that the alleged bias was demonstrated in the manner the trial was conducted which resulted in the court record upon which the judgment was based being incomplete; that the learned judge openly made partial and sympathetic comments in favour of the Respondents during trial (such as '*do not ask many questions to this poor woman, she has suffered enough*' in reference to Mrs Sakala who testified as DW7); he curtailed cross-examination of the Respondents when he stopped them from answering most of the questions put to them by counsel for the Appellants; the learned judge answered questions on behalf of the Respondents; he did not record evidence which was in favour of the Appellants and made rulings and orders against the findings of what the Appellants referred to as "commissions of inquiry" (which we understand to be in reference to the judge's directive to the ZCCM advocate to go and confirm Moses Mwelwa's alleged interference with the occupation of the house by Frank Musonda) which the learned judge directed during trial.

It was contended, therefore, that the refusal by the judge to hear and determine the application to arrest judgment affected the validity of the judgment he delivered. As authority, the same case of **National Airports Corporation Limited v Pizza Island (suing**

as a firm)[1] cited in the learned single judge of this court's ruling was recited. The case of **Sentor Motors Limited and 3 Other Companies**[2] was also cited in which we held that it was the duty of the Court to adjudicate matters brought before it and that in that case the court had abdicated its responsibility which amounted to a denial of justice. We allowed the appeal and remitted the matter to the High Court for re-hearing. Accordingly, we have been urged to set aside the High Court judgment and order a re-hearing before a different judge so that the Respondents are properly cross-examined and their responses recorded so as to arrive at a fair judgment.

Alternatively, Counsel for the Appellants submitted that in the event that judgment in the court below is not set aside and a re-hearing ordered, we should then consider the other arguments as follow hereunder.

Regarding the lower court's conclusion that although they were sitting tenants the Appellants did not automatically qualify to purchase the houses they occupied, the Appellants contended that the judgment by the lower court giving houses to the Respondents who had never lived in them was made against the rules on the sale of Mine houses or the Government home empowerment policy.

Therefore, that the judgment should be set aside and any certificates of title which were issued should be cancelled.

It was argued, conversely, that the Appellants met the two criteria for the purchase of the houses as they were employees of ZCCM and were sitting tenants, legally occupying the houses such that the Respondents who were sold those houses should have been deemed to have bought them with existing encumbrances. The encumbrances being the Appellants who were senior-most employees living in the shared houses as sitting tenants and eligible to purchase the said houses.

It was submitted that the ZCCM rules on the sale of houses indicated that priority was to be given to sitting tenants. Several decisions of this court were cited for the guidelines/principles applicable to the sale of Government houses. We do not intend to repeat what we have said in those cases in view of the position that we intend to take in this judgment.

In their further arguments, the Appellants have alleged that the trial judge had ordered that the Respondents do recover mesne profits from the Appellants and made other orders which were not pleaded and also gave advice to the Respondents in the judgments.

It was contended that this was misdirection as the judge should have restricted himself to issues before him.

The Appellants prayed that the judgment by the court below together with all the orders made therein be set aside and that the title deeds issued during the subsistence of the injunctions be cancelled. Further, that ZCCM be ordered to offer the houses to the Appellants as sitting tenants. We were urged to uphold the appeal with costs.

A response to the Appellant's arguments was made only in respect of the 1st Respondent. There were no arguments in response in respect of the rest of the Respondents. It is notable from the 1st Respondent's response that it only addressed the appeal by the **John Chisenga** group, namely, Mwangala, Batala and Kauseni. The foregoing notwithstanding, we are of the view that the arguments in ground one of the Appellants' grounds of appeal as summarised by ourselves will have a bearing on the whole of the matter.

Mrs Ndovi, for the 1st Respondent, relied entirely on the Heads of Argument filed in opposition to the Appeal. On the alleged refusal by the learned trial judge to hear the application to arrest judgment, the substance of the arguments were to the effect that

the law as it relates to civil proceedings does not seem to provide for applications to arrest judgment. She noted though that under Order 3/2 of the High Court Rules, (HCR) there is wide discretionary power given to the court to make any decision in the interest of justice which in her submission would allow an application to arrest judgment. She, however, took the view that in this particular case the evidence on record as it relates to the three Appellants, namely, Mwangala, Batala and Kauseni demonstrates that there was really no error on the court record that could have caused the court to arrive at an erroneous decision.

As regards the argument by the Appellants that the court below erred when it held that although the Appellants were sitting tenants, they did not qualify to purchase the houses they occupied, the 1st Respondent countered that the allocation for purchase of houses was made subject: firstly, to application; secondly, whether one was a sitting tenant; and thirdly, the seniority of the employee. It was pointed out that this was the Appellants' evidence throughout the trial and, therefore, that they should not now turn around and allege that the judge made findings solely from the evidence of the Respondents. It was submitted that the judgment by the court below reflects the facts as pleaded. It was also pointed out that

some Appellants did not give evidence during trial, such that, on the basis of the authorities of **Khalid Mohamad v Attorney General**[3] and **Wilson Masauso Zulu v Avondale Housing Project Limited**[4], the trial judge was on firm ground in dismissing the claims by the Appellants.

Concerning the Appellants' claim regarding certificates of title issued during the life of the interim injunction, the 1st Respondent argued that it is not the issuing authority of certificates of title and that there is no proof that the Ministry of Lands which is responsible for issuing title deeds was served with the order of injunction. Therefore, that the judge was on firm ground when he dismissed the Appellants' claim for cancellation of title deeds as they had failed to establish sufficient grounds as provided under the **Lands and Deeds (Registry) Act**, Chapter 185 of the Laws of Zambia. Moreover, the cancellation of title deeds depended on the findings that the judge was to make in each individual case and that their cases having failed, it meant that there was no need to cancel the title deeds that had been issued.

All in all it was argued that the evidence on record suggests that the sitting tenancy and seniority clauses were not violated by the 1st Respondent in relation to any of the Appellants. We, were

accordingly, entreated to dismiss the Appeal in its entirety and uphold the judgment by the court below. So far for the parties' arguments.

We have considered the grounds of appeal, the judgment by the lower court and the evidence on record. The starting point in our view is to deal with the submission or argument by the Appellants that we should set aside the judgment from the lower court and order a re-hearing of the matter on the bases of the failure by the learned trial judge to hear the summons for leave to appeal against interlocutory orders as well as the summons to arrest judgment and/or arrest judgment. It is the Appellants contention in effect that the applications disclose the unfair manner in which the learned trial judge conducted the proceedings. This position is opposed by the 1st Respondent mainly on the ground highlighted above that there was no error on the court record that could have caused the trial court to reach an erroneous decision. We have applied ourselves to the arguments.

Ordinarily, an order for the retrial of a matter may be made where there were fundamental misdirections in a trial on the basis of which a judgment cannot stand – **Afro Butcheries Limited v**

Evees Limited[5]. In the case of **Attorney General v Peter Mvaka Ndhlovu**[6], we said the following:-

> **"We have considered whether or not this is an appropriate case for retrial and we have taken note of Mr. Goel's argument that there is sufficient evidence on the record for us to come to our own conclusion. However, in view of the fact that this case depended entirely upon the question of credibility, namely, that there were two entirely conflicting sets of evidence from two different sets of witnesses, who could each have his or her own reasons for being prejudiced, we are quite satisfied that it would be quite impossible for this court to substitute from the record before us a judgment of our own deciding which of the witnesses were telling the truth. We have no alternative therefore, but to send this case back for retrial and we accordingly order that this case be retried before another judge of the High Court."**

The effect of the foregoing passage is that an appellate court would not order a retrial of the matter, unless there is sufficient evidence on the record from the trial court to enable the appellate court reach its own conclusion. This is the principle that we distil from the passage.

In the case before us, it is not in contention that the Appellants, who were the plaintiffs in the court below, had put before the trial court two applications – one seeking leave to appeal against certain pronouncements and orders allegedly made by the trial judge and the other to arrest the delivery of the judgment, obviously prompted by fear that judgment would be delivered and their cause altogether lost. The issues which the plaintiffs then wished to be addressed in the two applications relate to the

complaint that the trial court did not conduct the proceedings fairly in various instances such as: that the record of proceedings was incomplete because the learned trial judge curtailed cross-examination of the defendants; he answered questions on behalf of the defendants and that he did not record evidence favourable to the plaintiffs. Other complaints were that the trial judge made rulings and orders in the course of the proceedings which clearly cast him in the light of sympathising and showing bias towards the defendants. The Appellants' complaint is that there was a serious miscarriage of justice in the manner in which the proceedings were conducted hence the attempts by way of the two summonses to prevent the determination of the matter before the concerns were attended to. It is notable that the Respondents including the advocate for the 1st Respondent did not respond to these issues and arguments.

It appears to us that what is at stake is whether the Appellants had their full day in court to a point where it can be said that all the evidence that they needed to put before the trial court was put before the court.

We have combed through the record of proceedings in the court below. The complaints raised by the Appellants are not

readily visible on the record, apart from the instruction to the ZCCM advocate to investigate the tiff between Frank Musonda and Moses Mwelwa, such that one may be prompted to disbelieve the Appellants. However, we are also alive to the fact that the non-recording of evidence or interjections by the judge against the cross-examination of one party by the other, are hardly issues that may reflect on the record at the time that the proceedings were being conducted. As we said, there is nothing in the first Respondent's response to the Appellants' arguments that deny that the matters alleged ever took place. We are inclined to believe the Appellants' advocates' assertions in the affidavits that the learned trial judge did conduct himself in a manner that prevented parties from clearly expressing themselves. We are satisfied that this amounts to a miscarriage of justice. We cannot say in these circumstances that the evidence on the record is so sufficient as to enable us reach a conclusion of our own heightened by the several irregularities observed of the learned trial judge.

In making the order that we are about to make, we have not lost sight of the fact that this is a matter that started in 1997 and has had a long journey in court. Surely, the parties want to come to the end of it. But then it must be an orderly end and we are of

the firm view that justice would be better served by ordering that the Appellants be heard before another impartial court. We, accordingly, set aside the judgment of the court below and order that the matter be remitted back for retrial before another judge of the High Court at Kitwe with all the necessary dispatch. For the sake of clarity, we would like to explain that the directive only affects the Appellants already identified at the beginning of this judgment against the named Respondents. Our decision in the case of **Chibote Limited and 3 Others v Meridien BIAO Bank (Zambia) Limited (in liquidation)**[7], clearly demonstrates that a re-trial can be ordered with respect to specific issues for specific parties.

Before we conclude, we would like to observe that having set aside the High Court judgment, it must follow that the learned trial judge's order discharging the order of injunction that preserved the interests of the Appellants in the contested houses is equally set aside and the injunction revived. However, we have had the benefit of looking at the orders of injunction on the record of appeal in relation to the houses that the plaintiffs sought to be protected in relation to the relief pleaded in paragraph 9 (c) of the amended statement of claim in the lower court. It is questionable which

houses still remain protected by the injunction seeing that only five (5) unspecified houses remained protected when the ex-parte orders were confirmed (see page 279 of the record of appeal). In order for the Appellants to benefit from the revived injunction, they need to demonstrate that the houses they are contending for are part of the five houses that were still covered by the injunction.

Lastly, though not least, having resolved the appeal in the manner done, it is otiose to consider whether the application for leave to appeal against the interlocutory rulings or to arrest judgment should still be dealt with. We, however, do not depart from the principles in the **Sentor Motors**[2] and **Pizza Island**[1] cases that in an appropriate case, a court has a duty to adjudicate all matters put before it one way or the other and that ideally the lower court should not have shirked its responsibility to deal with and dispose of the application for leave to appeal against the alleged interlocutory rulings as well as the application to arrest judgment and/or stay proceedings. In the same vein, it is unnecessary for us to consider the rest of the grounds of appeal which go to the merit of the case since they relate to the issues that will be determined at the re-hearing. In view of the manner in

which we have dealt with this Appeal, it must follow that costs must and will abide the outcome of the hearing in the court below.

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I.C. MAMBILIMA
CHIEF JUSTICE

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M. MUSONDA, S. C.
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE