

IN THE CONSTITUTIONAL COURT OF ZAMBIA  
AT THE CONSTITUTIONAL COURT REGISTRY  
HOLDEN AT LUSAKA

2016/CC/0034

(CONSTITUTIONAL JURISDICTION)

IN THE MATTER OF: THE CONTRAVENTION OF ARTICLE 1, 101,103 AND  
105 OF THE CONSTITUTION OF ZAMBIA

BETWEEN:

HAKAINDE HICHILEMA

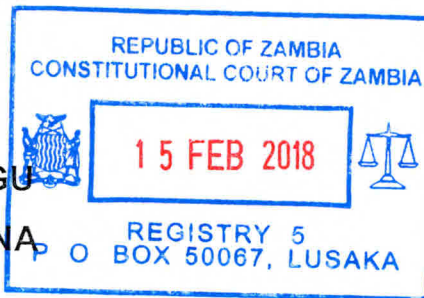
1<sup>ST</sup> APPLICANT

GEOFFREY BWALYA MWAMBA

2<sup>ND</sup> APPLICANT

AND

EDGAR CHAGWA LUNGU



1<sup>ST</sup> RESPONDENT

INONGE MUTUKWA WINA

2<sup>ND</sup> RESPONDENT

ATTORNEY-GENERAL

3<sup>RD</sup> RESPONDENT

Before Chibomba, PC, Mulenga, Mulonda, Munalula and Musaluke JJC. On  
18<sup>th</sup> January, 2018 and on 15<sup>th</sup> February, 2018

For the Applicants:

Mr. J Sangwa, S.C., and Ms. N. Alikipo  
both of Simeza Sangwa and Associates.  
Mrs. L. Mushota of Mushota and  
Associates

For the 1<sup>st</sup> and 2<sup>nd</sup> Respondents:

Mr. L. Linyama of Eric Silwamba, Jalasi  
and Linyama Legal Practitioners.

For the 3<sup>rd</sup> Respondents:

Mr. L. Kalaluka, SC, Attorney-General.  
Mr. F. Mwale, Principal State Advocate,  
Attorney-General's Chambers.

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## RULING

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Musaluke, JC, delivered the Ruling of the Court

**Cases referred to:**

1. *Metroinvest Ansalt v Commercial Union Assurance Co Ltd* [1985] 1 W.L.R. 513

**Legislation referred to:**

1. *The Constitution of Zambia (Amendment) Act No. 2 of 2016*
2. *The Constitutional Court Rules, 2016*

**Other work referred to:**

1. *Rules of the Supreme Court, (White Book) 1999 Edition*

When this matter came up for hearing of the Applicants' Summons on Appeal against the decision of the single Judge of this Court, the Attorney General who is the 3<sup>rd</sup> Respondent in this matter informed the Court that although he filed an Affidavit in Opposition to the Applicants' Summons on Appeal, what he was supposed to file was in fact a notice to raise a preliminary objection as to whether the Appeal was properly before this Court. He then apologized for the nature of the documents filed as instead of filing a notice of objection, what was filed is a document entitled 'Affidavit in Opposition to the Appeal'. He informed the Court that in the circumstances, he was applying that the Court first proceeds to hear the State's objection before hearing the Appeal as the objection goes to the root of the Appeal in that if the Court proceeds to hear this appeal and if the objection is upheld, this would not augur well. He thus prayed to be allowed to proceed as proposed.

The learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, Mr. Linyama, stated that he was inclined to agree with the proposal by the Attorney General for the Court to first proceed to hear the objection in question on ground that it was raising questions on the manner in which the Appeal was brought before this Court as in the event that the Attorney General's objection is upheld, then there will be no need for this Court to hear the Summons on Appeal.

In opposing the request by the Attorney General, the learned Counsel for the Applicants, Mr. Sangwa, SC., argued that what was being canvassed by the Attorney General was not tenable at law and that there were no procedural rules that support what the Attorney General was asking the Court to do. He pointed out that since in his own words, the Attorney General had admitted that he did not comply with the Rules of Court, then what he was asking the Court was to bypass the Rules of Court. And that the Attorney General's request is only tenable where there is a formal application before the court. State Counsel Sangwa submitted that he had the opportunity to peruse the Attorney General's Affidavit in Opposition to the substantive Summons on Appeal and that the allegation was only that there had been non-compliance with the rules. He contended that where a party wishes to raise such an issue, Order 2 Rule 2 of the Rules of the Supreme Court, 1999 Edition (**RSC**) clearly states the procedure to be followed and puts it as follows: -

- "2. (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.**

- (2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.”

He submitted that what the Attorney General was in essence asking this Court to do was to allow him to go and correct the step that he himself made, but this is not tenable at law. Further, that an application under Order 2 Rule 2 of the **RSC** must be made promptly but that in this case, the Summons on Appeal were filed over a year ago. Hence, it is not fair and just to raise this issue at this time. His prayer was therefore, to be allowed to proceed to argue the Appeal.

In reply, the learned Attorney General submitted that what he was asking this Court is to be allowed to raise a Motion **viva-voce** as the 3<sup>rd</sup> Respondent did raise the issue of irregularity of the Summons on Appeal in the 3<sup>rd</sup> Respondent's Affidavit in Opposition. Further, this would save the Court's time should the Court find that the objection has merit.

In response to State Counsel Sangwa's argument that no law or rule supports the 3<sup>rd</sup> Respondent's request to raise a **viva-voce** objection, the Attorney General, relied on **Article 118(2) (e)** of the Constitution which provides as follows: -

“(e) justice shall be administered without undue regard to procedural technicalities;”

He went on to submit that he did concede the error in filing the Affidavit in Opposition instead of a notice to raise an objection and had apologized that a motion was not filed. Notwithstanding the procedural oversight, he

prayed that he be allowed to raise the objection *viva-voce* as the objection goes to the root of the entire appeal.

In response to Mr. Sangwa's argument in relation to Order 2 Rule 2 of the **RSC**, the Attorney General submitted that the State has not waived its right to raise the issues of irregularity as the first step it made was to raise the same issue of irregularity in the Affidavit in Opposition to Summons to Appeal. According to the learned Attorney General, Order 2 Rule 2 does not defeat the State's application.

We have considered the submissions by learned Counsel for the respective parties. The issue for consideration before us is whether or not the Attorney General can be allowed to raise an objection to the Summons on Appeal *viva-voce*.

Clearly, the application to set aside a motion for irregularity can be made pursuant to Order 2 Rule 2 and the application must be made within a reasonable time.

With regard to the non-compliance with Order 2 Rule 2 RSC 1999, which requires the application to be made by Summons or motion, the Learned Attorney General conceded the same but maintained that the omission is a curable irregularity which does not go to the root of the application.

Order 2 Rule 2 provides for steps to be taken within a reasonable time by the party who has become aware of an irregularity. It was

understood from counsel for the Applicants in his reliance on Order 2 Rule 2 that the failure as regards application by the Attorney General was in one limb in respect of time.

Order 2 Rule 1 (1) gives guidance on the issue of time and provides:

“Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.”

The combined effect of Order 2 Rule 1(1) and Rule 1(2) is that a step or proceeding, though taken out of time, is to be treated as regular unless set aside. It was held in the case of *Metroinvest Ansalt v Commercial Union Assurance Co Ltd*<sup>1</sup>, that an irregular order or proceeding continues to operate until it is successfully set aside. The initiative to have the irregular step set aside must be taken by the other party. Until that is done, and an order to the contrary is made by the court, the step or proceeding taken is valid.

It must be mentioned that Order 2 Rule 1(2) sets out the power of the court to deal with an irregular step. The rule does not however, prescribe the parameters as to how, or the circumstances under which the discretion should be exercised.

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<sup>1</sup> *Metroinvest Ansalt v Commercial Union Assurance Co Ltd* [1985] W.L.R. 513

In **Metroinvest Anstalt** [supra], Cumming-Bruce LJ, in commenting on how the court should exercise its powers under Order 2 Rule 1 (2), said at page 521:

“I would say that in most cases the way in which the court exercises its powers under Ord 2 r 1(2) is likely to depend upon whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say, the particular failure to comply with the rules. But I would construe Ord 2 r 1(2) as being so framed as to give the court the widest possible power in order to do justice.”

Our understanding of Order 2 Rule 1 and authorities cited is the recognised principle that a party should not ordinarily be denied an adjudication of his claim on its merits merely because of a procedural default, unless the default causes prejudice to the opposing party for which an award of costs is not adequate to compensate that party.

It follows that where non-compliance to procedural aspects does not go to the root of the case, it is then a curable irregularity.

As regards whether or not the Attorney General had taken a fresh step after being aware of the irregularity, this was not shown by the Applicants. Order 2 Rule 2 (4) provides that steps reasonably taken to assert an objection do not amount to a waiver of it. Therefore, the Attorney General had not waived the irregularity.

We have considered the circumstances of this case, where the Attorney General had earlier raised the same issue of irregularity, albeit wrongly, and are of the view that this is a matter in which our discretion

could be exercised in allowing the Attorney General to formally raise the objection and not viva voce.

Further, we believe the Applicants will not suffer any prejudice as they will have an opportunity to answer to the preliminary issue the Attorney General would raise.

We accordingly grant leave to the Attorney General to file the Notice to raise preliminary issue within seven (7) days of the date of this ruling. The Applicants to file their response to the Notice to raise preliminary issue within seven (7) days of service of the said notice.

Each party to bear own costs.



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**JUSTICE H. CHIBOMBA**  
**CONSTITUTIONAL COURT PRESIDENT**



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**JUSTICE M. S. MULENGA**  
**CONSTITUTIONAL COURT JUDGE**



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**JUSTICE P. MULONDA**  
**CONSTITUTIONAL COURT JUDGE**



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**JUSTICE PROF. M. M. MUNALULA**  
**CONSTITUTIONAL COURT JUDGE**



.....  
**JUSTICE M. MUSALUKE**  
**CONSTITUTIONAL COURT JUDGE**