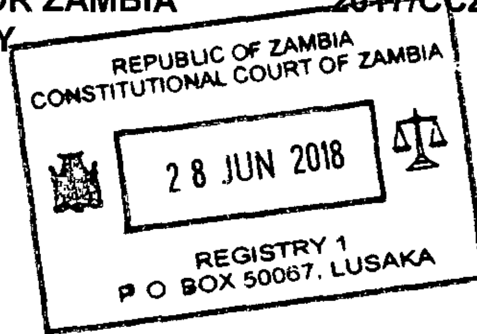
(1004)

SELECTED JUDGMENT NO. 28 OF 2018

IN THE CONSTITUTIONAL COURT FOR ZAMBIA **~~2017/C~~CZ/R003**
AT THE CONSTITUTIONAL REGISTRY
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)



BETWEEN:

THE PEOPLE

AND

THE PATENTS AND COMPANIES REGISTRATION AGENCY **RESPONDENT**

***Ex-Partes* FINSBURY INVESTMENT LIMITED AND ZAMBEZI PORTLAND CEMENT LIMITED** **APPLICANTS**

Coram: Chibomba, PC, Sitali, Mulembe, Mulonda and Munalula, JJC.
On 3rd October, 2017 and on ...., 2018.

For the Applicants: Mr. J. Sangwa, S.C. of Messrs Simeza Sangwa & Associates.
For the Respondent: Mrs B.M. Siakumo of Patents and Companies Registration Agency.

JUDGMENT

Chibomba, PC, delivered the Judgment of the Court.

(1005)

Cases Referred to:

1. **Dean Namulya Mung'omba and Others v Machungwa and Others (2003) Z.R. 17.**
2. **Raila Odinga and Others v Nairobi City Council, Civil Application No. 322 of 1999 (unreported).**
3. **Fredrick Jacob Titus Chiluba v Attorney General (2003) Z.R. 153.**
4. **Attorney General v Nigel Kalonde Mutuna and 2 Others SCZ/8/185/2012.**
5. **The Law Society of Kenya v The Centre for Human Rights and Democracy and 12 Others, Petition No. 14 of 2013.**
6. **Raila Odinga and 5 Others v Independent Electoral and Boundaries Commission and 3 Others, (Consolidated) Petition No. 5 of 2013.**
7. **James Muriithi Ngotho and 4 Others v Judicial Service Commission, Miscellaneous Application No. 316 of 2012 (Kenya High Court).**
8. **The People v Henry Kapoko, Selected Judgment No. 43 of 2016.**
9. **Zambia National Holdings Limited and Another v The Attorney General (1993 – 1994) Z.R. 115.**

Legislation referred to:

1. **Constitution of Zambia (Amendment) Act No. 2 of 2016.**
2. **Constitution of Zambia Act, No. 1 of 2016.**
3. **High Court Act, Chapter 27 of the Laws of Zambia.**
4. **British Acts (Extension) Act, Chapter 10 of the Laws of Zambia.**
5. **Rules of the Supreme Court of England 1999 Edition.**
6. **Kenya Law Reform Act.**
7. **The Supreme Court Act of England, 1981.**

Other works referred to:

1. **Black's Law Dictionary, edited by Bryan A. Garner, 10th Edition.**
2. **Concise Oxford Dictionary, 7th Edition.**
3. **Concise Oxford English Dictionary, 11th Edition, Revised.**
4. **Applications for Judicial Review Law and Practice of the Crown Office, by Grahame Aldous and John Alder, 2nd Edition.**

This is a Referral from the High Court of Zambia at Lusaka. The matter was referred to the Constitutional Court pursuant to Article 128

(2) of the Constitution as amended which states that subject to Article 28 (2), where a question relating to this Constitution arises in a court, the person presiding in that court shall refer the question to the Constitutional Court.

The brief history of this matter is that the Applicants applied for leave to issue judicial review process. The High Court granted the leave. While the main application for Judicial Review was pending hearing, the Respondent filed an application to discharge the leave granted to issue judicial review process. Then the Applicants filed a Motion to set aside the Respondent's application to discharge the leave for irregularity. The Applicants however filed Summons to have the matter referred to the Constitutional Court.

The Court below heard both parties and in the Ruling dated 5th December, 2016 the learned High Court Judge granted the application, and stayed the proceedings and referred the matter to the Constitutional Court for determination of the following questions:-

(1) Whether, in the light of the provisions of Article 118 of the Constitution, judicial review proceedings are still subject to the grant of leave; and

(2) Whether, in the light of the provisions of Article 118 of the Constitution, leave to commence judicial review

proceedings granted prior to 5th January, 2016, can be discharged."

In support of this Referral, Mr Sangwa, S.C, learned Counsel for the Applicants, relied on the Applicants' Skeleton Arguments filed in support of the reference. Counsel began by first giving the background to the reference which we do not intend to repeat here.

In arguing the first question raised above as to whether judicial review proceedings are still subject to the grant of leave by the High Court, State Counsel Sangwa submitted that judicial review applications in Zambia are premised upon Order 53 of the Rules of the Supreme Court, 1965. And that Order 53 is applied in judicial review process by virtue of the provision of Section 10 of the High Court Act, Chapter 27 of the Laws of Zambia.

It was submitted that the import of Section 10 was highlighted by the Supreme Court in **Dean Namulya Mung'omba and Others v The Attorney General and Others**[1].

According to State Counsel Sangwa, although the decision in the above case is not binding on this Court, it demonstrates what has been the foundation of judicial review proceedings in Zambia thus far.

It was contended that before the amendment of the Constitution on 5th January, 2016 the position of the Supreme Court in Zambia was always that matters before court ought to be decided on the merits as opposed to being prematurely terminated on a technicality and that this was so even in the face of obvious irregularities. It was argued that the enactment of Article 118 (2) (e) of the Constitution has simply constitutionalized the long line of decided cases in this regard. Hence, his contention was that any law, which requires one to obtain leave of the court before one can prosecute his substantive case violates Article 118 (2) (e) of the Constitution. And that under the current constitutional order in Zambia, moving the Court for whatever reason is a right which is vested in every person in Zambia and the court is obliged to decide such a case on its merit and not to prematurely terminate it on a technicality.

Mr. Sangwa, S.C., then referred to Order 53 Rule 3 of the **RSC, 1999 edition** which provides as follows: -

> **"(1) No application for judicial review shall be made unless the leave of court has been obtained in accordance with this rule.**
>
> **(2) An application for leave must be made ex-parte to a Judge by filing in the Crown Office –**
>
> **(a) a notice in Form No. 86A containing a statement of –**
>
> **(i) the name and description of the applicant,**
>
> **(ii) the relief sought and the grounds upon which it is sought,**

(iii) the name and address of the Applicant's solicitors (if any), and

(iv) the Applicant's address for service; and

(b) an affidavit verifying the facts relied on.

(3) The Judge may determine the application without a hearing, unless a hearing is requested in the notice of application, and need not sit in open Court; in any case, the Crown Office shall serve a copy of the Judge's order on the applicant."

He argued that the implication of Order 53 Rule 3 of the **RSC, 1965** is that one cannot move the court for judicial review without the permission of the court, which permission may be granted or refused at the court's own discretion. That as such, the refusal to grant leave entails that the application will never be heard and decided on its merits by the court. Hence, the Applicants' contention that in view of the provision of Article 118 (2) (e) of the Constitution, the requirement for leave to move the court in judicial review matters is contrary to Article 118 (2) (e) as all matters presented before court ought to be heard and decided on their merits and not terminated without their merits being interrogated by the court.

As regards the rationale for grant of leave in Judicial Review matters, Mr. Sangwa, S.C., quoted the learned authors of the **RSC, 1999** edition as follows: -

> **"No application for judicial review can be made (whether in a civil or criminal matter) unless leave to apply for judicial review has been obtained. Applications for leave are normally dealt with ex-parte by a single Judge, in the first instance without a hearing. *The purpose of the requirement of leave is: (a) to eliminate frivolous, vexatious or hopeless applications for judicial review without the need for a substantive inter-partes judicial review hearing; and (b) to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further investigation at a full inter-partes hearing."***

It was his submission that the rationale for the requirement of leave to apply for judicial review is in conflict with the provision of Article 118 (2) (e) of the Constitution as it is intended to prevent the determination of the application because it is made on very limited information supplied by the applicant and without hearing the respondent. Therefore, the assertion that the application for judicial review is frivolous, vexatious or hopeless should be left to the respondent to raise and for the court to rule on after hearing both parties as is the case with all other civil proceedings.

According to State Counsel Sangwa, leave to apply for judicial review has no place in Zambia because Order 53 of the **RSC 1965,** which provides a comprehensive procedure on judicial review, and which was introduced in 1977 as a product of the Rules Committee of the Court in England has the backing of statute, namely, the **Supreme**

to Zambia under Section 2 of the **British Acts Extension Act, Chapter 10 of the Laws of Zambia**.

It was contended that similarly, in Kenya, the requirement for leave to commence judicial review proceedings is prescribed by Section 9 of the Law Reform Act.

According to Mr. Sangwa, since neither the Constitution nor an Act of Parliament in Zambia limits the jurisdiction of the High Court in judicial review proceedings, such limitations cannot be introduced through the Rules of Court as doing so is a violation of Article 134 of the Constitution. He pointed out that Article 134 confers upon the High Court, unlimited and original jurisdiction to hear and decide any matter civil or criminal on merit. He also argued the requirement for leave also breaches Article 118 (2) (e) of the Constitution, which is the subject of the Referral. To press this point, State Counsel Sangwa gave an example from the case of **Raila Odinga and Others v Nairobi City Council**[2], in which the High Court in Kenya held that the new Order LIII, Rule 2 (b) (ii) was ultra-vires Section 9 (2) of the Law Reform Act. State Counsel then proceeded to extensively quote from the decision in that case.

It was contended that what emerges from the above authorities is that the requirement to first obtain leave to commence judicial review proceedings in both England and Kenya is premised on the statutes that are in place in those jurisdictions and which stipulate the need for leave. That conversely, no such statute is in place in Zambia. And that even if there was such a statute, the same would be a nullity for violating Articles 118 and 134 of the Constitution.

In furthering and cementing his submission that the requirement for leave violates Article 134, Mr. Sangwa argued that although Order 53 of the **RSC** is applied on the strength of Section 10 of the **High Court Act,** it must be applied in such a manner as not to violate the Constitution. As such, dispensing with leave would not violate any statutory provision in Zambia nor any constitutional provision, but rather, this would be in compliance with Articles 118 (2) (e) and 134 of the Constitution because to the extent that Order 53 Rule 3 of the **RSC**, requires leave in judicial review matters, this violates Article 134 of the Constitution. Therefore that applicants should be at liberty to apply for judicial review as a matter of right and the court should decline to grant the substantive relief on merit.

As regards the second issue raised as to whether leave to issue judicial review process that was granted prior to 5th January, 2016 can be discharged, Mr. Sangwa submitted that in view of his arguments above, it follows that by granting leave, the High Court would have decided, on the materials before it, that there is a case which merits full investigation while the effect of discharging the leave granted terminated the judicial review proceedings without the merit of the issues raised by the applicant being interrogated by the Court. And that this is contrary to Article 118 (2) (e) of the Constitution.

Mr. Sangwa's further submission was that should this Court hold the view that notwithstanding the provisions of Article 118, obtaining leave is still necessary prior to issuing judicial review proceedings, then the Applicants' position is nonetheless that once leave is granted, leave cannot be discharged as doing so violates Article 118 (2) (e) of the Constitution.

In conclusion, State Counsel Sangwa urged the Court to determine the two questions raised in this Referral in the negative and to thus hold that the Respondent's application to discharge the order for leave granted by the High Court should be dismissed with costs to the Applicants.

In augmenting the Applicants' written Heads of Argument, Mr. Sangwa, S.C., more or less repeated the Applicants' written submissions. We shall not repeat these except to the extent reflected hereunder and for emphasis. He added that the option to renew an application for leave before a superior court, where the High Court declines to grant it is not a remedy because access to court should not be based on the subjective determination of a judicial officer but rather is a matter of right. He pointed out that judicial review matters are sensitive matters that cannot be cured by renewal proceedings because the substance of the application would have been eroded. And that each technicality, which in this case is the requirement for leave, should be considered on its own merits in light of Article 118 and that this was consistent with this court's holding in **The People v Henry Kapoko**[8] case.

He added that the preserve of importing English statutes lay with the British Extension Act only and that Section 10 of the High Court Act only applies to practice and procedure and as such, it cannot be used to import statutes.

He further argued that existing tribunals would not be affected by the removal of the requirement to first obtain leave of court because

most statutes have internal administrative conflict resolution mechanisms which require an aggrieved party to exhaust administrative channels before moving the court. And that interim reliefs granted as a result of the granting of leave would equally not be affected as an applicant can ask for the same at the time of filing the substantive application for judicial review and that by virtue of Article 134 of the Constitution, courts in Zambia are not constrained from granting such reliefs.

In opposing the Applicants' application, the learned Counsel for the Respondent, Mrs Siakumo, also relied on the Respondent's Arguments in Response to the Referral.

In response to the first issue raised as to whether in the light of the provisions of Article 118 of the Constitution, judicial review proceedings are still subject to the grant of leave, Counsel began by highlighting what judicial review is.

As regards what regulates the practice and procedure for judicial review, Counsel referred to Order 53 of the **RSC, 1999** (White Book) of England. It was submitted that although originally, foreign law was not part of the Zambian laws, however, by virtue of Article 7 (e) of the

Constitution of Zambia, the laws of Zambia now also consist of the laws and statutes which apply or extend to Zambia as prescribed. Further, that Section 10 (1) of the **High Court Act** also prescribes which laws and statutes apply or extend to Zambia. To press this point, Counsel cited the case of **Attorney General v. Nigel Kalonde Mutuna and 2 Others**[4] in which the Supreme Court discussed the procedure and the law applicable to Judicial Review process in Zambia.

As regards the requirement for leave to apply for judicial review, Counsel contended that the practice and procedure as regards judicial review is set out in Order 53 Rule 3 (1) of the Supreme Court Practice, 1999 (White Book) which provides that no application for judicial review shall be made unless the leave of court has been obtained.

To press this point further, Counsel cited the following cases:-

1. **Frederick Jacob Titus Chiluba v Attorney General**[3] in which the Supreme Court held that:-

   "The hearing of an application for judicial review does not start from the day set for the motion. The Application starts with notice of application for leave to apply for judicial review."

2. **The Attorney General v Nigel Kalonde Mutuna and 2 Others**[4] in which the Supreme Court held thus:-

> **"The first stage of the judicial review is a stage of applying for leave. At that stage and this is common ground that it is a filter stage."**

It was submitted that the purpose of the requirement for leave as set out in the **RSC** is: -

> **"(a) to eliminate at an early stage any applications which are either frivolous, vexatious or hopeless, and**
>
> **(b) to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further consideration."**

Counsel referred to Article 118 (2) (e) of the Constitution which provides that: -

> **"(2) In exercising judicial authority, the courts shall be guided by the following principles:**
>
> **(e) justice shall be administered without undue regard to procedural technicalities."**

It was submitted that the question is: Is the requirement for leave to apply for judicial review *ultra vires* Article 118 (2) (e) of the Constitution?

Counsel pointed out that the Constitution of Kenya which was promulgated in 2010, much earlier than our own, has a similar provision to Article 118 (2) (e) in Article 159 (2) (d), which Counsel quoted as follows: -

"In exercising judicial authority, the courts and tribunals shall be guided by the following principles: -

> **(a) justice shall be administered without undue regard to procedural technicalities ....."**

Further, that the Supreme Court of Kenya had occasion to interpret the meaning of Article 159 (2) (d) in the case of **Law Society of Kenya v The Centre for Human Rights and Democracy and 12 Others**[5]. That in that case, the Court applied Article 159 (2) (d) of the Constitution to save an appeal from waste that was occasioned by failure to observe one limb of a procedural rule. The court held, *inter alia*, that: -

> **"..... Article 159 (2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do, is to be guided by the principle that "justice shall be administered without undue regard to technicalities." It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis....."**

And that in **Raila Odinga and 5 Others v Independent Electoral and Boundaries Commission and 3 Others**[6] which involved a presidential election petition where rulings that were made during the pre-trial conference were excluded from the proceedings and a "further affidavit" which had been filed by the 1st Petitioner sought to introduce new materials well after the filing of the petition, the court held that: -

> **"... The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, <u>the Court as</u>**

an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirement of a particular case, and conscientiously determine the best course. The time-lines for the lodgement of evidence, in a case such as this, the scheme of which is well laid-out in the Constitution, were in our view, most material to the opportunity to accord the parties a fair hearing and to dispose of the grievances in a judicial manner. Moreover, the Constitution, for purposes of interpretation, must be read as one whole: and in this regard, the terms of Article 159 (2) (d) are not to be held to apply in a manner that ousts the provisions of Article 140, as regards the fourteen-day limit within which a petition challenging the election of a President is to be heard and determined." (underlining is ours for emphasis).

Counsel submitted that Article 118 (2) (e) was not meant to dispense with the provisions of other laws where procedural requirements such as the requirement for leave to apply for judicial review have been prescribed but to ensure that substantive justice should not be sacrificed for procedural and technical requirements. And, that Article 118 (2) (e) should be applied on a case by case basis as has been demonstrated by the Supreme Court of Kenya. Hence, that this Court should, in exercising judicial authority, appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course.

Counsel argued that in the Kenyan case of **James Muriithi Ngotho and 4 Others v Judicial Service Commission**[7], in which the applicants had sought an order for leave to apply for judicial review against their dismissals by the Judicial Service Commission, the

applicants conceded that the statutory limitation of six months prescribed under Section 9 (3) of the Law reform Act had lapsed. Nevertheless, they argued that the court should treat the statutory limitation of six

months as a procedural technicality which can be disregarded in the exercise of the court's discretion under Article 159 (2) (d) of the Constitution in the spirit of administering substantive justice.

The Court, in *Obiter dictum* stated, inter alia, that: -

> **"The court is enjoined by the Constitution to administer substantive justice, the limitation period of six months prescribed under Section 9 (3) of the Law Reform Act is not a procedural technicality. It is a statutory limitation of time for the filing of applications seeking leave to apply for order of certiorari. It is therefore, a requirement imposed by substantive law and it cannot be said to be a procedural technicality which can be ignored under Article 159 (2) (d) of the Constitution. It would be stretching it too far to hold that statutory provisions relating to time can be equalled to procedural technicalities envisaged under Article 159 (2) (d) of the Constitution of Kenya 2010."**

It was submitted that the requirement for leave to apply for judicial review is not a procedural technicality but a substantive legal requirement that forms part of the application for judicial review as was held in the **Chiluba**[3] case.

Therefore, that Article 118 (2) (e) cannot be interpreted in a manner that ousts the provisions of other laws. And that this position is confirmed by the provisions of Section 6 of the **Constitution of Zambia**

Act, No. 1 of 2016, whose objectives include the provision of savings and transitional provisions of existing laws, and provides that: -

> **"(1) Subject to the other provisions of this Act, and so far as they are not inconsistent with the Constitution as amended, existing laws shall continue in force after the commencement of this Act as if they had been made in pursuance of the Constitution as amended, but shall be necessary to bring them into conformity with the Constitution as amended.**
>
> **(2) Parliament shall within such period as it shall determine, make amendments to any existing law to bring that law into conformity with or to give effect to, this Act and the Constitution as amended."** (underlining ours for emphasis)

Therefore, that much as this Court should appreciate the need to embrace widely the constitutional principle of access to justice, this must be done within the confines of the law as to do otherwise, would be a recipe for anarchy and could defeat the purpose of substantive legal requirements such as the need to obtain leave to apply for judicial review.

In conclusion, Counsel submitted that in light of the provisions of Article 118 (2) (e) of the Constitution, judicial review proceedings are still subject to the grant of leave as this is a substantive legal requirement which cannot be ousted by Article 118 (2) (e). And that the requirement for leave of court is not *ultra vires* the Constitution as Article 118 (2) (e) is only meant to avoid injustices to parties arising from failure to comply

with minor procedural lapses or technicalities in the course of proceedings whereas the requirement for leave forms part of the court's jurisdiction to grant the orders sought under judicial review.

In response to the second issue raised in support of the first question in the Referral as to whether in view of Article 118 of the Constitution, leave granted to commence judicial review proceedings can be discharged, Counsel submitted that a party to judicial review proceedings has recourse to apply for discharge of the ex-parte order granting leave. To press this point, Counsel cited the following authorities:-

(i) Order 53/14/4 which provides that: -

"Discharge of Leave – It is open to respondent (where leave to move for judicial review has been granted ex-parte) to apply for the grant of leave to be set aside ..... but such applications are discouraged and should only be made where the respondent can show that the substantive application will clearly fail."

(ii) Order 53/14/62 which provides that: -

"Application by a respondent seeking discharge of the grant of leave to move for judicial review – In R v Secretary of State for the home Department, ex p. Rukshanda Begum (1990) C.O.D. 107 CA, the court of Appeal dealt with two cases where leave to move for judicial review had initially been granted by the High Court Judge ex-parte, and then, on the application of the respondent and after an inter-parte hearing, the grant of leave to move for judicial review was set aside..."

(iii) **The Attorney General v Nigel Kalonde Mutuna and 2 Others**[4], in which the Supreme Court stated that: -

> **"At this stage of applying for discharge, the applicant has the onus to prove to the court on the balance of probability that the main application for judicial review will certainly fail at the hearing of substantive issues. It is required of the person challenging the order of leave to be able to show to the court that in fact the main matters will certainly fail. In other words, the High court should not have granted leave had it looked at the law and the facts before it."**

It was submitted that in its application to discharge the ex-parte order for leave the Respondent gave relevant arguments in line with the provisions of Order 53 of the **RSC** cited above.

In conclusion, it was submitted that it is not a miscarriage of justice nor a violation of Article 118 (2) (e) for the court to discharge leave granted prior to commencing judicial review process as the discretion of the court should be exercised within the provisions of the law, which in this case, are the provisions of Order 53 of the **RSC**.

In augmenting the Respondent's Heads of Argument, Mrs Siakumo contended in the alternative, that should this Court find that the requirement for leave is a technicality, the Respondent's position was that the requirement for leave did not hinder any due process as the emphasis of Article 118 (2) (e) is on undue regard to procedures. Therefore, where a court exercises due regard, there is no injustice. And that the Constitution merely lays down general principles and that the prescription of how the High Court is to exercise its jurisdiction is

provided in subsidiary legislation, in this case, the High Court Act and the **RSC**.

Further, that the Applicants' prayer that this Court should dismiss the application made by the Respondent, to discharge the order for leave granted by the High Court, has been raised before the wrong court as the High Court is the proper Court.

In reply, State Counsel Sangwa submitted that the prayer that the application made by the Respondent in the Court below to discharge the order for leave granted is before this Court because the essence of this Referral is for this Court to provide guidance to the court below because the latter has no jurisdiction to determine constitutional issues. And that had the Applicants proceeded by way of renewing the application, the response of the court below would still have been that it did not have jurisdiction to determine constitutional matters.

We have seriously considered this Referral together with the arguments advanced in the respective Skeleton Arguments, the authorities cited and the oral submissions by the learned Counsel for the parties. The main question raised in this Referral is whether the requirement for leave before a party can issue judicial review process is

a procedural technicality which is contrary to Article 118 (2) (e) of the Constitution.

Before we proceed to consider the main issue above, it is imperative that we first, in brief, outline the procedure that is currently obtaining in judicial review matters. This is that, currently, the law that governs judicial review in Zambia is Order 53 of the **RSC**, 1999 edition. This position was espoused by the Supreme Court in the **Dean Mung'omba**[1] case which the learned Counsel for the parties both cited in their respective submissions. It was therefore common cause that currently, before judicial review process can be issued, the applicant must first obtain leave of the court as stipulated in Order 53/3 of the **RSC**. It was also common cause that currently, where the High Court has granted leave to apply for judicial review, the respondent can, as provided by Order 53/14/4 of the **RSC,** apply to have such leave discharged. To this effect, the case of **Mutuna and 2 Others,**[4] which re-echoed this position of the law was cited. It was also common cause that where the High Court refuses to grant leave, the applicant's case ends at that stage unless the applicant renews the application before a higher court which grants leave.

In this Referral, the main arguments are firstly that the requirement for leave to commence judicial review process is a procedural technicality which is proscribed by Article 118 (2) (e) of the Constitution. Secondly, that the requirement for leave hinders access to justice because where leave is not granted, the main matter cannot be heard on the merits. Thirdly, that the requirement for leave is not backed by any statute in Zambia unlike in England and Kenya where statutes were enacted to back up this requirement. And fourthly, that the requirement for leave limits the unlimited and original jurisdiction conferred upon the High Court by Article 134 of the Constitution to determine criminal and civil matters.

On the other hand, the thrust of the Respondent's arguments in opposition was that the requirement for leave to institute judicial review proceedings is a substantive legal requirement and not a procedural one. And that Article 118 (2) (e) is not meant to dispense with existing laws that prescribe procedural requirements; and that Order 53 of the **RSC**, 1999 edition, forms part of the laws of Zambia by virtue of Article 7 (e) of the Constitution and Section 10 of the High Court Act.

We have considered the arguments from both Counsel. As regards the first issue raised as to whether the requirement for leave in judicial

review proceedings is a procedural technicality or a substantive legal requirement, to which Mrs. Siakumo's response was that it is a substantive legal requirement that forms part of the application for judicial review; our view is that to ably determine this issue, it is necessary for us to give meaning to both the terms "procedural" and "substantive" requirements used in couching Article 118 (2) (e). The terms "procedural law" and "substantive law" are defined by **Black's Law Dictionary, edited by Bryan A. Garner, 10th edition** at pages 1398 and 1658 respectively, as follows:-

> **Procedural law**
>
> **"The rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves."**
>
> **Substantive law**
>
> **"The part of the law that creates, defines, and regulates the rights, duties, and powers of parties."**

The learned authors at page 1658 further quote the learned authors of **John Salmond, Jurisprudence by Glanville L. Williams, 10th edition, 1947** where the distinction between procedural and substantive law has been put as follows:-

> **"So far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other."**

From the above, it is clear that while substantive law relates to the definition of the remedies or reliefs that may be sought in relation to violated rights in judicial review proceedings, procedural law encompasses the steps that a litigant has to satisfy in order to obtain the remedies/relief sought.

Applying the above principles to the current case, it is crucial that the rationale for first obtaining leave before issuing process must be borne in mind. This rationale is succinctly explained in pricise and clear language in paragraph 53/14/55 of the **RSC** as follows:-

> **"The application for leave to move for judicial review must be made ex parte to a single Judge, whether in term time or vacation (see r.3 (2)). The purpose of the requirement of leave is: (a) to eliminate at an early stage any applications which are either frivolous, vexatious or hopeless, and (b) to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further consideration (see below). The requirement that leave must be obtained is designed to "prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived" (R. v. Inland Revenue Commissioners, ex p. National Federation of Self-Employed and Small Businesses Ltd [1982] A.C. 617 at 642; [1981] 2 All E.R. 93 at 105, per Lord Diplock). Leave should be granted, if on the material then available the court thinks, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant (ibid., at 644/106). In R. v. Secretary of State for the Home Department, ex p. Rukshanda Begum [1990] C.O.D. 107, the Court of Appeal held that the test to be applied in deciding whether to grant leave to move for judicial review is whether the judge is satisfied that there is a case fit for further investigation at a full inter partes hearing of a substantive application for judicial review (see paras 53/14/62 to 53/14/64). If, on considering the papers, the Judge cannot tell whether there is, or is not, an arguable case, he should invite the putative respondent to attend the hearing of the leave application**

and make representations on the question whether leave should be granted (ibid)."

The above explanation clearly shows that at the leave stage, what the court or judge considers is whether there is an issue worthy of further inquiry. In other words, the court has to make a determination that there is an arguable case that warrants a further inquiry at the main hearing of the matter. This way, the court is able to eliminate frivolous, vexatious and hopeless cases at an early stage and thereby allowing only deserving cases to proceed to the substantive *inter partes* hearing stage.

Given the above position of the law, our view is that the requirement for leave to issue Judicial Review process is both procedural and substantive. It is procedural in the sense that it is a condition precedent or a step that one has to fulfill before the judicial review process can be issued. At the same time, it is a substantive requirement in that the court can only move to hear the substantive application for Judicial Review where leave has been granted and this is after the applicant has disclosed that there is a case worthy of further inquiry by the court. Consequently, where the applicant fails to meet this requirement, leave is declined and the applicant's case is closed at that *ex parte* stage.

For the reasons stated above, we hold that the requirement to first obtain leave before one can issue judicial review process is both a procedural and substantive legal requirement that is part and parcel of the application for judicial review.

The question that follows is whether the requirement for leave to issue judicial review process amounts to undue regard to procedural technicalities which is proscribed by Article 118 (2) (e) of the Constitution as argued by the Applicants and to which the Respondent's response was that notwithstanding the enactment of Article 118 (2) (e) judicial review proceedings are still subject to the grant of leave as Article 118 (2) (e) did not oust the provisions of other laws.

To ably determine this question, it is imperative that we first give meaning to the phrase 'undue regard to procedural technicalities' used in Article 118 (2) (e) of the Constitution.

The word "undue" is defined by the **Concise Oxford Dictionary, 7th edition** as follows:-

> **"not owed or suitable; excessive, disproportionate..."**

The same dictionary also defines the word "regard" as follows:

> **"....2. give heed to, take into account, let one's course be affected by..."**

The word "procedure" is defined by **Black's Law Dictionary, edited by Bryan A. Garner, 10th edition** at page 1398 as follows:-

> **"1. A specific method or course of action.**
> **2. The judicial rule or manner for carrying on a civil lawsuit or criminal prosecution. – Also termed rules of procedure."**

The **Concise Oxford English Dictionary, 11th edition, revised** defines the term "technicality" as follows:-

> **"1. A point of law or a small detail of a set of rules as contrasted with the intent or purpose of the rules.**
> **2. Details of theory or practice within a particular field."**

From the above definitions, it can be deduced that the phrase "undue regard to procedural technicalities" simply means placing excessive reliance on or giving heed to a minor detail or point of law which is part of a broader set of rules that govern the manner in which court proceedings are to be conducted which does not go to the core of the whole court process.

Therefore, the question is, what is the import of the provisions of Article 118 (2) (e) of the Constitution vis-a-viz the requirement for leave before issuing judicial review process? In other words, is the requirement for leave in judicial review proceedings proscribed by Article 118 (2) of the Constitution? What mischief did the framers of the Constitution intend to forestall by enacting Article 118 (2) (e)? Article 118 (2) (e) provides as follows:-

"(2) In exercising judicial authority, the courts shall be guided by the following principles:

(e) justice shall be administered without undue regard to procedural technicalities; and....."

In the case of **Henry Kapoko**[8], we had occasion to interpret and give meaning to Article 118 (2) (e). We put it thus:-

> **"Article 118 (2) (e) is not intended to do away with existing principles, laws and procedures, even where the same constitute technicalities. It is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality."** *Underlining is for emphais.*

In **Raila Odinga and 5 Others v Independent Electoral and Boundaries Commission and 3 Others**[6], which we referred to in the **Henry Kapoko**[8] case, the Supreme Court of Kenya, in interpreting Article 159 (2) (d) of the Kenyan Constitution which is couched in the same manner as our Article 118 (2) (e), stated as follows:-

> **"[t]he essence of [the] provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course."**

We also wish to borrow from the Kenyan Court decision in the case of **James Mangeli Musoo v Ezeetec Limited**[7] in which the high court of Kenya considered and pronounced itself on how procedural technicalities should be treated. The court aptly put it thus:-

"A provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not .... in any way oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute.

...

The Constitution and statute has no quarrel with due regard or even regard to technicalities .....[I]f this was a technicality, the test would be whether this is duly or unduly applied or regarded."

Applying the above principles to the current case, we reiterate and echo our position in the **Henry Kapoko**[8] case where we stated that:-

"Our decisions should generate incremental improvements in both substantive and procedural justice, but they must not jeopardise what has worked well in the past. The need for confidence in our legal system means that there must be good reason to depart from well settled procedure be it civil or criminal. Whilst Article 118 (2) (e) signifies a new era, it also signifies caution." *Emphasis ours.*

In the current case, we do not intend to depart from the above position as it is sound law. We reiterate that Article 118 (2) (e) was not meant to do away with laid down rules of procedure for conducting cases as these ensure predictability and uniformity of court procedures and processes. We also reiterate that Article 118 (2) (e) is meant to avoid manifest injustice that would otherwise ensue from giving unjustifiable regard to procedural technicalities. This Article in fact enjoins all the courts in Zambia which are thus bound by that provision not to give undue attention to procedural technicalities but to give

attention to all pertinent factors that have a bearing on the case and not to impede the administration of justice.

For the reasons stated above, we find that Article 118 (2) (e) of the Constitution does not proscribe adherence to procedural rules or technicalities as what it proscribes is paying undue regard to procedural technicalities that result in a manifest injustice. Consequently, we find that Article 118 (2) (e) does not proscribe the requirement for leave before issuing judicial review process in judicial review matters.

We are fortified in so holding by the rationale behind the requirement for leave in Judicial Review proceedings which the learned authors of **Applications for Judicial Review Law and Practice of the Crown Office, by Grahame Aldous and John Alder, 2nd edition at page 3** put thus:-

> "**The most important procedural features of judicial review are the requirement to obtain leave, the short time limits and the rules on locus standi. These features reflect the fact that judicial review extends to persons without legal rights in the ordinary sense and also the range of third parties potentially affected when government action is challenged. Judicial review proceedings are sui generis. They are not strictly speaking 'civil proceedings' between parties** (underlining ours for emphasis).

The learned authors further state at page 139 that:-

> **"The prime object of the requirement of leave is to filter out the applications of cranks and busy bodies who might otherwise impose an excessive burden on the process of legitimate administration. The granting of leave does not prevent a respondent from applying to strike out an application, just as applications to strike out are possible in actions begun by writ or originating summons. The fact that leave is**

required, however gives the Court an opportunity to control applications of its own motion, e.g. refusing leave or permitting them to proceed only in such manner as it may direct. The Court does not require extensive argument on an application for leave but simply needs to be satisfied that the applicant has a prima facie arguable point." (Underlining ours for emphasis)

From the foregoing, it is clear that the requirement to first obtain leave before one can institute judicial review proceedings is an important tool by which the court is able to prevent the impediment of the smooth functioning of government institutions as well as the halting unnecessarily of government policies and decisions that can result from having to hear and determine frivolous and vexatious cases. The leave stage also enables the court to stop the influx into the court system of unmeritorious cases that would consume the court's resources only to be dismissed later on ground that they are frivolous or vexatious.

As regards the second argument raised that the requirement for leave hinders access to justice because where leave is not granted, the substantive matter cannot be heard on the merits, our response is that as already stated above, the nature of judicial review proceedings, which are *sui generis*, is that at the leave stage, the applicant has the onus to ensure that he/she demonstrates to the court at that early stage that he has an arguable case that warrants a further investigation by the court. Where this is done, the court is duty bound to grant leave and appoint a date to determine the case on the merits. This also allows the court to

ensure that cases that are vexatious or frivolous and which clog up the justice delivery system and could cripple the governance of the country are filtered and eliminated at an early preliminary leave stage.

As regards State Counsel Sangwa's contention that the question whether a case is frivolous or not should be raised by the Respondent for the Court to determine as is the case with other matters begun by writ of summons or originating summons, our brief response is that this argument is not tenable at law and, as already stated above, would in fact result into clogging up the court system and defeating the very essence of expeditious disposal of judicial review matters and the sound rationale behind the requirement for obtaining leave of court before the applicant can issue judicial review process as espoused above.

For the reasons stated above, we do not agree with the Applicants that the requirement for leave in judicial review process is a hindrance to access to justice. In fact, the converse is true because the filing of frivolous or vexatious cases that clog up the justice delivery system cannot be said to be in the interest of justice or the development of the law nor can it be said that it proffers/promotes access to justice. It cannot be in the interest of the applicant who may have to pay the costs

to insist to be heard even when on the face of the record, he has a case that has no hope of success.

The third ground argued by Mr. Sangwa was that the requirement for leave has no statutory backing in Zambia and as such, there is no basis for requiring an applicant to first obtain leave. In elaborating on this point, Mr. Sangwa, S.C. referred us to what is obtaining in England and Kenya where according to him, the requirement for leave has statutory backing under Section 31 of the English Supreme Court Act 1981 and Section 9 of the Law Reform Act of Kenya respectively. His contention was that the English Supreme Court Act 1981, which is the foundation of Order 53, is not applicable to Zambia as it is not among the statutes extended to Zambia; and that Section 10 of the High Court Act cannot extend acts of parliament applicable to Zambia as the preserve of importing English statutes lies with the **British Acts (Extension) Act, Chapter 10 of the Laws of Zambia**. The response by Mrs. Siakumo was that the Supreme Court Act 1981 of England is applicable in Zambia by virtue of Article 7 (e) of the Constitution; and that the Supreme Court endorsed the applicability of Order 53 of the **RSC** in Judicial Review matters in the case of **Mutuna and 2 Others**[4].

We have considered the above arguments. We wish to state from the outset that in this case, it was common cause that the position of the law as regards the practice and procedure in judicial review proceedings is settled. In **Dean Mung'omba**[1], the Supreme Court aptly put it thus:-

> **"It is accepted that there is no rule under the High Court rules under which judicial review proceedings can be instituted and conducted and by virtue of Section 10 of the High Court Act, Cap 27, the court is guided as to procedure and practice to be adopted. Having accepted that there is no practice and procedure prescribed under our Rules, we follow the practice and procedure for the time being observed in England in the High Court of Justice. The practice and procedure in England is provided for in Order 53 of the Rules of the Supreme Court (RSC)...**
>
> **Once it is accepted that our Rules do not provide the practice and procedure on judicial review and we adopt the practice and procedure followed in England, our rules for the purposes of judicial review are completely discarded and there is strict following of the procedure and practice in Order 53 of RSC."**

The above position was re-echoed by the Supreme Court in the **Mutuna**[4] case where that court put it thus:-

> **"It is beyond dispute that the procedure and the law to all extent applicable to Judicial Review process in Zambia, falls under the principle of casus omissus. Therefore, the rules of procedure applicable in Zambia are the rules and procedure applicable in United Kingdom elucidated in the White Book 1999 Edition, (*see Section 10 of Cap. 27 High Court Act as amended by Act No. 7 of 2011*). In other words, in Zambia, we apply the procedure laid down in Order 53 of the Rules of the Supreme Court 1999th Edition (White Book) because our High Court Rules do not have provisions stipulating the rules and procedure in judicial review process."**

We totally agree with the above position and adopt it as our own. Order 53 of the **RSC** is part of Zambian law not only by virtue of settled

(1040)

case law but also by constitutional provision under Article 7(e) of the Constitution as well as statutory prescription by Section 10 of the High Court Act. Article 7 (e) of the Constitution and Section 10 of the High Court Act, respectively, gives the relevant Statutory backing. They respectively provide as follows:-

Article 7 (e) "The Laws of Zambia consist of—

> **(a) this Constitution;**
>
> **(b) laws enacted by Parliament;**
>
> **(c) statutory instruments;**
>
> **(d) Zambian customary law which is consistent with this Constitution; and**
>
> **(e) the laws and statutes which apply or extend to Zambia, as prescribed."**

Section 10 "(1) The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act, the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or any other written law, or by such rules, order or directions of the Court as may be made under this Act, the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or such written law, and in default thereof in substantial conformity with the Supreme Court Practice, 1999 (White Book) of England and subject to subsection (2), the law and practice applicable in England in the High Court of Justice up to 31st December, 1999.

> **(2) The Civil Court Practice, 1999 (Green Book) of England and any civil court practice rules issued in England after 31st December, 1999, shall not apply to Zambia."**

For the reasons stated above, our firm view is that the fact that England and Kenya have enacted statutes that back the requirement for

leave in judicial review proceedings cannot be the basis for us to oust the requirement for leave in judicial review matters. This is so because the requirement has constitutional and statutory backing as illustrated above. The rationale for leave is sound. Therefore, although we agree with Mr. Sangwa that the Supreme Court Act, 1981, of England does not apply as it has not been extended to Zambia, however, as already stated above, there is sufficient legal backing under Zambian law including case law as illustrated above which point to Order 53 of the **RSC** in terms of the procedure to be followed in judicial review matters.

Coming to Mr. Sangwa,|S.C.'s fourth argument that the requirement for leave before issuing judicial review process limits the jurisdiction of the High Court in judicial review matters and his proposition that it violates Article 134 of the Constitution and his further contention that the rules of court cannot limit the jurisdiction of the High Court; we wish to refer to the case of **Zambia National Holdings Limited and UNIP v The Attorney General**[9]. In that case, the Supreme Court gave meaning to the unlimited jurisdiction of the High Court. It was held in that case that although the Constitution gives the High Court original and unlimited jurisdiction, the jurisdiction is not limitless as it has to be exercised in accordance with the law and the rules of procedure

and the process prescribed. Hence the exercise of such jurisdiction includes complying with procedural requirements as well as substantive limitations. Therefore, the holding in the above cited case is sound and it means that the unlimited jurisdiction of the High Court in judicial review process is not limitless as it must be exercised within the parameters set by the rules of practice and procedure prescribed by the law. As such, it is flawed to suggest that the requirement for leave before issuing judicial review process limits the unlimited jurisdiction of the High Court as this requirement is, as stated above, part of the entire process and procedure in judicial review proceedings.

For the reasons stated above, the Applicants' argument that the requirement for leave before issuing judicial review proceedings violates Article 134 of the Constitution is flawed and is untenable and cannot be sustained.

Coming to the second question posed in this Referral, as to whether, in view of the provisions of Article 118 (2)(e) of the Constitution, leave to commence judicial review proceedings granted prior to 5th January, 2016 can be discharged, our brief response is that in view of the position that we have taken on the first question posed for our interpretation, it is not necessary for us to delve into the merits or demerits of the arguments advanced under the second question. This is

so because by necessary implication, the answer to the second question is in the affirmative.

In summing up and for the reasons given above, we reiterate our holding that the requirement to first obtain leave of the court before issuing judicial review process still subsists and that it does not violate the provisions of Articles 118 (2) (e) and 134 of the Constitution.

We order each party to bear their own costs.

H. Chibomba
President
CONSTITUTIONAL COURT

A. M. Sitali
Judge
CONSTITUTIONAL COURT

E. Mulembe
Judge
CONSTITUTIONAL COURT

P. Mulonda
Judge
CONSTITUTIONAL COURT

M. M. Munalula
Judge
CONSTITUTIONAL COURT