**IN THE SUPREME COURT OF ZAMBIA** **APPEAL No. 079/2012**
**HOLDEN AT LUSAKA**
(CIVIL JURISDICTION)

**BETWEEN:**

**ROSALIA MWAMFULI** **APPELLANT**

**AND**

**NYENDWA NTIMBA** **1ST RESPONDENT**
**MAGGIE SIMPUNGWE** **2ND RESPONDENT**

Coram: Mambilima, CJ; Hamaundu and Chinyama, JJS.
On 20th July, 2017 and on 25th September, 2018.

***APPEARANCES:***

*For the Appellant:* *Mr S.A.G. Twumasi of Kitwe Chambers.*
*For the Respondents:* *Legal Aid Board (No Appearance).*

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# JUDGMENT

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

**Cases referred to:**

1. *Trinity Engineering (Pvt) Ltd v Zambia National Commercial Bank Ltd (1995-1997) ZR 189*
2. *John R. Ng'andu v Lazarous Mwiinga (1988-1989) ZR 197*
3. *Muyawa Liuwa v Judicial Complaints Authority and Attorney General (2011) 1 ZR 318*
4. *Waterwells Ltd v Wilson Samuel Jackson (1984) ZR 121*
5. *Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture (Suing as a Firm), SCZ/8/52/2014.*

**Legislation referred to:**

1. *The Supreme Court Act, Chapter 25 of the Laws of Zambia, Rule 48(5)*
2. *The Intestate Succession Act, CAP 59, Laws of Zambia, Section 9 (1) (a)*

3. *The Housing (Statutory and Improvement Areas) Act, CAP 194, sect. 3*
4. *The Rules of the Supreme Court, White Book, 1999 Edition, Order 35 Rule 1(2) and Rule 2.*

By Notice of Motion, the 1st respondent seeks to set aside the judgment of this court dated 2nd September, 2014 on the ground that he was not given an opportunity to be heard at the hearing of the appeal in this matter. In the judgment this court upheld the appellant's appeal against the judgment of the High Court which held that the 1st respondent had acquired good title to a house he had bought from a deceased's estate because the 2nd respondent who was the administrator of the estate was entitled to sell it pursuant to **section 19(2)** of **the Intestate Succession Act.** The motion was argued on the basis of affidavits and written submissions on either side. The respondents were not in attendance or represented at the hearing of the motion before us.

The facts that led to the judgment which the 1st respondent impugns is that a Mr Henry Mwamfuli owned a house No. 3326 Chimwemwe in Kitwe. Mr Mwamfuli later died. He was survived by his children who included the appellant as well as Ms Doris Kabwe who was the second wife. After he died, the Buchi Local Court in

Kitwe ordered the administrator of Mr. Mwamfuli's estate to surrender the house to Ms Kabwe in a property settlement action instituted in that Court. Ms Kabwe then registered the house in her name and she obtained a certificate of title issued by the Kitwe City Council. Later, she died and the administrator of her estate (the 2nd respondent herein) sold the house to the 1st respondent.

The appellant instituted an action in the Subordinate Court seeking the annulment of the transfer of the house from her late father's estate as well as the subsequent sale of the house or alternatively, an order for the payment to her of the full value of the house. The Subordinate Court upheld the claim and ordered the reversion of the house to late Henry Mwamfuli's estate on the basis that Ms Kabwe had only enjoyed a life interest in the house under section 9 (1) (a) of the **Intestate Succession Act** which ended when she died. It was also held that the 2nd respondent had no right to sell the house as Mr. Mwamfuli's children still had an interest in it; that they had not given the 2nd respondent permission to sell the house and they did not also benefit from the proceeds of the sale.

On an application in the Subordinate Court to review its judgment, the Court maintained its earlier decision. The High Court,

however, overturned the lower Court's decision on appeal and restored the house to the 1st respondent, as it were, on the basis that he had acquired good title to the house.

Aggrieved by the decision of the High Court, the appellant appealed to this Court. We upheld the appeal on the ground that the house at issue was located in a statutory housing area subject to the **Housing (Statutory and Improvement Areas) Act**; that under section 3 of that Act, the dispute relating to the distribution of Mr Mwamfuli's estate should have been instituted in the Subordinate Court and not the Local Court. Therefore, that the Local Court had no jurisdiction to vest the house in Ms Kabwe, rendering its decision a nullity. We, accordingly, quashed the proceedings in the Local Court for want of jurisdiction with a direction that the house did not form part of Ms Kabwe's estate and consequently, the 2nd respondent as administrator of her estate had no power to sell it to the 1st respondent. Further, that the 1st respondent had not acquired good title to the said house. We ordered the house to revert to Mr Mwamfuli's children and advised that the 1st respondent could have recourse to the estate of the late Ms Doris Kabwe.

The 1st respondent's grievance, according to the affidavit in support of the motion, is that he was not heard in the appeal that led to our decision stated above. He averred that the Notice of Appeal and the Memorandum of Appeal were not served on him. He complained that as such, he had not been aware of the proceedings that led to our judgment. He stated that Counsel who had been representing him in the High Court, Mr. Mukolwe of Messrs Mukolwe and Associates, who may have been served with process, had passed away, a fact which the court should have considered before proceeding to hear the appeal. Therefore, that he was not informed of the appeal. It is the 1st respondent's desire that the appeal be re-opened and heard *de novo*, in his presence so that he does not feel unjustly treated by this court for not having been heard; and that the execution of the judgment be stayed pending the determination of the motion.

As regards the law, the 1st respondent's position is that Rule 48 (5) of the **Supreme Court Rules** (**SCR**), *Chapter 25 of the Laws of Zambia* and Order 35 rule 2, **Rules of the Supreme Court** (**RSC**), *1999 Edition*, give this court power to set aside its own judgment. For

ease of reference, we hereunder reproduce the two provisions. Rule 48 (5), SCR, states:

> "**An application involving the decision of an appeal shall be made to the Court in like manner as aforesaid, but the proceedings shall be filed in quintuplicate and the application shall be heard in Court unless the Chief Justice or presiding judge shall otherwise direct.**"

Order 35 Rule 2, RSC, states:

> "(1) **Any judgment, order or verdict obtained where one party does not appear at the trial may be set aside by the Court, on the application of that party, on such terms as it thinks just.**
>
> (2) **An application under this rule must be made within 7 days after the trial.**"

Counsel for the 1st respondent acknowledged our statement of the law in the case of **Trinity Engineering (Pvt) Ltd v Zambia National Commercial Bank Ltd**[1] that "*judgments of this court are final and there can be no stay of execution of a final judgment*". He, however, contended that this law is only applicable in circumstances where there is no injustice occasioned to any party as a result of an event that arose in the course of the proceedings which the parties had no opportunity to address in court. Counsel, in any case, emphasised that Rule 48 (5), **SCR** is couched in such a way that it gives the court power to make an order to set aside its own judgment,

as we understood the argument; that Order 35/2, **RSC** further empowers the court to set aside its own judgment which was delivered in the absence of the applicant. Counsel also referred to the commentary in Order 35/2/2, **RSC** which states:

> "**The absent party should apply for a new trial to....the court which tried the action and if possible to the trial judge himself.... An affidavit of merits is not necessary though the judge may require one in his discretion.**"

It was submitted accordingly, that the effect of the foregoing law is to ensure that the court is not prevented from giving redress and to undo any injustice arising from a judgment passed in the absence of a party.

It was submitted further that the 1st respondent had no opportunity to address the court on the issue(s) before it which includes, inter alia, the fact that he was a *bonafide* purchaser for value without notice, as we understood the argument; that the foregoing is a very compelling reason for us to set aside the judgment of the court. Another case, among others, cited to support the motion to re-hear the appeal was **John R Ng'andu v Lazarous Mwiinga**[2] in which we held to the effect that a judge had no jurisdiction to dismiss the appeal for want of attendance of the appellant's advocate in the

absence of proof of service of a notice of the new hearing date; that the only course open to the court is to allot a fresh hearing date and to cause notices thereof to be served on the advocates for the parties or to strike the case out of the list and leave it to the parties to make application to restore. We were thus urged to allow the motion on the basis that the reasons advanced in support thereof are neither frivolous nor vexatious.

The appellant's response in opposition to the motion, by way of an affidavit in opposition, is that as far as Counsel was aware the respondents' advocates were all duly served with the Notice of Appeal, the Memorandum of Appeal [and the Notice of Hearing]; that if the 1st respondent's advocate had died at the time of the hearing, the 1st respondent ought to have made follow-ups on the matter; and in effect that the court had satisfied itself that all parties were served with the Notice of Hearing before proceeding. It was averred, in any case, that the 1st respondent has not shown any reason on the merits for the court to revisit the judgment herein.

In terms of the law, it was submitted by Mr Twumasi that this court has no jurisdiction to review its judgment or set aside and re-

open an appeal. The case of **Muyawa Liuwa v Judicial Complaints Authority and Attorney General**[3] was cited in which we said that:

> **"The Supreme Court has no jurisdiction to review its judgment or to set aside and re-open an appeal. If it were not so, there would be no finality in dealing with appeals".**

Counsel submitted that on the foregoing authority alone, the motion should be dismissed.

It was further submitted that the applicant (1st respondent) has not given any meritorious grounds for the court to revisit its judgment contrary to our guidance in cases such as **Waterwells Ltd v Wilson Samuel Jackson**[4] which require the party applying to show a good case on the merits. It was argued, therefore, that this court cannot set aside its judgment merely because the other party did not attend; that a perusal of the judgment shows that the court considered the issues as well as case authorities.

It was also pointed out that this motion, filed on 22nd July, 2015 comes over 11 months after the delivery of the impugned judgment of 2nd September, 2014. It was pointed out that in terms of Order 35/1/2, **RSC**, any application to set aside judgment made in the absence of a party should be made within 7 days after the trial. This was not done and no extension of time was applied for. It was

submitted that the delay was inordinate in making this application; that it would be unfair and prejudicial to the appellant if the motion was to be granted.

We have considered the motion and the submissions on behalf of the parties. We have also taken into account our judgment dated 2nd September, 2014. The crux of the motion is whether we should set aside the said judgment and open the appeal for re-hearing so that the 1st respondent is given an opportunity to argue his case. The motion is not for the stay of the judgment of this court which we have no jurisdiction to grant.

We would like to begin by saying something about the provisions under which the motion was filed. According to the 1st respondent's advocates, Rule 48(5), **SCR** is couched in such a way as to permit the making of an application to the Court to set aside its own judgment. We have no problem with that submission as the provision quite clearly allows the making of an "*application involving the decision of an appeal*" to the Court. We see no reason why this should not include an application to set aside judgment pursuant to the inherent power of the Court.

As to the applicability of Order 35 Rule 2, **RSC**, however, it is clear that the provision is concerned with proceedings before the High Court in which it is sought to set aside a judgment rendered by that court. This is confirmed by the fact that the Rule talks about a party failing to appear at the trial which as we understand, distinguishes it from an appeal hearing. The commentary or editorial note in Order 35/2/2, **RSC**, also talks about the absent party applying *to "the Court which tried the action and if possible to the trial judge himself"*. There can, therefore, be no doubt that the intention of the law was to provide for the setting aside of judgments rendered by the High Court. Further, the Rule requires that the application is filed within 7 days' of the judgment which did not happen in this case. It should be noted also that specific provision is made with respect to the Court of Appeal in England on the subject-matter under Order 59/1/151, **RSC**. In sum, therefore, **Order 35 Rule 2, RSC** does not apply to applications before this court but to the High Court as we have shown.

We have already alluded to the fact that an application to set aside a judgment of the court pursuant to its inherent jurisdiction is permissible under **Rule 48(5) SCR**. Recently, this Court affirmed

and very narrowly qualified this position in the case of **Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture (Suing as a Firm)**[5] in which the following was said:

> **"The final point relates to the exercise of the inherent jurisdiction to reopen a case after a decision is passed. It is common cause that this court does have the inherent power to, in very rare circumstances, reopen its final decision and rescind or vary such decision. This was our holding in the case of Finsbury Investments Limited and Another v Antonio and Manuela Ventrigria which both parties referred to in their submissions. The learned counsel for the respondent stressed the need for finality of decisions so as to enhance certainty, predictability and acceptability of these judgments.**
>
> **As we emphasised in the Finsbury Investments case, <u>reopening of the decision made by the full court will rarely ever be permitted</u>. We, of course, realise that court decisions, by their very nature hardly ever give universal satisfaction to both parties to litigation. It is not infrequently the case that one party or the other, and sometimes both parties, would deprecate a judgment or decision when it is given. This does not a *priori* entitle the dissatisfied party to apply to reopen the matter. In our view, there is public interest in litigation being brought to a binding end. Apart from the narrow instances when the court will allow reopening of a matter, there is great good sense in bringing closure to court matters even if neither party is entirely satisfied.**
>
> **We have in numerous cases such as Attorney General v Kang'ombe and Nahar Investments Limited v Grindlays Bank International Limited stressed that there ought to be finality to litigation..."**

The implication of the foregoing is that all those cases that assert that there is no jurisdiction in the Court to review or re-open a case should be read in the light of what we said in the case. The case and those

referred to show that it is possible to re-open a case before this court if there are compelling reasons for doing so.

In the case before us the major grievance is that the 1st respondent was never aware of the hearing date of the appeal even though he acknowledges the probability that his advocates were served with the necessary process. The argument on behalf of the appellant is, however, that the record shows that the respondent's advocates were served with the Notice of Appeal and the Memorandum of Appeal, that if the advocate was deceased at the time of the hearing, the 1st respondents should have followed up the matter.

We do not think that the 1st respondent can legitimately use his own absence at the hearing of the appeal to justify the motion. He was being represented by counsel. He has acknowledged the probability that the advocate may have been served with the necessary process. In fact the appellant's position is that the advocate was actually served. As pointed out by Mr Twumasi this Court ordinarily satisfies itself that parties were notified of the hearing date before proceeding. The fact that there may have been no communication between the advocate and his client cannot have an

effect on the proceedings. Certainly, the situation in this case was unlike that dealt with in the case of **John R Ng'andu v Lazarous Mwiinga**[2] cited earlier. The Court, in this case, was clearly entitled to proceed in the manner that it did. But this is the less significant consideration. The more significant one and on which the motion is resolved is that the Court took into account the merits of the appeal. The 1st respondent's central argument is that he was not heard on the point that he was a *bona fide* purchaser of the house for value and without any notice.

The argument cannot be of any assistance to the 1st respondent bearing in mind what we said in our judgment. In the impugned judgment we found that the house at issue was located in a statutory housing improvement area administered under the **Housing (Statutory and Improvement Areas) Act**. The Local Court has no jurisdiction to deal with estates (comprising houses) covered under that Act. The court that has power to deal with estates under that Act is the Subordinate Court. Consequently, the Local Court had no power to make the disposition of the house at all. This meant that everything that flowed from the disposition had no effect including the sale of the house by the 2nd respondent who had been appointed

as administrator of Ms. Kabwe's estate. In the circumstances, we are satisfied that the matter at hand is not one of the rare cases which we can re-open to hear a party because we had all the material needed to render a just decision on the record notwithstanding the fact that neither the 1st respondent nor his advocate may have been in attendance at the hearing. Our conclusions were based on the facts and the law from which the 1st respondent suffered no prejudice whatsoever.

The motion has no merit and we dismiss it with costs to the appellant.

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**I.C. MAMBILIMA**
**CHIEF JUSTICE**

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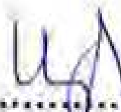
**E.M. HAMAUNDU**
**SUPREME COURT JUDGE**



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**J. CHINYAMA**
**SUPREME COURT JUDGE**