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

Appeal No. 242/2020
CAZ/08/341/2020

BETWEEN:

EURO AFRICA KALENGWA MINES LIMITED	**1ST APPELLANT**
MULONDWE MUZUNGU	**2ND APPELLANT**
NEPHSON KAFWEBU	**3RD APPELLANT**
ELIJAH MUNYOMPE	**4TH APPELLANT**
PATENTS AND COMPANIES REGISTRATION AGENCY	**5TH APPELLANT**
EUROAFRICA KALENGWA MINES LIMITED	**6TH APPELLANT**
MOXICO RESOURCES ZAMBIA LIMITED	**7TH APPELLANT**

AND

EURO AFRICA MINING LIMITED	**1ST RESPONDENT**
CHINUA EDGAR MULENGA	**2ND RESPONDENT**
AFRICAN CONSOLIDATED RESOURCES	**3RD RESPONDENT**

Coram: ***Mchenga, DJP, Chishimba and Sichinga JJA***
On 17th February 2021 and 25th February, 2021.

For the 1st, 2nd, 3rd, 4th, 6th and 7th Appellants: *Mr. Z. Muya, Ms. N. Chila and Mr. J. Hara of Messrs Muya and Company*
Mr. C. Mundia of Messrs C.L. Mundia and Company

For the 5th Appellant: *Mr. D. Kamfwa, Legal Officer*
For the 1st and 2nd Respondents: *Mr. C. Phiri of Messrs Malambo and Company*
For the Interested Party: *No Appearance*

JUDGMENT

Sichinga, JA delivered the Judgment of the Court

Cases referred to:

1. *Bellingsley v. Mundi (1982) ZR 11*
2. *Kabwita and Others v. NFC Mining Plc (2012 Vol. 2) ZR 103*
3. *Siebe Gorman Company Limited v. Pneupac Limited (1982) 1 WLR 185*
4. *Major Lubinda Sawekena v. Watson Ng'ambi and Attorney-General (2010 Vol. 2) ZR44*
5. *Sean Tembo v. The Attorney General 2018/CCZ/0007*
6. *Murray & Roberts Construction Limited and 1 other v. Lusaka Premier Health Limited and 1 other SCZ Appeal No. 141 of 2016*
7. *Mugala and Another v. Attorney-General (1988-1989) ZR 171*
8. *Paluku v. Granny's Bakery Limited and others (2006) ZR 119*
9. *Mason v. Grigg (1909) 2 K.B 341*
10. *Morris v. Bailey (1893) 62 L.J.Q.B. 338*

Legislation referred to

1. *Rules of the Supreme Court (White Book) 1999 Edition*
2. *High Court Rules, High Court Act, Chapter 27 Laws of Zambia*
3. *The Constitution of Zambia, Chapter 1 Laws of Zambia*
4. *Legal Practitioners Act, Chapter 30, Laws of Zambia*

Other works referred to:

1. *A Practical Guide to Civil Litigation, Second Edition*
2. *Patrick Matibini, Zambian Civil Procedure – Commentary and Cases, Vol. 2 (Lexis Nexis 2007)*
3. *Black's Law Dictionary, 9th Edition, Bryan A. Garner, Thomson Reuters*

1.0 Introduction

1.1 The appellants appeal is against the refusal by Mweemba J to endorse a Consent Judgment and/or to refuse to recognize a notice of discontinuance and ordering that the proceedings ought to continue in the matter. The Ruling appealed against is dated 20th February, 2019.

2.0 Background

2.1 The respondents (applicants in the court below) brought proceedings on 16th March, 2017 by way of originating summons seeking the following reliefs:

1. An order that the removal and/or expulsion of the 1st applicant as shareholder and 2nd applicant as director and shareholder of the 1st respondent (1st applicant now) is contrary to the provisions of the Companies Act, Chapter 388 of the Laws of Zambia.
2. A Declaration that all changes made to the details of the 1st respondent at the Patents and Companies Registry (PACRA) after the purported removal and/or expulsion of the applicants from the 1st respondent are illegal and therefore null and void.

3. An order of injunction to restrain the respondents from, in any way interfering with the applicants' right to participate in the management of the affairs of the 1st respondent or in its ownership and control.
4. An order that any rectifications made or caused to be made to the Register of Companies by the Respondents by which they purported to alter the directorship and shareholding of the 1st respondent are null and void.
5. An order that the shareholding and directorship of the 1st respondent be restored to that which subsisted at its incorporation.
6. An order restraining the 2nd, 3rd and 4th respondents from transferring the mining licence No. LPL-8584-HQ issued in the name of the 1st respondent to any third party save as in accordance with the agreement made between the 1st respondent and a company called African Consolidated Resources Plc.
7. An order that the respondents account for all company assets and properties belonging to the 1st respondent from the time when the purported removal and/or expulsion of the applicants from the shareholding and directorship of the 1st respondent was effected.
8. An order that any transfer, assignment or sale of the 1st respondent's goodwill licences and/or permits or other property *in*

rem undertaken by the 1st, 2nd, 3rd and 4th respondents was ultra vires and therefore, null and void; and

9. An order that the 1st respondent does convene a General Meeting of all the original shareholders or their alternates and/or successors in title within the requisite notice period for the convening of such a meeting set out in the Articles of Association of the 1st respondent.

2.2 The summons were taken out by Messrs Malambo and Company on behalf of the applicants. The record shows that the parties were represented by different advocates. Messrs C.L. Mundia and Company were on record as advocates for the 2nd, 3rd and 4th respondents as at 16th May, 2017. On 18th May, 2017 Messrs J and M Advocates were on record as advocates for the interest party. The 5th respondent was represented by in-house counsel. On 14th December, 2018, Messrs C. Chonta Advocates filed a Notice of Change of Advocates as the new advocates for the 1st applicant. On the same day they filed a Consent Judgment wherein the 1st applicant *inter alia* forthwith discontinued all claims as against all the respondents. The intended Consent Judgment

was executed by advocates for all the parties save those for the 2nd applicant and the interested party.

3.0 Decision of the court below

3.1 In his Ruling of 20th February, 2019 Mweemba J refused to endorse the Consent Judgment. The learned Judge firstly took issue with the fact that the 2nd applicant had been excluded from the Consent Judgment. He was of the view that the intended Consent Judgment was not a contract of the parties, and as such he could not sign it.

3.2 The second issue that vexed the learned Judge was that the Notice of Change of Advocates filed by Messrs C. Chonta Advocates on 14th December, 2018 was not served on the other parties, and in particular, Messrs Malambo and Company, the former advocates for the applicants, as is required by **Order 67 Rule 1 (1) and Order 67 Rule 1 (3) of the Rules of the Supreme Court, 1999 edition[1].** He held that Messrs Malambo and Company were still the advocates on record for the 1st and 2nd applicants.

3.3 Thirdly, the learned Judge thought it was necessary to delve into the issues in contention as between the parties. He questioned the incorporation of the 6th respondent by the 5th respondent given that it had a similar name with the 1st respondent and the same shareholders and directors. He thought it was worth inquiring into how the prospecting licence no. LPL-8584-HQ was transferred to the 7th respondent and the 6th respondent were one and the same entity and to ensure that the 1st and 2nd applicants' interests were safeguarded and protected.

3.4 Finally, the learned Judge was of the view that the lawyers representing the parties had dealt with the rules pertaining to an advocate on record in a cavalier fashion because it was not clear to him as to why Messrs C.L. Mundia and Company had signed the Consent Judgment as advocates for the 1st, 2nd, 3rd, 4th and 5th respondents when the Notice of Appointment filed by Messrs Muya and Company on 4th September, 2018 stated the former were their agents in terms of the 1st, 2nd, 3rd and 4th Respondents. Further, Messrs C.L. Mundia and Company

never placed themselves on record as advocates for the 6th respondent.

3.5 Having made these findings, the learned Judge held that the Notice of Discontinuance filed on 3rd January, 2019 by Messrs C. Chonta Advocates on behalf of the 1st applicant was not effective because Messrs Malambo and Company were still considered to be the advocates of the 1st applicant pursuant to ***Order 67 Rule 1 (1) of the Rules of the Supreme Court of England, 1999 edition.***

4.0 The appeal

4.1 Dissatisfied with the lower court's Ruling, the respondents (appellants now) launched this appeal on the following grounds; namely:

1. The court below erred in law by refusing to sign a Consent Judgment signed by the parties that discontinued the 1st respondent's cause against the appellants, and ordered the matter to proceed for hearing on the basis that the 2nd respondent did not execute the consent order, without considering that the 2nd respondent's consent was not

necessary for the 1st respondent to discontinue its cause against the appellants;

2. The court below erred in law by refusing to recognize the Notice of Discontinuance filed by the 1st applicant on 14th December, 2018 and ordering that proceedings ought to continue in the matter;
3. The court below erred in law by fettering the constitutional right of a party to appoint counsel of choice;
4. The court below erred in law and in fact when it granted an injunction against parties who were not heard and proceeded generally with injunctive relief granted ex-parte without hearing the parties' earlier applications for discharge which raised *inter alia* issues of fraud against the applicants who were granted ex-parte orders of injunction; and
5. The court below erred in law in granting an injunction *ad infinitum* in favour of a party against whom fraud is alleged and refused to hear the application inter-parte for over 24 months.

5.0 Appellant's submissions

5.1 Submitting on behalf of all the appellants, save the 5th appellant, Mr. Muya relied on the appellants' heads of

argument filed on 30th November, 2020. On the first ground, it was Mr. Muya's submission that it was common for parties to come to an agreement about the outcome of an entire matter before calling upon the court to decide. He referred us to the case of ***Bellingsley v. Mundi***[1] where the Supreme Court stated that:

> ***".....the parties are at liberty to apply for a Consent Judgment at any stage of an action. The parties are at liberty to agree to the terms of upon which the proceedings will be concluded and to present such terms to the court, so that it may draw upon an order or enter judgment accordingly."***

5.2 Reference was also made to the High Court's case of ***Kabwita and others v. NFC Mining Plc***[2] where it was held that:

> ***".....it is trite that consent orders are prepared by the parties setting out the terms, and are brought to court only for approval or acknowledgement."***

5.3 Mr. Muya submitted that the Consent Judgment on page 134 to page 135 of the record of appeal was well executed by the parties.

5.4 Fundamentally counsel raised the question whether or not it was important for parties, not materially affected by the terms of a consent order, to be included in its execution. He submitted that the 2nd applicant and the interested party would not be affected by the outcome of the Consent Judgment, and therefore they were not necessarily required to indorse their signatures on the Consent Judgment. He quoted Denning MR in the case of ***Siebe Gorman Company Limited v. Pneupac Limited***[3] where he discussed the concept of a consent judgment in the following terms:

> ***".....it should be clearly understood by the profession, that when an order is expressed to be made, "by consent," it is unambiguous ....one meaning is this;***
>
> ***The words "by consent" may evidence a real contract between the parties. In such case, the court will only interfere with such order on the same grounds as it would with any other contract.***
>
> ***The other meaning is this; the words "by consent" may mean, the parties hereto are not objecting. In such case, there is no real contract between the parties."***

5.5 According to Mr. Muya the Consent Judgment was drawn in consensus and without the objection of any of the parties and as such it ought to have been endorsed by the court below.

Counsel contended that there was no need for the 2nd applicant and the interested party to have endorsed and/or authorised the Consent Judgment because the terms only related to the parties that executed it.

5.6 On the second ground of appeal, Mr. Muya referred us to a portion of the Ruling on page 40 of the record of appeal, lines 22-27 where the learned Judge stated that:

> ***"I find and hold that the Notice of Discontinuance of all claims as against all the Respondents filed on 3rd January, 2019 by Messrs C. Chonta Advocates on behalf of the 1st applicant is also not effective because Messrs Malambo and Company are still considered to be the advocates of the 1st applicant pursuant to Order 67 Rule 1 (1) of the White Book 1999 Edition."***

5.7 Mr. Muya recited ***Order 27 Rule 1 of the High Court Rules[2] and Order 21 Rule 5 (2) of the Rules of the Supreme***

Court, White Book *supra* as the law regarding the discontinuance of actions. He referred us to the case of ***Major Lubinda Sawekena v. Watson Ng'ambi and Attorney General***[4] which held that:

> ***"A plaintiff who is compelled through lack of some necessary piece of evidence or for some or other adequate reason to abandon the proceedings, by filing a Notice of Discontinuance."***

5.8 Counsel argued that the 1st applicant was within the law to have discontinued the action against all the respondents at any time before the date fixed for trial as the relevant notice of discontinuance was filed as prescribed discontinuing all claims against all the respondents and the interested party. He submitted that the lower court had no jurisdiction to continue hearing a matter that had been discontinued by the 1st applicant. To buttress the argument counsel quoted Sitali JC in the case of ***Sean Tembo v. The Attorney General***[5] where she stated as follows:

> ***"....after all the considerations, we find no compelling reasons for declining the petitioner's application. We say so***

because this matter has not yet been heard substantively. The petitioner has duly complied with the requirement to notify both the court and the other party. Further, we find no merit in the respondent's argument that the petition should be dismissed as granting the said discontinuance may lead to a fresh action in the future which would prejudice the respondent. The claim is purely speculative at this time and as such cannot be considered by the court. For this reason, the application to discontinue the petition filed by the petitioner on 15th June, 2018 is granted."

5.9 Stemming from the above passage, Mr. Muya submitted that *in casu* it was erroneous for the lower court to hold that the notice of discontinuance was ineffective as that was an instruction of the 1st applicant, the party that instituted the action which was within its rights to discontinue the action as it deemed fit not to proceed with it. Counsel urged us to set aside the Ruling of the lower court on this ground.

5.10 In respect of the third ground of appeal it was submitted that the right to have a legal representative of choice is constitutional pursuant to ***Article 18 (1) (d) of the Constitution***[3] which equally covers civil actions. Counsel argued that it is trite law that a party suing or being sued or

defended by an advocate is at liberty to change counsel in any cause or matter without the prior leave or permission of the court, provided a notice of change of advocates was drawn and filed into court. With reference to the learned authors of ***A Practical Guide to Civil Litigation***[1], he submitted that there were three distinct situations where a notice of change of advocates was required including where ***"A party for whom an advocate is acting wants to change their advocate."***

5.11 Counsel submitted that the 1st applicant satisfied the conditions stipulated in ***Order 67 Rule 1 (1) and (3) of the Rules of the Supreme Court*** *supra* by filing and lodging the notice of change of advocates into court. Further, with regard to the issue of service of the said notice, Mr. Muya submitted that Messrs Malambo and Company were notified of the change of the advocates by the 1st applicant and were fully aware of the said change. That the default on the part of the 1st applicant to formerly serve the notice was merely procedural, curable and could not affect the validity of the notice of change of advocates once filed into court.

5.12 Mr. Muya argued that by holding that Messrs C. Chonta Advocates were to continue acting on behalf of the 1st applicant and the matter was to proceed, the lower court fell in error as enunciated in the case of ***Murray & Roberts Construction Limited & 1 other v. Lusaka Premier Health Limited & 1 other***[6] where the Supreme Court made comment on a judge who had issued a Ruling on his own motion, as follows:

> ***"We must emphasise here that the so called 'inherent jurisdiction' of a trial judge must not be exercised willy-nilly but with caution and judiciously. If in his judgment, the trial judge was of the view that there was some irregularity in the manner the default judgment was obtained and that there was an abuse of the court process, he ought to have requested the parties, particularly the appellants who had filed the application he was considering, to address him on the issues he had in mind but had not been presented by any of the parties before making the orders he made..."***

5.13 Reference was also made to the case of ***Mugala and Another v. Attorney-General***[7] where the Supreme Court stated the following:

"It is most undesirable for a trial judge to volunteer a ruling especially without affording the parties advance notice of what the judge has in mind and giving them the opportunity to address him. The better practice is to make a ruling only when the defence make a submission and even then, the judge should be slow to make a decision on the evidence before he has heard it all."

5.14 Mr. Muya submitted that there was no application before the lower court that led to the Ruling of 20th February, 2019. He argued that if the lower court had requested the parties to address it on the issues raised, the 1st applicant would have been able to establish its right of representation and its choice of advocates. That it would have been shown that the default of service was curable.

5.15 In conclusion, counsel urged us to set aside the impugned Ruling with costs to the appellants.

5.16 In his oral submissions, Mr. Muya briefly restated what has already been captured by his written submissions. For brevity, we do not intend to regurgitate what we have captured above. Save to state that with respect to grounds 4 and 5 counsel complained that the appellants' various applications

filed between three and four years ago had remained without return dates to date. He urged us to allow the appeal in its entirety.

5.17 Mr. Hara echoed Mr. Muya's submission on grounds 4 and 5 by complaining that all the appellants' applications have to date not been granted any hearings while the respondents have been granted hearings. He urged us to allow the appeal with costs and that the matter be heard by a different judge.

5.18 Mr. Kamfwa, on behalf of the 5th appellant did not raise any issue in the appeal.

6.0 The respondent's submissions

6.1 On behalf of the respondents, Mr. Phiri, learned counsel, relied on the 1st and 2nd respondents' heads of argument filed on 21st December, 2020.

6.2 In the heads of argument, the 3rd ground of appeal is argued first. Mr. Phiri begun by quoting *P. Matibini J*, as he then was, the author of **Zambian Civil Procedure: Commentary and Cases**[2] where he states at page 281 that:

"An advocate is deemed to act for a party when the address is also said to be on the record. In such event, the court and other parties must communicate with the advocate(s)."

6.3 We are also referred to ***Section 52(a) of the Legal Practitioners Act***[4] which provides that:

"No practitioner shall:

a) Take instructions in any case except from the party on whose behalf he is retained or some person who is the recognized agent of such party, or some servant, relation or friend authorized by the party to give such instructions; or,

b) Mislead or allow any court to be misled, so that such court makes an order which such practitioner knows to be wrong or improper;"

6.4 Mr. Phiri equally referred to ***Order 67/1/3 of the Rules of the Supreme Court*** *supra* and submitted that the appellants admitted in their arguments that procedure therein was not followed as the court below noted. He submitted that the appellants had no basis to contend that the lower court erred in its Ruling or that Messrs Malambo and Company seized to act for the 1st applicant.

6.5 He submitted that the defect could not be cured because the advocates on record had not been served and there was no resolution of the 1st applicant to change its advocates or discontinue the matter. Mr. Phiri submitted that one of the respondents had unilaterally appointed Messrs C. Chonta Advocates notwithstanding that the same respondent was on record disputing the existence of the same company. He submitted that the conduct of the respondent who instructed Messrs C. Chonta Advocates was fraudulent and that of the advocates was professional misconduct as provided under ***Section 52 (a) of the Legal Practitioners Act*** *supra.*

6.6 Mr. Phiri submitted that the aforesaid issues were brought to the attention of the court, and on the authority of the case of ***Murray & Roberts Construction Limited and 1 other v. Lusaka Health Limited and 1 other*** *supra*, the lower court was on firm ground to hold that the notice of change of advocates and the notice of discontinuance was of no legal effect.

6.7 Turning to the 2nd ground of appeal, Mr. Phiri reiterated the respondents' arguments in the 3rd ground of appeal.

On the 1st ground of appeal, Mr. Phiri referred us to ***Order 42/5A/4 of the Rules of the Supreme Court*** *supra* which provides that:

> ***"The consent judgment or order must be drawn up in the terms agreed and must be expressed as being "by consent," and it must be endorsed by the solicitors acting for each of the parties..."***

6.8 Mr. Phiri referred us to the case of ***Paluku v. Granny's Bakery Limited and Others***[8] in which the Supreme Court stated that:

> ***"What is equally common is that the parties excluding the appellant negotiated and drew up what was referred to as a consent order in the absence of the appellant, this was in breach of Order 42, rule 5A (3) (a)...."***

6.9 Counsel submitted that the lower court was on firm ground to decline to sign the consent order as it excluded the 2nd applicant. That even if the lower court had accepted the fraudulent notice of appointment the said consent judgment was incompetent.

6.10 Mr. Phiri urged us to dismiss the appeal forthwith with costs.

6.11 In his oral submissions, Mr. Phiri merely recited a summary of what was contained in the written heads of argument. We will not repeat the same.

7.0 Decision of the court

7.1 We have considered the record of appeal, the submissions of counsel and the issues raised in this appeal. In the first ground of appeal, the main contention is that the learned trial judge did not sign the Consent Judgment on account of the 2nd respondent not being a party to it, and thus fell into error as the 2nd respondent's consent was not necessary. In the Ruling appealed against the learned Judge was alive to the fact that parties to an action were at liberty to agree on the outcome of entire proceedings before the court. He relied on the case of ***Billingsley v. Mandi*** *supra* where the Supreme Court stated that parties are at liberty to apply for a consent judgment at any stage of the action. He drew the parties' attention to the case of ***Siebe Gorman Company Limited v.***

Pneupac Limited *supra* where Denning MR explained what is meant by the term "*by consent*". In his view, the learned Judge stated that a consent order or consent judgement was drawn up in agreed terms and expressed to be "*by consent,*" meaning that the order or judgment was made without objection by any of the parties. In support of his preposition he referred to the case of ***Paluku v. Granny's Bakery Limited and others*** *supra* in which case the appellant therein was left out of a consent order. The appellant was neither present, nor represented. On appeal, the Supreme Court held that it was a breach of ***Order 42 Rule 5A (1) (3) of the Rules of the Supreme Court*** *supra.* Having considered the wording of the said order the learned Judge came to the conclusion that the so-called consent judgment filed by the 1st respondent on 14th December, 2018 could not be endorsed by the court when it was not signed by counsel of all the parties to the cause or matter.

7.2 In our view, the learned Judge explained at length that a true consent order is based on a contract between the parties. As such, consent judgments or orders must be expressed as being "*by consent*" and must be signed by the legal representatives for each party, or by the litigants in person. For clarity we refer to ***Order 42 Rule 5A (3) of the Rules of the Supreme Court (White Book)*** *supra* which provides as follows:

> ***"Before any judgment or order to which this rule applies may be entered, or sealed, it must be drawn up in terms agreed and expressed as being "By Consent" and it must be indorsed by the solicitors acting for each of the parties."***

7.3 *In casu*, it is not in dispute that the 2nd respondent was not a party to the drawn up consent judgment. If the intention of the parties, as the consent judgment suggests, was to discontinue the action, then the 2nd respondent ought to have been a party to the consent judgment to indicate that he had no objection to the agreed terms of the Consent Judgment.

7.4 In our view, the learned Judge determined, in accordance with the law, that the consent judgment was required to be signed

by counsel of each of the parties to the matter or cause. The first ground of appeal therefore fails.

7.5 Coming to the second ground of appeal we have visited ***Order 21 Rule 2 (5A) of the Rules of the Supreme Court (White Book)*** *supra*. It provides that:

> ***"The plaintiff in an action begun by originating summons may, without the leave of the court, discontinue the action or withdraw any particular question or claim in the originating summons, as against any or all of the defendants at any time not later than 14 days after service on him of the defendant's affidavit evidence filed pursuant to Order 28, rule 1A (4) or, if there are two or more defendants, of such evidence last served, by serving a notice to that effect on the defendant concerned."***

7.6 ***Order 21 Rule 5 sub rule 2*** under the heading ***"Discontinuance or withdrawal by a plaintiff without leave"*** states that –

> ***"The right of a plaintiff to discontinue the action or withdraw part thereof without the leave of the Court may be exercised only if the following conditions are fulfilled:***
>
> ***(3) Where the action is begun by originating summons -***
>
> ***(i) That a notice of discontinuance or a notice of withdrawal of any particular question or claim, as***

the case may be, is served on the defendant, or if there are two or more defendants, on the defendant concerned."

7.7 We further considered ***Order 17 rule 1 of the High Court Rules***. It provides:

> ***"1. If, before the date fixed for the hearing, the plaintiff desires to discontinue any suit against all or any of the defendants, or to withdraw any part of his alleged claim, he shall give notice in writing of discontinuance or withdrawal to the Registrar and to every defendant of such notice, such defendant shall not be entitled to any further costs, with respect to the matter so discontinued or withdrawn, than those incurred up to the receipt of such notice, unless the Court or a Judge shall otherwise order; and such defendant may apply ex parte for an order against the plaintiff for the costs incurred before the receipt of such notice and of attending the Court or a Judge to obtain the order. Such discontinuance or withdrawal shall not be a defence to any subsequent suit."***

7.8 ***Black's Law Dictionary***[3] describes a '***notice***' as a ***"legal notification required by law or agreement."*** And it describes '***discontinuance***' as ***"the termination of a***

lawsuit by the plaintiff; a voluntary dismissal or nonsuit."

7.9 It is on record that the 1st respondent gave notice in writing to the Registrar and appellants of the discontinuance of all claims against all the respondents (appellants now) and the interested party. The said notice was filed on 3rd January, 2019, well over a month before the lower court rendered its Ruling of 20th February, 2019. In his decision, the learned Judge found and held that the said notice of discontinuance filed by Messrs C. Chonta Advocates on behalf of the 1st respondent was ineffective because Messrs Malambo and Company were still considered to be the advocates of the 1st respondent on account of ***Order 67 Rule 1 of the Rules of the Supreme Court*** *supra.* Mr. Muya argued that it was within the 1st respondent's right to discontinue a matter it had commenced. On the other hand, Mr. Phiri did not make any submissions with regard to a plaintiff's rights to discontinue or withdraw a matter. While accepting that Messrs C. Chonta Advocates had filed a notice of change of advocates, counsel

took issue that his firm, Messrs Malambo and Company had not been served.

7.10 We have earlier held that the learned Judge was on firm ground to have declined to sign the consent judgment because there was a requirement that it had to be signed by counsel of each of the parties to the cause or matter. The same cannot be said of the notice of discontinuance, which only requires notification to the Registrar and to the parties against whom the discontinuance is intended. In our view, the notice of discontinuance, in and of itself, was filed in accordance with the law.

7.11 The failure to serve a notice of appointment on counsel on record cannot be said to affect the validity of the notice of discontinuance or of a right of a party to discontinue a matter or cause. The view that we take is that the service on counsel was not fatal on the validity of the notice since all the lower court had to do was to order service of the notice of appointment of advocates on Messrs Malambo and Company to satisfy the requirement of ***Order 67 Rule 1 (1) of the Rules***

of the Supreme Court *supra.* It is clear to us that the 1st respondent having filed the notice of discontinuances against the appellants and interested party, the only action that would have survived is that between the 2nd respondent (2nd applicant in court below) and the appellants and interested party. We find the arguments by Mr. Muya, on the second ground of appeal tenable and allow this ground.

7.12 On the third ground of appeal, it is on record in this case that the 1st respondent filed a notice of change of advocates on 14th December, 2018. The learned Judge found that it was of no effect because the procedure outlined in ***Order 67/1/3 of the Rules of the Supreme Court*** *supra* was not complied with. The said Order provides:

> ***"67/1/3 Procedure for substituting one solicitor for another – No order is necessary, but in order to make the change effective the party or his new solicitor must:-***
>
> ***I. File the notice of change in the appropriate office (r.1 (2)).***
>
> ***II. Lodge a copy of the notice of change in the appropriate office (r. 1 (2)).***
>
> ***III. Serve on every other effective party a copy of the notice of change endorsed with a memorandum***

stating that the notice has been duly filed in the named appropriate office (r. 1 (3))

IV. Serve on the former solicitor a copy of the notice endorsed with a similar memorandum (r.1 (3)).

7.13 The learned Judge found that the notice of change of advocates was ineffective because it had not been served on Messrs Malambo and Company, the firm on record as acting for the 1st respondent (1st applicant in court below).

7.14 ***Order 4 Rule 1 of the High Court Rules*** *supra* on change of practitioners during the hearing of a cause or matter provides:

> ***"1. A party suing or defending by a barrister or advocate in any cause or matter shall be at liberty to change his advocate in such course or matter, without an order for that purpose, upon notice of such change being filed in the office of the Registrar. But, until such notice is filed and a copy served, the former advocate shall be considered the advocate of the party until final judgment, unless allowed by the Court or a Judge, for any special reason, to cease from acting therein; but such advocate shall not be bound, except under express agreement or unless re-engaged, to take any proceedings in relation to any appeal from such judgment."***

7.15 In the view we take, the failure to serve the notice on Messrs Malambo and Company was not fatal. It was curable and ought not to have affected the validity of the notice of change of advocates, which in itself was filed in accordance with the Rules of the High Court. As we have stated earlier, the court ought to have ordered the new advocates to serve the notice on all the requisite parties without volunteering a ruling. In fact the explanatory note under ***Order 67/1/3 of the Rules of the Supreme Court*** states that an omission to comply with the procedure is an irregularity which may be waived. The cases of ***Mason v. Grigg*** and ***Morris v. Bailey*** refer. We accept the submissions by Mr. Muya. Ground three of the appeal succeeds.

7.16 We shall now briefly comment on grounds four and five of the appeal. In their oral submissions Messrs Muya and Hara merely complained that various applications made by the appellants had remained unheard for three to four years. No submissions were made by Mr. Phiri on these grounds.

7.17 Grounds four and five take issue with an injunction earlier granted in an ex-parte order of interim injunction dated 13th February, 2019. The said injunction was not the subject of the Ruling of 20th February, 2019, which is the subject of this appeal. There is no pending appeal against the Order of injunction before us. These grounds are therefore misconceived and ought not to have been raised in this appeal. We accordingly dismiss them.

8.0 Conclusion

8.1 In conclusion, we have found no merit in grounds 1, 4 and 5. The appeal effectively succeeds on grounds 2 and 3. We set aside the Ruling of the court below and hold that the matter was discontinued as between the 1st respondent (1st applicant in the court below) and the appellants (respondents in the court below) and the interested party.

8.2 The subsisting action remains between the 2nd respondent (2nd applicant in the court below) and the appellants (respondents in the court below) and interested party. We order that each party bears its own costs in this appeal.

.....

C.F.R Mchenga

DEPUTY JUDGE PRESIDENT

.....

F.M. Chishimba

COURT OF APPEAL JUDGE

.....

D.L.Y. Sichinga

COURT OF APPEAL JUDGE