IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 45/2020**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

MORGAN NAIK	**APPELLANT**

AND

SIMON DAVID BURGESS	**1ST RESPONDENT**
RAHENDRAKUMAR SOMBAHAI PATEL	**2ND RESPONDENT**
TREVOR ASHLEY WATSON	**3RD RESPONDENT**
THOMAS DAVID THOMPSON	**4TH RESPONDENT**
SHAILENDRA RAGHA	**5TH RESPONDENT**
AMADEEUS INTERNATIONAL LIMITED	**6TH RESPONDENT**

CORAM: Chashi, Sichinga and Banda-Bobo, JJA
On the 13th day of June, 2021 and 29th October, 2021.

For the Appellants:	Mr. M. Lungu, Ms. M. Mwape and Ms. M. Mulenga all of Lungu Simwanza and Company
For the Respondent:	Mr. L. Mwamba of Simeza Sangwa and Associates

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JUDGMENT

BANDA-BOBO, JA, delivered the Judgment of the Court

Cases referred to:
1. *Mutantika and Another v. Chipungu (SCZ Judgment No. 13 of 2014)*

2. *JCN Holdings Limited v. Development Bank of Zambia (SCZ Judgment No. 22/2013)*
3. *Esan v. Attorney General (App No. 96/2016)*
4. *Zambia Seed Company Limited v. Chartered International (PVT) Limited (SCZ Judgment No. 20 of 1999*
5. *Zambia Revenue Authority v. Jayesh Shah (SCZ Judgment No. 10 of 2001)*
6. *Belamano v. Ligure Lombarda Limited (1976) ZR 267*
7. Crossland Mutinta and Others v. Donovan Chipanda (selected Judgment No. 53 of 2018)
8. *MacFoy v. United Africa Company Limited (1961) 3AII ER 1169*
9. *Vengelatos v. Vengelatos (SCZ Selected Judgment No. 35 of 2016)*
10. Antonio Ventriglia and Emmanuela Ventriglia v. Finsbury Investments Limited (SCZ Appeal No. 2 of 2019)
11. Owner of Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Limited (1989) KLR 1
12. Access Bank Zambia Limited v. Group Five/Zcon Business Park Joint Venture (SCZ/8/52/2014)

Legislation referred to:

- The Limitation Act 1939
- The Constitution of Zambia, Act No. 2 of 2016
- The High Court Act, Cap 27 of the Laws of Zambia

Other Works

- Halsbury's Laws of England

1.0. INTRODUCTION

1.1. This is a Ruling on an application by the Respondent to Raise a Preliminary Objection to the Appeal launched by the Appellant.

2.0 **BACKGROUND**

2.1 The appeal in the main matter arises from the decision of the Hon. Mrs. Justice Chibbabbuka, who on 27th September, 2019 determined that the matter before her was statute barred and dismissed it on that ground.

2.2 The Appellant commenced this action in the lower Court where he sought various reliefs. Before the matter could proceed, the Respondents raised a preliminary issue contending that the matter was statute barred and it should be dismissed, which application was opposed.

3.0 **DECISION OF THE DEPUTY REGISTRAR**

3.1 The application was heard and determined by the Deputy Registrar, who determined that the action was not statute barred and that it should proceed to trial.

4.0 **DECISION OF THE HIGH COURT**

4.1 The Respondent being dissatisfied with the decision of the Deputy Registrar, appealed to a single Judge of the High Court sitting alone in Chambers.

4.2 After hearing both parties, the learned Hon. Judge rendered her Ruling and disagreed with the decision of the Deputy Registrar and set the Ruling aside. The learned Judge agreed with the Respondent herein that the case was indeed statute

barred for offending the Limitation Act 1939. As already stated in paragraph 2.1 herein, the Ruling was handed down on 27th September, 2019.

5.0 APPLICATION FOR LEAVE TO APPEAL TO THE COURT OF APPEAL

5.1 On 29th October, 2019, the Appellant filed ex-parte summons, accompanied by an affidavit in support for leave to appeal against the Ruling of 27th September, 2019 pursuant to Order 47 rule 2 of the High Court Rules (HCR). The Order was granted and perfected on 26th November, 2019. The Ex-parte Order so granted paved the way for the Appellant herein to lodge the Appeal before this Court.

6.0 **APPEAL BEFORE THIS COURT**

6.1 The Appellant lodged his appeal on 31st March, 2020 together with all the requisite documents.

The Respondents filed their heads of argument in opposition to the appeal on 30th April, 2020.

7.0 **PRELIMINARY OBJECTION**

7.1 However before the scheduled date of hearing of the appeal, the Respondents, on 22nd May, 2020 filed a Notice of Motion to Raise a Preliminary Objection to the appeal pursuant to Order 13 rule 5 (1) of the Court of Appeal Rules, Statutory

Instrument No. 65 of 2016. They sought the dismissal of the appeal in its entirety.

7.2 In the affidavit in support sworn by one Kashinga Kaoma, it was deposed that the Order granting Leave to Appeal was made on 26th November, 2019 and yet the Ruling that the Appellant sought to Appeal against was delivered on 27th September, 2019. The deponent averred that this was thirty-two (32) days after delivery of the Ruling it was sought to impugn. It was his deposition that he believed that the Application for leave to appeal ought to have been made on or before 11th October, 2019 and not 29th October, 2019. He averred that the Order granting leave to appeal having been granted thirty-two (32) days after the statutory date was irregular as it was premised on a flawed application.

8.0 **ARGUMENTS IN SUPPORT**

8.1 At the hearing, both counsel relied on their affidavits and arguments in support. Mr. Mwamba, learned counsel for the Respondent, submitted that applications for leave to appeal interlocutory decisions of the High Court ought to be made within 14 days of the decision sought to be appealed against. That Order 47 rule 2 of the High Court Rules (HCR) is clear on this where it states that:-

"(2) After 14 days from the date of any Interlocutory decision, application for leave to appeal shall not be entertained."

8.2 That based on the above, leave to appeal against an Interlocutory decision of the High Court ought to be sought within fourteen (14) days of the decision, failure to which it should not be entertained. He deposed that Rule 2 of Order 47 H.C.R. is couched in mandatory terms and was not merely regulatory and thus must be adhered to. In furtherance of this point, learned counsel drew our attention to the case of **Mutantika and Another v. Chipungu**[1]. He said that this same case also pointed out that there ought to be strict adherence to Court rules, as failure to do so can be fatal to a party's case.

8.3 Counsel reiterated that the application for leave to appeal the Ruling of 27th September, 2019, ought to have been made no later than 11th October, 2019, but was only filed on 29th October, 2019, thirty-two (32) days after the Ruling, the subject of the Appeal before this Court.

8.4 Counsel went on to state that it is settled law that if a matter is not properly before Court, the Court lacks the necessary jurisdiction to hear, determine or indeed make any pronouncement on it. Our attention on this point was drawn

to the case of **JCN Holdings Limited v. Development Bank of Zambia**[2]. That this case made it clear that any order or ruling delivered by a court without jurisdiction is null and void for want of jurisdiction. That based on the above, the Order for Leave to Appeal dated 26th November, 2019 is null and void ab initio as the Judge in the lower court had no power to grant leave when the application for leave was made outside the permissible time and was thus contrary to the Rules of Court. That therefore this Appeal is not properly before Court and this Court lacks jurisdiction to hear and determine it and it should thus be dismissed for want of jurisdiction by the Court. That since this Court only gets vested with jurisdiction to hear an interlocutory appeal by the leave granted by the High Court, and since in this case they have shown that the order for leave is irregular, the Court is bereft of the requisite jurisdiction to hear and determine the Appeal. That this Appeal should not be entertained as it is not properly before Court and it should be dismissed with costs.

8.5 **ARGUMENTS IN OPPOSITION**

In opposing the application to dismiss the Appeal, it was argued that the preliminary objection was misplaced at law

and was devoid of logical reasoning, accuracy and law as it was vague. It was contended that there was no application before this Court or the Court below or even an appeal against the said order for being irregular. That the preliminary objection to the Appeal could not be sustained in the absence of setting aside the order granting leave to appeal by the Court below since the order still subsists.

8.6 Our attention was drawn to the case of **Esan v. Attorney General**[3] in support of the contention that there are no pleadings before this Court to set aside the said order for the purported irregularity. That the above case clearly stated that it was not for this court to go outside the pleadings and set aside the said order without the actual hearing of the actual application for an order to set aside the Order granting leave to appeal for irregularity.

8.7 It was contended that despite the clever arguments raised in the objection to the Appeal, the same cannot succeed without the actual application to set aside the order that granted leave to Appeal. That as a result, the objection lacks merit as it appeared to contest the Order it cannot set aside.

8.8 There was argument on the equitable right to be heard. It was contended that the Respondent's' application came too

late, since they already filed their Heads of Arguments and thus by conduct, they waived their right to oppose the Appeal as they have complied. Consequently, the application cannot come as an afterthought, just to defeat the equitable right of the Applicant to be heard. Further, that it is trite that, where equity and law conflict, equity must always prevail. To that end, the case of **Zambia Seed Company Limited v. Chartered International (PVT) Limited**[4] and **Section 13 of the High Court Act, Cap 27 of the Laws of Zambia** were cited to buttress the issue that Courts in Zambia administer both law and equity concurrently, and where law and equity are in conflict, equity shall prevail. That the Court below was on firm ground when it granted the Order for Leave as the same was in the interest of justice. That *in casu,* the Appellant ought to be heard in the interest of justice. That Order 3 rule 2 HCR vests jurisdiction in the court to grant any order which it deems necessary for better administration of justice. That the lower Court acted within the Law by granting leave to appeal out of time and there was nothing irregular about that action, as the Court is vested with power and authority to grant any order under Order 3 rule 2 of the HCR.

8.9 It was argued that the purported error is not fatal, despite Order 47 rule 2 of the HCR being couched in mandatory terms. That the use of the word "shall" is regulatory or directory, thus not fatal as the defect is curable and the Appellant cannot be denied the right to have his case heard as the Court has powers to exercise its discretion to grant the order for leave. That Order 3 rule 2 of the HCR is actually an extended step of Order 47 HCR in that where leave expires, the Court has leverage to grant any order to ensure that there is no miscarriage of justice. That the provisions of Order 47 HCR fall within the teeth of the provisions of Order 3 rule 2 HCR which empowers the court to make any Order for doing justice, including the Order for Leave to Appeal.

8.10 The case of **Zambia Revenue Authority v. Jayesh Shah**[5] was cited to support the argument that cases should be decided on their substance and merits and that, though rules must be followed, the effect of breach will not always be fatal, if the rule is merely regulatory or directory. It was submitted that the fourteen (14) days requirement in Order 47(2) HCR is merely regulatory and thus not fatal but curable. That the Appellant reserved his right to be heard in the interest of

justice. Further, that matters should not be concluded on technicalities. That Article 1 of the Constitution of Zambia, Act No. 2 of 2016, makes it clear that the Constitution is the Supreme Law of the land and any other law inconsistent with its provisions is void to the extent of the inconsistency. That the prayer to dismiss the Appeal offended Article 118(2) (e) of the same Constitution, which enjoins Courts, when exercising judicial authority, not to administer justice with undue regard to procedural technicalities. That based on the above constitutional provision, this Court should not allow the Respondents' application, as doing so would be going against the provisions of the Constitution. That the Court's hands are tied as the matter should not be concluded on technicalities.

8.11 The Appellant submitted in the alternative citing the case of **Belamano v. Ligure Lombarda Limited[6],** for the proposition that where a defect can be cured in a proper case, the Court ought to stay the action rather than dismiss it directly. The submission in the alternative was that in the event that the Court agreed with the Respondents, this Court should stay the Appeal until a proper order is obtained from the Court below.

9.0 **ARGUMENTS IN REPLY**

9.1 In their arguments in Reply, on whether the preliminary objection is improper, it was replied that infact the Preliminary Objection is not challenging the irregularity of the ex-parte order, but the appeal itself which had been brought pursuant to an irregular order. It was contended that the mere fact that the irregular order has not been set aside does not mean that this Court now has jurisdiction to hear and determine the appeal. Counsel argued that this is because an irregular order such as the one in question is void ab initio for lack of jurisdiction. That it amounts to nothing, which renders the appeal before Court improper. The case of **Crossland Mutinta and Others v. Donovan Chipanda**[7] was relied upon where the Supreme court held that:-

> **"In the Vengelatos case referred to in paragraph 44, we held that:**
> **"... the absence of jurisdiction nullifies whatever decision that follows from such proceedings.**
> **"Similarly in the present case, we conclude that the absence of jurisdiction on the part of the magistrate nullified proceedings in the subordinate court. To that extent, it was a futile exercise on the part of the High Court to purport to consider an appeal and consequently uphold a judgment of the trial magistrate when, for want of jurisdiction, the court proceedings from which it arose were null and void ab initio. As we said in the Vengelatos case, the decision of a court which purports to exercise a jurisdiction it does not have amounts to nothing.**

This is better illustrated by the Latin maxim ex nihilo nihil fit (from nothing, nothing comes) (emphasis suppled).

The case of **JCN Holdings Limited v. Development Bank of Zambia**[2] was also relied upon for the same proposition.

9.2 It was submitted that in view of the above, this Court cannot therefore determine an appeal when the Order pursuant to which the appeal has been brought is a nullity since it was made without the requisite jurisdiction. It was contended that *in casu*, it is not in dispute that the ex-parte order for leave to appeal was made outside the prescribed 14 days. That, what that meant is that the High Court lacked the requisite jurisdiction to hear, determine and grant an order brought or sought outside the prescribed period. It was said that the High Court Judge had no jurisdiction to grant the ex-parte order pursuant to which this appeal was brought since it was sought outside the prescribed time. That in the **JCN Holdings**[2] case referred to above, the Supreme Court also held that:-

> **"Also, it is settled law that if a matter is not properly before a Court, that Court has no jurisdiction to make any orders or grant any remedies."**

9.3 It was contended that since the ex-parte order was made without jurisdiction, the order amounts to nothing

which renders the appeal before the Court improper. That this Court could only hear the appeal on its merits if it is satisfied that the ex-parte order for leave to which this appeal was brought, arose out of proper proceedings. That it followed therefore that since the ex-parte order is a nullity for want of jurisdiction, this Court cannot hear and determine the appeal.

9.4 Moving on, it was submitted that since the Order is void ab initio, there is no need for an order of the Court to set it aside. That what is important is that it is a nullity and nothing can be done pursuant to the Order. To that end, the case of **MacFoy v. United Africa Company Limited**[8] was relied upon where the Court said that:-

> **"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void ab initio without more ado, though it is sometimes convenient to have the Court declare it to be so. Any other proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse"** (emphasis supplied).

9.5 It was argued that as a result, the Appellants' argument that the preliminary objection is improper because the ex-parte order has not been set aside, and is still

subsisting, is misconceived. That infact the Appellant has not appreciated the fact that the ex-parte order he is relying on is void ab initio and not voidable.

9.6 As to whether the Respondents had waived their right to raise a preliminary objection, it was contended that it is trite law that a jurisdiction issue can be raised at any stage and that a jurisdictional issue cannot be waived. To buttress, counsel adverted to the case of **Vengelatos v. Vengelatos**[9] where the Supreme Court cited with approval the Learned authors of Halsbury's Laws of England who said that:-

> **"It is the duty of an appellate court to entertain a plea as to jurisdiction at any stage even if the point was not raised in the court below."**

9.7 It was submitted that therefore a plea as to jurisdiction of the Court can be raised at any stage of the appeal. That the preliminary objection raised herein is a plea as to the jurisdiction of this Court which can be raised at any stage notwithstanding that the Respondents have filed their heads of arguments. Further, that a jurisdictional issue cannot be waived contrary to the Appellants' arguments, and that whenever a

jurisdictional issue is raised, the Court ought to deal with the issue first before dealing with the appeal on its merits.

9.8 On the Appellant's argument that they have an equitable right to be heard, which the preliminary objection cannot defeat, it was contended that in their view, the Appellant had not appreciated the gravity of the issue raised in the preliminary objection. That the objection raised goes to the jurisdiction of the Court to hear the appeal. That the Respondents contend that this Court cannot hear the appeal before it for want of jurisdiction. That the Court cannot engage in a futile exercise to hear the parties when it has no jurisdiction. That the right to be heard does not arise when the Court has no jurisdiction to hear the appeal in the first place. It was submitted that the argument by the Appellant would have been acceptable if the appeal was properly before Court and if the Court had jurisdiction to hear this appeal. It was submitted that the arguments by the Appellant on this issue lacked merit.

9.9 On whether Order 3 rule 2 HCR was applicable, it was submitted that this Order cannot aid the Appellants. That this Order can only be called upon to assist in cases where the application or proceedings is properly before the High Court. That however, where the Court lacks jurisdiction, this Order cannot be used to confer jurisdiction on it. That want of jurisdiction means that the Court cannot make any order pursuant to any rule whatsoever whether under Order 3 rule 2 HCR or otherwise. That the Appellant's argument is tantamount to suggesting that Order 3 rule 2 HCR can confer jurisdiction on the Court even in instances when it has none.

9.10 It was mentioned that the Appellant had made reference to the High Court granting leave to appeal out of time, but that this was factually incorrect and meant to mislead the Court. It was submitted that what the High Court granted was simply leave to appeal and not leave to appeal out of time; and that these were two different things which could not be used interchangeably.

9.11 On the issue of whether the error was fatal and whether the appeal cannot be concluded on a technicality, the

Respondents submitted that the Appellant has trivialised the gravity of the issue raised in the objection. It was said that the issue raised goes to jurisdiction of this Court to hear the appeal. The case of **JCN Holdings**[2] was again adverted to, including the earlier arguments on the issue of jurisdiction. It was argued that want of jurisdiction can never be a curable defect and the Court cannot assume or confer jurisdiction on itself which it does not have. That therefore, the argument that the error is curable is clearly misconceived.

9.12 The Respondents found the argument by the Appellant that use of the word "shall" is directory and not mandatory startling. The case of **Mutantika v. Chipungu**[1] was relied upon where the Supreme Court held that:-

> **"Both provisions are couched in mandatory manner as each uses the word "shall". The two rules are therefore not regulatory as they do not give the Court discretionary power."**

That clearly therefore the Appellants' arguments fly in the teeth of the holding by the Supreme Court and should not be entertained.

9.13 As regards the Appellant's reliance on Article 118(2) of the Constitution, the response was that this argument too lacked merit, because a jurisdictional challenge cannot be characterised as a technicality. That once the Court's jurisdiction is in question, the issue of the matter being heard on merit does not arise because the Court does not have jurisdiction to hear and determine the matter in the first place.

9.14 As regards the argument in the alternative, that should the Court find that the appeal is not properly before it, it should stay the appeal until a proper order is obtained, it was argued that for as long as the Court had no jurisdiction, it could not make any order to stay the appeal which is not properly before it. That the Court could not stay the appeal as that would amount to granting an order or relief in a matter where it has no jurisdiction. That the Court would be assuming jurisdiction on the appeal which it does not have.

It was contended that the Appellant's argument in opposition to the preliminary objection raised has no

merit and it should be dismissed for want of jurisdiction with costs to the Respondents.

9.15 In addition, in his oral augmentation, counsel brought to our attention the case of **Antonio Ventriglia and Emmanuela Ventriglia v. Finsbury Investments Limited**[10]. He submitted that in that case, leave had been obtained after fourteen (14) days from the Court of Appeal. He said the Supreme Court upheld the objection raised and ruled that the Court had no jurisdiction to accept the preliminary objection as it lacked the jurisdiction to entertain it, as it had been obtained after the fourteen (14) days period. That *in casu*, the Order for leave to appeal had been filed after fourteen (14) days and it therefore did not matter that the Order was still subsisting, as it is a nullity and thus incompetent as it was filed irregularly.

10.0 **DECISION BY THIS COURT**

10.1 We have considered the preliminary objection raised by the Respondents, the arguments advanced in support thereof and the Appellant's arguments in response to the preliminary objection as well as the arguments in Reply.

10.2 The major contention raised in the Preliminary Objection is simply that, this Court lacks jurisdiction to entertain the appeal by the Appellants herein, against the Ruling of the lower Court, which was handed down on 27th September, 2019 and which dismissed the main action, because the ex-parte order pursuant to which the Appellants were granted leave to appeal, was not made within the stipulated fourteen (14) days from the date of the Ruling sought to be appealed against as required by Order 47 rule 2 of the HCR.

10.3 The gravamen of the Respondents' complaint is that even if the ex-parte order granted leave to appeal, the purported granting of that leave was a complete nullity because its granting was done in complete disregard or violation of a mandatory requirement as contained in Order 47 (2) HCR.

To put the issue in perspective, Order 47 rule 2 H.C.R states that:-

> **"After fourteen days from the date of any interlocutory decision, an application for leave to appeal shall not be entertained."**

10.4 Mr. Mwamba, learned counsel for the Respondents forcefully argued against this Court entertaining the present appeal, contending that the Appellants did not comply with the above cited order. He argued that the appellant ought to have applied for leave to appeal against the lower court's Ruling of 27th September, 2019 no later than 11th October, 2019. Instead, they only filed the application on 29th October, 2019 while the Ex-parte order was granted on 26th November, 2019, a good 32 days post the Ruling against which they now seek to appeal. That this was way outside the permitted period.

10.5 Learned counsel Mwamba cited the case of **Mutantika and Another v. Chipungu**[1] to drive the point home that the Order in issue is mandatory and its provisions ought to be complied with as they do not give the Court any discretionary power; as well as to state that parties are obliged to strictly adhere to Court rules and that failure to comply can be fatal to a party's case.

10.6 Learned counsel brought the case of **JCN Holdings Limited v. Development Bank of Zambia**[2] to drive the point home that where a matter is not properly before

Court, that Court has no jurisdiction to make any orders or grant any remedies. That in that case, the Court ruled that since the matter had been improperly before that Court, it had no jurisdiction to hear it and consequently the Judgment and Ruling delivered were null and void.

10.7 Learned counsel contended that *in casu*, the Order for leave to appeal dated 26th November, 2019 is null and void ab initio as the Judge of the lower court had no power to grant leave when the application for leave was made outside the permissible time and was thus contrary to the Rules of Court. Learned Counsel stated that it was clear that this appeal is not properly before Court, as this Court lacks jurisdiction to hear and determine the appeal and therefore, the appeal should be dismissed for want of jurisdiction. Further, that this Court is vested with authority to hear and determine an interlocutory application via the leave granted by the High Court to appeal. That therefore, in the face of an irregular order for leave, this Court is stripped of the requisite jurisdiction to hear and determine such appeal. In his oral augmentation, Mr. Mwamba drew our attention to the case of **Antonio Ventriglia and Emmanuela**

Ventriglia v. Finsbury Investments Limited[10] saying that, that case was almost on all fours with this matter, in that, in that matter, leave had been obtained after fourteen (14) days from the Court of Appeal contrary to the law. He said the Supreme Court upheld the objection, when it stated that the Court had no jurisdiction to accept the preliminary objection as it lacked the jurisdiction to entertain it as it had been obtained after fourteen (14) days. That this was also the case *in casu* and therefore it did not matter that the order was still subsisting as it was a nullity and therefore the appeal incompetent before this Court.

10.8 Mr. Lungu counsel for the Appellant, impugned the preliminary objection, stating that it is misplaced, devoid of logical reasoning, accuracy and law as it is vague. It was contended that there is no appeal before this or the Court below against the Order for its purported irregularity. That since the order granting leave was still subsisting, having not been set aside, the preliminary objection cannot be entertained. Further, that there are no pleadings to set the said order aside for the purported

irregularity and reliance was placed on the case of **Esan v. Attorney General**[3] for the proposition that this Court should confine itself to pleadings before it and not go outside and set the order aside, but should hear the actual appeal for an order to set aside.

10.9 It was further argued that the relief sought cannot come by way of preliminary objection but by a specific application to set aside the said order for irregularity. Learned counsel contended also that because the Respondents had filed their heads of argument, they, by conduct had waived their right to oppose the appeal, as they had complied.

10.10 Learned Counsel asked that the Appellants be heard based on the principle of equity as envisaged in Section 13 of the High Court Act, and to buttress, relied on the case of **Zambia Seed Company Limited v. Chartered International (PVT) Limited**[4].

10.11 Learned counsel relied on Order 3 rule 2 to impress on this Court that the lower Court is vested with jurisdiction to grant any order it deems necessary for better

administration of justice. That therefore in granting the order, it acted within the Law.

10.12 Learned counsel sought to further impress upon us that the purported error is not fatal but curable and the appellant should not be denied the right to be heard, since the Court had leverage to grant any order. Learned counsel placed reliance on Article 118(2) of the Constitution of Zambia for the proposition that matters should be heard on merit and not concluded on technicalities. He further said the law relied upon by the Respondent offends this Constitutional provision as it is trite that where any other law is inconsistent with the Constitution, it is to be declared invalid to the extent of the inconsistency.

10.13 Having considered the arguments proffered by each party, we are of the view that the Respondents raises valid and compelling arguments even in the face of the Appellant's strenuous arguments. We say so because Order 47 rule 2 of the Rules of the HCR, categorically stipulates the period for reckoning the time within which to apply for leave to appeal any interlocutory decision. It

is patent from the record that the Appellants ought to have applied for leave to appeal no later than 11th October, 2019. To have filed the same on 29th October, 2019 and the Court to have granted it on 26th November, 2019 is way beyond the stipulated time frame.

10.14 The Appellants have argued that the preliminary objection is incompetent before Court because the Order is still subsisting. We agree with the Respondents when they state that the Appellant has missed the point. The preliminary objection is not meant to challenge the irregularity of the ex-parte order, but rather the appeal itself which was brought pursuant to an irregular order. This is because the Court had no jurisdiction to grant the order it did after it was presented beyond the stipulated timeframe. We are guided by the cited case of **Crossland Mutinta and Others v. Donovan Chipanda**[7] and the case of **Antonio Ventriglia and Emmanuela Ventriglia v. Finsbury Investments Limited**[10], where the Supreme Court asked the question whether, having regard to the fact that the Respondent had purported to apply for leave to appeal at a time when the applicable period within

which they could lawfully have done so had long expired, the decision or outcome of that purported application could possibly stand. Their Lordships and Ladyships response was that it could not stand. The Court went on to express the view, based on the latin maxim translation that:-

"out of nothing, comes nothing" and held that what the Court of Appeal did in proceeding to hear the Respondents application in the circumstances amounted to nothing, from the stand point of both the means (i.e the process) and the end (i.e the outcome).

10.14 Further that:-

> **"... what transpired before the Court of appeal in the way of the Court's reaction to the respondents search for leave to appeal having amounted to nothing, it does follow that the necessary Sine Qua non which the Court of Appeal Act prescribes for the purpose of clearing the way for the launching of the present appeal to this Court was not attained."**

10.15 It was in the same case that the Supreme Court cited with approval, the Kenyan Court of Appeal's observation in the case of **Owner of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Limited**[11] which held that:-

"Jurisdiction is everything (and that) without it, a court has no power to make one more step".

10.16 And also that:-

"where the Court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing."

10.17 Based on the guidance provided above, we are of the view that we have no jurisdiction to entertain the appeal as it was obtained outside the stipulated timeframe. Therefore, the argument that there should have been an appeal against the Order, rather than raising a preliminary objection is flawed. Since jurisdiction is paramount, in the absence thereof, the appeal cannot stand. The Order pursuant to which the appeal was made having been obtained outside the stated period, it means that the High Court had no jurisdiction to entertain it and by extension, neither does this Court; as indeed, it can only hear the appeal on its merits if it is satisfied that the ex-parte Order for leave arose out of proper proceedings.

10.18 We also agree that in view of our determination that the Order by the lower Court was void ab initio, there is indeed no need for an order of the Court to set it aside.

We place reliance on the **MacFoy v. United Africa Company Limited**[8] authority which held that:-

> **"If an act is void, then it is in law a nullity. It is not only bad, but is incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse"** (emphasis supplied).

10.19 The Appellants contend that the Respondents waived their right to object because the Respondents had already filed their Heads of Argument to the appeal. Our short response to this argument is that, and as already shown above, issues of jurisdiction cannot be waived and can be raised at any time. This is because the question of jurisdiction goes to the root of the appeal. Without jurisdiction, the Court cannot make any determination.

10.20 In the **Antonio Ventriglia**[10] case the Supreme Court said:-

> **"In our view the applicant proceeded correctly or appropriately when it invoked Rule 19 to pre-empt and thwart the further progress of the respondent's ill-fated appeal. In saying this we are acutely alive to the fact that the basis of the Applicant's objection went to the root or**

foundation of a court's adjudicative function ..."

10.21 Consequently, even the issue of the equitable right to be heard cannot be sustained if the Court handling a matter is devoid of the requisite jurisdiction. As Mr. Mwamba says, and with whom we agree, the right to be heard does not arise when the Court has no jurisdiction to hear the matter in the first place.

10.22 The above also covers the Appellant's argument anchored on Order 3 rule 2 HCR. It goes without saying that that Order can only be invoked when the proceedings are properly before Court. We find no merit in this argument by the Appellant. The Order cannot confer any jurisdiction on a Court when it has none to start with.

10.23 We also agree that the lower Court granted leave to appeal, and not leave to appeal out of time. The Ex-parte Summons appearing at page 161 of the record of Appeal makes it clear that the application was for leave to appeal against the Ruling dated 27th September, 2019 pursuant to Order 47 HCR. It was therefore erroneous and misleading to contend, as was done by the Appellants, at

page 4 of their submissions, that the Court granted them leave to appeal out of time.

10.24 We wish to comment on the issue raised by the Appellant that this matter ought to be heard on its merits. Counsel drew our attention to the Constitutional provision in Article 118(2) of the Zambian Constitution. Our view is that that provision is not applicable in the matter before Court. The Supreme Court provided guidance on this issue in the case of **Access Bank Zambia Limited v. Group Five/Zcon Business Park Joint Venture**[12], where they said that:-

> **"... all we can say is that the Constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts."**

It is our view therefore that the Appellants cannot rely on Article 118(2) of the Constitution as the root of the objection is lack of jurisdiction.

11.0 In the final analysis, we find merit in the preliminary objection. We declare that the Order having been granted outside the statutory period, this Court lacks the

necessary jurisdiction to hear the appeal. The preliminary objection therefore succeeds and to borrow the words of the Supreme Court in the **Ventriglia**[10] case:-

> **"this conclusion means we cannot touch the appeal in question, because in the eyes of the law, and for all intents and purposes, its purported escalation to this Court amounted to nothing."**

11.1 Consequently, the appeal in question stands dismissed with costs to be taxed in default of agreement.

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J. CHASHI
COURT OF APPEAL JUDGE

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D. L. Y SICHINGA, SC
COURT OF APPEAL JUDGE

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A. M. BANDA-BOBO
COURT OF APPEAL JUDGE