

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA

(Civil Jurisdiction)

Appeal No. 99 of 2022
CAZ/08/506/2021



BETWEEN:

SARAH NKOMBO MALAMBO

*(Sued in her capacity as a beneficiary and signatory
Of the following companies: SparePro, AutoForce,
Shaflex, Jersey Mall, and Homemark)*

Appellant

AND

NGOZA SINKOLONGO MALAMBO

*(Suing in her capacity as one of
The Administrators And a mother of minor
Beneficiaries of the Estate of the
Late Reeves Malambo)*

Respondent

Coram: Chashi, Majula and Patel SC, JJA
on 13th June 2023 and 30th June 2023

For the Appellant: Mr. M. Nalishuwa
Messrs Mulenga Mundashi Legal Practitioners

For the Respondent: Mr. C.J. Musonda & Ms. Kalisilomba
Messrs Jonah Sitimela & Partners

JUDGMENT

Patel S.C., JA, delivered the Judgment of the Court

Cases referred to:

1. *Salomon v Salomon, and others*, (1897) AC 22.
2. *Macaura v Northern Assurance Co. Limited* (1925) AC 619.
3. *B.P. Zambia Plc v Interland Motors Limited*, SCZ Judgment No. 5 of 2001.

4. *Citibank Zambia Limited vs Suhayl Dudhi* SCZ Appeal No. 6 of 2022
5. *Pule Elias Mwila and Others vs Zambia State Insurance Corporation Limited* ZLR 2015 vol 3 at p 1526.
6. *Jamas Milling Co Limited vs Imex International Limited* (2002) ZR 79
7. *July Danobo (T/A Juldan Motors) vs Chimsoro Farms Limited* (2009) ZR 148
8. *Mutantika and Another vs Chipungu* SCZ Judgment No. 13 of 2014 (unreported)
9. *Standard Chartered Bank v Wisdom Chanda and Christopher Chanda* SCZ No. 18 of 2014
10. *Nkhuwa vs Lusaka Tyre Services* (1977) ZR 43
11. *Charles Mambwe and Others vs Mpelembe Properties Limited* SJZ No. 36 of 2016
12. *Letang v Cooper* (1965) 1 QB 232
13. *Graduare Property Development Limited vs Emporium Fresh Foods Ltd T/A Food Lovers Market* CAZ Appeal No. 138/2020
14. *Embassy Supermarket v Union Bank (in liquidation)* SCZ Appeal No. 58 of 2006
15. *Drummond Jackson v British Medical Association* (1970) 1 AL E.R. 1094
16. *Indeni Petroleum Refinery Co Ltd vs Kafco Oil Limited, Andrew Bungoni, Silas Mumba and Emmanuel Shikaputo* SJZ No. 29 of 2017
17. *Teklemichael Mengstab & Anr vs Ubuchinga Investments limited* SCZ No. 281 of 2013
18. *Concrete Pipes & Products Limited vs Kingsley Kabimba & Anr* SCZ No. 14 of 2017
19. *Beatrice Muimui vs Silvia Chanda* SCZ Appeal No. 50 of 2000

Legislation referred to:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia (HCR).*
2. *The Rules of the Supreme Court, 1965, 1999 Edition (Whitebook) (RSC).*
3. *The Wills and Administration of Testate Estates Act, Chapter 60 of the Laws of Zambia.*
4. *The Intestate Succession Act, Chapter 59 of the Laws of Zambia.*
5. *The Companies Act No. 10 of 2017.*
6. *The Court of Appeal Rules S.I. No. 65 of 2016*
7. *The Supreme Court Amendment Rules No. 26 of 2012*

Other Works:

1. *Halsbury's Laws of England*
2. *Edgers on Civil Court Actions, Practice and Procedures 24th Edition*
3. *Atkins Court Forms*

1.0 INTRODUCTION

- 1.1 This is an appeal against the Ruling of *Malama J* of the Family Division of the High Court, delivered at Lusaka, on 16 December 2021.
- 1.2 It is noted that the Respondent, (*the Applicant*) in the court below, commenced an action against the Appellant (*the Respondent*) in the Court below on 21 September 2021. For the avoidance of doubt, and due to the term "*respondent*" in the Court below and in this Court referring to different people, and due to the similarity of initials of the parties to the dispute, we will refer to them by their first names, *Ngoza* the Applicant, and *Sarah* the Respondent, as they were in the court below.
- 1.3 It is not in dispute and the Court has noted that probate was granted to five Registered Trustees of the Reeves Malambo Family Trust on 8th May 2018 namely, the Applicant *Ngoza*, *Sara B. Komoto*, *Chilekwa Matsotso*, *Leonard Malambo* and *Austin Malambo* ("*The Trustees*") who were appointed personal representatives of the estate of the deceased, *Reeves Malambo*. A copy of this was produced marked '*SNM1*' to the Originating process and supporting Affidavit of 21 September 2021.

2.0 BACKGROUND

2.1 On 21st September 2021, *Ngoza* commenced an action against *Sarah* by way of Originating Summons and Affidavit in Support (*pages 37 to 55 of the Record*) claiming the following reliefs:

- (i) An order that the Respondent being a signatory to the companies listed herein namely (SparePro, AutoForce, Shaftex, JerseyMall and Homemark) pays the total amount of K322,038.13 (Three hundred and twenty-two thousand thirty-eight Kwacha thirteen ngwee, as annual school fees at Chengelo Trust School for LANESHA MALAMBO and JAYDEN MALAMBO respectively.
- (ii) A Declaration that the Applicant and the children namely LANESHA MALAMBO and JAYDEN MALAMBO are given an upkeep.
- (iii) That any Damages suffered as a result of the failure to pay for the children's school fees be borne by the Respondent.
- (iv) Any other relief the Court may deem fit under the circumstances herein.
- (v) Costs of and incidental to these proceedings.

2.2 On 20th October 2021, *Sarah* filed her opposing affidavit and skeleton arguments to the claims above (*pages 60 to 140 of the Record*). On the said date, her Advocates also caused to be filed an application for the determination of a question of law pursuant to Order 14A of the Rules of the Supreme Court of England (1965) (1999 Edition)² (*pages 141 to 185 of the Record*) (the "**Order 14A application**"). The Order 14A application raised the following issues:

- (i) *Whether the Applicant has demonstrated a sufficient cause of action to warrant this Honourable Court entertain this action;*
- (ii) *Whether the assets of a company constitute part of the estate of a deceased shareholder;*
- (iii) *Whether the Respondent not being a personal representative of a deceased can be sued under **section 3** of the Intestate Succession Act⁴.*

2.3 Following orders of the court below, *Ngoza* filed her affidavit in opposition and skeleton arguments on 5th November 2021 (*pages 186 to 193 of the Record*), and *Sarah* filed her reply and attendant arguments on 19th November 2021 (*pages 196 to 221 of the Record*).

3.0 DECISION OF THE COURT BELOW

3.1 The trial Judge considered the questions of law posited in the **Order 14A application** founded on the submission that the matter was suitable for determination summarily without a trial on questions of law as the Applicant's (*Ngoza's*) affidavit did not reveal a cause of action. She addressed this issue in three aspects: firstly, as it pertains to the duties of the personal representatives of the deceased's estate. The Court noted that probate was granted to five Registered Trustees of the Reeves Malambo Family Trust on 8th May 2018 namely, the Applicant *Ngoza*, Sara B. Komoto, Chilekwa Matsotso, Leonard Malambo and Austin Malambo ("*The Trustees*") who were appointed personal representatives of the deceased's estate. She was invited to consider that *Sarah*, the Respondent, not being one of the named Trustees, is not a personal representative of the estate of the deceased and has no authority to

distribute assets in the deceased's estate. Based on authorities cited, it was counsel's submission that the order sought being untenable at law, made the action suitable for determination without the need for a trial. In opposing this submission, *Ngoza* argued that the matter did disclose a cause of action, and that as the applicant, in her capacity as personal representative of the estate, she has power to have an account rendered to the Court from any person who may be in possession of property belonging to the estate.

3.2 After analysis of the provisions of **Order 14A** as read with the explanatory note under **paragraph 14A/2/3**, and the diametrically opposed arguments of the Parties, the Court found that the question sought to be determined summarily, goes to the root and merits of the main matter and which the court below was not inclined to entertain at the interlocutory stage of the proceedings.

3.3 The lower court thereafter considered the argument anchored on the principle of separate legal personality and the submissions that *Ngoza's* claim for payment of school fees and upkeep directly from accounts of the named companies, is untenable based on the concept of legal personality being separate from its shareholders. The celebrated case of **Salomon vs Salomon¹** was cited along with other authorities in support of the principle. It was also argued that the deceased, despite being a majority shareholder of the named companies, did not own any of the properties of the companies and upon his demise, his interest in the companies, devolved by operation of law, to his estate, and as such the personal representatives have title over the estate including the shares in the named companies. The case of **Macaure v Northern Assurance Co.**

Limited² was relied on in support of this argument. Reliance was placed on **section 190** of the Companies Act³ and **paragraph 7 (1)** of Halsbury's Laws of England¹. It was further argued that as per **section 159** of the Companies Act⁵, funds held in the accounts of the named companies, could only be disbursed by way of loans or dividends.

3.4 The court below in analyzing the argument of separate corporate personality, considered the opposing argument that some assets of the deceased's estate being in the hands of Sarah, she can be ordered to render an account. Again, the Court took the view that this issue could only be analysed after a full trial and could not be determined summarily and dismissed the second question raised under the **Order 14A** application.

3.5 Sarah also argued that the action by Ngozo is an abuse of court process, as the issues raised in this action are capable of determination under cause no. 2021/HPC/0284, an action commenced by her as Plaintiff and still subsisting in the commercial division of the High Court. The claims were set out in the exhibit produced under cover of Sarah's supporting affidavit and marked 'SNM2'. It was argued in opposition, that the action was not bad for multiplicity as the subject matter in this cause was distinct. The trial court considered the reliefs set out by the two causes of action, one being for payment of school fees and upkeep, while the one in the commercial division relates to the removal of Sarah as director of some of the named companies and the purported irregular appointment of other named parties as directors thereto, Ngozo being one of them, and for injunctive reliefs as set out in the claims. The court below relying on the guidance of the Supreme Court in the case of **Interland Motors**

Limited³, was of the view that the claims in the two matters being distinct, are capable of being determined parallel to each other and that this matter was not bad for abuse of court process.

3.6 The lower court in its ruling (*pages 13 to 36 of the Record*), dated 16 December 2021, dismissed the Order 14A application and now the subject of this appeal.

4.0 THE APPEAL

4.1 Being dissatisfied with the Ruling of the lower Court, the Appellant, Sarah filed a Notice of Appeal and Memorandum of Appeal on 30 December 2021 advancing four grounds of appeal as follows:

1. *The Court below erred in law and fact when it declined to make a determination of the 1st and 3rd points of law raised by the Appellant despite having all the information required to make the requisite determination of the points of law raised by the Appellant.*
2. *The Court below erred in law and fact when it held that the arguments being raised by the Appellant in relation to the 1st and 3rd points of law should be raised by way of a defence to the action, contrary to the requirements of Order 14 of the White Book.*
3. *The Court below erred in law and fact when it declined to dismiss the Respondents' action for failure to disclose a cause of action despite clear evidence showing that there is no cause of action disclosed against the Appellant.*
4. *The Court below erred in law and fact when it held that the action by the Respondent did not constitute abuse of court process despite the fact that the commercial division of the High Court was not only dealing with similar claims under cause Number 2021/HPC/0248 but had also rendered a ruling in relation to such claims.*

5.0 APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 The Appellant's heads of arguments filed on 12 May 2022, have been duly considered and appreciated, alongside its application for determination of a question of law appearing collectively from pages 141 to 185 of the Record of Appeal (the Order 14A Application').

6.0 RESPONDENT'S ARGUMENTS OPPOSING THE APPEAL

6.1 The Respondent purported to file its heads of arguments on 30th May 2023.

6.2 At the hearing of the appeal, the Appellant had filed its application to raise a preliminary issue pursuant to Order X rule 9 (16) as read together with Order XIII rule 5 (2) of the Court of Appeal Rules Statutory Instrument No. 65 of 2016⁶ (CAZ Rules).

6.3 Counsel Nalishuwa relied on the supporting affidavit and argued that service of the appellants record of appeal and heads of argument was effected and acknowledged on 16 May 2022. He also argued that the respondent ought to have filed its heads of arguments within 30 days of the date thereof. Counsel Musonda, while conceding its breach, argued that the rule being regulatory and not mandatory, invited the Court to use its discretion to make an order that best suits the interest of justice. In this case, he argued, that the Court should allow the respondent's heads of argument and in support, he relied on the decision of the Supreme Court of Zambia in the case of **Citibank Zambia Limited vs Suhayl Dudhia**⁴, in which case the Supreme Court stated that where a statute does not

provide a sanction for the breach, a Judge should not imply a breach. He argued that **subrule 16⁶** of the CAZ rules, does not specify the consequences that should attach to a breach of that rule.

In response, Counsel for the appellant urged the Court to expunge the respondent's heads of arguments. It was his argument that rules of court were meant to create a level playing field and that the respondent having conceded breach, did not even attempt to advance any persuasive reasons for the breach.

6.4 In our considered view, the respondent having conceded breach, and admitting that they ought to have sought leave, we had no hesitation in allowing the objection and did order that the respondents heads of argument be expunged off the record. As a consequence, Counsel for the respondent was not allowed to participate further in the appeal.

6.5 We have taken the opportunity to address the issue canvassed in the preliminary objection for guidance to litigants, and to settle the position in this Court. We have been guided in our research by the judgment of the Supreme Court in the case of **Pule Elias Mwila and Others vs Zambia State Insurance Corporation Limited⁵**, which appeal had occasion to trace the history of the amendment to **Rule 58(5)** of the Supreme Court Amendment Rules (SCR) Statutory Instrument No. 26 of 2012⁷ which prescribes for the filing of the heads of arguments together with the record of appeal. The Supreme Court guided that Rule 58 (5) was amended by the amendment Rules of 2012, in response to widespread complaints that delays were caused by endless applications for leave to

file heads of argument out of time, causing immeasurable prejudice to opposing parties as well as accounting for backlog of pending appeals.

The Supreme Court reasoned that whilst not every rule of court where the word "shall" was used, connoted mandatory effect, **Rule 58(5)** of the SCR was mandatory and not merely regulatory or directory. The Court noted that a period of one year and nine months had elapsed since the filing of the record of appeal, and heads of argument.

6.6 In **Jamas Milling Co Limited vs Imex International Limited**⁶ the Supreme Court with reference to rules of procedure stressed as follows:

"While we agree that the rules of procedure are meant to facilitate proper administration of justice, we do not accept that in all cases rules cannot be made mandatory, and that their breach cannot be visited by unpleasant sanctions against a party who breaches them...it is not in the interest of justice that parties by their shortcomings should delay the quick disposal of cases and cause prejudice and inconvenience to other parties."

In **July Danobo (T/A Juldan Motors) vs Chimsoro Farms Limited**⁷, the Supreme Court with reference to an incomplete record of appeal before it, again emphasized that it would not condone breaches of the rules of court. The Court held that:

"As aforesaid, failure to compile the record of appeal in the prescribed manner is visited by sanctions under Rule 68 (2) of the SCR. The sanction is that the appeal may be dismissed. In this case, there is no doubt and as admitted by learned counsel for the appellant that the record of appeal is incomplete as the record of proceedings of the court below is missing. It follows that the record of appeal has not been prepared in the manner prescribed by the rules of this court. We must therefore invoke the provisions of Rule 68 (2) and dismiss this appeal."

- 6.7 The Supreme Court in the **Mwila**⁵ case held that Rule 58 (5) of the SCR was mandatory and not merely regulatory or directory and reiterated the position it had taken in the case of **Mutantika and Another vs Chipungu**⁸ where it held:

"Rule 58(5) as amended by Statutory Instrument No. 26 of 2012 is mandatory and not regulatory as it does not give the court discretionary power."

- 6.8 It is also trite and the law is settled in the jurisdiction that the duty to rectify the default lies with the defaulter and before the affected party makes an application. The Supreme Court in the case of **Standard Chartered Bank v Wisdom Chanda and Christopher Chanda**⁹ stated at page 8:

"We have stated in a plethora of cases that, any reason, no matter how well articulated, cannot of its own cure a defect. The Party concerned must take out an appropriate application seeking to cure the defect; and that the court has no mandate to choose to ignore the defect and, of its own motion, proceed as if the defect never existed"

- 6.9 We take the view that the arguments and rationale above, equally applies to the respondent's heads of argument and not only the appellant's heads of argument, as was the subject of the decision in the **Mwila**⁵ case considered by the Supreme Court. It is clear that **Order X rule 9 (16)** of the CAZ Rules⁶, is mandatory and not regulatory or directive. It is trite that litigants default at their own peril since any rights available as of course to a non defaulter are usually jeopardized. In the case at hand, the respondent chose to file its heads of argument, one year and 14 days after being served with the appellant's record of appeal and heads of argument. It chose to do so without leave and with impunity. It is only

natural that it suffered the fate it did in the face of breach of a mandatory rule.

- 6.10 Before we leave this issue, we wish to echo the warning issued by the Supreme Court in the case of **Nkhuwa vs Lusaka Tyre Services**¹⁰, when it made the following observation, albeit with reference to general rules of procedure and timelines:

"It is regrettable that in recent years Legal Practitioners in this Country have approached the need to comply with the rules as to time with complete non-chalance. This Court has had occasion in the past to comment adversely on the attitude of legal practitioners to compliance with other rules of procedure but it is time that all legal practitioners were made to understand that where the rules prescribe time within which steps must be taken these rules must be adhered to strictly and those practitioners who ignore them will do so at their own peril."

7.0 DECISION OF THIS COURT

- 7.1 At the hearing of the appeal, Appellant's counsel opted to rely on their heads of argument filed before Court and briefly augmented their arguments.
- 7.2 We have carefully considered the grounds of appeal reproduced in paragraph 4.1 above; the Ruling being impugned and the arguments of the Appellant. We will begin by considering grounds 1 and 3 together as they are interrelated.
- 7.3 The essence of these two grounds of appeal was that the Appellant, {Sarah} raised two crucial points of law that were declined despite the

Court being possessed with the requisite information. For the sake of clarity, we recast the 1st and 3rd points of law as follows:

- i. *Whether the Respondent has demonstrated a sufficient cause of action to warrant this Honourable Court entertain this action; and*
- ii *Whether the Appellant not being a personal representative of the deceased can be sued under section 3 of the Intestate Succession Act.*

7.4 We have re-visited the Originating Summons as appearing on pages 37 to 38 of the Record of Appeal, which reveal that the Respondent *Ngoza*, is claiming the costs of school fees, upkeep and damages for failure to pay school fees against the Appellant, *Sarah*. We have analysed this claim in the face of the grant of Probate dated 8th May 2018 and appearing at various places in the Record of Appeal and note that the Appellant *Sarah*, is not a personal representative of the estate of the deceased. This was not disputed. The Appellant has drawn our attention to the provisions of **Order 18 rule 19** of the White Book² and has urged us to find that where a party fails to disclose a reasonable cause of action or discloses a cause of action that is scandalous, frivolous or vexatious, the court has wide discretion to dismiss the matter. It was also argued that **Order III Rule 2** of the High Court Rules¹ supports the argument above and reliance was also placed on the decision of the Supreme Court in the case of **Charles Mambwe and Others vs Mpelembe Properties Limited**¹¹.

7.5 We have equally considered the arguments tendered in the court below, by the Respondent *Ngoza* in opposing this argument, by which she has argued that the Appellant, *Sarah*, being a beneficiary of Estate, did obtain an injunction against the Respondent, *Ngoza* and other Administrators

and referred to her exhibit marked 'NSM1' which appears at *pages 189/190* of the Record of Appeal and must render an account. She has also countered that having commenced the action as a litigant in person and having failed to clearly outline the issues against *Sarah* in the originating process, and having engaged counsel, the matter is for rendering an account regarding the properties which came into *Sarah's* hands.

- 7.6 In analyzing the question of failure to disclose a cause of action, we have looked at the explanatory note in the **White Book**² under **paragraph 15/1/2** for the meaning of "cause of action". The note provides as follows:

"The words 'cause of action' comprise every fact (though not every piece of evidence) which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the Court"

We have also been referred to the case of **Letang v Cooper**¹², cited by us in our recent decision in the case of **Graduare Property Development Limited vs Emporium Fresh Foods Ltd T/A Food Lovers Market**¹³ where the term cause of action was defined as:

'simply a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person.'

- 7.7 On the 3rd point of law, it was contended on behalf of *Sarah*, that not being a personal representative, of the Estate, she cannot be sued under **section 3** of the Intestate Succession Act⁴. On this issue, reference was made to the decision of the Supreme Court in the case of **Embassy Supermarket v Union Bank (in liquidation)**¹⁴ wherein the Court stated:

"where a statute places a duty on an individual or officer, no other person shall perform the duty unless it is so provided for under the same law."

- 7.8 We have already noted in *paragraph 7.4* above that *Sarah* was not a 'personal representative' of the Estate. *Paragraph 1.3* above, names the five appointed registered trustees who were appointed as the personal representative of the Estate. Can it then be argued based on the **Embassy Supermarket¹⁴** case, that there is a duty on *Sarah* to render an account? On the aspect of separate and distinct corporate personality, is *Sarah* as director, in the named companies, liable to render an account to *Ngoza*, who is one of the five named personal representative of the Estate? We have also looked at the provisions of **section 45 (1)** of the Wills and Administration of Estates Act³ which provides as follows:

"The duties and powers of a personal representative shall be-

- a. to pay the debts and funeral expenses of the deceased and pay estate duty if payable;*
- b. if the deceased left a valid will, the distribution of the property disposed of by the will in accordance with its provisions or an order of court made under section twenty;*
- c. when required to do so by the court, either on the application of an interested party or on its own motion-*
 - (i) to produce on oath in court the full inventory of the estate of the deceased; and*
 - (ii) to render to the court an account of the administration of the estate.*

- 7.9 The trial court in analyzing the contested evidence of the parties at page R17 stated as follows:

"My view is fortified by some of the averments in the Respondent's affidavit in reply, to the Applicant's opposing affidavit in the current application, the gist of which is that the beneficiaries of the estate cannot benefit from assets that do not form part of the

deceased's estate; and that the Applicant is not the surviving spouse of the deceased; and that part of the estate is being managed by named property consultant. All these are matters that cannot be determined summarily by way of a P.I.

My further view is that the arguments raised by the Respondent would be better suited to be raised as part of the defence in the main matter and not in the form of a P.I."

7.10 We were also referred to the learned Authors of **Odgers on Civil Court Actions**² at page 207 thereof, which states as follows:

"On an application based on this ground alone, no evidence is admissible. The application is analogous to a demurrer and the court can look only at the pleadings and particulars, not at any affidavit. The court's power is exercisable at any stage of the proceedings, but it should only strike out a pleading in 'plain and obvious cases' and where no reasonable amendment would cure the defect."

In **Drummond Jackson v British Medical Association**¹⁵ the court stated as follows:

"The summary power to strike out a pleading for failure to disclose a reasonable cause of action was one which should be exercised only in plain and obvious cases, where the alleged cause of action, on consideration only of the allegations in the pleading, was certain to fail."

(underlining is ours for emphasis)

It has also been argued that although the Explanatory Note **18/19/3** of the **White Book**² provides that, though the order may be made at any stage of the proceedings, the application should always be made promptly. In *casu*, the application was made promptly on 20th October 2021.

7.11 We are of the settled view and the law is clear that it is an administrator of an estate that may be compelled by the court or on application by an interested party, to render an account. To support our position further, a beneficiary, not being an administrator, cannot render an account to an

estate to which they have not been appointed to administer. We are fortified in arriving at this finding that had the learned trial judge in the court below, examined the reliefs sought and the law as cited, without placing reliance on contested affidavit evidence, she would have come to the only conclusion supported by the authorities, that there was no cause of action disclosed against the Appellant, *Sarah* in the court below, and certainly none that would be disclosed by producing evidence at full trial. *Ngoza* in her own arguments in opposition, conceded that she had commenced the action in person, and subsequently having engaged counsel, her action was in fact for Sarah to render an account. This is an argument that was neither pleaded nor sought as a relief. It is trite that Parties cannot chop and change the cause of action seeking different reliefs from the ones set out in their pleadings. We accordingly find merit in *grounds 1 and 3* of the appeal and uphold the same.

7.12 We now turn our attention to *ground 2* of the appeal which is produced at *paragraph 4.1* above. The Appellant has argued that the court erred in law and fact when it held that the arguments raised in relation to the 1st and 3rd points of law should be raised by way of a defence. However, the appellant has argued that the essence of an **Order 14A application**, allows the Court to determine any question of law or construction of any document without a full trial where it appears to the Court that such determination will finally determine the proceedings or an issue therein.

Order 14A rule 1(1) provides as follows:-

“The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:-

(a) such question is suitable for determination without

- a full trial of the action;*
- (b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein; and*
- (c) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.'*

7.13 It was argued that, there are requirements that need to be met before an order 14A application can be pursued. These were discussed extensively by the Supreme Court in the case of **Indeni Petroleum Refinery Co Ltd vs Kafco Oil Lilited, Andrew Bungoni, Silas Mumba ad Emmanuel Shikaputo¹⁶**, and were referred to as follows:

- i. *The defendant must have given notice of intention to defend.*

This requirement was met by the Respondent *Sarah* having filed an Affidavit in opposition on 20th October 2021 and which according to the **Indeni** case constitutes notice of intention to defend. We concur with this submission.

- ii. *The question of law or construction is suitable for determination without a full trial of the action.*

It has been argued and the facts show that the Appellant, *Sarah* was not a personal representative and accordingly the only issue for determination was a point of law relating to whether or not *Ngoza's* claim is tenable against a person who is not a personal representative.

We equally agree with this submission. It has not been challenged that *Sarah* is not a personal representative of the estate of the deceased.

- /
- iii. *Such determination will be final as to the entire cause or matter or any claim or issue therein.*

In reference to this, the learned authors of **Atkins Court Forms**³, with respect to **Order 14A** have guided that the object of the Order is to seek finality at an interlocutory stage, to terminate the whole action or some claim or issue contained in the action. The finality of any order made is subject to appeal. It has accordingly been argued that the determination of whether or not a person can make a claim against someone who is not a personal representative to render an account would bring finality to the matter at hand has equally been satisfied.

We agree with this line of argument and as discussed above, Sarah not being a personal representative, cannot render an account.

- iv. *The parties had an opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination.*

It was also a fact that both parties had the opportunity to be heard following the mounting of the Order 14A application. The Appellant has argued that the Ruling of the lower court in which it declined to determine the matter at an interlocutory stage was flawed in that the essence of **Order 14A** of the White Book is that it gives the Court jurisdiction to determine a matter on a point of law at any stage of the proceedings without the need for a full trial.

We accept this line of submission and are of the considered view that this matter was amenable to be determined as an Order 14A application.

7.14 We are also alive to the caution noted by the Supreme Court in the case of **Teklemicael Mengstab & Anr vs Ubuchinga Investments limited**¹⁷ where the Court expressed misgivings at many preliminary issues being raised so early, as they pose the danger of inviting the court to delve into issues which ordinarily it can only do after making findings of fact. However, on the facts at hand, the Appellant *Sarah*, raised 3 questions of law, on matters that were settled before the Court, on facts that were not disputed and an examination of those would have necessarily determined the matter without the need for trial.

7.15 We are equally alive to the dangers of such early challenge and the caution issued by the Supreme Court in the case of **Concrete Pipes & Products Limited vs Kingsley Kabimba & Anr**¹⁸ where the Supreme Court noted that the preliminary issues raised, being so integral, could properly be raised in the main cause. However, in the context in *casu*, and based on our reasoning above, we have no hesitation in accepting the Appellant's line of submission and find that all criteria for the successful presentation of the Order 14A application having been fulfilled, the lower court erred in its finding that the matter cannot be determined in finality without a full trial. *Ground 3* therefore is accordingly upheld.

7.16 With reference to *Ground 4* on the issue of abuse of process, this Court has noted a litany of litigation touching on similar issues as the ones in *casu*. There appears to have been an action before the *late Hon J Chitabo* under cause No. 2017/HP/0421. There is also reference to some mediation settlement order in an action that is not cited, and another action was commenced in the Commercial Division under Cause No. 2021/HPC/0284. Cardinal to the issue under consideration is a Ruling by

Hon J Mwale on an application made by the Plaintiff in that case, (*Sarah*), to discharge the *ex parte* mandatory Order of injunction granted on 8th October 2021. In his Ruling, the Hon Judge in the court below stated as follows: (pages 227-230 of the Record of Appeal)

*“As I see it, the central issue raised by this application is whether or not the ex parte order of mandatory injunction should have been granted in favor of the 1st, 4th, 5th, 6th and 7th defendants against the Plaintiff especially in light of the fact that she is not the personal representative of the late Reeves Malambo and by extension, whether or not the said mandatory order should be discharged.Relative to the present case, it is trite that only the duly appointed personal representative of the deceased has the mandate to administer and manage the affairs of the estate and any other person purporting to do so would be intermeddling in the estate. The Plaintiff has stated that she is not the personal representative of the deceased and this fact has been confirmed by the 3rd Defendant (Ngoza), who herself is one of the Trustees managing the estate. I am inclined to agree with the Plaintiff’s submission that compelling her to pay upkeep and school fees for the beneficiaries of the estate would be tantamount to sanctioning her commission of an offence under **section 65 (1) of the Wills and Administration of Testate Estates Act**.....In the premises, I do not feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; I am of the considered view that sustaining the ex parte order of mandatory injunction against the Plaintiff carries a greater risk of injustice if it turns out that it was wrongly issued. Accordingly, the said ex parte order of mandatory injunction against the Plaintiff is hereby discharged forthwith.”*

- 7.17 We have noted the reasoning and the finding by the court below, that the causes are distinct, which on the face of the actions and the reliefs they seek, may be considered to be distinct, but we are of the considered view that the court below fell into error by attempting to distinguish the reliefs sought in the action before the Commercial division against those in the action before the Family division. The Court below failed to consider that

the Respondent *Ngoza*, had sought the same relief, being for the payment of school fees and upkeep in the form of a mandatory injunction in the Commercial Court and which reliefs she was concurrently seeking in her action in the family court. It is trite that there is only one High Court of Zambia, creating different divisions for convenience only. Parties seeking the same relief from different courts and different adjudicators has the potential of causing embarrassment and bringing the administration of justice into disrepute. It was clear from the Ruling above, that Hon J Mwale had granted the *ex parte* mandatory order to pay the school fees and upkeep, which order was discharged upon due examination of the law and the facts of the matter.

In our considered pinion, to then pursue the same application, seeking the same reliefs, in a new cause of action, before another division of the High Court, can only be considered an abuse of process.

- 7.18 We have taken into consideration the facts of this case, the reliefs sought, and the Ruling of the Commercial Court as quoted above, which addressed the same issue between the parties and agree with the Appellant that the lower court ought to have dismissed the action for being an abuse of process. In our considered view, parties have an obligation to bring all issues in a particular matter before one court without resorting to forum shopping in other courts to seek favorable rulings by scattering litigation across the divisions of the High Court. This position was echoed by the Supreme Court in the case of **Beatrice Muimui vs Silvia Chanda**¹⁹. We are comforted in our finding by the words of the Supreme Court in the case of **BP Zambia Plc vs Interland Motors**


Limited³ when it frowned upon abuse of court process by litigants in the following words:

"A party in dispute with another over a particular subject should not be allowed to deploy his grievances piecemeal in scattered litigation and keep on hauling the same opponent over the same subject matter before various courts. The administration of justice would be brought into disrepute if a party managed to get conflicting decisions or decisions which undermine each other from two or more different judges over the same subject matter."

7.19 We accordingly uphold ground 4 of the appeal. The net result is that the appeal is successful, and we set aside the Ruling of the Court below and dismiss the matter before the Family court.

8.0 CONCLUSION

8.1 The appeal having been successful we dismiss the matter before the family court and award costs to the appellant in this court and the court below. Same to be taxed in default of agreement.



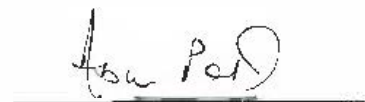
J. CHASHI

COURT OF APPEAL JUDGE



BETTY M. MAJULA

COURT OF APPEAL JUDGE



ABHA N. PATEL SC

COURT OF APPEAL JUDGE