

IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
FAMILY COURT DIVISION  
HOLDEN AT LUSAKA  
(Family Jurisdiction)

2022/HPF/A004

**BETWEEN:**

**DANIEL SINJWALA LIBATI**

**APPELLANT**

**AND**

**JENALA CHIPUNGU**

**RESPONDENT**

**BEFORE THE HONOURABLE MR. JUSTICE KENNETH MULIFE**

For the Appellant: *Mrs. P.L.K. Chisenga-Messrs Legal Aid Board*

For the Respondent: *Mrs. L. Mushota-Messrs Mushota & Associates*

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**JUDGMENT ON APPEAL**

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**LEGISLATION REFERRED TO:**

1. *The Subordinate Court Civil Jurisdiction Rules, Subordinate Courts Act, Chapter 28 of the Laws of Zambia.*

**CASES REFERRED TO:**

1. *Mutanika & Another v Chipungu (SCZ Judgment 94 of 2012)*
2. *NFC Africa Mining Plc v Techpro Zambia Limited (2009) Z.R. 236*
3. *The Attorney General v Million Juma (1984) Z.R. 1 (S.C.)*

4. *Bellamano v Ligure Lombarda Limited* (1976) Z.R. 267 (S.C.)

## 1.0. INTRODUCTION

1.1. This is an Appeal against the Ruling of the Subordinate Court delivered at Lusaka on 14<sup>th</sup> December 2021. It relates to the Preliminary Issue raised by the Appellant concerning the Lusaka Subordinate Court's jurisdiction to hear the matter as opposed to the Subordinate Court at Ndola.

1.2. The Appeal was allocated to me on 14<sup>th</sup> March 2022. It was heard on 1<sup>st</sup> June 2022.

## 2.0. BACKGROUND

2.1. The matter was originally commenced in the Subordinate Court at Lusaka where the Respondent (Jenala Chipungu) commenced an action against the Appellant for maintenance of the children. At the hearing of the matter in the Lower court, the Appellant raised a Preliminary Issue pursuant to Order XIV Rule 1(c) of the **Subordinate Courts Civil Jurisdiction Rules, Subordinate Courts**

**Act, Chapter 28 of the Laws of Zambia** (hereinafter referred to as 'Cap. 28'), on the basis that the matter should have been commenced in the jurisdiction where the Appellant resides. The Learned Magistrate delivered her Ruling on 14<sup>th</sup> December 2021 and held that no injustice would be occasioned to the Appellant if the matter was heard at Lusaka and that the Appellant had already accepted the court's jurisdiction when he made payments into court.

2.2. Order XIV of Cap. 28 provides as follows:

***"1. Subject to the law respecting transference, the place for the trial of any suit or matter shall be regulated as follows:***

***(a) All suits arising out of the breach of any contract may be commenced and determined in any court having jurisdiction in the District in which such contract ought to have been performed, or in which the defendant resides or carries on business.***

***(b) All other suits may be commenced and determined in any court having jurisdiction in any District in which the defendant resides or carries on business. If there are more defendants***

*than one, resident in different Districts, the suit may be commenced in any court having jurisdiction in any one of such Districts; subject, however, to any order which the court may, upon the application of any of the parties, or on its own motion, think fit to make with a view to the most convenient arrangement for the trial of such suit.*

*c) In case any suit shall be commenced in any other court than that in which it ought to have been commenced, the same may, notwithstanding, be tried in the court in which it shall have been so commenced, unless the court shall otherwise direct, or the defendant shall plead specially in objection to the jurisdiction before or at the time when he is required to state his answer to or to plead to such suit”.*

2.3. These were the issues in the Subordinate Court.

### **3.0. GROUNDS OF APPEAL BEFORE THIS COURT**

3.1. Dissatisfied with the Ruling of the Learned Magistrate, the Appellant lodged the present appeal based on the Grounds reproduced below:

- i. That the Learned Trial Magistrate in the court below erred in law and fact when she misinterpreted the provisions of Order 14 Rule 1(c) of Civil Jurisdiction Rules of the Subordinate Court, Subordinate Court Act Chapter 28 of the Laws of Zambia as allowing her the discretion whether or not to allow an objection to the jurisdiction of that court when an objection to the court's jurisdiction had been raised, pursuant to that provision, by the Appellant notwithstanding the fact that the matter had already been commenced, albeit wrongly, in the said court, which wrong jurisdiction the court noted in her Ruling of 14<sup>th</sup> December 2021.
- ii. That the Learned Trial Magistrate in the court below erred in law and fact when in ruling on the objection raised by the Appellant pursuant to the provisions of Order 14 Rule 1(c) of the Civil Jurisdiction Rules of the Subordinate Court, Subordinate Court Act, Chapter 28 of the Laws of Zambia,

she misinterpreted the meaning of the words '*answer*' and '*plead*' to mean one and the same thing.

- iii. That the Learned Trial Magistrate in the court below erred in law and fact when in ruling on the objection raised by the Appellant pursuant to the provisions of Order 14 Rule 1(c) of the Civil Jurisdiction Rules of the Subordinate Court, Subordinate Court Act, Chapter 28 of Laws of Zambia, she erroneously took into account such considerations as the Appellant already having previously raised preliminary issues on, among other things, the propriety or otherwise of the court allowing the Respondent (Complainant in the court below) to proceed with the matter without producing evidence of her income, earning capacity, property and other financial resources which she has, or is likely to have, in the foreseeable future as is required by the provisions of Section 11(2) (b) of the Affiliation and Maintenance of Children Act, Chapter 64 of the Laws of Zambia (hereinafter referred to as 'Cap. 64') which preliminary issues, for some odd reason, the court below chose not to pronounce itself on.

#### 4.0. SUBMISSIONS AND HEARING

4.1. Both parties filed Lists of Authorities and Head of Arguments.

4.2. Mrs. Chisenga, Legal Counsel for the Appellant submitted that Order XIV Rule 1(c) of Cap. 28 empowers the Appellant to object to the Lower Court's jurisdiction. Counsel submitted that even though the parties had filed their pleadings which was the earliest stage at which the Appellant had the opportunity to raise the objection, the parties had not commenced trial at the time of raising the objection. He argued that the Lower Court misinterpreted the provisions of the said Order XIV Rule 1(c) when it held that it had the discretion whether or not to allow an objection relating to its jurisdiction.

4.3. In ground 2, Counsel submitted that the Lower Court misinterpreted the words '*plead*' and '*answer*' to have the same meaning. She argued that the implication of Order XIV Rule 1(c) of Cap. 28 was that the Appellant could either have raised the objection at the time of settling his pleadings or at the time he was called upon to defend

himself at the trial. Counsel argued further that if the two words had the same meaning, the legislature would not have gone through the trouble of including both of them in the same provision.

- 4.4. In ground 3, Counsel submitted that the Lower Court erred when it took into consideration that the Appellant had previously raised a preliminary issue which the court had decided on. Counsel argued that the Lower Court erred because the earlier preliminary issue was very distinct from the objection which is subject of this appeal because the earlier preliminary issue pertained to the Respondent's failure to produce documents relating to her financial capacity as a requirement under Section 11(2)(b) of the Affiliation and Maintenance of Children Act, Cap. 64. Counsel submitted that the court below chose not to pronounce itself on the implications of Section 11(2)(b) of the said Cap. 64. Counsel invited this Court to exercise its supervisory jurisdiction and guide the Lower Court on the implications of the Section 11(2)(b) of Cap. 64. Counsel



finally urged the Court to set aside the Ruling of the court below.

4.5. In response, Counsel for the Respondent argued that Order XIV Rule 1(c) of Cap. 28 refers to the time the Appellant is required to file an Answer or to plead, that is to file a defence. Counsel also argued that this provision gives the court the discretion to determine matters of this nature which is why the court below ruled that the matter could be heard in the Subordinate Court at Lusaka. It was submitted by Counsel that since the matter commenced in February 2021, the Appellant had attended several court sittings and made several payments into court for child maintenance prior to the objection relating to the Lower Court's jurisdiction to hear the matter.

4.6. In ground 2 of Appeal, Counsel for the Respondent relied on ***Black's Law Dictionary*** and ***the Magistrate's Handbook***, for the definition of the words 'plead' and 'answer' used in Order XIV Rule 1(c) of Cap. 28. Here, it was argued that the two words could be used interchangeably in civil matters. It was argued further that

the interpretation used by Counsel for the Appellant that the word '*answer*' used in the provision meant that he was required to state his answer at trial was not supported by any authority. That in any event, pleadings had closed at the time the Appellant made the objection in the Lower Court.

- 4.7. Turning to Ground 3 of the Appeal, Counsel submitted that the ground ought to fail because the Appellant did not seek leave of the court to appeal against the Ruling of the Lower Court dated 29<sup>th</sup> October 2021 out of time. Counsel referred to the following holding of the Supreme Court of Zambia in the case of *Mutanika & Another v Chipungu (1)*:

***“on our part, we have always underscored the need for parties to strictly adhere to the Rules of Court and that failure to comply can be fatal to a party’s case”.***

- 4.8. I was also referred to the case of *NFC Africa Mining Plc v Techpro Zambia Limited (2)* where the same Court held

that ***"litigants who fail to strictly adhere to rules of court risk their appeals being dismissed."***

4.9. Based on the foregoing, Counsel prayed that the appeal should be dismissed.

4.10. Counsel for the Appellant filed a List of Authorities and Head of Arguments in reply to the Respondent's Head of Arguments and List of Authorities which mainly reiterated what was contained in the Appellant's Heads of Arguments.

4.11. However, in arguing that the words 'plead' and 'answer' did not have the same meaning, he relied on the case of ***The Attorney General v Million Juma (3)*** in which the Supreme Court of Zambia held as follows:

***"It is common cause that the appeal rests on a proper construction of Article 27 (1) (a) of the Constitution in regard to the requirement that grounds for detention shall be in writing " in a language " that the detainee understands. An examination of this constitutional requirement reveals that the words there used are plain and unambiguous. Craies on Statute Law, 7th edition, says at page 65 that:***

*"If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the law given. 'The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject matter with respect to which they are used and the object in view.' In 1953 Lord Goddard, C.J. said (in Barnes v Jarvis (1)) 'A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered.*

*'Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature.' "*

*The question of giving effect to statutory words was considered by this court in Molu Butchery Ltd. v The People (2) where, with reference to Halsbury's Laws of England, 3rd Ed., Vol. 36*

*para. 533 and Yorkshire Insurance Company v Clayton, (3). Gardner, J.S., said at page 341:*

*"It is a fundamental principle in construing statutes that it may be presumed that words are not used in a statute without a meaning and are not tautologous or superfluous, and effect must be given if possible, to all the words used, for the legislature is deemed not to waste words or to say anything in vain."*

4.12. Counsel accordingly submitted that the Lower Court should have allowed the objection and set aside the proceedings for lack of jurisdiction.

4.13. Regarding this Court's jurisdiction to exercise its supervisory jurisdiction, Counsel argued that this Court has the jurisdiction to inquire into proceedings of the court below in accordance with Article 134 of the Constitution of Zambia as amended by Act No. 2 of 2016. The said provision provides as follows:

***"134. The High Court has, subject to Article 128—***

***(a) unlimited and original jurisdiction in civil and criminal matters;***

*(b) appellate and supervisory jurisdiction, as prescribed; and*

*(c) jurisdiction to review decisions, as prescribed”.*

4.14. These were the arguments which the parties' Legal Advocates largely recited during the hearing on 1<sup>st</sup> June 2022. For avoidance of repetition, I shall not recite the oral submissions by Counsel.

4.15. These are the Issues in total.

## **5.0. CONSIDERATION AND DECISION OF THIS COURT**

5.1. I have considered the Grounds of Appeal, the Record of Appeal and the Arguments by the parties. I shall address Grounds 1 and 2 of Appeal first and collectively as they relate to the same subject, namely the lower Court's interpretation of Order XIV of Cap. 28. Ground 3 of Appeal shall be addressed last.

5.2. Regarding the meaning of Order XIV of Cap. 28, the Provision sets out places of trial for various civil suits instituted in Subordinate Courts. A scrutiny of the Provision disclose that the civil suits are categorized into two namely, '**contracts**' and '**other suits**'. The institution

and places of trial of suits arising from '**contracts**', is provided for under Order XIV, Rule 1 (a) of Cap. 28, while that relating to '**other suits**' is provided for under Order XIV 1(b) of the same Rules.

5.3. Concerning Order XIV Rule 1(a) of Cap. 28, the provision prescribes that suits arising from '**contracts**' may be commenced and tried in any Subordinate Court having jurisdiction either in the District in which the contract ought to have been performed or in which the Defendant resides or carries on business.

5.4. Turning to Order XIV Rule 1(b) of Cap. 28 the provision, as noted already, governs the institution and place of trial relating to '**other suits**'. The provision prescribes that such a suit can be instituted in any Subordinate Court having jurisdiction in the District in which the Defendant resides or carries on business. If there are more Defendants than one resident in different Districts, the suit may be instituted and tried in any Subordinate Court having Jurisdiction in any one of such Districts. In the latter case however, the Court on its own motion, or upon

application by any of the parties to the suit, may make an order it deems fit for the convenient conduct of the trial.

5.5. About Order XIV Rule (1)(c) of Cap. 28, the provision governs '**any suit**' (either '**contract**' or '**other suits**') instituted in a wrong District. This provision introduces two innovations thus: firstly, it bestows discretionary power on the Court in which the suit has been wrongly instituted, to try such a matter or direct otherwise. Secondly, it empowers the Defendant to object to the jurisdiction of such a court to try the suit. However, an objection by the Defendant to the jurisdiction of the Court should not be raised too late in the suit. Rather, it should be raised before or at the time he is required to state his answer or to plead to such suit.

5.6. Turning to the present suit, there is no dispute that it does not arise from a contract. Therefore, it falls under the category of '**other suit**' so that ordinarily, its place of commencement and trial should have been in accordance with Order XIV Rule (1)(b) of Cap. 28 namely, Ndola District where the Appellant resides or carries on



business. Therefore, having been commenced in Lusaka the suit was commenced in a wrong District and the applicable provision under the circumstances, is Order XIV Rule (1)(c) of Cap. 28. As explained already, Order XIV Rule (1)(c) bestows discretion upon the Subordinate Court in Lusaka (in which the matter was wrongly commenced) to try the matter. With this background, I have no basis to fault the Lower Court when it opted to try the matter. I am mindful though, of the entitlement bestowed by the provision, upon the Appellant to object to the Lower Court's jurisdiction to try the matter. This notwithstanding, the objection came too late thereby violating the provisions of Order XIV Rule (1) (c) of Cap. 28 as it was raised after the Appellant had stated his answer or pleaded to the suit. The Appellant's answer or plea to the suit is denoted by his Affidavit in Opposition to the Respondent's Complaint. By filing the Affidavit in Opposition, the Appellant, impliedly submitted himself to the Lower Court's jurisdiction.

5.7. Apart from filing the Affidavit in Opposition, the Record of Appeal disclose that the Appellant took further or fresh steps submitting himself to the jurisdiction of the Lower Court. The Appellant's fresh steps are denoted by his payments into court towards the Respondent's suit, even when it was undisputed (by virtue of him being a Legal Practitioner) that he was aware of his entitlement to object to the Lower Court's jurisdiction. With this background, the following holding in the Supreme Court of Zambia in the case of *Bellamano v Ligure Lombarda Limited* (4) instructive:

***"An application to set aside a writ for irregularity is not the appropriate procedure in the case of a writ issued without authority. Where it is the appropriate procedure the application will not be granted if the Applicant has taken any fresh step in the action after becoming aware of the irregularity. Entering of unconditional appearance is such a fresh step".***

5.8. Based on the foregoing, Grounds 1 and 2 of appeal have failed.

5.9. Turning to Ground 3 of appeal, the Appellant has raised two issues. Firstly, that the Lower Court erred in referring to the objections previously raised by the Appellant. And, which were the subject of that court's Ruling dated 29th October 2021. Secondly, that the Lower Court did not pronounce itself on the said preliminary issues which were previously raised.

5.10. Turning to the first issue, I concur with Counsel for the Appellant that the Lower Court erred when it made reference to the earlier preliminary issue. I am of this view because a party is not prevented from raising another preliminary issue after having raised one previously for as long as the two preliminary issues were distinct from each other. This notwithstanding, overall, I find Ground 3 of appeal to be misconceived and without merit. Firstly, because it has no bearing on the question of whether or not the Lower Court has jurisdiction to try this suit, which in my view is the pertinent question in this appeal. Secondly, the Appellant's suggestion that the Lower Court did not pronounce itself on the issues he previously raised

is misleading since the Court at page J4 in its Ruling dated 29th October 2021 deferred the said issues to the main trial. For avoidance of doubt, I reproduce hereunder the Magistrate's requisite pronouncements

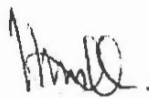
***“...the issues raised by the Respondent are matters that can be cured by way of cross examination. The issue that the Complainant must disclose her earnings and capacity so as to contribute to the maintenance of the said infants is not in issue because it is the evidence that has to be led and the Court is to be made aware of”.***

## **6.0. CONCLUSION**

6.1. Based on the foregoing, Ground 3 of appeal has also failed.

Thereby, the entire appeal has failed and is dismissed with costs to be taxed in default of agreement. The Record is forthwith remitted back to the Lower Court for trial of the main matter.

**DELIVERED AT LUSAKA ON 15<sup>TH</sup> SEPTEMBER, 2022.**



**KENNETH MULIFE  
HIGH COURT JUDGE.**