

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

Appeal No. 175/2019

**B E T W E E N :**

FRED M'MEMBE  
POST NEWSPAPER LIMITED (In Liquidation)

**1<sup>ST</sup> APPELLANT**  
**2<sup>ND</sup> APPELLANT**

**AND**

ABEL MOOZI  
ROY HABAALU  
ANDREW CHIFWENDA  
MWENDALUBI MWEENE  
BONAVENTURE BWALYA  
ZAMBIA REVENUE AUTHORITY



**1<sup>ST</sup> RESPONDENT**  
**2<sup>ND</sup> RESPONDENT**  
**3<sup>RD</sup> RESPONDENT**  
**4<sup>TH</sup> RESPONDENT**  
**5<sup>TH</sup> RESPONDENT**  
**6<sup>TH</sup> RESPONDENT**

**CORAM : Mchenga DJP, Chishimba and Majula, JJA**  
**20<sup>th</sup> May, 2020 and 10<sup>th</sup> July, 2020**

For the Appellant : Mr. N. Nchito S.C and Mr C Hamweela of Messrs Nchito  
& Nchito  
For the Respondent : N/A

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**J U D G M E N T**

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**CHISHIMBA, JA, delivered the Judgment of the Court**

**CASES REFERRED TO:**

1. Avalon Motors Limited (In Receivership) vs Bernard Lagh Godsen Motors City Limited (1998) SJ 26.
2. Zambia Seed Company Limited v. Chartered International PVT Limited SCZ No of 1999.
3. Avalon Motors Limited (in Receivership) v Bernard leigh Gadsden Motor City Limited (1998) SJ 26 S.C
4. Robert Mbonani Simeza (sued as Receiver/Manager of Ital Terrazo Limited) and Finance Bank Zambia limited vs Ital Terrazzo Limited SCZ Appeal no 144 of 2019.
5. Courtyard Hotel Limited v Zanaco & 2 others 2014/HPC/0094

6. Ashburder BV v Green Gas Power Limited (2005) EWHC 1031
7. Zambia Seed Company limited and Chartered International (PVT) Limited SCZ No 20 of 1999
8. Lusaka West Development Company Limited BS K Chiti (Receiver), Zambia State Insurance Corporation v Turnkey Properties Limited (1990) SJ (SC)
9. Huddesfield Banking Co. Ltd v Henry Lister and Son ltd 1895
10. Miles Sampa, Geoffrey Bwalya Mwamba, Capt. Selemani Banda Phangula v Inonge Wina (Suing in her capacity as National Chairman for Patriotic Front) and Davies Chama (sued in his capacity as Secretary-General of Patriotic Front) SCZ/8/294/2014 Appeal No. 195/2014
11. Barclays Bank Zambia PLC v ERZ Holdings Limited (in Liquidation) and Others Appeal No. 71/2007

**LEGISLATION AND OTHER WORKS REFERRED TO:**

1. The Rules of the Supreme Court 1999 Edition
2. Halsbury's Laws of England 3<sup>rd</sup> Edition, Volume 15

**INTRODUCTION**

1. This is an appeal against the ruling of the court below dismissing the action commenced by the Appellants which sought to set aside a consent order on the basis of fraud and illegality. Judge S. Kaunda Newa found the action to be one that she had no jurisdiction to preside over.

**BACKGROUND**

2. It is imperative that we state the facts preceding the appeal. The 1<sup>st</sup> to 5<sup>th</sup> Respondents had filed a winding up petition in cause number 2016/HPC/0518 before Judge Nkonde in November 2015. They sought to wind up the Post Newspapers

Limited on the basis of inability to pay them as employee creditors, salaries to the tune of K 815,000. The 6<sup>th</sup> Respondent, on the basis of outstanding tax obligations.

- 2.1 The proposed provisional liquidator Mr Lewis Mosho, was subsequently appointed provisional liquidator by way of an ex-parte order dated 1<sup>st</sup> November 2016. The scheduled inter parties return date of hearing of the application for appointment of provisional liquidator was 9<sup>th</sup> November 2016. The Appellants applied to set aside the order appointing the provisional liquidator and for a stay of execution of the said order. Despite return dates being issued, the applications were not heard by the learned Justice Nkonde.
- 2.2 Upon his appointment as provisional liquidator, Mr Mosho terminated the services of Messrs Nchito & Nchito as Advocates for the Post Newspapers Limited and in their stead appointed Messrs Lewis Nathan and Messrs Palan and George to represent Post Newspapers (in Liquidation). Thereafter, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants applied to set aside the removal of Messers Nchito and Nchito from representing the Post Newspapers. The said application was not heard.

- 2.3 On the 10<sup>th</sup> of January 2018, a consent judgement was executed between the Petitioners (Respondents herein) and the 2<sup>nd</sup> Appellant confirming Mr Lewis Mosho as liquidator of the Post Newspaper.
- 2.4 On 3<sup>rd</sup> November, Messrs Lewis Nathan discontinued the earlier applications made by Messrs Nchito and Nchito to stay execution and set aside the order of appointment of the provisional liquidator.
- 2.5 The 1<sup>st</sup> Appellant then filed a notice as an interested party (shareholder/director) and applied to set aside the order appointing Mr Mosho as provisional liquidator and to stay execution of the liquidation process. The applications were equally not heard by the presiding learned judge Nkonde as earlier stated.
- 2.6 Arising from the above conduct of proceedings, the Appellant commenced cause number 2018/HP/0064 (subject of this appeal) seeking an order to set aside the consent judgment order entered in cause 2016/HPC/0518 between the Respondents and the 2<sup>nd</sup> Appellant on basis of illegality and fraud. They also sought an order to stay the proceedings and orders granted by Justice Nkonde in cause number

2016/HPC/0518. The major aggrievement being the averments that the consent judgment order declaring the 2<sup>nd</sup> Appellant insolvent and confirming Mr. Mosho as liquidator was made without hearing the Appellant. Further that Judge Nkonde was found with a misconduct by the Judicial Complaints Commission. In addition, that the claims by the Respondents (creditors) in the winding up proceedings are disputed by the Appellants, yet an ex-parte appointment of a provisional liquidator was obtained which was used illegally in the removal of Messrs Nchito & Nchito as Advocates for the Post Newspapers and the selling of its assets.

- 2.7 Before, the learned judge could hear the main matter to set aside the consent judgment, the parties made numerous applications and raised preliminary issues.

The Appellants applied to set aside the Notice of Change of Advocates and the Notice of Discontinuance filed by Messrs Lewis Nathan and Palan & George on 19<sup>th</sup> January, 2018.

The 1<sup>st</sup> to 5<sup>th</sup> Respondents filed a Notice to raise preliminary issues on 16<sup>th</sup> January, 2018 and 22<sup>nd</sup> January, 2018.

2.7(1) The preliminary issues raised on 16<sup>th</sup> January, 2018 are as follows that;

1. *The Plaintiff who was aware of the winding-up proceedings in which the Consent Judgement was entered cannot challenge the Consent Judgment.*
2. *It is an abuse of court process for the Plaintiff who was aware of the winding-up to commence a fresh action when he should have joined himself to those proceedings.*
3. *The Post Newspapers Limited has withdrawn its claims in this matter against all the Defendants and the Plaintiff cannot therefore sustain this action alone.*
4. *A Court of the same jurisdiction may not upset or interfere with the decision or judgment passed or delivered by another Court of similar or same jurisdiction.*

2.7(2) The preliminary issues raised on 22<sup>nd</sup> January, 2018 are as follows;

- 1) *Whether this matter is properly before court having regard to the fact that the Writ of Summons filed by the Plaintiffs is defective as it does not include the Plaintiffs Postal and electronic address contrary to the mandatory provisions of Order VII [the] High Court Rules Chapter 27 of the Laws of the Republic of Zambia.*
- 2) *Whether the affidavit filed herein on the 15<sup>th</sup> of January, 2018 deposed by Fred M'Membe is competently before the court as it does not disclose the deponent's profession as required by Order 5 of High Court Rules Chapter 271 of the laws of Zambia.*
- 3) *Whether the ex-parte summons for stay of execution of ex-parte order appointing Mr Lewis Mosho as a provisional liquidator of the 2<sup>nd</sup> Plaintiff in cause number 2016/HPC/0518 and consent*

*judgment dated 10<sup>th</sup> January, 2018 is competently before the court as it does not cite any law.*

- 4) *Whether a cause of action is disclosed or can be sustained in view of the Plaintiffs who have discontinued the matter against the Defendants.*
- 5) *Whether the action can be maintained or sustained before a puisne judge which seeks to set aside consent judgment dated 10<sup>th</sup> January, 2018, which order was made by puisne Judge under cause No. 2016/HPC/0516 by the 1<sup>st</sup> Plaintiff who was not a party to the proceedings under cause no. 2016/HPC/0518.*
- 6) *Whether the 1<sup>st</sup> Plaintiff's purported derivative action can be maintained or sustained as it is incompetently before the court.*
- 7) *Whether Messrs Nchito & Nchito can act in the manner they have without instructions from the purported 2<sup>nd</sup> Plaintiff which itself amount to professional misconduct contrary to Rule 29 of the Legal Practitioners Rules Statutory Instrument no. 51 of 2002.*

2.8 On the 16<sup>th</sup> January 2018, the 6<sup>th</sup> Respondent, Zambia Revenue Authority entered conditional appearance and filed a preliminary issue to dismiss the action on point of law which was struck out for non-attendance.

### 3.0 **HOLDING BY THE COURT BELOW**

The learned judge considered the preliminary issues raised pursuant to **orders 14A and 33(3) and (7) of the Rules of the Supreme Court**. On the issue of the locus standi of the Appellants to commence this action, the court after discussing

the nature of derivative actions and considering the case of ***Avalon Motors Limited (In Receivership) vs Bernard Lagh Godsen Motors City Limited*** <sup>(1)</sup> stated that what the Appellants seek to litigate is the alleged breach of the fiduciary duty that Mr Lewis Mosho as liquidator of the 2<sup>nd</sup> Plaintiff owes. It is not a derivative action as envisioned under **Order 15 Rule 12A of Supreme Court Rules**. Though the Appellants have locus standi to sue for wrong doing on the part of the liquidator, the Respondents in the matter are not the Liquidators of Post Newspapers Limited who are alleged to have committed wrongs against the 2<sup>nd</sup> Appellant but were parties to the consent judgment in cause number 2016/HPC/518.

- 3.1 The court below held that it was not tenable to litigate and seek to obtain a remedy against a judge for any act done in the exercise of their judicial office. The instituted action seeks to achieve the above, though Justice Nkonde is not a party to these proceedings. The learned judge held that a wrong suit had been commenced to challenge the consent order executed in cause 2016/HPC/518. The court then dismissed the action for want of jurisdiction and stated that other avenues can be

explored to seek justice over the consent order if the Plaintiffs are aggrieved with it. Further that having had no jurisdiction to preside over this matter, she therefore could not determine the other issues and applications raised by the parties.

#### 4.0 **GROUND OF APPEAL:**

Two grounds of appeal are raised as follows;

- (i) **The court erred in law and fact when it held that the Appellants action sought to litigate the alleged breaches of the liquidator when in fact the Appellants were seeking to challenge the validity of the consent order confirming him.**
- (ii) **The court below erred in law and in fact when it held that the Appellants commencing a new action was the wrong suit to challenge the consent order executed under Cause Number 2016/HP/518 contrary to the position in Zambia Seed Company Limited v. Chartered International PVT Limited <sup>(2)</sup>**

#### **HEADS OF ARGUMENTS:**

- 5.0 The Appellants relied on the heads of argument dated 23<sup>rd</sup> September 2019. The factual background of the proceedings

in the cause **2016/HPC/518** was highlighted by the Appellants as earlier alluded to by the court.

5.1 In respect of ground one, it was submitted that the aim of cause **2016/HPC/518** was to challenge the instrument appointing Mr. Lewis Mosho as the liquidator of the 2<sup>nd</sup> Appellant, particularly the consent order dated 10<sup>th</sup> January 2018. The ex-parte appointment of Mr Mosho as liquidator was never heard inter-parties. Equally, that the notice filed by the 1<sup>st</sup> Appellant as an interested party to the winding up petition was never heard. The 2<sup>nd</sup> Appellant was placed into liquidation without hearing the winding up petition.

5.2 Due to the above series of events, the Appellants commenced the action to set aside the consent judgment; in line with the guidance in ***Avalon Motors Limited (in Receivership) v Bernard leigh Gadsden Motor City Limited*** <sup>(3)</sup>

5.3 It was further submitted that the 1<sup>st</sup> Appellant commenced the action in his capacity as shareholder and director in the 2<sup>nd</sup> Appellant on account of allegations of wrong doing in the conduct of the ex-parte liquidation of the 2<sup>nd</sup> Appellant. As authority, the cases of ***Robert Mbonani Simeza (sued as Receiver/Manager of Ital Terrazo Limited) and Finance***

**Bank Zambia Limited vs Ital Terrazzo Limited** <sup>(4)</sup> and **Courtyard Hotel Limited v Zanaco & 2 Others** <sup>(5)</sup> were cited.

In the latter case, our learned brother Chashi J, (HC) as he then was held that directors of a company in receivership can sue in the name of the company where there are seeking to litigate the validity of the Debenture pursuant to which the said appointment was made.

5.4 It was contended that directors of a company maintain residual power to defend a company in liquidation because of their duty to act in the best interest of the company. The case of **Ashborder BV v Green Gas Power Limited** <sup>(6)</sup> was cited as authority for the above proposition. In a nutshell, the Appellants submit that they have authority to commence a fresh action in the name of the company, on the basis that the consent order was obtained without the 1<sup>st</sup> Appellant having an opportunity to be heard or to challenge the appointment and that unqualified person was appointed as liquidator.

5.5 In ground two, it was submitted that the law on setting aside of a consent judgment is clear. That a fresh action has to be commenced to challenge a consent order. As authority the cases of **Zambia Seed Company Limited vs Chartered**

*International (PVT) (7)* and *Lusaka West Development Company limited BS K Chiti (Receiver), Zambia State Insurance Corporation v Turnkey Properties limited (8)* were cited.

5.6 On the issue of the ex-parte order of appointment of provisional liquidator, **Rule 8 (3) and (4) of the Companies (Winding Up Rules) 2004 SI Number 86 of 2004** was drawn to our attention on the requirement for issuance of a return date for inter parte hearing by the court. It was contended that contrary to the provisions of the above cited laws, the inter-parte hearing of the appointment of provisional liquidator was never heard.

5.7 It was argued that having locus standii to commence and maintain this action with lawyers of their choosing, the Appellants could challenge the consent orders on the basis of fraud and illegality. Reference was made to case of ***Huddesfield Banking Co. Ltd v Henry Lister and Son (9)*** and **Halsbury's Laws of England 3<sup>rd</sup> Edition, Volume 15** page 203 on the principle of law that a judgment obtained by fraud, collusion or any other ground that would invalidate it, will be nullified or set aside by the courts of justice.

5.8 At the hearing of the appeal on 20<sup>th</sup> May 2020, the Learned State Counsel, Mr. Nchito submitted that the issue for determination was narrow and straight forward namely, whether an incorporated company can be liquidated ex-parte without ever being heard. They contend that the grievance of the Appellant is not against the actions of the liquidator per se but against the confirmation of the liquidator by way of an ex-parte order.

5.9 In respect of the second ground of appeal, it was reiterated that a consent order obtained fraudulently can only be set aside by commencing a fresh action. On the question of the issue of whether a none party to a consent judgment can commence a fresh action to set it aside, learned State Counsel submits that the 1<sup>st</sup> Appellant applied to be heard in the liquidation matter and was never heard. Both the 1<sup>st</sup> and 2<sup>nd</sup> Appellants in that regard were parties to the winding up action. The problem being that the provisional liquidator purportedly dismissed the 2<sup>nd</sup> Appellant's lawyers and appointed his own lawyers to challenge the liquidation against itself, thereby becoming judge, jury and executioner in his own cause. In conclusion, it was submitted that the court below

had jurisdiction to determine the matter and erred by dismissing it at a preliminary stage. We were urged to uphold the appeal.

There was no appearance by the Respondents.

## 6.0 **ISSUES ON APPEAL**

We have considered the appeal, the submissions and arguments advanced by the Learned State Counsel. The issues raised for determination are as follows;

- (i) Whether cause 2018/HP/0064 which sought an order to set aside the consent order in cause 2016/HPC/0518 sought to litigate the alleged breaches of the liquidator.*
- (ii) Whether commencing a new action was the wrong suit or manner in which to challenge the consent order executed in cause 2016/HPC/0518.*
- (iii) Whether a non party to a consent judgment can commence a fresh action to set aside the consent order.*

## **DECISION OF THE COURT**

- 7.0 The first ground assails the holding by the court below to the effect that the Appellant by instituting cause **2018/HP/0064**, sought to litigate the alleged breaches of the fiduciary duty owed by Mr Lewis Mosho as liquidator of the 2<sup>nd</sup> Appellant.

7.1 It is not in issue that a consent judgment in the petition winding up proceedings, was executed between the Respondents and the Post Newspapers (in liquidation) by their advocates declaring the Post Newspapers Limited insolvent and wound up. In addition, the provisional liquidator was accordingly confirmed as liquidator. The Appellants then commenced Cause Number **2018/HP/0064** seeking to set aside the consent order entered into Cause Number **2016/HPC/0518** (Winding Up Proceedings) and sought an order to stay proceedings and orders granted by Justice Nkonde.

7.2 We have perused the statement of claim in respect of cause **2018/HP/0064** which the learned trial judge held sought to litigate alleged breaches of the liquidator and to obtain a remedy against a judge for an act done by him in the exercise of judicial office.

The averments in the pleadings, particularly the statement of claim in cause **2018/HP/0064** mainly allude to the proceedings in **2016/HPC/0518** and what transpired leading to the claim for setting aside of the consent judgment subject of appeal.

7.3 We are of the view that though averments were made in respect of and we quote “*strange ex-parte orders granted*” by justice Nkonde to the “*Mosho and parties aligned to him*” and the conduct of proceedings in the winding up matter, the 1<sup>st</sup> Appellant was essentially pleading that the actions of the Respondents were fraudulent and illegal. Under particulars of illegality and fraud, the appellants averred in the statement of claim that the claim by the Respondents (Petitioners) was disputed and that the appointment of liquidator was done contrary to the law amongst other allegations. Cardinal being the averment that the liquidation was completed by way of execution of a consent order not signed by the 1<sup>st</sup> Appellant in his capacity as a party or by the 2<sup>nd</sup> Appellant’s choice of lawyers.

7.4 Under the heading “*And the Plaintiffs now claim*”, the Appellant sought an order setting aside the consent judgment order executed under cause **2016/HPC/0518** on account of illegality and fraud. From the pleadings on record, it is apparent to us that the 1<sup>st</sup> Appellant was seeking to set aside the consent judgment declaring the 2<sup>nd</sup> Appellant insolvent

and wound up and the confirming of the liquidator without hearing the petition to wind up.

- 7.5 Therefore, the learned trial judge erred by stating that by instituting the action before her, the Appellant sought to obtain a remedy against a judge for an act done in the exercise of their judicial office.

In our view, the Appellant was merely seeking to set aside the consent order. Further, the Appellant was not seeking to challenge the alleged breaches of the liquidator but the setting aside of the consent order. We therefore set aside the holding to that effect made by the court below.

- 7.6 In our view, the cardinal issue is as raised in ground two, whether commencing a new action, was the wrong suit to challenge the consent order executed under cause number **2016/HPC/0518**.

The record will show that the consent judgment of 10<sup>th</sup> January 2018 was entered into between the 1<sup>st</sup> to 6<sup>th</sup> Petitioners (Respondents herein) and the Post Newspapers Limited (in Liquidation). By consent of the aforementioned parties, the Post Newspapers was declared insolvent and

wound up. The provisional liquidator, Mr Lewis Mosho was confirmed as liquidator of the 2<sup>nd</sup> Respondent. The parties' advocates on record executed the consent judgment on behalf of the aforestated litigants.

7.8 As regards the procedure relating to setting aside or impeachment of a consent judgment, the only means open to a party to set aside a consent judgment or order is by commencing a fresh action for that purpose. See paragraph 17 A-23 of the **Rules of the Supreme Court** Volume 2, **Halsbury's Laws of England** paragraph 1672 and the case of ***Zambia Seed Company v Chartered International PVT limited***<sup>(7)</sup>.

7.9 The critical or decisive issue for consideration in our view is whether a person or entity that was not a party to the consent judgment can commence a fresh action to set it aside.

It is not in dispute that the parties to the proceedings in **cause number 2016/HPC/0518** (winding up proceedings) are the Respondents and the Post Newspaper limited (in liquidation). Their Advocates on record executed the consent judgment on their behalf. This was after Messrs Nchito and Nchito were removed as Advocates for the Post Newspaper and in their

stead, Messrs Lewis Nathan Advocates, Messrs, Palan & George and Messrs Robson Malipenga & Company were appointed by the provisional liquidator to represent the Post Newspapers (in liquidation).

7.10 The 1<sup>st</sup> Appellant, Mr. Fred M'membe was not a party to the proceedings. The 1<sup>st</sup> Appellant submitted that he had applied under the liquidation rules to be heard in the liquidation and was never heard. Therefore, both the Appellants in that regard were contended to be parties to the action.

7.11 We have perused the record of proceedings relating to the winding up matter, to ascertain whether the 1<sup>st</sup> Appellant was joined to the proceedings or was a party to the consent judgment order. The record of appeal shows that there was an application made by the 1<sup>st</sup> Appellant as an interested party, made by way of Notice of Intention to Raise Preliminary issue. The 1<sup>st</sup> Appellant sought determination of the questions; whether Justice Nkonde could continue to hear the matter on account of bias and whether he could hear the matter in another cause **2017/HPC/0097**. The 1<sup>st</sup> Appellant deposed in the supporting affidavit that he was an interested party,

having filed a Notice under **Rule 10 of the Winding up Rules, 2004.**

7.12 In opposition, the 5<sup>th</sup> Respondent, refuted the statement that the 1<sup>st</sup> Appellant was a party to the winding up proceedings. In the absence of an order joining him to the winding up proceedings, the 1<sup>st</sup> Appellant lacked the requisite locus standi to move the court.

The preliminary issues raised by the 1<sup>st</sup> Appellant had nothing to do with joinder or non joinder.

We have had sight of the provision of Rule 10 of the Companies (Winding-up) Rule 2004. Rule 10 (1) stipulates that a person who intends to appear on the hearing of a petition shall file into court a notice of that person's intention in the format set out in the schedule.

In our view, mere filing of a notice of intention to appear does not automatically make the person a party to the proceedings. Upon filing of the notice a party must apply to be joined to the proceedings as an interested party.

7.13 We are therefore of the view that the 1<sup>st</sup> Appellant was not a party to the proceedings under cause **2016/HPC/0518**

subject of the consent judgment nor was he a party to the consent judgment entered into between the Respondents as Petitioners and the Post Newspapers (in liquidation). Arising from the above finding, we are of the view that the 1<sup>st</sup> Appellant as a non party to the said proceedings cannot commence a fresh action for the purpose of setting aside the consent judgment entered into under cause **2016/HPC/0518** as he was not a party to the proceedings or the executed consent judgment.

7.14 We are of the view that only parties to an action/proceedings or executed order can set aside a consent judgment order by commencing a fresh action.

7.15 The procedure to set aside a consent judgment by way of commencement of fresh action on basis of fraud or mistake or any grounds that would vitiate a contract does not apply to litigants or persons who were not parties to the consent judgment or proceedings.

7.16 In our view, the avenue or option available to the 1<sup>st</sup> Appellant was to apply under cause **2016/HPC/0518** (winding up petition) to be joined to the proceedings for the purposes of setting aside the consent judgment. We refer to the case of

**Barclays Bank v ERZ Holdings Limited** <sup>(11)</sup>, in which the Supreme Court stated that *“we agree with Counsel for the Respondents that the only legal option which was open to the Appellant Bank was to have invoked the provisions of Order 67 and in line with London Ngoma and Other vs LCM Company Limited case, to have applied to join the proceedings before Kakusa J even after the consent judgment had been entered”*.

7.17 In the case of **Miles Sampa, Geoffrey Bwalya Mwamba, Capt. Selemani Banda Phangula v. Inonge Wina** <sup>(10)</sup>, the Supreme Court stated that it is clear from the authorities cited i.e **London Ngoma & Others vs LCM Company Barclays Bank Zambia PLC v ERZ** <sup>(11)</sup> **Holdings Limited** that *“a person can be joined to the proceedings notwithstanding that there is a consent judgment provided he satisfies the conditions which we set out in the London Ngoma case...”*.

7.18 Therefore the option open to the 1<sup>st</sup> Appellant was to apply under cause **2016/HPC/0518** to be joined to the proceedings as a party. Therefore, we cannot fault the court below which held that the Appellants commencing a new action was the wrong suit to challenge the consent order executed in cause

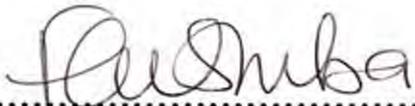
Number 2016/HPC/518 because the Appellants were not party to the proceedings and to the consent judgment.

**CONCLUSION**

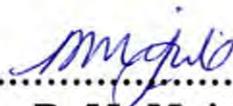
7.19 We accordingly uphold the holding by the court below that commencing a new action was the wrong suit to challenge the consent order executed under cause **2016/HPC/518**. We make no order as to costs, the Respondents not having appeared or contested the appeal.



.....  
**C.F.R. Mchenga**  
**DEPUTY JUDGE PRESIDENT**  
**COURT OF APPEAL**



.....  
**F.M. Chishimba**  
**COURT OF APPEAL JUDGE**



.....  
**B. M. Majula**  
**COURT OF APPEAL JUDGE**