

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

APPEAL Nº 128 /2017

BETWEEN:

MESSRS D. FINDLAY & ASSOCIATES

1ST APPELLANT

GOPAL THAKUR

2ND APPELLANT

AND

**HARENDRA DUSHAN RODRIGO
KURUKULASURIYA**



RESPONDENT

CORAM: **Mchenga, DJP, Mulongoti and Lengalenga, JJA**
On 23rd January, 2018 and 6th April, 2021.

For the Appellants: Mr. M. Chitambala – Messrs Lukona Chambers

For the Respondent: Ms B. Ng'andu – Messrs GDC Chambers

J U D G M E N T

LENGALENGA, JA delivered the Judgment of the Court.

Cases referred to:

**1. SIMWANZA NAMPOSHA v ZAMBIA STATE INSURANCE
CORPORATION LTD (2010) 2 ZR 389**

2. **BANDA v CHIEF IMMIGRATION OFFICER & THE ATTORNEY GENERAL (1993 – 94) ZR 80**
3. **TURNKEY PROPERTIES v LUSAKA DEVELOPMENT COMPANY LTD & ORS (1984) ZR 85 (SC)**
4. **DEVELOPMENT BANK OF ZAMBIA & ANOR v SUNVEST LTD & ANOR (1995 – 97) ZR 187 (SC) at p. 188**
5. **BP ZAMBIA PLC v INTERLAND MOTORS LTD (2001) ZR 37 (SC)**
6. **ZULU v AVONDALE HOUSING PROJECT LTD (1982) ZR 172**
7. **AUGUSTINE KAPEMBWA v DANNY MAIMBOLWA (1981) ZR 127 (SC)**
8. **COMMONWEALTH SHIPPING v PENINSULA BRANCH SERVICE (1923) AC 191**
9. **BALDWIN AND FRANCES LTD v PATENT TRIBUNAL LTD (1959) AC 663**
10. **SHAMWANA & ORS v THE PEOPLE (1985) ZR 41**
11. **NEW PLAST INDUSTRIES v THE COMMISSIONER OF LANDS & ANOR (2001) ZR 51**

Legislation referred to:

1. **THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA**
2. **THE RULES OF THE SUPREME COURT, 1999 EDITION**
3. **THE MATRIMONIAL CAUSES ACT, N^o 20 OF 2007**
4. **THE LEGAL PRACTITIONERS' PRACTICE RULES, 2002**
5. **THE LEGAL PRACTITIONERS' ACT, CHAPTER 30 OF THE LAWS OF ZAMBIA**
6. **THE LAW ASSOCIATION OF ZAMBIA ACT, CHAPTER 31 OF THE LAWS OF ZAMBIA**

Other works and materials referred to:

1. **THE HALSBURY'S LAWS OF ENGLAND, 4TH EDITION, VOLUME 9**
2. **ORGRERS ON CIVIL COURT ACTIONS, 24TH EDITION**

1.0 INTRODUCTION

1.1 This appeal arises from a High Court ruling dated 9th May, 2017 delivered by Judge N. A. Sharpe Phiri.

2.0 BACKGROUND

2.1 The background to this appeal is that on 29th September, 2015 the Respondent herein filed a petition pursuant to Articles 17 and 28 of the Constitution of the Republic of Zambia, Chapter 1 of the Laws of Zambia, against one Chrysoula Rodrigo Kurukulasuriya as 1st Respondent, and the Appellants herein as 2nd and 3rd Respondents respectively, in the Court below. The 1st Appellant herein were petitioned in their capacity as the said Chrysoula Rodrigo Kurukulasuriya's advocates while the 2nd Appellant was petitioned as an alleged expert witness.

2.2 In the said petition, the Respondent herein alleged that the 1st Respondent in the Court below stole his cellular phone, a Sony Ericsson X-Peria at his home on 21st April, 2015 early in the morning. He further alleged that on or before or about 2nd September, 2015, the 1st Respondent therein and the Appellants herein severally and jointly, without the Respondent's knowledge, agreement and or

consent, accessed, manipulated, cracked and hacked into his cellular phone so as to crack and hack his username, passwords and other personal and private information. He averred that the said actions were done without a court order, direction or permission.

2.3 The Respondent herein further averred that on or before or about 2nd September, 2015, the 1st Respondent in the Court below and the Appellants herein, without the Respondent's knowledge, agreement or consent caused to be printed or published and or aid print or publish a report which showed the Respondent's private information, usernames and passwords. On or about 7th September, 2015, the 1st Appellant herein without court order, knowledge, agreement or consent of the Respondent herein are alleged to have caused to be filed and did file the said report in the High Court.

2.4 In the petition filed in the Court below, the Respondent herein sought the following reliefs:

- (a) **Declaration that the access, manipulation, cracking and hacking of the Respondent's cellular phone, usernames, passwords and the printing or publication of records therefore is unlawful and unconstitutional;**
- (b) **Damages for breach of the Respondent's right to privacy by the 1st Respondent and Appellants;**

- (c) An order directing the 1st Respondent and Appellants by themselves, their agents, servants or by whomsoever from accessing, manipulating, cracking and hacking the Respondent's cellular phone, usernames, passwords or printing publications of records therefrom;**
- (d) Costs;**
- (e) Any other relief the Court deemed fit.**

2.5 Before the petition could be heard in the Court below, the Appellants herein on 3rd April, 2017, filed a Notice of motion to raise preliminary issues on points of law pursuant to Article 28(2) of the Constitution of Zambia, Act No 1 of 1991 as amended by Act No 18 of 1996 as read together with Order 14A, Rule 1 of the Rules of the Supreme Court, 1999 Edition.

2.6 The preliminary issues raised for determination by the Court below are set out hereunder:

- 1. Whether it was proper for the Petitioner (Respondent herein) to found the cause of action on matters arising under another action, namely, under cause no. 2015/HP/D093;**
- 2. Whether material produced before another court as evidence under cause no. 2015/HP/D093 can be subject of an action in the matter before the Court below;**

3. Whether the 3rd Respondent (2nd Appellant) can be properly sued for acting in accordance with her instructions and in performance of her duty to the Court under cause no. 2015/HP/D093.

2.7 Before the Appellants' application to raise preliminary issues could be heard, the Respondent herein on 25th April, 2017 filed into the Court below a summons to dismiss the application to raise preliminary issues for irregularity, affidavit and skeleton arguments in support thereof. The learned trial judge directed that the arguments in that application be raised at the hearing of the application to raise preliminary issues.

2.8 The application was heard on 26th April, 2017 in the Court below. With regard to the 1st and 2nd preliminary issues raised, Mr. M. Chitambala, Counsel for the Appellants argued that the Respondent's claims were premised on issues that arose in proceedings under cause no. 2015/HP/D093 and evidence adduced in the said proceedings that were still active before the Court. He had contended that the substance of the petition related to statements or averments made before a court of law. Counsel for the Appellants urged the Court below to dismiss the

petition before it as they considered it to be an abuse of court process.

2.9 On the 3rd preliminary issue, Mr. Chitambala argued that the 2nd Appellant (3rd Respondent) ought not to be sued for performance of her duties and in acting in accordance with instructions from her client.

2.10 In opposing the application to raise preliminary issues, Mr. Chibangula, Counsel for the Respondent argued that the action before the Court below related to the alleged violation of the Respondent's constitutional rights to privacy whereas the other action under cause no. 2015/HP/D093 related to proceedings for dissolution of marriage and that the actions were substantially different. He relied on the arguments filed into Court on 25th April, 2017 and the gist of which was that the notice to raise preliminary issues was improperly before the Court as the mode of commencement was wrong. He contended that the mode of commencement ought to have been by either summons or motion and not notice. Counsel for the Respondent cited a number of authorities to the effect that where the mode of commencement

of an action is wrong, the court has no jurisdiction to entertain the matter. He prayed for the preliminary issue to be dismissed with costs to the Respondent.

2.11 After considering the affidavit evidence and oral submissions by the parties, the learned judge found that the main issue for determination was whether the application was properly before the Court. She considered the first and second preliminary issues together and the third one alone.

2.12 She noted that from the respective arguments, the parties were in agreement that the subject matter of the two actions were substantially different as the proceedings under cause no. 2015/HP/D093 relate to dissolution of marriage whereas the proceedings before her related to violation of constitutional rights. She further noted that the Appellants herein were not parties to the divorce proceedings and had no connection thereto. She, however, acknowledged that in the action before her, there were allegations by the Respondent that the Appellants had engaged in conduct that had infringed his right to privacy.

- 2.13 Having satisfied herself that the two actions were substantially different, the learned judge opined that the Respondent properly commenced his complaint concerning violation of his constitutional rights under the separate action as his claims could not have been raised under the divorce petition.
- 2.14 With regard to the issue raised whether evidence adduced before another court can be the subject of an action in a different court, she found that the Appellants had not proved that that evidence was before another judge hearing the divorce petition. She stated that in any event, even assuming that such evidence was before the judge hearing the divorce petition, the issue of whether or not the Respondent's right to privacy had been violated was not the subject of the divorce proceedings. She, therefore, found Counsel for the Appellants' argument about evidence being before both courts to be irrelevant and misconceived.
- 2.15 With regard to the third preliminary issue raised by the Appellants, the learned judge noted that there was an allegation of impropriety against the 2nd Appellant herein (3rd Respondent) in her conduct of cause no. 2015/HP/D093. She noted that the 2nd

Appellant had argued that her actions cannot be called into question if she was acting in accordance with instructions. She found that the argument was misconceived and misplaced.

2.16 The learned judge stated that it is trite law that an advocate does not fall outside the court's scrutiny simply on account of having followed client's instructions. She further stated that Counsel has a duty not only to her client but to the Court and to the profession to act in a professional and ethical manner. She stated that where there are allegations that Counsel's conduct is wanting, Counsel can be sued in relation thereto. She, therefore, dismissed the said argument.

2.17 Based on her reasoning, the learned judge found that the matter was properly before her and she, accordingly, dismissed the Appellants' application with costs to the Respondent.

3.0 APPELLANTS' GROUNDS OF APPEAL

3.1 The Appellants being dissatisfied with Judge N. A. Sharpe-Phiri's Ruling, have appealed to this Court and advanced the following five grounds of appeal:

- 1. The trial judge erred in law and fact when she concluded that the matter under cause no.**

2015/HP/D093 and the matter herein are not connected at all when affidavit evidence on record shows that the Petitioner (Respondent) found his claim herein on an affidavit that had been filed under the said cause no. 2015/HP/D093.

- 2. The trial judge misdirected herself when she held to the effect that the 2nd and 3rd Respondents (Appellants) are not at all connected to the action under cause no. 2015/HP/D093.**
- 3. The trial judge gravely erred in law and fact when she seemed to make a conclusion that the Petitioner's phone was hacked by the Respondents in the absence of proof to that effect.**
- 4. The trial judge erred in law and fact when she came to the conclusion that the action in this petition did not amount to an abuse of court process when the evidence on record shows that the claim herein emanates from an application before another judge of the High Court under cause no. 2015/HP/D093.**
- 5. The trial judge erred in law and fact when she held that the 2nd and 3rd Respondents could be sued in these proceedings in relation to their conduct in the proceedings under cause no. 2015/HP/D093 without considering the position that in fact such action on the part of the Petitioner (Respondent) amounts to contempt of Court.**

4.0 APPELLANTS' ARGUMENTS IN SUPPORT OF THE APPEAL

- 4.1 The Appellants' heads of argument in support of the grounds of appeal were filed into court on 13th October, 2017.

4.2 Counsel for the Appellants in his arguments in support of ground one submitted that a thorough perusal of the Respondent's petition and affidavit verifying facts in the petition filed in the Court below discloses that the Respondent's main grievance is the alleged disclosure of his private information. He referred this Court to salient portions of the petition which clearly indicate that it is founded on proceedings under cause no. 2015/HP/D093 including the following:

"5(i) Under an action in the High Court instituted under cause no. 2015/HP/D093, the Petitioner is a Petitioner and the 1st Respondent is the Respondent and the 2nd Respondent is the Respondent's advocates.

(iv) On or before or about 2nd September, 2015 the Respondents without the Petitioner's knowledge, agreement and or consent caused to be printed or published a report which shows the Petitioner's private information, usernames and passwords.

(vi) On or about 7th September, 2015, the 2nd Respondent as advocates for the 1st Respondent, without court order, knowledge, agreement or consent of the Petitioner caused to be filed and did file the said report with the High Court."

- 4.3 Counsel for the Appellants further submitted that a thorough perusal of the petition and affidavit verifying facts under clause no. 2015/HP/1671 clearly shows that it is founded on matters arising from under cause no. 2015/HP/D093 and that the link between the two actions is contained in the Respondent's petition.
- 4.4 He further submitted that contrary to the facts disclosed and which are apparent on the record, the learned trial judge made erroneous findings that the parties had agreed that the subject matter of the two actions are substantially different and that there is no connection between them.
- 4.5 Counsel for the Appellants contended on behalf of the Appellants that the learned trial judge's finding is perverse as it is unsupported by the evidence on record. To support his argument, he relied on the case of **SIMWANZA NAMPOSHYA v ZAMBIA STATE INSURANCE CORPORATION LTD**¹ where the Supreme Court held that:

"An appellate Court will not upset findings of fact unless it can be shown that the findings are perverse or made in the absence of relevant evidence or based upon a misrepresentation of facts such that on a proper view of the evidence no trial court acting correctly could have reasonably made."

4.6 He further relied on the case of **BANDA v CHIEF IMMIGRATION OFFICER & THE ATTORNEY GENERAL**² where the Supreme Court held *inter alia* that:

“The appeal court will not interfere with the findings of fact of the lower court unless it is apparent that the trial Court fell into error.”

4.7 He, therefore, submitted that it is the Appellant’s contention that it is clear that on a proper review of the record under cause no. 2015/HP/1671, the learned trial judge’s finding of fact cannot be substantiated and he prayed that this Court allows ground one.

4.8 In support of ground two in which the learned trial judge is faulted for holding that the 2nd and 3rd Respondents (the Appellants herein) are not at all connected to the action under cause no. 2015/HP/D093, Counsel for the Appellants submitted that upon perusal of the Respondent’s petition under cause no. 2015/HP/1671 in paragraph 5 it is indicated that:

“(i) Under an action in the High Court instituted under cause no. 2015/HP/D093 the Petitioner is a Petitioner and the 1st Respondent is Respondent and the 2nd Respondent is the Respondent’s advocates.”

- 4.9 He further submitted that a perusal of exhibit "**HDRK3**" in the affidavit verifying facts to the petition shows that the 3rd Respondent is herein sued owing to the fact that he was under cause no. 2015/HP/D093 referred to as an "**expert witness**" in relation to report contained in the affidavit marked "**HDRK3**" in the affidavit verifying facts in the petition.
- 4.10 He further submitted that further perusal of the record indicates that the Appellants were sued under cause no. 2015/HP/1671 in their capacity as advocates for the 1st Respondent in the Court below and expert witness respectively under cause no. 2015/HP/D093.
- 4.11 He argued that the learned trial judge therefore, clearly misdirected herself by holding that the 2nd and 3rd Respondents were not parties to the divorce action and have no connection to the substantive divorce proceedings.
- 4.12 He submitted that while it was conceded that the 1st and 2nd Appellants were not parties to the divorce action under cause no. 2015/HP/D093, it was grossly erroneous for the learned trial judge to conclude that they were not connected to the action. He relied on

the two cases that were earlier cited for the proposition that an appellate court can upset a finding of fact where it is shown that it is perverse. He, therefore, urged this Court to allow ground two.

4.13 In ground three, the learned trial judge's ruling is faulted for her conclusion that the Respondent's phone was hacked by the Appellants in the absence of proof to that effect. It was contended on behalf of the Appellants that erred in reaching a flawed conclusion of the whole matter while ignoring abundant evidence on record. Counsel for the Appellants reiterated the Appellants' reliance on the cited cases.

4.14 He further submitted that it was grossly erroneous for the learned trial judge to seem to be determining the rights of the parties to an action at the preliminary stage before the full trial of the issues. He fortified his argument by relying on the case of **TURNKEY PROPERTIES v LUSAKA WEST DEVELOPMENT COMPANY & ORS**³ where the Supreme Court held *inter alia* that:

"It is improper for a court hearing an interlocutory application to make comments which may have an effect of pre-empting the decision of issues which are to be decided on the merits at trial."

4.15 In this case, Counsel for the Appellants submitted that the proceedings before the Court below were of an interlocutory nature and that there was no basis for reaching what seems like a final conclusion of the matter before trial of the issues. He prayed that ground three be allowed.

4.16 Ground four challenges the learned trial judge's finding that the action before her was not an abuse of court process when the evidence on record shows that it emanates from an application before another judge under cause no. 2015/HP/D093. It is contended that by commencing the petition in the Court below, the Respondent abused the court process.

4.17 Counsel for the Appellants submitted that the learned trial judge mis-apprehended the premise of the preliminary issue before her, which was whether a party can found a cause of action on the basis of issues arising in another matter. He contended that she grossly erred when she ignored the fact that the Respondent had engaged in a multiplicity of procedures in relation to his claim. To fortify his arguments, he relied on the case of **DEVELOPMENT BANK OF**

ZAMBIA & ANOR v SUNVEST LTD & ANOR⁴ where the Supreme

Court observed that:

“We have listened to the arguments in this appeal and would like immediately to affirm the judge on his disapproval of the steps taken in this matter whereby one action is pending and some other steps are being pursued. We also disapprove of parties commencing a multiplicity of procedures and proceedings and indeed a multiplicity of actions over the same subject matter.”

4.18 He further relied on the later case of **BP ZAMBIA PLC v INTERLAND MOTORS LTD**⁵ where the Supreme Court held that:

“A party in a dispute with another over a particular subject should not be allowed to deploy his grievances piece meal in scattered litigation and keep on hauling the same matter before various Courts.”

4.19 Counsel for the Appellants prayed that this Court allows ground four.

4.20 With regard to ground five, Counsel for the Appellants firstly drew this Court’s attention to the fact that in the action under cause no. 2015/HP/D093, the 2nd Appellants were not advocates for the Respondent but advocates for Chrysoula Rodrigo Kurukulasuriya, the 1st Respondent in the Court below.

4.21 He submitted that the learned trial judge seems to have

mis-apprehended the law in that while she finally acknowledged that the petition under cause no. 2015/HP/1671 emanated from the proceedings under cause no. 2015/HP/D093, she made a conclusion that was not supported by the law and evidence. He further submitted that a duly admitted advocate acting on a client's instructions is the client's agent. He contended that for as long as the advocate was acting on his client's instructions, he or she cannot be held personally liable for the consequences of his or her actions in the course of duty. To fortify his argument, he relied on Rule3(2) of the Legal Practitioners' Practice Rules, 2002, of the Legal Practitioners' Act, Chapter 30 of the Laws of Zambia which provide that:

"A practitioner shall not do anything in the course of practice or permit another person to do anything on the practitioner's behalf, which compromises or impairs or is likely to compromise or impair the following:

- (b) a person's freedom to instruct practitioner of choice;**
- (c) the practitioner's duty to act in the best interest of the client;**
- (f) the practitioner's duty to the Court."**

4.22 He contended that if there was any impropriety on the 1st Appellant's part as suggested by the learned trial judge, which was denied by the 1st Appellant, the Law Association of Zambia Act, Chapter 31 of the Laws of Zambia and the Legal Practitioners' Act provide for mechanisms for dealing with advocates who engage in any form of professional misconduct. He submitted that section 53 of the Legal Practitioners' Act empowers the Court below and the Disciplinary Committee in appropriate cases to deal with advocates who engage in any form of misconduct. He further referred to Rules 41 and 42 of the Legal Practitioners' Practice Rules, 2002 that empower the Legal Practitioners' Committee to deal with advocates who allegedly engage in unethical conduct in the course of their duty as advocates.

4.23 It was contended that in light of the statutes referred to, it was not open for the Respondent to commence proceedings against the 1st Appellant in relation to their conduct as advocates for the Petitioner under cause no. 2015/HP/D093 as the mode of commencing proceedings for redress is prescribed by the two statutes referred to. Based on those arguments, Counsel for the Appellants maintained his

earlier contention that the petition in the Court below is an abuse of court process.

4.24 It was further contended by the Appellants through Counsel, that the commencement of the action under cause no. 2015/HP/D093 was calculated by the Respondent to intimidate and or interfere with the Appellants in view of their roles in proceedings under the said cause no. 2015/HP/D093. He referred to the **HALSBURY'S LAWS OF ENGLAND, 4th Edition Volume 9, para 29 at page 23** where the learned authors state that:

"Any interference with a witness to a pending or imminent suit, the purpose or effect of which is to deter the witness from giving evidence or to influence the nature of evidence given, is a serious interference with the administration of justice"

4.25 He further relied on Order 52, Rule 1(23) of the Rules of the Supreme Court, 1999 Edition which states that:

"..... Acts calculated to prejudice the due course of justice may constitute contempt, whether committed before, after or during the proceedings. So interference with solicitors, witnesses for example, by victimizing persons who have given evidence or are likely to give evidence....."

- 4.26 It was contended that in light of the authorities cited, the learned trial judge erred in law when she failed to establish that the Respondent's actions of commencing proceedings under cause no. 2015/HP/1671 were calculated to interfere with the course of justice in the proceedings under cause no. 2015/HP/D093 especially in suits against the Appellants.
- 4.27 Counsel for the Appellants finally prayed that ground five and the entire appeal be allowed with costs to the Appellants.

5.0 RESPONDENT'S ARGUMENTS IN OPPOSITION TO THE APPEAL

- 5.1 The Respondent's heads of argument were filed into court on 30th November, 2017 and the Respondent relied on them in opposing the appeal.
- 5.2 Counsel for the Respondent argued grounds one and two together. He submitted that the learned trial judge was on firm ground when she ruled that the Appellants herein are not at all connected to the action under cause no. 2015/HP/D093 as they have no connection to the substantive divorce proceedings brought pursuant to the Matrimonial Causes Act, N^o 20 of 2007. He submitted that the action

under cause no. 2015/HP/1671 is premised on the violation of constitutional rights to privacy under Articles 16 and 7 of the Constitution of Zambia.

5.3 He further submitted that the portions of the affidavit quoted by the Appellant's Counsel have no material effect whatsoever of connecting the two causes of action and that, therefore, the Appellants have no nexus to the proceedings under cause no. 2015/HP/D093.

5.4 He submitted that based on the foregoing there is clearly no legal basis upon which this Court can reverse or upset the findings of fact made by the learned trial judge. To support his argument, Counsel for the Respondent relied on the case of **ZULU v AVONDALE HOUSING PROJECT** where the Supreme Court held that:

“Before this Court can reverse findings of fact made by a trial judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a mis-apprehension of the facts or that they were findings which, on a proper review of the evidence, no trial court correctly could reasonably make.”

5.5 He further relied on the case of **AUGUSTINE KAPEMBWA v DANNY MAIMBOLWA**⁷ where the Supreme Court held that:

“The Appellate Court would be slow to interfere with a

finding of fact made by a trial court which had the opportunity and advantage of seeing and hearing the witness.”

5.6 Counsel for the Respondent invited this Court to take judicial notice of the proceedings under cause no. 2015/HP/D093 and cause no. 2015/HP/1671 in the Court below. To support this, he relied on the following authorities:

5.7 In the case of **COMMONWEALTH SHIPPING v PENINSULA BRANCH SERVICE**⁸, Lord Summer defined judicial notice in the following terms:

“Judicial notice refers to facts which a judge can be called upon to receive and to act upon either from his general knowledge of them or from his general knowledge of them or from enquiries to be made by himself for his own information from sources to which it is proper for him to refer.”

5.8 In the case of **BALDWIN AND FRANCES LTD v PATENT TRIBUNAL LTD**⁹ where Lord Denning observed that:

“All that happens is that the Court is equipping itself for its task by taking judicial notice of all such things as it ought to know in order to do its work properly.”

5.9 He further submitted that calling for records of proceedings under cause no. 2015/HP/1671 and 2015/HP/D093 will enable the Court to do so. He also relied on the Zambian case of **SHAMWANA & ORS v THE PEOPLE**¹⁰ where the Supreme Court held that:

"In an appropriate case, therefore, particularly where, as in this case, facts may be judicially notified after an inquiry has been made, a judge has power not to look at his own records, but also at those of another judge, and to take judicial notice of their contents. This applies to all courts in the Republic."

5.10 Counsel for the Respondent submitted that there is no evidence on record to show that the Appellants are connected in any way to the matrimonial cause between the Respondent and Chrysoula Rodrigo Kurukulasuriya except for the averment by the Respondent that the Appellants were sued for their unlawful conduct and roles as advocates and expert witness respectively under cause no. 2015/HP/D093.

5.11 Ground three was argued on its own. Counsel for the Respondent firstly acknowledged that he is alive to the guidance given by the Supreme Court in the **TURNKEY PROPERTIES** case before proceeding to argue ground three.

- 5.12 He submitted that it is inconceivable that the Appellants are alleging that the learned trial judge made a conclusion that the Respondent's phone was hacked by the Appellants when there is no apparent comment by way of conclusion at all made by the Court below that may have an effect of pre-empting the decision on issues that are to be decided on the merits at the hearing of the petition.
- 5.13 Counsel for the Respondent contended that the **BANDA**² and **SIMWANZA NAMPOSHA**¹ cases cited by the Appellants are distinguishable and not applicable to this case in view of the foregoing arguments.
- 5.14 In opposing ground four, Counsel for the Respondent submitted that the learned trial judge was on firm ground when she ruled that the cause of action under cause no. 2015/HP/1671 was properly before the Court and did not amount to an abuse of court process in view of the evidence on record. To demonstrate that he relied on the definition of abuse of court process by the learned authors of **ORGERS ON CIVIL COURT ACTIONS, 24th Edition** where it is defined in the following terms:

“the term abuse of court process is similarly descriptive.

It connotes that the powers of the Court must be used *bonafidely* and properly, and must not be abused. The Court will prevent the improper use as a means of vexatious and oppressive behaviour in the process of litigation. In particular, it is an abuse of the court process for a Plaintiff to litigate again identical issues which have already been decided against him in earlier proceedings, even though the matter may not be strictly *res judicata*. The operation of this principle may be avoided if the Plaintiff can show that the earlier decision was obtained by perjury or if he can adduce fresh evidence, but such evidence must not have been obtained by reasonable diligence at the time of the earlier proceedings and must show conclusively that the earlier decision was wrong."

5.15 Counsel for the Respondent referred to the **DEVELOPMENT BANK OF ZAMBIA**⁴ and **BP ZAMBIA PLC**⁵ cases cited by Counsel for the Appellant and he acknowledged that it is settled that a litigant has no right to pursue similar claims which will have the same effect in different courts at the same time with a view of getting victory in one or both. He submitted that, however, in order to determine whether the two causes are similar, it requires careful scrutiny of the reliefs in either cause.

5.16 He further submitted that upon scrutiny of the same, he was satisfied that the two causes of action are distinct and that there is no abuse of court process. Consequently, he reiterated that the learned trial

judge was on firm ground when she ruled that the preliminary issues were misconceived because the two causes were substantially different and did not amount to abuse of court process.

5.17 In response to ground five, Counsel for the Respondent submitted that the learned trial judge was firm ground when she ruled that the Appellants could be sued in these proceedings in relation to their conduct in respect of the proceedings under cause no. 2015/HP/D093 and that there was no contempt of court committed by the Respondent. He drew this Court's attention to the fact that the 3rd preliminary issue raised for determination in the Court below was whether the 1st Appellant can be properly sued for acting in accordance with her instructions and performance of her duty to the Court under cause no. 2015/HP/D093.

5.18 He submitted that the learned trial judge was on firm ground when she ruled that Counsel has a duty to their client and to the Court and the profession to act in a professional and ethical manner. He further submitted that an advocate is not immune from the law and that he or she must represent his or her clients within the confines of the law. He further submitted that there is nothing that precludes

the Respondent from commencing an action to seek reparation or redress against the 1st Appellant.

5.19 Counsel for the Respondent also dispelled as being far fetched the Appellants' assertion that the Respondent's commencement of an action against the 1st Appellant under cause no. 2015/HP/1671 was calculated to intimidate or interfere with the Appellants for their role in the proceedings under cause no. 2015/HP/D093.

5.20 In conclusion, he submitted that the appeal has absolutely no merit and he urged this Court to dismiss it with costs to the Respondent, to be taxed in default of agreement by the parties.

6.0 THIS COURT'S CONSIDERATION AND DECISION

6.1 We have considered the grounds of appeal, respective arguments by the parties, authorities cited, evidence on record and ruling appealed against.

6.2 Ground one faults the trial judge's finding that the matters under cause numbers 2015/HP/D093 and 2015/HP/1671 are not connected. It is not disputed that the 1st Appellant are advocates for Chrysoula Kurukulasuriya who is the Respondent in cause number 2015/HP/D093 the same being a petition for divorce whilst the

Respondent herein is the Petitioner in the divorce petition. Cause number 2015/HP/1671 relates to issues of alleged infringement of constitutional right to privacy.

6.3 In the case of **NEW PLAST INDUSTRIES v THE COMMISSIONER OF LANDS & ANOR**¹¹, the Supreme Court held that:

“It is not entirely correct that the mode of commencement of an action largely depends on the reliefs sought. The correct position is that the mode of commencement of an action is generally provided by the relevant statute.”

6.4 While section 2 of the Matrimonial Causes Act, 2007 defines matrimonial causes as:

- (a) **proceedings for a decree of –**
 - (i) **dissolution of marriage**
 - (ii) **nullity of marriage; or**
 - (iii) **judicial separation.**
- (b) **proceedings for a declaration of the validity of the dissolution or annulment of a marriage by a decree or otherwise or of a decree of judicial separation**
- (c) **proceedings with respect to the maintenance of a party to the proceedings, settlement, damages in respect of adultery, the custody or guardianship of children of the marriage or the maintenance, welfare, advancement or education of children of the family**”

- 6.5 From the foregoing, it is evident that the proceedings referred to are instituted under the Matrimonial Causes Act. On the other hand, the action under cause number 2015/HP/1671 for alleged breach or infringement of constitutional rights is commenced pursuant to Article 28 of the Constitution.
- 6.6 We are, therefore, satisfied that the two actions are clearly not connected as they deal with totally different issues that have different remedies or reliefs. We opine that the Respondent was, therefore, at liberty to seek redress from the High Court in another action commenced pursuant to Article 28 of the Constitution.
- 6.7 Consequently, we find that the learned trial judge was on firm ground in finding as she did. We find that ground one is devoid of merit and we, accordingly, dismiss it.
- 6.8 We turn to ground two which faults the learned trial judge's finding that the 2nd and 3rd Respondents (Appellants) are not at all connected to the action under cause number 2015/HP/D093.
- 6.9 As we earlier observed, the 1st Appellant are advocates for one Chrysoula Kurukulasuriya in cause number 2015/HP/D093 while according to the evidence on record, the 2nd Appellant was an expert

witness therein. That being the position, we opine that they had a role to play in the divorce proceedings, but not as parties thereto and that they are therefore, not connected to the substantive divorce proceedings.

6.10 We, accordingly, find that the learned trial judge was on firm ground in her reasoning that there was need for a separate action to be taken out as the reliefs the Respondent seeks could only be addressed in a petition brought pursuant to Article 28 of the Constitution.

6.11 Consequently, we find that ground two is also devoid of merit and we, accordingly dismiss it.

6.12 In ground three, the learned trial Judge is faulted for seeming to have concluded that the Respondent's (Petitioner's) phone was hacked by the Appellants in the absence of proof to that effect. We had occasion to peruse the ruling by the Court below and particularly, page 12 of the record of appeal which contain the comments that are the subject of this ground of appeal. At lines 3 to 10 the learned trial Judge stated that:

"However, there are allegations by the Petitioner that

the Respondents have engaged in conduct which has infringed on his right to privacy. This action is based on the conduct of the Respondents and not on the divorce proceedings under cause no. 2015/HP/D093. I am therefore of the opinion that it is proper for the Petitioner to have brought his complaint regarding violation of his constitutional rights under this separate action. The claims could not have been raised under the divorce action."

6.13 From the aforesaid, it is clear that no conclusion regarding the merits of the petition before her were made by the learned trial judge. It is also evident that she did not make any findings of fact or draw any conclusions that the Respondent's (Petitioner's) phone was hacked as alleged in ground three.

6.14 We, are, therefore, of the view that the learned trial Judge's comments or observations do not come within the ambit of those proscribed by the Supreme Court in the **TURNKEY PROPERTIES** case relied on by Counsel for the Appellants.

6.15 We, therefore, find that ground three is bereft of merit and we, accordingly dismiss it.

6.17 We turn to ground four which faults the learned trial judge's conclusion that the action in the petition did not amount to an abuse of court process when the evidence on record indicated that it

emanates from an application before another High Court judge under cause no. 2015/HP/D093. We note that the Appellants contend that by commencing the petition in the Court below the Respondent abused the court process.

6.18 Considering the view we have taken in ground one that the divorce proceedings and this matter are distinct and not connected, even if we accept that the claim seems to have emanated from the divorce proceedings, we acknowledge the fact that divorce proceedings are not the prescribed legal process by which a party can seek redress where there is an allegation of infringement of constitutional rights.

6.19 Consequently, we accept that the only available avenue by which the party (Respondent) could seek redress is by way of petition pursuant to Article 28 of the Constitution which entailed commencing a fresh action. Hence the action in the petition did not amount to an abuse of court process or deployment of the Respondent's grievances piece meal in scattered litigation before various courts as alleged and within the context of the cited cases of **BP ZAMBIA PLC v INTERLAND MOTORS LTD** and **DEVELOPMENT BANK OF ZAMBIA & ANOR v SUNVEST LTD & ANOR.**

- 6.20 Therefore, we find that the learned trial Judge was on firm ground in finding as she did and that ground four is devoid of merit and we, accordingly disallow it.
- 6.21 We turn to ground five where the learned trial Judge is challenged for holding that the 2nd and 3rd Respondents could be sued in the proceedings before her in relation to their conduct in the proceedings under cause number 2015/HP/D093. We have duly noted that under cause number 2015/HP/D093, the 2nd Appellant were not advocates for the Respondent but the 1st Respondent therein, Chrysoula Rodrigo Kurukulasuriya.
- 6.21 The thrust of the arguments by Counsel for the Appellants is that an advocate acting on his client's instructions cannot be held personally liable for consequences of his or her actions in the course of duty in accordance with Rule 3(2) of the Legal Practitioners Practice Rules, 2002, Chapter 30 of the Laws of Zambia. It was alternatively submitted that if there was any impropriety on the part of the 1st Appellant, the Law Association of Zambia Act, Legal Practitioners Act and Legal Practitioners' Practice Rules, 2002 provide for mechanisms for dealing with them.

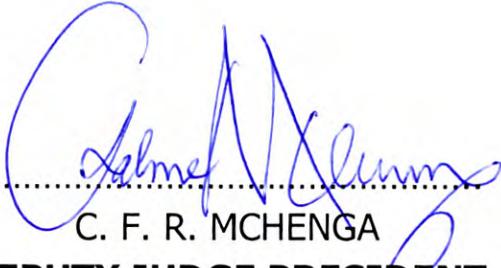
6.22 We are of the firm view that while the Legal Practitioners Act and the Law Association of Zambia Act have mechanisms by which erring advocates may be dealt with, but the fact that the complaint herein relates to violation of a constitutional right, namely, right to privacy, and an issue of contempt of court, the matter cannot be dealt with by the Law Association of Zambia.

6.23 Therefore, by seeking redress under the Constitution for the said violation, the Respondent herein cannot be perceived as seeking to intimidate the Appellants herein from giving evidence. We are of the firm view that no contempt can be committed by a party seeking redress against an advocate and/or witness who allegedly violates his constitutional rights while representing his client.

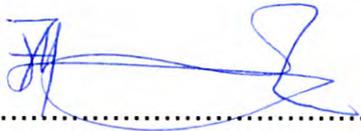
6.24 Therefore, we find that the learned trial Judge was on firm ground when she held as she did. We find that ground five is also devoid of merit.

6.25 In conclusion, all five grounds of appeal being unsuccessful, the net effect is that the appeal fails and it is, accordingly dismissed for lacking merit.

6.26 Consequently, costs are awarded to the Respondent, and in default of agreement, same to be taxed.


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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT


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J. Z. MULONGOTI
COURT OF APPEAL JUDGE


.....
F. M. LENGALENGA
COURT OF APPEAL JUDGE