

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

YOUJUN ZHUANG

WANG QINGHAI

KINGPHAR COMPANY ZAMBIA LIMITED

1<sup>ST</sup> APPELLANT

2<sup>ND</sup> APPELLANT

3<sup>RD</sup> APPELLANT



AND

BUMU GENERAL TRADING FZE

RESPONDENT

CORAM: **KONDOLO SC, NGULUBE AND BANDA - BOBO, JJA.**

**On 2<sup>nd</sup> December, 2021 and 28<sup>th</sup> December, 2021.**

**For the 1<sup>st</sup> and 2<sup>nd</sup> Appellants:** Mr. K. Mweemba of Messrs. Keith Mweemba Advocates, appearing with Mr. G. Phiri of Messrs. PNP Advocates.

**For the Respondent:** Mr. S. K. Simwanza of Messrs. Lungu Simwanza & Company, appearing with Mr. N. Yalenga of Messrs. Yalenga & Associates.

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## JUDGMENT

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**NGULUBE, JA,** delivered the Judgment of the Court.

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### Cases referred to:

1. *Ladd v Marshall (1954) 3 All ER 745 at 748.*
2. *Zambia Revenue Authority vs Hitech Trading Company Limited (2001) ZR 17.*

3. *Saluja vs Gill (T/A P Gill Estate Agents Property Services) and Another (2002) EWHC 1435 (Ch) 24.*

**Legislation referred to:**

1. *The Court of Appeal Act No. 7 of 2016.*

**INTRODUCTION**

1. This is a Judgment on the respondent's notice of motion for an order for production of a document on appeal, pursuant to ***Section 24(1)(b)(i) of the Court of Appeal Act.***

**BACKGROUND**

2. The affidavit in support of the motion was sworn by Wenxiu Pan, who deposed that the lower court on 26<sup>th</sup> March, 2021 delivered a judgment under cause number 2020/HB/023 which set aside a consent judgment under cause number 2020/HB/015. In that judgment, the lower court referred to the sequence of entries in the civil register at Kabwe High Court and stated that cause number 2020/HB/015 had been allocated to two causes. The appellant has since appealed to this court against that judgment.
3. The witness said the lower court had the advantage of perusing the register of entries since the matter was tried in Kabwe where the court is based. He deposed that the respondent wishes to submit a copy of excerpts from the register to enable this court

appreciate the basis of the findings of the lower court. He stated that the document could not be produced in evidence before the lower court.

4. The deponent further stated that the excerpts of the entries of the register are pertinent in the determination of this matter with finality, as the appellants have made it an issue for consideration by this court. He stated that the order being sought will not prejudice the appellants in any way and that unless this court grants it, the respondent will suffer injustice in that this court will not have the advantage that the trial court had, even though the register was not filed as part of the documents in the court below.
5. The first and second appellants filed an affidavit in opposition sworn by the first appellant who testified that the register which the respondent is seeking to produce did not form part of the court record upon which the lower court was tasked to make a judgment. He stated that though the court below did touch on the entries in the court register, it did not state whether such a finding was informed after a perusal of the court register or the submissions made by the respondent.

6. He told this court that it will not be in the interest of justice for this court to consider material that was not considered in the court below though it was readily available and could have been reasonably obtained by the respondent in the court below. Further that no prejudice would be caused to the respondent if this application is denied, as it would be able to make its case on the material it used in the court below. He stated that material which was not before the lower court cannot be produced before this court, which goes by the record of the trial court.
7. He went on to state that if this court is minded to allow this motion, the appellants should equally be allowed to produce the receipts issued by the registry which show the order in which matters were filed, as the receipts are serialized. According to him, the receipts show the relevant matters that were filed and give a complete picture of what transpired and they will assist this court in arriving at a fair and just position.
8. He emphasized that the entries in the register are underpinned by receipts, which form the primary documents that need to be inquired into to establish the order in which process was filed into court and this information is what would settle the entire appeal. The receipts would also demonstrate how the court below

completely misdirected itself and arrived at a wrong conclusion based on suppression of facts by the respondent.

9. When we heard this motion, counsel for the parties relied on the affidavits and skeleton arguments they filed on behalf of their respective clients, which they augmented with oral submissions.

## **THE APPELLANTS' CONTENTIONS**

10. On behalf of the respondent, Mr. Simwanza argued that this court is vested with power to order the production of a document on appeal, by virtue of **Section 24(1)(b) of the Court of Appeal Act**.
11. He submitted that the appellant lodged an appeal into this court and one of the issues that ought to be determined is the manner in which entries were made in the civil register at Kabwe. According to Counsel, the entries in the register could not be produced into evidence at the time of trial in the lower court because the trial court was based at Kabwe and it had the advantage of calling for the register before making its finding of fraud, which led to the setting aside of the consent order. He relied on the case of **Ladd vs Marshall<sup>1</sup>**, where the court laid down the conditions to be satisfied before admitting new evidence on appeal. The court in that case held that:

**"Firstly, it must be shown that the evidence could not have been obtained with reasonable diligence for use at trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible though it need not be incontrovertible."**

12. He also cited the case of **Zambia Revenue Authority vs Hitech Trading Company Limited**<sup>2</sup> where the Supreme Court held that for an application to introduce new evidence to succeed, it must be shown that the evidence could not be obtained with reasonable diligence at trial; that the evidence will have an important influence on the result of the case and that the evidence will be credible. On this basis, he said it is imperative that a copy of the entries of the civil register be admitted and produced on appeal as evidence, as it is cardinal in the determination of the appeal with finality.
13. Mr. Simwanza submitted that this court ought to allow the production of the document as it is in the interest of justice. He stated that if the motion is not granted, the respondent will be denied the opportunity to respond to the whole appeal effectively, as the appellants have made it an issue in this appeal. He also

submitted that it is the duty of a litigant to bring all relevant evidence before the court as this is important in the determination of the issue before court. Counsel prayed that we grant this application and that costs be in the cause.

## **THE RESPONDENT'S CONTENTIONS**

14. On behalf of the appellants, Mr. Mweemba opposed the motion by way of skeleton arguments in which he cited the case of **Zambia Revenue Authority vs Hitech Trading Company Limited<sup>2</sup>**, where the Supreme Court stated that:

***"For an application to introduce new evidence to succeed, it must be shown that the evidence could not be obtained with reasonable diligence at trial; that the evidence will have an important effect on the results of the case and that the evidence will be credible."***

15. Firstly, counsel argued that the respondent had not demonstrated that the register which it seeks to produce could not be obtained and produced in the court below with reasonable diligence. He said the register could have easily been obtained from the registry and produced before the lower court. The failure to do so seemed to suggest that the register was not relevant and it cannot be said that the register has become

relevant because it was referred to by the judge in his decision albeit not being part of the record.

16. Secondly, Mr. Mweemba contended that the respondent did not demonstrate that the register will have an important influence on the results of the case. He submitted that the respondent cannot argue that it will be unable to respond to the whole appeal effectively, if the document is not allowed to be produced. This is because the respondent was able to argue its case successfully in the court below and therefore cannot complain that it will not be able to deal with the case if this document is not produced before this court.
17. Thirdly, counsel argued that the respondent had not demonstrated before this court that the document it seeks to produce will be a credible document. He submitted that allowing the civil register to be exhibited at this hour would require that the registry staff be called to testify on how the entries were made in the register.
18. Finally, Mr. Mweemba submitted that if this court is inclined to order that the respondent produces the register, the appellants should also be allowed to produce the receipts issued upon the filing of the matter relating to the first appellant and the matter

relating to the estate of the late Rodgers Bwalya. The receipts would be important to show this court which matter was filed earlier than the other and which matter was given what cause number.

## **CONSIDERATION OF THE MOTION BY THIS COURT AND VERDICT**

19. We have considered this notice of motion, the skeleton arguments filed by the parties and the oral submissions which were made by counsel for the parties. This application has been made pursuant to ***Section 24 (b) (i) of the Court of Appeal Act***, which gives discretionary powers to this court, where necessary or expedient in the interest of justice, to order the production of a document, exhibit or any other thing which may be necessary for the determination of a matter. It provides that:

- "24. (1) The Court may, on the hearing of an appeal in a civil matter-***
- (a) ...***
  - (b) where necessary or expedient in the interest of justice-***
  - (i) order the production of a document, exhibit or other thing connected with the proceedings, the production of which may be necessary for the determination of the matter; ..."***

20. The question we have to determine is whether it is necessary and expedient in the interest of justice, for this court to order the production of a copy of excerpts from the civil register of the Kabwe High Court, at this stage of the proceedings. We have to consider whether the production of that document will be necessary for the determination of the appeal in this matter.
21. The point we first want to make is that an appellate court rarely admits fresh evidence on appeal. In the case of **Ladd v Marshall**<sup>1</sup>, which has been cited by the respondent's counsel, Denning LJ laid down the three conditions to be satisfied before an appellate court can receive new evidence. His Lordship held that:

***“...to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”***

22. This authority was cited with approval in the case of **Zambia Revenue Authority vs Hitech Trading Company Limited**<sup>2</sup>, where the Supreme Court held that:

**"For an application to introduce new evidence to succeed, it must be shown that the evidence could not be obtained with reasonable diligence at trial; that the evidence will have an important effect on the results of the case and that the evidence will be credible."**

23. It is our considered view that the respondent has not satisfied the conditions set out in the cases we have cited. We agree with counsel for the appellants that this document sought to be produced could have been obtained with reasonable diligence for use at the trial before the lower court. The judgment of the lower court which is said to have referred to the civil register has not been exhibited to the affidavit in support of this notice of motion, but we are convinced based on the material that is before us, that the document sought to be produced would not have an important influence on the result of the appeal, even if it was admitted in evidence before this court. We say this because courts decide cases based on the evidence or material before them, and not on extraneous material. If the document was indeed relevant to the determination of the matter, the respondent would have taken the necessary steps to obtain it and produce it before the trial court.

24. The fact that the lower court referred to the register in its judgment is not a sufficient reason for us to order the production of the register before this court which is an appellate court. We agree with Mr. Mweemba that if this court is to order the production of the register, there would be need to call the registry staff from Kabwe to testify how the relevant entries were made in the register. We have not found a sufficient reason for us to take that route.
25. By imposing strict requirements that prohibit the introduction of fresh evidence on appeal unless special grounds are advanced, the principle in **Ladd vs Marshall**<sup>1</sup> advances public policy considerations that require litigants to advance their entire case at trial, and not deliberately leave over points for the purposes of the appeal thereby obtaining an advantage of having a second bite at the cherry. In the case of **Saluja vs Gill (t/a P Gill Estate Agents Property Services) and Another**<sup>3</sup>, Laddie J aptly stated that:

***"Litigants should be disciplined into ensuring that they only fight an action once. For that reason in most cases it will be unfair to a litigant to subject him to a retrial, for example, because his opponent culpably failed to put all the best relevant evidence before the court at the first trial. The rule in Ladd v Marshall was applied so as to achieve justice."***

26. We cannot overemphasize that litigants are expected to put before the trial court all the issues relevant to that litigation. In the circumstances of the case before us, it is our considered view that the document sought to be produced could have been obtained with reasonable diligence for use at the trial before the lower court. We therefore do not find it necessary or expedient in the interest of justice to order its production before us.
27. We find no merit in this notice of motion and we accordingly dismiss it. We award the costs of this motion to the respondent, to be taxed in default of agreement.



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M. M. KONDOLO SC  
**COURT OF APPEAL JUDGE**



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P. C. M. NGULUBE  
**COURT OF APPEAL JUDGE**



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A. M. BANDA - BOBO  
**COURT OF APPEAL JUDGE**