HIGH COURT
LILONGWE

IN THE SUPREME COURT OF APPEAL

SITTING AT BLANTYRE

MSCA CIVIL APPEAL NUMBER 37 OF 2015

(Being High Court Civil Cause Number 1713 of 2007)

BETWEEN

THE REGISTERED TRUSTEES OF SEVENTH DAY ADVENTIST CHURCH..... .....APPELLANT

AND

GANIZAN MAKHUMULA..... RESPONDENT

CORAM: **HONOURABLE JUSTICE R.R. MZIKAMANDA SC, JA**

HONOURABLE JUSTICE L.P. CHIKOPA SC, JA

HONOURABLE JUSTICE F. E. KAPANDA SC, JA

Mndolo for the Appellant

Salimu for the Respondent

Chimtande Mrs, Recording Officer

JUDGMENT

Mzikamanda SC, JA

On 4 June 2012, Chipeta J, as he then was, rendered a ruling dismissing the appellant's originating summons and all remedies sought under it, with costs. The appellant was dissatisfied with that decision of the High Court and appealed to this Court against the whole of the decision. Six grounds of appeal and a number of reliefs sought are set out in the notice of appeal dated 2 July 2012 as follows:

1. The Learned Judge used an affidavit in opposition sworn by the defendant and wrongly filed with the court contrary to the order of the court of 12th October, 2011 granting leave to the defendant to file affidavit evidence out of time. That affidavit though on court file was not part of the evidenceand was never adopted by the defendant at the hearing. None of the parties made reference to it. The plaintiff in arguing their case made reference to the three affidavits in opposition excluding the affidavit that the Learned Judge heavily relied on in his judgment.
2. The Learned Judge misdirected himself when he held that the defendant acquired the land in 1982 and the plaintiff in 2006, when the Land Certificate only shows the date the land was registered under the Registered Land Act.
3. The Learned Judge was wrong in law in holding that the plaintiff could not maintain an action in trespass simply because the Land Certificate bore a different name from that of the plaintiff when it was never disputed that the plaintiff was in possession of the land, the subject matter of the court proceedings.
4. There was no evidence to support the findings of the Learned Judge that the defendant had a right of way over the plaintiff's land.
5. The Learned Judge did not analyse exhibits ED1, GM1 and NN1 that were before him which clearly show that the defendant has no right of way over the plaintiff's land.
6. The Judgment of the court was against the weight of evidence before it.

The appellant seeks reversal of the whole decision of the High Court and a determination that:

1. The defendant has no right of way over the plaintiff's land;

2. The defendant's actions amounted to trespass; and
3. That the plaintiff is entitled to damages.

The appeal is challenged mainly on the grounds that the action was not competent and that there is evidence affirming his right of way over the land in question.

The background to the matter shows that the concerned properties lay adjacent to each other and one behind the other when viewed from the main road. The appellant's case is that at all material times it owned and possessed plot Title Number Blantyre West 396 while the respondent is owner of plot Title Number Blantyre West 397 to which he wrongfully constructed a passage through the said plot Title Number Blantyre West 396. It was established in the court below that the Land Certificate for property Title Number Blantyre West 396 was in the name of The Seventh Day Adventist Association of Malawi and not that of the appellant, The Registered Trustees of the Seventh Day Adventist Church, who challenged the conduct of the respondent in establishing a passage through the property. It is the appellant who took action for trespass against the respondent, claiming ownership of the property and seeking a number of reliefs as in the notice of appeal. The appellant also sought a permanent order of injunction restraining the respondent from continuing the construction of the passage way with a further mandatory order of injunction for the respondent to restore the land to its original condition by refunding to it the soil removed during the construction of the passage way.According to the appellant, the respondent could easily have constructed the passage way through another adjacent plot Title Number Blantyre West 398. It is not clear who has title to this other plot.

The respondent's case is that his right of way over the land in question existed for a long time and that it had been duly denoted in a survey that took place in 1982.

The originating summons which was issued on 1 August 2007 in this matter sought a declaration that on the true construction of sections 24 and 25 of the Registered Land Act of the Laws of Malawi and in the events which happened, the defendant trespassed the plaintiff's land. It sought a number of reliefs that have been referred to earlier in this judgment.

We observe that in the High Court this matter was disposed of solely on affidavit evidence. All appeals to this Court are by way of rehearing in terms of Order III rule 2 of the Supreme Court of Appeal Rules. Rehearing entails fresh scrutiny and consideration of the matter in this Court. At the start of the rehearing of the matter we noted that the record had some serious omissions and lacked order. The parties had to go back to reconstruct the record for orderliness and completeness before we could proceed. The reconstructed record, though and improved version, lacked some crucial pages. For example, the order of 12 October, 2011 referred to in Ground 1 of the appeal does not appear to have been placed on the file. We see no record of the actual proceedings in the court below on file. Counsel must have addressed the court below on the affidavits and the exhibits and yet a recording of the address is not on the reconstructed file. There were challenges in the manner the record was put together even in the court below and the Judge expressed his discomfort in that regard. The affidavits in opposition placed on file were never properly described to show whether the one was supplementary to the other. An affidavit which purported to have an attachment did not have any attachment to it. What clearly emerges is that the affidavit in opposition were filed following a court order granting leave to file out of time. Despite the challenges with the record, the Judge proceeded to determine the substantive matter, expunging some of the documentary evidence in the process.

We notice that in the address to us, there was no attempt to argue on the true construction of sections 24 and 25 of the Registered Land Act referred to in the originating summons. Section 24 provides that the registration of a person as a proprietor of private land confers on that person the rights of owner of that land as private land. Section 25 provides that the rights of a proprietor are not liable to be defeated except in certain specified circumstances and that such rights are held by the proprietor free from all interests and other claims. Although these provisions were cited in originating summons, they were not alluded to in this Court. The appellant argued the law on trespass, citing the High Court case of **Tea Brokers (Central Africa) Ltd v Bhagat [1994] MLR 339** as authority for the proposition that trespass is the unjustifiable interference with possession of land. Counsel did not say whether or not there was a decision of the Supreme Court of Appeal on this point. It was argued that one need not be the owner of the land to maintain an action in trespass. It was further argued that one can maintain an action in trespass by proving that one is in possession of the land which has been trespassed even though one is not the owner.These arguments clearly show that the appellant was no longer relying on sections 24 and 25 of the Registered Land Act providing for registration and proprietorship of land. We will make no attempt to discuss those provisions as we find such a discussion as an unnecessary exercise. Again, the law of trespass has brought no real controversy between the parties. The case turns on the parties' differing interpretation of survey and deed plans.

The first ground of appeal attacks the use by the Judge of an affidavit in opposition which was filed with the court below allegedly contrary to an order of the court of 12 October, 2011, granting leave to the defendant to file affidavit evidence out of time. As pointed out earlier, the court order of 12 October 2011 referred to in this ground of appeal is not on the court record before us. It is not stated whether the

order was brought to the attention of the Judge in the court below at the time of the hearing of the matter. It is not clear to us whether or not it was brought to the attention of the Judge that the respondent might not have complied with the relevant court order at the time of filing the affidavit in question. The appellant is not consistent about the date of the order as in one breath it is said to be an order of 12 October 2011 and in another breath it is said to be an order of 12 October 2010. The order was allegedly made by the Deputy Registrar before the matter was handled by the Judge. This, coupled with the poor record keeping attendant to this file, cannot be blamed on the Judge in the court below. The Judge found the affidavits, including the one under contention, on file and proceeded to determine the substantive matter on the basis of the material placed before him.

It transpired during the address to us by counsel for the appellant that the order in question made the filing of an affidavit in opposition contingent upon payment of costs in relation to an application for leave to file affidavit out of time. She went on to submit that the respondent filed the affidavit before payment of costs and when an attempt was made to serve the same on the appellant it was rejected and returned for non-compliance with the order of 12 October 2011. According to her, it was only after the respondent had paid the costs that he was able to file his affidavit of 14 November, 2011 and two others by other persons in opposition to the originating summons. Counsel argued that the affidavit in opposition of 25 November 2010 was served and filed before the respondent complied with a court order as to costs and should not have been part of the evidence for consideration by the Judge. What we find somewhat unsettling is the presence on the file, and in a true fashion of the not so clear court record before us, of a detailed affidavit, quite similar to the one in question but sworn by the respondent on 8 August, 2007 appearing on pages 16 to 18 of some copies of the record. According to counsel for

the appellant, the court below compared the evidence of the appellant with the affidavit in opposition sworn on 25 November 2010 and the court's evaluation of the probabilities was affected by wrong reliance on the challenged affidavit. Counsel submitted that of importance is a finding by the Judge that the appellant's evidence was lacking because there was no affidavit in reply to the affidavit of 25 November 2010. There could not have been a reply to an affidavit that was filed without complying with the condition imposed by the order granting leave to file out of time, as that did not constitute evidence in a court of law and should have been disregarded by the court. According to counsel for the appellant, if the affidavit of 25 November 2010 is disregarded, the remaining evidence for the respondent would be exhibits GM1 and NN1 which she submits are similar to the appellant's exhibit ED1 showing existence of an access road to the respondent's property being outside the property in question.

In relation to Ground 1 of appeal, counsel for the respondent argued that although it was correct to say that the filing of the affidavit of 25 November 2010 was contingent upon payment of costs, the order also prescribed 14 days within which the affidavit in opposition should be filed. When the affidavit was filed, it was in compliance with the order of the court below. Counsel for the respondent also argued that the ruling of the Judge did not turn on the affidavit of 25 November 2010. That it turned on all the material from the appellant and the respondent. He cited matters such as the affidavit of Mr. Dambula, the respondent's affidavit of 14 November 2011 and survey plans of 1982 as being outside the affidavit complained of and relied upon by the Judge. He argued that disregarding the affidavit of 25 November 2010 would have no consequence on the findings by the Judge. That affidavit does not constitute the foundation of the findings and the bedrock of the ruling.

We are deeply troubled by the scantiness of the record of appeal before us. Ideally, the incompleteness of the record should have meant that setting down of the appeal was premature. Had it not been made known to this Court, by the parties that they had agreed to the reconstructed record of appeal, albeit incomplete, this appeal should have been dismissed without further consideration. This is a troubled appeal. In our view, the absence of the court order of 12 October 2011, or 12 October 2010, whichever is the correct date, makes it difficult for this Court to appreciate the exact import and purport of that order. It matters very little to us that counsel seem to agree the conditional nature of the alleged court order granting leave to file affidavit in opposition out of time. The parties disagree on whether that affidavit was wrongly filed or not. The scanty record of appeal does nothing to help the case before us. There is nothing to show how the actual proceedings went in the court below and who adopted what, as well as who objected to what. The record of appeal was prepared after a consent order settling the record, but still appears lacking in some material aspect. What we see are the affidavits, attendant exhibit and the ruling of the court below. The ruling went to great length in its analysis of the material before the Judge, rejecting some and accepting others. The ruling neither made specific reference to the affidavit of 25 November 2010 nor did it expunge the affidavit which the Judge found on file. It would appear the appellant was aware of the affidavit being on the file but it never commented on it, not even asking the court to expunge it. We find it disingenuous for counsel for the appellant to argue that the Judge did not ask the parties to address him on the affidavit of 25 November 2010 which was on the file. In all the circumstances, this Court has no basis to conclude that the affidavit of 25 November 2010 was wrongly on the court file and was wrongly resorted to by the Judge. We are of the view that in its extensive analysis of the material before it, the court below relied on a wide range of the materials before it besides the affidavit complained of in

ground one of appeal. Our reading of the ruling shows that the appellant's evidence was carefully analysed on its own as well as in the light of the material in opposition. That process cannot be characterized as erroneous, in our view. Ground 1 of the appeal is not made out. It fails and is dismissed.

Ground 2 of the appeal is that the Judge misdirected himself when he held that the respondent acquired the land in 1982 and the appellant in 2006, the date of the Land Certificate showing the date the land was registered under the Registered Land Act. The appellant makes reference to a statement in the ruling which is that "I note, in contrast, that in opposition the defendant makes reference to Survey Plans that were officially drawn and approved in 1982, long before the Seventh Day Adventist Association of Malawi acquired the property that has allegedly been trespassed on, and therefore long before this litigation was a possibility." It was argued that this was a wrong conclusion which prejudiced the appellant in that the appellant was regarded as a party that was complaining about something that was settled before it acquired the property. The respondent did not even state when he acquired his property. Notably, the appellant did not say when it acquired the land to which it claims ownership. The appellant seems to attack the reasons for the decision, but a party cannot premise an appeal merely on reasons for decision. Rather, an appeal must be premised on an attack on the decision. We have difficulty in appreciating this ground of appeal and the arguments that have been advanced in support of that ground. What we see on the record is that 1982 is the date when the area was surveyed and an original plot of the respondent Title Number BW 277 was subdivided and retitled Title Number Blantyre West 530 and Title Number Blantyre West 531 as evidenced in exhibit GM1 supported by exhibit NN1 which in the appellant's own words is similar to its exhibit ED1. We also see a Land Certificate dated 2006 which was produced to the court by the

appellant as proof of title to Title Number Blantyre West 396. It seems to us that neither party considered the dates they may have acquired title critical to the disposition of the present matter. Rather, it was what the survey plans and deed plans say. We are unable to agree with counsel for the appellant that any misdirection as to dates when the parties may have acquired respective titles to the land prejudiced the appellant on the determination of what constitutes right of way in the case. Ground 2 must fail and it is dismissed.

The next ground of appeal attacks a holding by the Judge that the appellants could not maintain an action in trespass because ownership of Title Number Blantyre West 396 was with an entity not being the appellant. According to the appellant, it was in possession of the land and possession was never in dispute. Indeed, at page 7 of the ruling the Judge expressed worry that the present action may have been taken out by a wrong party, The Registered Trustees of the Seventh Day Adventist Church holding out as proprietor of the land allegedly trespassed when the Land Certificate produced to prove proprietorship was in the name of The Seventh Day Adventist Association of Malawi. The Judge observed that on the face of it, the appellant complained of a trespass that may have occurred on land that does not belong to it, according to the Land Certificate it exhibited to prove its title. It is not clear to us whether the expression of worry resulted in a holding that the appellant brought the action as a wrong party, a holding that in our view would have entitled the court to dismiss the action without the necessity of analyzing the evidence before it. In an attempt to explain the relationship between the two entities to this Court, counsel argued that the words 'Seventh Day Adventist' are common in the names of the two entities. We did not find the argument to be helpful in this case. The mere fact that certain words are common in the names of different entities does not without more imply that those entities are the same or related. Counsel

also argued that it was never in dispute that the appellant was in possession of the land and that in any event an occupier or a tenant can commence an action in trespass. However, it is clear to us that the present action was premised on ownership and that is what had to be proved on a balance of probability.

We think that the Judge in the court below was entitled to express a worry on the evidence of ownership of Title Number Blantyre West 396 as evidenced by the Land Certificate whether or not the evidence was challenged. The action was taken out by a party claiming ownership of the property and using the Land Certificate to prove that ownership. Yet the Land Certificate has a name of an entity different from the appellant. We want to stress that it is an elementary point of law that the identity of the parties to an action is a crucial matter. There must never be any doubt as to who is suing who and for what. Where an action is taken on behalf of another exiting party, it must be demonstrated that instructions were given to commence the action. The arguments before us make no attempt to ease our anxiety on the competence of this action in so far as the appellant's name is not the one reflected on the Land Certificate. That the appellant now seeks to fall back on tenancy or mere possession when the action was premised on ownership is unhelpful to the case. The third ground of appeal must fail.

Ground 4, 5 and 6 were argued together. They are that there was no evidence to support findings that the respondent had the right of way over the land in question, that the Judge failed to analyse exhibits ED1, GM1 and NN1which, according to the appellant, clearly show that the respondent had no right of way over the land. According to the appellant, the judgment was against the weight of the evidence before it. Counsel for the appellant argued that the effect of the ruling by the court below dismissing the originating summons on trespass to land meant that the respondent had the right of way over the contested property. According to her, the

evidence before the court proved that such right of way did not exist because the evidence by both parties showed what may seem to be an access way to the respondent's property outside the contested property. She argued that this was not a case of need for right of way, but one of whether or not a right of way exists. According to her, exhibits GM1 and NN1 support the appellant's case rather than the respondent's case and are similar to exhibit ED1. She suggested that interpreting these exhibits require no special expertise.

In contrast, counsel for the respondent argued that the Judge in the court below expunged a few affidavits and documents for various reasons, including an affidavit in which counsel for the appellant swore to matters which would have placed her in the position of a witness attempting to reply to an affidavit in opposition. That the Judge meticulously examined the remaining evidence and established that there had been a survey of the defendants plot which lay behind the plot in question, from the position of the main road, in 1982 and it was subdivided. The survey plan is exhibit GM. That there was ample evidence even to the exclusion of the challenged affidavit, showing where the access road should be through the contested property. That there was evidence of consultation with Blantyre City Authorities and Department of Surveys on the matter of the access way through the contested property. That the evidence satisfied the Judge that as a matter of city or town planning, the respondent had the right of way. That the action was incompetent.

We are mindful that the Judge in the court below found the case for the appellant completely wanting, having analysed all the evidence. The Judge saw no merit in the originating summons and held that the appellant was not entitled to any of the remedies it was asking for. It was at that point that the Judge dismissed the originating summons with costs. It is correct to observe that although the Judge did

not specifically state that he found for the defendant on his actions, by refusing to grant the reliefs sought by the appellant and by dismissing the originating summons, he in a way allowed the respondent to go on with his actions. Observably, the Judge did not say in the ruling that the respondent had the right of way over the contested property over which the respondent was creating an access road. Yet the ruling meant that there was nothing to stop the respondent from creating an access road over the contested property, the case of the appellant having been found to be completely wanting and having been dismissed. There was no dispute that there was a survey of the area conducted in 1982 and survey plan exhibit GM1 produced. The respondent's pre-existing plot was subdivided during that survey. There is also no dispute that at the time of the survey, beacons were planted denoting access route. It is clear from the record, including survey documents and deed plans that the issue of access to the respondent's plots had previously been taken care of, even before the survey of 1982. According to the record before us, there was a time when the appellant had argued that the right of way through the contested property had been given by error.It is clear to us that although the parties seem to agree on what exhibits GM1 and NN1 are about, they give these exhibits differing interpretation, each party thinking that they support its case. Yet the cases are opposed. We are unable to subscribe to the argument that interpreting these exhibits GM1 and NN1 alongside exhibit ED1 requires no expert understanding. This is where we think that this case would have benefited from testimonies and cross examination of witnesses if the present matter had been proceeded with as if it was begun by writ.

Be that as it may, we think that the argument in the court below highlighted in paragraph 3.4 of the defendant's skeletal arguments in that court, not disputed, that the defendant had been given the disputed right of way in error lends itself to a

conclusion that the appellant had suggested that the right of way the defendant claimed had been given in error. We have found nothing on the record to lead to a contrary conclusion. Now, if indeed the right of way the defendant claimed was given in error, the way to correct that error would not be an action in trespass. In the present matter we have no basis to disagree with the findings of the Judge in the court below. Mr. NanariwuNanguwo, a Town Planner with the City of Blantyre, upon being consulted on the matter, swore an affidavit in opposition to the originating summons stating in paragraph 2:

> "That I can confirm that there is an existing access to plot BW 530 as shown in deed plan No 236/82 now shown to and marked NN1."

The above statement was never challenged although it was in opposition to the appellant's case in the originating summons. It was a statement made in support of the defendant's opposition to the appellant's case. Ground of appeal 4, 5 and 6 were not made out and must fail.

This appeal fails and is dismissed with costs.

Pronounced in open court this....29th..... day of.....March.....2018

SIGNED:

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HONOURABLE JUSTICE R.R. MZIKAMANDA SC, JA

SIGNED:

29th March 2018

HONOURABLE JUSTICE CHIKOPA SC, JA

Judgement Delivered by Justice of Appeal F.E. Kapanda SC (concurring in judgment)

I have had the chance to read in advance the judgment of my Lord Justice of Appeal R.R. Mzikamanda SC just delivered in this matter with which I agree. I reverentially adopt all his reasoning as mine and I also refuse the appeal by the appellants. However. I wish to say something more about lost and/ or missing court record alluded to by Justice of Appeal R.R. Mzikamanda. It was observed above that there was scantiness of the record of appeal before us. My brother added that in an ideal world, the incompleteness of the record should have meant that setting down of the appeal was premature but since the fact of the missing record was brought to the attention of this Court and the parties had agreed to the reconstruct record of appeal, albeit incomplete, this appeal hearing proceeded although it ought to have been dismissed without further consideration. As indicated above, the position we have taken herein is a unanimous one save that I thought it necessary that I add as follows in the hopes that it will assist this Court and the court below in minimizing the incidences of incomplete or lost and/ or missing court record.

Lost / Missing court record

As this Court understands it, every person litigating in our court has a right to a fair trial, which includes the right to appeal to, or review by, a higher court. This right can be illusory in situations where a court record is missing. Indeed, the reality is

a different matter when incidences of missing or incomplete records become so common. This is when one considers the issue of lost or missing transcripts and court records. Missing transcripts and court records continue to plague litigants in their attempts to exercise this right to appeal to, or review by, a higher court.

This seemingly administrative issue is not just bureaucratic. It profoundly affects the litigants and violates their constitutional rights. However, as observed earlier missing court records may be a ground for dismissing an appeal without further consideration because of a lost record.

We say this as an application for leave to appeal cannot proceed without access to court transcripts. Thus, when the records are unavailable or shown to be missing, it falls on the magistrate court or court below to reconstruct the case on the strength of the notes of either the magistrate or judge. This lengthy process can lead to further unnecessary court delays.

In addition, it would not be surprising that an audit of the cases at the various registries of the High Court could reveal that, on average, litigants are made to wait for years from the date of lodging their leave to appeal application until they have received their court records. This is unhealthy as it almost invariably leads to the hearing of appeals being delayed by years because either tape recordings of the proceedings cannot be traced or indeed the records the Supreme Court needed to consider an appeal are missing. It is the view of this Court that the "excessive delay" in accessing justice could amount to a miscarriage of justice. We must add that administrative errors such as incorrectly transcribed records also play a role in creating unreasonable delays. These mistakes, we note, lead to court delays.

In regard to the missing court record, in the case of ***Andrew Morris Chalera and others v R***[1] it was instructively stated that a court of appeal will be enjoined to weigh the degree, extent and relevance of the part of the court record missing and cannot be reconstructed. Where the missing court record is not substantial, immaterial and inconsequential as would not result in miscarriage of justice, the appeal shall proceeded with and finally be determined. However, we need to place it on record that in our judgment the inability to appeal because of a missing record could be a breach of the constitutional right. In criminal cases this could result in a sentence and conviction being set aside on the grounds of a technical irregularity. We say this as sometimes it is also noted that are hundreds of similar cases of lost or destroyed records in the magistrates' and High Court in civil cases that are becoming the subject of appeals in this Court. It happens more often that records are not properly transcribed or go missing for a number of reasons, among them that court records were missing, had been misfiled or there had been a lack of communication among those involved in or dealing with the appeal.

Therefore, it will be amiss of this Court if it does not give a direction as to what us as an institution need to put in place so as to minimize this problem of missing record of proceedings. This is what we propose:

It is trite that court records are also integral to the judicial process. This is especially so where an aggrieved party seeks to review a decision of a court of first instance. The right of a litigant to appeal against a decision of a court below or to seek a review is an important right and one which must be jealously guarded. Central to a proper determination of an appeal or any review is the ability of the appellate court or reviewing court to consider the record of proceedings.

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[1] MSCA Civil Appeal No. 5 of 2017

There has been a plethora of cases in this Court as well as the court below over the past years arising from this endemic problem, which deal with the issue of missing/incomplete records. The harshest repercussion is the dismissal of an appeal on the ground of missing/incomplete records. This is how we think we can deal with the situation of lost/missing records:-

It is improper for a Court to dismiss a case on appeal or review on the ground that a court cannot do so without a proper record of the proceedings in the face of evidence that no record existed. In our view, this is surely correct in law and also serves to protect the very limited right of appeal or review that exists under the various rules of procedure under the guise of the constitutional right to fair trial.

Where the record of the proceedings under appeal or review has been lost, or if the recording of the proceeding is of poor quality, a party seeking review or appeal has an obligation to initiate steps towards reconstruction of the record and approach the Judge President for directions on the further conduct of the review or appeal. The Chief Justice or Judge President of this Court should then cause a Practice Direction to be issued directing courts to develop the habit of keeping proper notes or a recording of proceedings. We are alive to the fact that this approach is good and could work well if the parties to a case were also called upon to develop the habit of themselves keeping proper notes or a recording of proceedings. We observe that this must indeed be correct procedure although it can hardly be the responsibility of parties to a case to be responsible for the record of proceedings. In the scheme of things this obligation lies solely with the Court of first instance. But in trying to minimise the risk of inadequate or lost records, we go on to propose certain measures that can be utilised by both the court of first instance and the parties in the creation of the audio recording:

At the commencement of every hearing the parties and the judicial officer seized with the matter should inspect the recording machine or device to satisfy themselves that it functions properly. The judicial officer and the parties should sign a certificate to confirm that they did this;

Each morning, mid-day and evening of the trial or hearing of a matter, the judicial officer must also inspect the machine to satisfy himself or herself that it is still functioning properly;

At the end of the of the trial or hearing of a matter or proceedings, the judicial officer should once again check that the recording machine was still functioning properly when the hearing came to an end, and sign a certificate to the effect that during the proceedings he or she inspected the functioning of the recording machine at the given intervals and on each occasion found the machine to be functioning properly or not, as the case may be. If it had not functioned properly at any stage this must be stated, as must the steps taken to have the situation rectified; and

If there are any tapes or documents to be handed over to anyone, such as employees of the court at the end of the proceedings, or should the trial or hearing of a matter or proceedings be postponed, the judicial officer must certify to whom and when they were handed over and the recipient must sign a certificate to confirm this. We wish to acknowledge that others would argue that this is not realistically the way out as it would be both laborious and too administrative a process in a technological era. But it is the better of the two evils or indeed it is better than all the time allow or dismiss an appeal on a technicality. It does not serve the interests of justice. In a jurisdiction like ours it must be realized that courts are not usually better resourced and it is not an absolute wonder therefore

that it cannot therefore simply be fitted-out with proper audio recording equipment in its hearing rooms. This of course is not to encourage the infringement of rights of litigants under our laws. We take recognizance of the fact that such litigants including accused or convicted persons are entitled to assert their rights and that the State is obliged to provide the means to ensure that constitutional law rights are protected and vindicated.

In sum, I respectfully adopt all the reasons for the dismissal of the appeal as mine and I also refuse the appeal by the appellants. Nonetheless, it was necessary that I say something more about lost and/ or missing court record and make proposals on how these incidences could be lessened. I confirm the judgment of the Court below. Further, I abide by the order for costs contained in the judgment herein of my Lord Justice of Appeal R.R. Mzikamanda SC.

Signed:

29th March 2018

HONOURABLE JUSTICE F.E. KAPANDA SC, JA