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IN THE SUPREME COURT OF APPEAL SITTING AT LILONGWE

MSCA CIVIL APPEAL NO. 23 OF 2014

(Being High Court (Lilongwe District Registry-Commercial Division) Miscellaneous  
Commercial Case No. 1 of 2013)

BETWEEN

COMPETITION AND FAIR TRADING COMMISSION .....APPELLANT

AND

AIRTEL MALAWI LIMITED .....1<sup>ST</sup> RESPONDENT

BHARTI AIRTEL LIMITED .....2<sup>ND</sup> RESPONDENT

CORAM: Chief Justice A. K. C. Nyirenda, SC  
Justice E. B. Twea, SC, JA  
Justice Dr. J. M. Ansah, SC, JA  
Justice R. R. Mzikamanda, SC, JA  
Justice A. C. Chipeta, SC, JA  
Justice L. P. Chikopa, SC, JA  
Justice F. E. Kapanda, SC, JA  
Justice D. F. Mwaungulu, SC, JA  
Justice Anthony Kamanga, SC, JA  
Mvalo of Counsel for the Appellant  
Counsel for the Respondent.... Absent  
Msowoya and Wahabi Judicial Research Officers  
Chimtande and Masiyano Court Clerks  
Pindani Court Reporter

## ORDER

**Kamanga, JA** (Nyirenda, CJ; Twea, JA; Dr Ansah, JA; Mzikamanda, JA; Chipeta, JA; Chikopa, JA; Kapanda, JA; and Mwaungulu, JA *concurring*)

This is an appeal by the Competition and Fair Trading Commission, the appellant, against the determination made on 8<sup>th</sup> December, 2013 by the High Court Lilongwe District Registry - Commercial Division (the “court below”) in Miscellaneous Commercial Case No.1 of 2013.

The record of appeal indicates that Messrs Racane Associates, the legal firm representing the respondents in this appeal, was duly served with the notice of hearing of this appeal on 17<sup>th</sup> September, 2018. At the hearing of the appeal on 26<sup>th</sup> November, 2018 no legal practitioner from Messrs Racane Associates appeared in court, on behalf of the respondents; and this Court did not receive any communication whatsoever from that firm. In accordance with Order III rule 22 of the Supreme Court of Appeal Rules, this Court proceeded to hear the appeal *ex parte*.

The record of appeal (pp. 7-9) indicates that on 13<sup>th</sup> January, 2013, the appellant filed an application at the High Court Lilongwe District Registry - General Division in Miscellaneous Civil Cause No. 13 of 2013 to lodge an order with the court against Bharti Airtel Limited, the 2<sup>nd</sup> respondent, pursuant to section 40 of the Competition and Fair Trading Act. The order was to compel the 2<sup>nd</sup> respondent to notify the appellant of the takeover of Zain Malawi by the 2<sup>nd</sup> respondent. The court, on 23<sup>rd</sup> January, 2013, issued the order as its judgment. On 30<sup>th</sup> January, 2013, the 2<sup>nd</sup> respondent obtained an order of stay of the judgment of 23<sup>rd</sup> January, 2013, pending the hearing and determination of an application to set aside the judgment and an application for leave to apply for judicial review within seven days.

The record of appeal (pp. 24-25) further indicates that on 5<sup>th</sup> February, 2013, while the proceedings in the High Court Lilongwe District Registry - General Division were still pending, the respondents filed an application in the High Court Lilongwe District Registry - Commercial Division in Miscellaneous Civil Cause No. 1 of 2013 for leave to apply for judicial review and an extension of the stay granted by the High Court Lilongwe District Registry-General Division on 30<sup>th</sup> January, 2013. Both the application for leave to apply for judicial review and the application for extension of the stay granted on 30<sup>th</sup> January, 2013 were granted by the High Court Lilongwe District Registry - Commercial Division on 6<sup>th</sup> February, 2013. The record of appeal (pp. 26-40) indicates that the respondents, accordingly, commenced proceedings for judicial review, and the court below made its determination on 8<sup>th</sup> December, 2013.

At the commencement of the hearing of this appeal on 26<sup>th</sup> November, 2018, we found it appropriate to raise with the bar two important separate but related preliminary issues in relation to this appeal. The first issue relates to the legal status of the order of the appellant requiring the 2<sup>nd</sup> respondent to notify the appellant of the takeover of Zain Malawi by the 2<sup>nd</sup> Respondent after it was lodged with and issued by the court, pursuant to section 40 of the Competition and Fair Trading Act. The second issue relates to the procedure for challenging orders issued by the appellant that have been lodged with and issued by the court pursuant to section 40 of the Act.

Section 40 of the Competition and Fair Trading Act provides as follows-

*“(1) The Commission or any person in whose favour or for whose benefit an order has been made may lodge a copy of the order, certified by the Commission or a person authorized by the Commission, with the Registrar of the High Court and the Registrar shall forthwith record the order as a judgment of the High Court.*

*(2) An order that has been recorded under subsection (1) shall, for the purposes of enforcement, have the effect of a civil judgment of the High Court.”.*

The procedure for challenging decisions or orders of Competition and Fair Trading Commission is set out in section 48 of the Act which provides as follows-

*“(1) Any person who is aggrieved by a finding of the Commission may, within fifteen days after the date of that finding appeal to a Judge in Chambers.*

*(2) The Judge in Chambers may –*  
*(a) confirm, modify or reverse the findings of the Commission or any part thereof; or*  
*(b) direct the Commission to reconsider, either generally or in respect of specified matters, the whole or any specified part of the matter to which the appeal relates;*

*(3) in giving any direction under this section, the Judge shall-*  
*(a) advise the Commission of his reasons for doing so; and*  
*(b) give to the Commission such directions as he thinks fit concerning the reconsideration of the matter by the Commission.*

*(4) In reconsideration of the matter, the Commission shall have regard to the Judge’s reasons for giving a direction.”.*

In view of section of 48 of the Act, it was, therefore, inappropriate for the respondents to commence judicial review proceedings to address any grievance they may have had in relation the order compelling the 2<sup>nd</sup> respondent to notify the appellant of the takeover of Zain Malawi by the 2<sup>nd</sup> respondent which the appellant lodged with the High Court Lilongwe District Registry - General Division in Miscellaneous Civil Cause No. 13 of 2013 on 13<sup>th</sup> January, 2013, pursuant to section 40 of the Competition and Fair Trading Act. The respondents should instead have proceeded by way of appeal to a Judge in Chambers in accordance with section 48 of the Act.

It was equally inappropriate for the High Court Lilongwe District Registry - Commercial Division to grant the respondents leave to apply for judicial review and an extension of the stay granted by the High Court Lilongwe District Registry - General Division on 30<sup>th</sup> January, 2013, and indeed, to entertain the application for judicial review. To the extent that it may be applicable to courts and tribunals, judicial review is a power given to the High Court to be able to review decisions of courts or tribunals inferior to it. The

High Court has no power to judicially review its own decisions or decisions of courts of concurrent jurisdiction; and a Judge of the High Court, therefore, cannot judicially review a decision of another Judge of the High Court.

In this matter, there were subsisting proceedings in the High Court Lilongwe District Registry - General Division at the time that the proceedings for judicial review were commenced in the High Court Lilongwe District Registry - Commercial Division. Furthermore, the order compelling the 2<sup>nd</sup> respondent to notify the appellant of the takeover of Zain Malawi by the 2<sup>nd</sup> respondent which the appellant lodged in the High Court Lilongwe District Registry - General Division on 13<sup>th</sup> January, 2013, in accordance with section 40 (2) of the Competition and Fair Trading Act, had “the effect of a civil judgment of the High Court”, and as such was not amenable to judicial review.

Order III rule 2 (6) of the Supreme Court of Appeal Rules enables this Court to decide and determine appeals on grounds other than those set forth by an appellant, but so however that this Court may not do so unless a respondent has had sufficient opportunity of contesting the case on those grounds. As already indicated, Messrs Racane Associates, the legal firm representing the respondents in this appeal, was duly served with the notice of hearing of this appeal, but at the hearing of the appeal no legal practitioner from Messrs Racane Associates appeared in Court, on behalf of the respondents; and this Court did not receive any communication whatsoever from that firm. As such this Court, much as it might have desired to do so, could not extend to the respondents the opportunity to contest this case outside the grounds of appeal on which this Court intended to decide the appeal.

This Court, accordingly, proceeds to decide and determine this appeal on grounds other than those set forth by the appellant, as follows: First, it was inappropriate for the respondents to commence judicial review proceedings to address any grievance they may have had in relation the order compelling the 2<sup>nd</sup> respondent to notify the appellant of the takeover of Zain Malawi by the 2<sup>nd</sup> respondent which the appellant lodged with the High Court Lilongwe District Registry - General Division on 13<sup>th</sup> January, 2013, pursuant to section 40 of the Competition and Fair Trading Act; the respondents should have proceeded by way of appeal to a Judge in Chambers in accordance with section 48 of the Act. Second, it was inappropriate for the High Court Lilongwe District Registry - Commercial Division to grant the respondents leave to apply for judicial review and an extension of the stay granted by the High Court Lilongwe District Registry - General Division on 30<sup>th</sup> January, 2013; and further to entertain the application for judicial review when there were subsisting proceedings in High Court Lilongwe District Registry - General Division at the time that the proceedings for judicial review were commenced in the High Court Lilongwe District Registry - Commercial Division. Furthermore, the order compelling the 2<sup>nd</sup> respondent to notify the appellant of the takeover of Zain Malawi by the 2<sup>nd</sup> respondent which the appellant lodged High Court Lilongwe District Registry - General Division on 13<sup>th</sup> January, 2013, in accordance with section 40 (2) of the Competition and Fair Trading Act, had “the effect of a civil judgment of the High Court”, and as such was it not amenable to judicial review.

We, accordingly, allow the appeal and we set aside the determination of the court below dated 8<sup>th</sup> December, 2018. We award the appellant costs here and below.

## Mwaungulu, JA

I only comment on a point of practice which, in addition to that the respondent was served with the notice of hearing and never appeared at the appeal hearing, justifies our proceeding to hear this appeal. There was no obligation to serve further documents or processes on the respondent. The respondent, after thirty days of being served with the notice of appeal, never served the address of service.

Order 3, rule 6(1) of the Supreme Court of Appeal Rules is usually obeyed in breach without any consideration of the consequences. Order 3, rule 6 (1) of the Supreme Court of Appeal Rules provides:

Every person who by virtue of service on him of the notice of appeal becomes a respondent to any appeal or intended appeal shall within thirty days after service on him of the notice of appeal file in duplicate with the Registrar of the High Court below notice of a full and sufficient address for service in such number of copies as the said Registrar shall require. The Registrar of the Court below shall forthwith send a copy of the notice of address to the Registrar and shall cause a copy thereof to be served on the appellant.

Order 3, rule 6 (2) of the Supreme Court of Appeal Rules provides:

Such notice may be signed by the respondent or his legal representative.

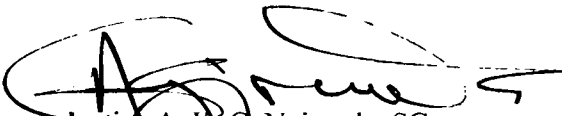
Order 3, rule 6(a) of the Supreme Court of Appeals Rules impose a sanction:


If any respondent fails or omits to file such notice of address for service it shall not be necessary to serve him any other proceedings.

Order 3, rule 11 of the Supreme Court of Appeal Rules obligates the Registrar only to deal with those who have served addresses of service:

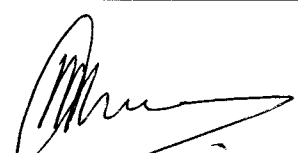
The Registrar of the Court shall cause to be served of all parties mentioned in the notice of appeal who have filed an address for service a notice that the record has been filed and shall in due course enter the appeal in the cause list and give notice to the parties of the date of hearing.

Pronounced in Open Court at Lilongwe this 26<sup>th</sup> day of Nov, 2018.

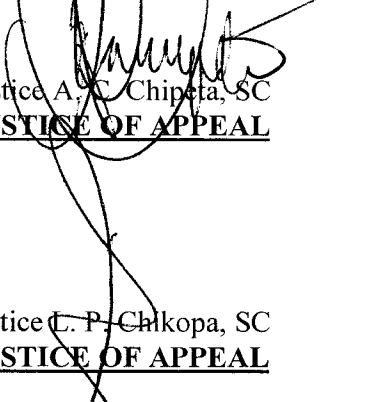
  
Justice A. K. G. Nyirenda, SC  
**CHIEF JUSTICE**


  
Justice E. B. Twea, SC  
**JUSTICE OF APPEAL**

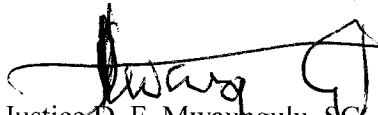
  
Justice Dr. J. M. Ansah, SC  
**JUSTICE OF APPEAL**

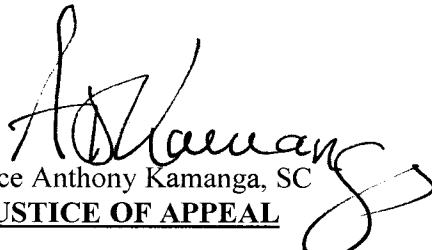
  
Justice R. R. Mzikamanda, SC  
**JUSTICE OF APPEAL**

  
Justice A. C. Chipeta, SC  
**JUSTICE OF APPEAL**

  
Justice L. P. Chikopa, SC  
**JUSTICE OF APPEAL**

  
Justice F. E. Kapanda, SC  
**JUSTICE OF APPEAL**

  
Justice D. F. Mwaungulu, SC  
**JUSTICE OF APPEAL**

  
Justice Anthony Kamanga, SC  
**JUSTICE OF APPEAL**

