

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

CAZ/08/06/2016

BETWEEN:

MEAMUI GEORGINA KONGWA

AND

KEKELWA SAMUEL KONGWA

APPELLANT

RESPONDENT



Before the Hon. Mrs. Justice J.Z. Mulongoti
in Chambers on the 4th day of April, 2017.

For the Appellant:

Mrs. L. Mushota of Mushota & Associates

For the Respondent:

Mr. S. Sikota of Messrs Central Chambers

R U L I N G

Legislation referred to:

1. *Court of Appeal Act No. 7 of 2016*
2. *Court of Appeal Rules, Statutory Instrument No. 65 of 2016*

This is the appellant's application for leave to file additional grounds of objection pursuant to Order 55/6A(I) and 55/7 of the Rules of the Supreme Court (white book) as read with section 8 (2)(a) of the Court of Appeal Act. The application is supported by an affidavit filed on 8th November, 2016 sworn by

the appellant Meamui Georgina Kongwa. She deposed that on 8th September, 2016, she filed a memorandum of appeal with three grounds and expressly stated that she would not limit herself to those grounds. The grounds she now seeks to add are contained in Paragraph 5 of her affidavit couched as follows:

The court below misdirected itself in ignoring the evidence of the appellant that:

(i) The Magistrate should have recused herself as she was married to a relative of the respondent which information was well known to the Magistrate. The effect of her non-recusal was total bias in her judgment.

(ii) The Magistrate misdirected herself in law and in fact when she completely ignored that the Respondent owed the appellant monies as follows:

- (1) K5,336,309.74 (page 4 of Respondent's submissions)
- (2) SAR30,000 on a repossessed house. On this point, the house was repossessed by the bank as clearly stated in line 10 and the judgment says that the appellant should repay the money or forfeit the house which house is in the Republic of South Africa, beyond her jurisdiction and was already repossessed from the appellant anyway.
- (3) K10,000,000.00 to Loveness Malambo (page 6 paragraph (ii) Respondent's Submission).

- (4) K9,750,000.00 (page 7 Respondent's Submission)
- (iii) The Court below misdirected herself in law and in fact when she manufactured evidence that (i) the parties lived a luxurious life, and (ii) that both the appellant and the respondent were bringing in the family something from their earnings, when there was no evidence to support such findings.

She averred that it was necessary for the court to grant the application to file the additional grounds in order to deal with all matters that were presented in the court below. Further, that no prejudice will be occasioned to the respondent if the application is granted.

The respondent filed an affidavit opposing the application on 28th February, 2017 sworn by himself. I perused the affidavit and suffice to state that he delved into the merits of the proposed grounds which I must state is inappropriate at this stage given that this is an interlocutory application that is not intended to address the merits of the appeal. I note also that, the gist of the affidavit is that the application is a ploy to delay quick disposition of the appeal as the proposed grounds have no prospects of success. That no prejudice will be occasioned on the appellant if the application is dismissed. Conversely, that the interest of justice will be served.

At the hearing, the appellant was represented by Mrs. Mushota who relied on the affidavit in support of the application which she augmented with oral submissions. In brief, she submitted that the respondent's argument that the proposed grounds have no prospects of success has been presented as though arguing the appeal itself which cannot be argued at this stage. If there are no prospects of success, it is for the Court to determine and make such a finding. The appellant has the right of appeal and does not appreciate why the application to file additional grounds is objected.

Regarding the submission that the application is intended to delay the appeal, she argued that the application was filed in November, 2016 and the delay in it being heard has not been occasioned by the appellant. She added that appeals do not take a long time to be heard such that the respondent will not be prejudiced.

Upon hearing counsel for the appellant, I adjourned the application for a ruling to 3rd April, 2017. Mr. Sikota, SC who is representing the respondent walked in late right at the end as the record reveals. He was advised of the date of the ruling and that the Court would take into account the affidavit in opposition, on record, when making its ruling.

I have considered the affidavit evidence and the submissions by counsel. I note that the application is made pursuant to section 8(2)(a) of the Court of Appeal Act which allows this Court to apply English procedure where there is a lacuna. The Rules of the Supreme Court of England pursuant to which the application is made are general provisions allowing courts to make any such orders. Let me state, regarding the application, that I am of the considered view there is no lacuna as Order X rule 9 (2) and (3) of the Court of Appeal Rules provides that:

(2) "A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the judgment appealed against, and shall specify the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively."

And sub rule 3 states that:

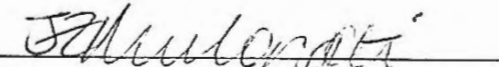
"The appellant shall not thereafter without the leave of the Court put forward any grounds or objection other than those set out in the memorandum of appeal"

It is clear that the Rules of this Court allow the appellant to seek leave to file additional grounds of appeal. There was therefore no need to resort to the White Book. I have carefully

perused the application and the proposed grounds. As earlier alluded to in opposing the application, the respondent has in a way attempted to address the grounds raised in arguing that the said grounds have no prospects of success. I agree with Mrs. Mushota that the merits or demerits of the grounds are a non-issue at this stage. The same will be considered at the hearing of the appeal. The respondent can raise these same arguments at that stage. The application for leave to file the proposed additional grounds of appeal is granted in accordance with Order X rule 9 (3) of the Court of Appeal Rules. The additional grounds to be filed within seven days from today.

The costs of this application shall be in the cause.

Delivered at Lusaka this 4th day of April, 2017.


J.Z. Mulongoti
Court of Appeal Judge