

17
IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA

(Civil Jurisdiction)

APPEAL No. 09/2021

BETWEEN:

16 DEC 2021

JOSPHAEL MBIZULE

1ST APPELLANT

ASPHALT ROADS (Z) LIMITED

2ND APPELLANT

AND

MILAN GORDIC

RESPONDENT

CORAM: CHASHI, NGULUBE AND SIAVWAPA, JJA.

On 19th October, 2021 and 16th December, 2021.

For the Appellants : *P. Mulenga, Messrs Mulenga Advocates*

For the Respondent : *Major J. H Mwaaba (RTD), Messrs Mwansa, Phiri, Shilimi and Theu Legal Practitioners*

J U D G M E N T

NGULUBE, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Royal Trading Limited vs Zambia Revenue Authority, SCZ Judgment Number 38 of 1999*
2. *Access Bank (Zambia) Limited vs Group Five Z/CON Business Park Joint Venture SCZ/8/52/2014*
3. *D.C Nkhuwa vs Lusaka Tyres Services Limited (1977) Z.R.43*

4. *Kalvic Bakery Limited vs Attorney-General and Dar Farms and Transport Limited, CAZ Appeal Number 78A of 2017*
5. *Jonathan Lwimba Mwila vs World Vision Zambia Limited, SCZ Appeal Number 193 of 2015*
6. *Zambia Revenue Authority vs Jayesh Shah, SCZ Judgment Number 10/2001*
7. *BP Zambia Plc Vs Zambia Competition Commission, Total Aviation and Export Limited, Total Zambia Limited, SCZ Judgment Number 21 of 2011*
8. *Owners of the Motor vessel Lillian "S" vs Caltex Oil (Kenya) Limited (1989) KLR 19*
9. *JCN Holdings limited vs Development Bank of Zambia (2013) 3 Z.R. 299*

Legislation referred to:

1. *The Lands Act Chapter 184 of the Laws of Zambia*
2. *The Lands Tribunal Act No. 39 of 2010*

INTRODUCTION

1. This is an appeal against a Judgment of the Lands Tribunal delivered on 9th October, 2020, which granted the respondent leave to file a notice of complaint out of time, within seven days of that Ruling.

BACKGROUND

2. The facts constituting the background to this appeal are not in dispute and are as follows-

On or about August, 2009, the Commissioner of Lands re-entered Stand Number 140, Chilanga and issued a certificate of re-entry. The property belonged to the respondent at the time and he made representations to the Commissioner of Lands seeking a reversal of the decision to re-enter.

3. The property was subsequently allocated to the first appellant who was issued with a certificate of title. It is worth mentioning that the respondent did not appeal to the Lands Tribunal to challenge the re-entry by the Commissioner of Lands within the prescribed thirty-day period.
4. The first appellant later sold the property to the second appellant who obtained a certificate of title. On 31st May, 2011, the respondent commenced an action in the High Court at Lusaka challenging the re-entry that was done in 2009. The matter was scheduled for hearing before Judge Wanjelani but a preliminary issue in *limine* was raised by Counsel for the first and second appellants who were defendants in the lower court. They sought the determination of the question whether the High Court had jurisdiction to hear and determine the matter.

5. Judge Wanjelani heard the preliminary issue and dismissed the matter, stating that she had no jurisdiction to hear it. The respondent appealed to this court but failed to file the record of appeal and heads of argument and the matter was accordingly dismissed for want of prosecution. On 19th March, 2019, the respondent made an application before the Lands Tribunal seeking leave to file a notice of complaint out of time pursuant to **section 15(1) of the Lands Act and 8 of the Lands Tribunal Act¹**, as read with **Rule 19 of the Lands Tribunal Rules²**.
6. The respondent was granted leave to file a complaint out of time within seven days from the date of the order, but he filed the notice outside the seven day prescribed period. The appellants challenged the Lands Tribunal's decision and raised a preliminary issue regarding the manner in which the notice of complaint was filed. The Lands Tribunal then dismissed the complaint that was filed by the respondent because it was filed outside the seven day prescribed period.
7. The respondent lodged an appeal in this court against the decision of the Lands Tribunal which was subsequently abandoned on 24th June, 2020. He later filed an application to the Lands Tribunal for further leave to extend time within which to file notice of

complaint out of time, which was made on 3rd July, 2020. The appellants challenged the respondent's application for further leave to extend time as they were of the view that the issue had already been determined and that the procedure utilized by the respondent was irregular. The Lands Tribunal dismissed the preliminary issue that was raised by the appellants and granted the respondent a further extension of seven days within which to file a notice of complaint out of time.

THE APPEAL

8. The appellants were dissatisfied with the decision of the Lands Tribunal and lodged this appeal, advancing the following grounds of appeal.

1. *That the Lands Tribunal erred in law and fact when it proceeded to hear and allow the respondent's application for further leave to file Notice of Complaint out of time in the absence of any legal basis or justification.*
2. *That the Lands Tribunal fell into legal error when it took the view that the application for further leave to file notice of complaint out of time was an entirely new or fresh application.*
3. *That the Lands Tribunal erred in both law and fact when it revisited or reopened the question of leave to file Notice of Complaint out of time when the question had already*

been determined and dealt with by court order dated 15th April, 2019 and the Ruling of 31st January, 2020 respectively which orders have not been set aside or vacated.

- 4. That the Learned members of the Lands Tribunal erred in law and fact when they purported to review the order of 15th April, 2019 and the Ruling of 31st January, 2020 on wrong legal principles or/and on a flawed basis.*
- 5. That the learned members of the Lands Tribunal fell into grave error when they exercised their discretion in favour of the respondent when they held that he was still at liberty to file his notice of complaint out of time.*
- 6. That the learned members of the Lands Tribunal fell into grave error when they granted leave to the respondent to file his complaint out of time as this had the effect of amending the law which provides for a period of thirty days to file an appeal or complaint against the decision of the Commissioner of Lands.*

THE APPELLANT'S CONTENTIONS

9. The appellants' counsel argued ground five first. In doing so, it was contended that in exercising its power or discretion in the manner it did, by granting the respondent a further period in which to file a notice of complaint, the power was improperly exercised on the facts and in the circumstances of this case as there were no sufficient reasons warranting the exercise of such discretion.

10. The court was referred to **section 13(3) of the Lands Act**, which provides that-

“A lessee aggrieved with the decision of the President to cause a certificate of re-entry to be entered in the register may within thirty days appeal to the Lands Tribunal for an order that the register be rectified.”

11. It was argued that the respondent's property was re-entered by the Commissioner of Lands on or about 19th August, 2009 when the certificate of re-entry was issued. Counsel argued that the respondent's latest application for extension of time within which to file notice of complaint out of time was made before the Lands Tribunal on 3rd July, 2020, after a period of eleven years from the date the re-entry was effected. The court was referred to **Rule 19 of the Lands Tribunal Rules** which gives power to the Lands Tribunal to extend time for doing any act or taking any steps in connection with any proceedings.
12. Counsel argued that section 13(3) of the Lands Act provides for a thirty day period within which a party can appeal against a notice of re-entry. It was contended that Rule 19 of the Lands Tribunal Rules cannot be used to override the provisions of section 13 (3) of the Lands Act. The Court was referred to the case of **Royal**

Trading Limited vs Zambia Revenue Authority¹, where the Supreme Court held that:

“As we see it, the provisions of section 164(4) could operate as a Limitation Act, 1939 to defeat an action. Indeed the section does not give the court any discretion to extend time as provided for in Order 53/4 of the White Book.”

13. It was submitted that **section 13(3) of the Lands Act** operates as a statute of limitation and does not give courts discretion to extend the thirty day time limit and that it was a misdirection on the part of the Lands Tribunal when it extended time within which the respondent could file his notice of complaint out of time.
14. It was counsel's submission that allowing an aggrieved party who comes after eleven years to extend the statutory limit of thirty days will not inspire confidence in land administration. According to counsel, there were no compelling reasons to exercise such power or discretion in favour of the respondent.
15. It was contended that the reasons that the respondent advanced before the Lands Tribunal when he sought an extension of time within which to file a notice of complaint out of time were insufficient and not convincing. According to counsel, the respondent's lapses in his attempts to lodge a complaint out of

time go to the jurisdiction of the Lands Tribunal and cause substantial injustice and prejudice to the appellants. The case of ***Access Bank (Zambia) Limited vs Group Five Z/CON²*** was referred to, where it was stated that laxity in application of rules may seem to aid one side, but unfairly harm the innocent party who strives to abide by the rules.

16. The case of ***D.E. Nkhuwa vs Lusaka Tyres Services Limited³*** was also referred to, where the court stated that there are standards which must be met before a court can exercise its discretion to extend time within which a particular step needs to be done or undertaken.
17. The court's attention was drawn to the case of ***Kalvic Bakery Limited vs Attorney-General and Dar Farms and Transport Limited⁴***, where the court stated that-

“In the view we have taken, we are in agreement with the court below that it had no jurisdiction to determine an action before it and in that respect could not have adjudicated on the merits of the case. We agree with Mr Sianondo that the lack of jurisdiction by the court below goes to the root of the matter. It is in that respect that the appellant's plea to have the matter sent back to the High Court for retrial is misplaced.”

18. The case of **Jonathan Lwimba Mwila vs World Vision Zambia Limited**⁵ was referred to, where the Supreme Court held that-

“The granting of leave to file delayed complaints requires that discretion is exercised judiciously. There has to be sufficient reasons for delay to seek redress in court after the incident complained of that the case was meritorious is no valid reason to counter the delay on the contrary that should have prompted the complainant to get to court early within the prescribed time.”

19. It was argued that the learned honourable members of the Lands Tribunal did not exercise their discretion judiciously as there was no tangible material or good cause that warranted the grant of an extension of time.
20. In arguing grounds one and four, it was submitted that the learned members of the Lands Tribunal, in granting a further period of seven days or extending the time within which to file the notice of complaint out of time, in effect did review their decisions of 15th April, 2019, and 31st January, 2020 on wrong and flawed principles.
21. Counsel argued that the respondent’s application to extend time within which to file a complaint out of time which the Lands Tribunal granted did not disclose new or fresh circumstances

which changed between April, 2019 and 3rd July, 2020. It was contended that this was a misdirection on the part of the Lands Tribunal when it stated that-

“We find that if the complainant is not given a chance to file his complaint, he will have no other forum under which to have the substantive matter heard and determined as it is only the Lands Tribunal that can hear appeals against re-entry. . .”

22. It was contended that on the facts and the circumstances of this case, there was no legal basis or jurisdiction for the Lands Tribunal to interfere with its order of 15th April, 2019 and its Ruling of 31st January, 2020 as there was no error, accidental slip or omission in the said order and ruling.
23. Turning to grounds two, three and six it was submitted that the application for further leave to extend time within which to file the notice of complaint out of time which was made on 3rd July, 2020 was the same as the application which was before the Tribunal in March, 2019 and was therefore not a new application. Counsel contended that the members of the Tribunal were *functus officio*. According to Counsel, the respondent's applications to file notice of complaint out of time dated March, 2019 and 3rd July, 2020 both sought an extension of time within which the notice of

complaint could be filed. It was argued that granting leave to the respondent to file his complaint out of time had the effect of amending the law which provides for a thirty day period.

24. It was contended that nothing had changed which warranted the Ruling of 9th October, 2020, in which the Tribunal opined that it had jurisdiction to entertain the later application on the basis that it was an entirely new or fresh application. It was argued that the Tribunal was *functus officio* and was precluded from hearing the same application twice. The court was urged to allow the appeal for the aforestated reasons.

RESPONDENT'S CONTENTIONS

25. The respondent filed heads of argument on 2nd February, 2021. In responding to ground five, it was submitted that the members of the Lands Tribunal were on firm ground when they exercised their discretion in favour of the respondent and held that he was at liberty to file his notice of complaint out of time. Our attention was drawn to **section 4 of the Limitation Act of 1939** which provides that-

"No person shall make entry, or bring an action or suit to recover any land, or rent but within twelve years next after, the time at which the right to make such entry, or

bring such action or suit, land or shall have first accrued to any person whom he claims, then within twelve years next after entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same.”

26. Counsel referred to **section 13(3) of the Lands Act** which provides that-

“A lessee aggrieved with the decision of the President to cause a certificate of re-entry to be entered in the register may within thirty (30) days appeal to the Lands Tribunal for an order that the register be rectified.”

27. It was argued that the Lands Act has not specifically provided that any reasons should be advanced when the complaint is lodged after the thirty day period stated nor has it provided what should happen where there is failure to file within thirty days. According to Counsel, where one misses the thirty day period, the discretion expires after the twelve- year statutory limitation period has expired as per the Limitation Act, 1939.

Counsel referred to the case of ***Zambia Revenue Authority vs Jayesh Shah⁶***, in which the Supreme Court held that-

“Cases should be decided on their substance and merit. Where there has been only a very technical omission or oversight not affecting the validity of the process.”

28. It was argued that the twelve year limitation period had not expired and that there is need to allow the case to be resolved on the merits. Counsel contended that the Tribunal was on firm ground when it proceeded to hear and allow the respondent's application for further leave.
29. Responding to grounds ones, two, three and four it was argued that **section 15(1) of the Lands Act** provides that-

"Any person aggrieved with a direction or decision of a person in authority may apply to the Lands Tribunal for determination."

The case of ***Kalvic Bakery vs Dar Farms and Transport Limited (Supra)*** was referred to where the court stated that-

". . . A party aggrieved by the certificate or re-entry has no option but to appeal to the Lands Tribunal in accordance with Section 13(3) of the Lands Act which has power to give effect to any challenge that might succeed."

30. Counsel contended that the right to bring the claim remains active until the twelve year period has lapsed, and that as such, the Lands Tribunal; was on firm ground when it revisited the question of leave to file notice of complaint out of time. It was argued that the claim to the property in question remain a constitutional right

and that the court cannot close the doors of justice when the statutory time period is still active.

31. According to Counsel, the learned members of the Lands Tribunal reviewed the Order of 15th April, 2019 and exercised their discretion and the right principles of law when they held that was still at liberty to file once more, his notice of complaint out of time.
32. Turning to ground six, the respondent submitted that **section 13(3) of the Lands Act** is couched in a discretionary manner and allowed the honourable members of the Lands Tribunal to exercise its inherent jurisdiction and grant the respondent leave to file the complaint after the thirty-day period had elapsed. It was argued that the respondent is still within the twelve year period and can bring his grievance before the courts of law and the Lands Tribunal, is the only forum with original jurisdiction.
33. Counsel contended that the High Court had authority to transfer the matter to the Lands Tribunal instead of dismissing it and causing the respondent to commence the matter de novo. According to counsel, the respondent has a constitutional right to be given a fair hearing within a reasonable time, before the twelve

year period expires. We were urged to dismiss the appeal with costs to the respondent.

COUNSELS SUBMISSIONS AT THE HEARING OR THE APPEAL

34. At the hearing of the appeal, Mr. Mulenga, on behalf of the appellants submitted that appellants would rely on the submissions that he made in the Lands Tribunal as well as the grounds of appeal and heads of argument filed in this court.
35. Mr. Mulenga went on to submit that, **Section 13(3) of the Lands Act** provides that a complaint to the Lands Tribunal may be lodged within thirty-days. According to counsel, the said section does not provide for extension of time nor does it give discretion to the Lands Tribunal.
36. Counsel contended that **section 13(3) of the Lands and Deeds Registry Act** is akin to a statute of limitation, and our attention was drawn to the case of **BP Zambia Plc Vs Zambia Competition Commission, Total Aviation and Export Limited, Total Zambia Limited⁷**, and it was submitted that the time frame provided for must be utilized.

37. Mr. Mulenga argued that the Lands Tribunal had no authority to allow the respondent to file a notice of complaint out of time. The court was urged to allow the appeal for the aforestated reasons.
38. The learned counsel for the respondent Major Mwaaba (Retired) submitted that he would rely on the heads of argument and further heads of argument filed. Counsel submitted that the question that needs to be answered is whether the respondent is estopped from bringing an action when the twelve year process had not elapsed.
39. According to counsel, the right interpretation will show that section 13(3) provides discretion regarding when the appeal can be brought before the Lands Tribunal. Major Mwaaba contended that the period is twelve years as provided under the Limitation Act. We were urged to dismiss the appeal with costs.

In reply, Mr. Mulenga submitted that there should be a distinction between **section 4 of the Limitation Act** and **section 13(3) of the Lands and Deeds Registry Act**. He submitted that the respondent did not adhere to the thirty day period that is prescribed by section 13(3) of the Act and that he did so at his own

peril. We were urged to allow the appeal with costs to the appellants.

CONSIDERATION OF THE APPEAL, DECISION AND VERDICT

40. We have carefully considered the arguments and submissions which the parties canvassed before us in the context of the Ruling of the Lands Tribunal, the evidence and arguments which had yielded the Ruling and the grounds of appeal. We are grateful to the two sides for their spirited arguments before us.
41. Our consideration of the six grounds of appeal must necessarily begin with examining the fifth ground of appeal which, as structured, invites us to determine whether the learned members of the Lands Tribunal fell into legal error when they allowed the respondent to file his notice of complaint once more, out of time, as they held that he was still at liberty to do so.
42. Earlier on in this judgment, we reproduced the background to this appeal, whose key features include the following-
 - (a) The fact that the respondent's property was re-entered by the State on or about 19th August, 2009, and a certificate of re-entry was issued;

- (b) That the respondent made representations seeking a reversal of the said re-entry in the year 2009, but this was unsuccessful;
 - (c) The respondent then commenced an action before the Lands Tribunal on 19th March, 2019, by way of Summons for leave to file Notice of Complaint out of time.
 - (d) This was pursuant to **Sections 15(1) and 8 of the Lands Act and the Lands Tribunal Act**, respectively, as read with **Rule 19 of the Lands (Lands Tribunal) Rules** and leave was granted to the respondent on 15th April, 2019.
 - (e) The respondent filed a complaint with supporting affidavit on 26th April, 2019 and had issues with the certificate of re-entry which was effected in 2009.
43. The Attorney-General made an application to dismiss the respondent's notice of complaint out of time on 14th August, 2019. This was on the argument that the respondent had seven days within which to file his complaint which was not filed by 23rd April, 2019 as per requirement, as the same should have been filed by 23rd April, 2019.

44. The Lands Tribunal rendered a Ruling on 31st January, 2020 and found that the respondent failed to comply with the Tribunal's order to file its complaint within seven days of the order. The Tribunal noted that the respondent did not apply for an extension of time within which to file his complaint and the Tribunal was bound to grant the Respondent's application to dismiss the respondent's complaint.
45. The appellants vehemently opposed the respondent's application filed on 3rd July, 2020, in which he sought further leave to extend time within which to file the notice of complaint out of time pursuant to **sections 15(1) of the Lands Act and 8 of the Lands Tribunal Act** and **Rule 19 of the Lands Tribunal Rules**. The Lands Tribunal opined that there is no other forum through which the application to file the complaint out of time can be heard apart from the Tribunal.
46. The Lands Tribunal went on to rule that it delivered a Ruling on 31st January, 2020 which had not been challenged, varied or modified and was therefore valid and effective. The Tribunal opined that once judgment has been entered, it concludes the judicial function and the court is *functus officio*.

47. The Tribunal further stated that the application that the respondent filed on 3rd July ,2020, for further leave to extend time was a totally new application to extend time so the Tribunal retains jurisdiction to hear the application. The Tribunal stated that it was not *functus officio* because this was a fresh application.

48. We have considered ground five of the appeal, the arguments from both counsel as well as all the authorities cited. The real question to be determined by this court as we see it is whether a litigant whose application was dismissed by the Lands Tribunal can commence a fresh action. In its Ruling dated 31st January, 2020, the Tribunal ruled that-

“We find therefore that the complainant failed to comply with the Order of this Tribunal to file its complaint within 7 days of the said order and noting that the complainant did not apply for an extension of time within which to file his complaint, we are bound to grant the respondent’s application to dismiss the complainant’s complaints.”

49. The respondent was at liberty to appeal to the Court of Appeal within 30 days of the Tribunal’s Ruling, but the respondent’s appeal to the Court of Appeal was not heard. Instead the respondent filed an application for further leave to file a notice of complaint out of time, which application was granted by the Tribunal.

50. In the Kenyan case of ***Owners of the Motor Vessel "Lillian S" vs Caltex Oil of (Kenya) Limited***⁸ the court observed that-

"Jurisdiction is everything (and that) without it, a court has no power to make one more step."

This was the position of the Supreme Court in the case of ***JCN Holdings Limited vs Development Bank of Zambia***⁹ where the court observed that-

"It is clear from the Chikuta and New plast Industries cases that if a court has no jurisdiction to hear and determine a matter, it cannot make any lawful orders or grant any remedies sought by a party to that matter."

51. We are in agreement with the learned counsel for the appellants that the Lands Tribunal had no jurisdiction to entertain the respondent's application and hold that he was still at liberty to file his notice of compliant out of time. This is because the Tribunal, in its ruling dated 31st January, 2020 stated that-

"We find therefore that the complainant failed to comply with the order of the Tribunal to file its complaint within seven days of the said order and noting that the complainant did not apply for an extension of time within which to file the complaint we are bound to grant the respondent's application to dismiss the complainant's complaint."

52. The view we take is that the Lands Tribunal had already dismissed the respondent's application in the Ruling dated 31st January, 2020. The Tribunal found that the respondent failed to comply with its order to file his complaint within seven days.

We form the view that the Lands Tribunal erred in its subsequent Ruling dated 9th October, 2020 when it found that the respondent's application for further leave to extend time within which to file a notice of complaint out of time was a totally new application for extension of time.

53. This is because the Tribunal had already dismissed the respondent's application on 31st January, 2020 and did not have jurisdiction to review its earlier decision. As was decided by the Supreme Court in the case of **JCN Holdings Limited vs Development Bank of Zambia** (*Supra*), the Lands Tribunal had no jurisdiction to hear and determine the respondent's matter after rendering the Ruling on 31st January, 2020, and its ruling dated 9th October, 2020 was a nullity as the Tribunal could not make any lawful orders. We find merit in ground five of the appeal and it succeeds.

54. Turning to grounds two and four which are that the Lands Tribunal erred when it revisited and reopened the question of leave to file the notice of complaint out of time, we refer to the learned authors of Halsbury Laws of England, 4th Edition, Vol 29, paragraph 390, where “*functus officio*” is defined as–

“An instance where Justice or indeed the court has discharged all its judicial functions in a case”.

55. We take the view that in its order dated 15th April, 2019 and its Ruling dated 31st January, 2020 the Lands Tribunal dismissed the respondent’s complaint as there was no application for extension of time within which to file the complaint.
56. The Lands Tribunal was therefore *functus officio* as it had dismissed the respondent’s application and given its final Judgment in the matter. It therefore had no further authority or legal competence to preside over the matter which it disposed of on 31st January, 2020. Black’s Law dictionary defines the word “dismissal” as–

“Termination of an action or claim without further hearing especially before the trial of the issues involved.”

57. Having taken the view that that the Lands Tribunal had no further authority to deal with the matter, we agree with counsel for the appellants that the Lands Tribunal was *functus officio* and had no jurisdiction to entertain the respondent's later application on the guise of it being a new and fresh application. The Lands Tribunal was *functus officio* and could not have heard the same application twice. We find merit in grounds two and three of the appeal and they succeed.
58. Grounds one, four and six challenge the Lands Tribunal's decision to allow the respondent's application for further leave to file the notice of complaint out of time. Having taken the view that the Lands Tribunal had no jurisdiction to review its earlier decisions as no new circumstances existed at the time of the purported review, which culminated into the Tribunal's Ruling dated 9th October, 2020, which stated that the respondent had filed a fresh application for further leave to extend time, we opine that the Lands Tribunal had no reason or justification to review its order of 15th April, 2019 and its Ruling of 31st January, 2020, as there was no legal basis for doing so.

59. As such, grounds one, four and six of the appeal succeed and they are upheld. The six grounds of appeal have all succeeded and in effect, this appeal succeeds in its entirety, and it is accordingly upheld. Costs are awarded to the appellants, to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



P.C.M. NGULUBE
COURT OF APPEAL JUDGE



M. J. SIAVWAPA
COURT OF APPEAL JUDGE