

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

APPEAL NO. 251/2020

BETWEEN:

EUNICE LIKANDO

16 DEC 2021

APPELLANT

AND

BRIGHT SIMUMBWE

RESPONDENT

CORAM: CHASHI, CHISHIMBA AND NGULUBE, JJA.

On 21st September, 2021, 6th September, 2021 and
16th December, 2021.

For the Appellant: Ms. C. Jere, National Legal and Clinic for Women

For the Respondent: In person

J U D G M E N T

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to:

1. *Waterwells Limited vs Jackson* (1984) Z.R.98
2. *Mwambazi vs Morrester Farms Limited* (1977) Z.R.108
3. *D. E. Nkhuwa vs Lusaka Tyre Services Limited* (1977) Z.R.43
4. *Blair Freight International Limited vs Credit Africa Bank Limited*, SCZ Appeal Number 2009/1997
5. *R. B. Policies at Lloyds vs Butler* (1950) 1 KB 76
6. *Development Bank of Zambia and Mary Ncube (Receiver) vs Christopher Mwansa and 63 Others*, SCZ/08/103/08

7. *Ruth Kumbi vs Robinson Caleb Zulu, S.C.Z Judgment Number 19 of 2009*
8. *Ituna Partners vs Zambia Open University Limited, Appeal Number 117 of 2008*

Legislation and other works referred to:

1. *The Constitution of Zambia, Act Number 1 of 2016*
2. *Black's Law Dictionary*
3. *The High Court Rules, Chapter 27 of the Laws of Zambia*

INTRODUCTION

1. This appeal is against a ruling of the High Court delivered by the Hon. Lady Justice E. P. Mwikisa on 2nd November, 2019, in which the court found that the learned Registrar was on firm ground when she dismissed the matter as she was of the view that time within which the appellant could lodge an appeal had elapsed.

BACKGROUND

2. The background to this appeal is that on 28th June, 2017, the High Court pronounced a *decree nisi* in favour of the respondent and referred the question of property adjustment to the Registrar on formal application.
3. The applicant applied for property settlement and maintenance before the Registrar but the matter was struck off the active cause

list on 28th November, 2017 with liberty to restore within thirty days. The appellant did not apply to restore the matter and it was dismissed for want of prosecution.

4. The appellant later learnt that the matter was dismissed and retained the National Legal Aid Clinic for Women to represent her and counsel seized with conduct of the matter made an application to restore the matter to the active cause list on 8th May, 2018. The appellant sought leave to appeal the decision of the Registrar and have the matter that was dismissed for want of prosecution restored to the active cause list as she was not aware that the matter was scheduled for hearing before the learned Registrar. Counsel submitted that the appellant desired to be heard on an application for property settlement and maintenance of the children of the family.

DECISION OF THE HIGH COURT

5. When the matter came up for hearing in the High Court, Lady Justice Mwikisa granted the appellant leave to appeal out of time, on 24th April, 2019. However, the Court later ruled that the matter stood dismissed as the learned Registrar had dismissed it on account of the lapse of time within which to appeal.

THE APPEAL

6. Dissatisfied with the decision of the lower court, the appellant lodged an appeal to this court, advancing nine grounds of appeal couched as follow –

- a) *That the trial Judge erred in law and fact when she held that the matter stands dismissed.*
- b) *That the trial Judge erred in law and fact when she failed to consider the fact that applications for property settlement and maintenance of the children after dissolution of marriage are only heard and determined by the Learned Deputy Registrar.*
- c) *That the trial Judge erred in law and fact when she failed to consider that the matter having been dismissed will cause great injustice on the appellant as she will not benefit from any property that was acquired during the subsistence of the marriage herein.*
- d) *That the trial Judge erred in law and fact when she failed to consider that the matter having been dismissed will cause great injustice on the children of the family who are still very young as the application for maintenance of the children was never heard and determined as the matter stands dismissed.*
- e) *That the trial Judge erred in law and fact when she failed to consider the interest of the children of the family as their only recourse to maintenance is if the application for maintenance is heard and determined.*
- f) *That the trial Judge erred in law and fact when she failed to take into account that if the application for*

maintenance of the children is not heard and determined, the children of the family will continue suffering as the respondent does not support them financially nor pay their school fees, therefore they may end up dropping out of school and start begging on the streets.

- g) That the trial Judge erred in law and fact when she failed to take into account that at the time the matter was dismissed by the learned Deputy Registrar, the appellant had no legal representation and had no legal knowledge to understand the legal procedures of what ought to have been done when the matter was struck out and eventually dismissed.*
- h) That the trial Judge erred in law and fact when she failed to take into account that the appellant's case should have been heard and determined on the merit.*
- i) That the trial Judge erred in law and fact when she failed to take into account the principles of equity and justice and just give regard to procedural technicalities and that has caused great injustice on the appellant and especially the children.*

THE APPELLANT'S CONTENTIONS

7. The appellant argued the nine grounds of appeal together. Our attention was drawn to the provisions of **Article 118 of the Constitution of Zambia**, as amended, which prescribes the exercise of judicial authority by the Zambian system of courts in the following terms—

- (2) In exercising judicial authority, the courts shall be guided by the following principles-
- (e) Justice shall be administered without undue regard to procedural technicalities.
8. The court's attention was drawn to the cases of ***Waterwells Limited vs Jackson¹*** and ***Mwambazi vs Morrester Farms Limited²*** where the Supreme Court guided that –
- “Triable issues should come to trial despite the default of the parties. It is not in the interest of justice to deny him the right to have his case heard”.***
9. It was submitted that the appellant made an application for property settlement on 19th July, 2017 which was struck out on 28th November, 2017, with liberty to restore within thirty days, failing which the matter would stand dismissed. On 29th October, 2018, the appellant commenced a fresh action for property settlement and maintenance of the children of the family.
10. The learned Registrar declined to hear the application and informed the appellant that the matter had been dismissed. The appellant then made an application to restore the matter to the active cause list out of time on 29th March, 2018, but the registrar

maintained her position and declined to restore the matter to the active cause list.

11. The appellant lodged an appeal to the Judge in chambers after obtaining leave to appeal out of time on 9th July, 2018 and the said leave was granted. However, when the matter came up for hearing, the learned Judge ruled that the matter stood dismissed.
12. The appellant was dissatisfied with the decision of the learned Judge and filed the notice of appeal and memorandum of appeal on 18th December, 2019. The appellant's contentions are that, the law in Zambia is that all triable issues must go to trial, that Justice shall be administered without giving undue regard to procedural technicalities, that justice demands that all parties are heard before a determination is made by the court. It was submitted that this is a proper case that should be heard in its entirety and that the lower court's decisions be set aside so that the matter can be heard on the merits.

RESPONDENTS CONTENTIONS

13. The respondent filed heads of argument on 30th September, 2021. The appellant's nine grounds of appeal were tackled as one as they are interrelated and premised on the lower court's decision. The

respondent referred to the case of ***D. E. Nkhuwa vs Lusaka Tyre Services Limited***³ where the Supreme Court stated that-

“Rules prescribing times within which steps must be taken must be adhered to strictly and practitioners who ignore this will do so at their own peril.”

14. The case of ***Blair Freight International Limited vs Credit Africa Bank Limited***⁴ was also referred to, where the Supreme Court held that-

“The appeal on grounds of failure to comply with the rule was in our view properly dismissed. The rules of the court are for the smooth administration of Justice. They ought to be obeyed.”

15. The respondent went on to cite the case of ***R. B. Policies at Lloyds vs Butler***⁵ where it was held that-

“It is a policy of the Litigation Act that those who go to sleep upon their claim should not be assisted by the courts recovering their property, but another, and, I think, equal policy behind these Acts is that there should be an end to litigation.”

16. The respondent submitted that the appellant has constantly been in breach of the rules of the court by not adhering to the times in which the necessary applications ought to have been filed before

the court as well as how and where they properly ought to have been filed.

17. According to the respondent, the appellant sat on her rights for over one year before she moved the court and kept the respondent in suspense as he did not know what action she would take further in the matter.
18. Out attention was drawn to the case of ***Development Bank of Zambia and Mary Ncube (Receiver) vs Christopher Mwansa and 63 Others⁶***, where the court held that-

“There must be finality and a party that is clearly in default should reap the consequences of its inertia and cannot be allowed to roam the courts like a headless chicken keeping the other party in suspense more so that the party was represented by counsel.”

19. The respondent submitted that the appellant’s inordinate delay has been an injustice to him and a waste of time and resources as the litigation has been prolonged. According to the respondent, the rules of court must be adhered to and complied with so that there is an end to litigation. We were urged to dismiss the appeal for lack of merit.

DECISION OF THIS COURT CONSIDERATION OF THE MATTER AND VERDICT

20. We have considered the heads of argument filed by the parties, the submissions, the record of appeal and the authorities to which we were referred. All the grounds of appeal are interrelated and revolve around the issue whether the lower court was on firm ground when it dismissed the appellant's application in the lower court for not adhering to the unless order that was issued by the learned Registrar.
21. The learned Registrar dismissed the appellant's application for property settlement for reason that the matter was dismissed on 28th December, 2017 and that Registrar had no jurisdiction to restore a dismissed matter. The learned Judge in Chambers, Justice Mwikisa upheld the decision of the learned Registrar and stated that the appellant could have appealed against the decision of the learned Registrar within thirty days. The appeal to the learned Judge in Chambers was unsuccessful because the court was of the view that the matter was already dismissed due to lapse of time.
22. In the case of ***Ruth Kumbi vs Robinson Caleb Zulu***⁷, the Supreme Court held that-

“In Zambian courts, where the unless order has been made and there has been failure to comply with the order within a specified period, that does not necessarily mean that the action is dead or defunct, or that the court is thereby deprived of the jurisdiction or power to extend time for doing a specific act within a specified time.”

23. In the Ruth Kumbi case referred to above, the Supreme Court stated that breach of an unless order does not necessarily mean that the action is dead or defunct or that the court is deprived of the jurisdiction or power to extend time for doing a specific act within a specific time.
24. The appellant's grounds of appeal attack the lower court's ruling that the matter stood dismissed and that it therefore could not entertain the appellant's application to effectively set aside the dismissed order and have the application for property settlement heard on the merits.
25. In the case of *Ituna Partners vs Zambia Open University Limited*⁸, the Supreme Court held *inter alia* that-

“A court becomes functus officio when all the substantive issues in the cause are determined by it.”

Black's Law Dictionary defines the word “*Dismissal*” at page 502 as

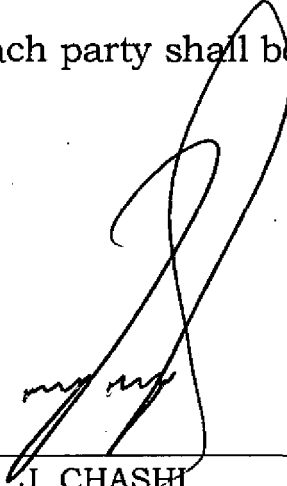
“Termination of an action or claim without further hearing especially before the trial of the issues involved.”

26. The view that we take is that a court still retains jurisdiction to bring an action to life where it was dismissed for failure to comply with conditional orders. The lower court therefore erred when it found that it had no jurisdiction to hear the appellant's application to set aside the dismissal order and have the application for property settlement heard on the merits.
27. The appellant sufficiently excused her absence before the learned Registrar as she was not aware that the matter was due for hearing before the Registrar. ***Order 25 rule 5 of the High Court Rules*** provides that-

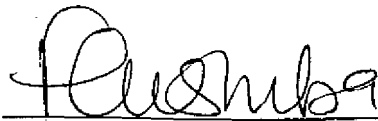
“Any judgment or order made in the absence of a party may be set aside by the lower court upon sufficient cause being shown.”

28. We are of the view that the High Court has inherent jurisdiction to supervise its own orders and proceedings at all times. We note that the absence of the appellant before the learned Registrar was not deliberate and that she is desirous of prosecuting the matter. We accordingly find that the appeal has merit and the Ruling of the lower court is hereby set aside.

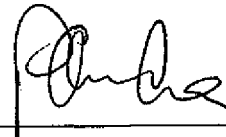
29. The matter is sent back to the High Court to be heard by another learned Registrar so that the application for property settlement is heard on the merits. Each party shall bear its own costs.



J. CHASHI
COURT OF APPEAL JUDGE



F. M. CHISHIMBA
COURT OF APPEAL JUDGE



P.C.M. NGULUBE
COURT OF APPEAL JUDGE