

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

APPEAL No 60/2022

BETWEEN:

DIMITRIOS MONOKANDILOS

APPELLANT

AND

FINANCE BANK (Z) LIMITED

RESPONDENT

CORAM: CHASHI, SIAVWAPA AND BANDA-BOBO JJA

On 20th September and 4th November, 2022

FOR THE APPELLANT: MR. L. YETA AND MISS C. MWAMBAZI
BOTH OF MESSRS CENTRAL CHAMBERS

FOR THE RESPONDENT: MR. C. HAMWEELA AND MISS N. CHIBUYE
BOTH OF MESSRS NCHITO AND NCHITO

J U D G M E N T

SIAVWAPA JA delivered the Judgment of the Court.

Case referred to:

1. *Ridgeway Motors [Isleworth] Limited v Alts Limited (2005) EWCA Civ 92*
2. *Kitwe City Council v Nguni (2005) ZR, 54*

Legislation referred to:

1. *The Limitation Act 1939.*
2. *The British Extension Act Chapter 10 of the Laws of Zambia.*

1.0 INTRODUCTION

1.1 This is a composite rendering of our decision on the Notice of Motion filed by the Respondent questioning our jurisdiction to entertain the appeal for being Statute barred and on the appeal against the Ruling of the Honourable Mr. Justice E. L. Musona of the Commercial Division of the High Court dated 11th January 2022.

1.2 In that Ruling, the learned Judge dismissed an application by the Appellant for an order to dismiss Bankruptcy proceedings commenced against him.

1.3 The Appellant argued that the Bankruptcy proceedings should be dismissed because they were time barred under Section 2(4) of the Limitation Act 1939, thereby depriving the Court of jurisdiction.

1.4 In dismissing the application, the learned Judge was of the view that Insolvency proceedings did not fall under the definition of "*Fresh Action.*"

2.0 BACKGROUND

2.1 The Respondent obtained Judgment against the Appellant in the liquidated sum of USD1, 200,000 with interest at 12 per centum per annum on 21st May 1999.

2.2 On 28th March, 2018, the Court granted the Respondent leave to issue writ of execution of the Judgment. However, the Respondent failed to execute because the judgment debtor, the Appellant, was not reachable to effect service.

2.3 On 18th September 2020, the Respondent filed a Notice of Bankruptcy against the Appellant giving the Appellant seven days within which to pay the Judgment sum with interest.

2.4 On 7th December, 2020, the Appellant, in response, filed a Notice of Motion supported by an affidavit to dismiss the Bankruptcy proceedings for want of jurisdiction, on account that they were Statute barred under Section 2(4) of the Limitation Act 1939. The learned Judge below considered the arguments advanced by the parties and rendered his Ruling dismissing the Motion.

3.0 **THE APPEAL**

3.1 The Appellant was aggrieved by the decision of the learned Judge. He disagreed with the learned Judge's interpretation of Section 2 (4) of the Limitation Act 1939 and filed a Notice and Memorandum of Appeal on 13th January 2022.

3.2 The Memorandum of Appeal contains five grounds of Appeal namely;

1. *The learned Judge erred in law and fact when he held that the Respondent's action was not a fresh action and therefore not barred by the Statute of Limitations.*
2. *The court below misapprehended the law when he placed reliance on the interpretation of the word "action" found in the case of Ridgeway Motors [Isleworth] Ltd v Alts Limited¹ which was based on the English Limitation Act 1980 which Statute does not apply to Zambia.*
3. *The Court below misdirected itself in law and fact when it failed to apply the literal interpretation of Section 2(4) of the Limitations Act 1939 without furnishing any reasons.*
4. *The Court below misdirected itself in law and in fact when at pages R6 and R7, it took account of the Petitioners' submissions and evidence and failed to take into account the Respondent's entire submissions and evidence on record without furnishing any reasons.*
5. *The court below contradicted itself when, having held earlier in a ruling dated 30th November 2021 in the same proceedings that a Bankruptcy proceeding is a fresh action, somersaulted in the Ruling under appeal and held that a bankruptcy proceeding is not a fresh action.*

4.0 **ARGUMENTS IN SUPPORT THE APPEAL**

4.1 The Appellant filed arguments in support of the Appeal on 21st March 2022 wherein he argues each ground separately.

4.2 We however, decipher from the arguments on all the grounds that the Appellant is of the view that the ordinary and plain meaning of the word “action” under Section 31 of the Limitation Act 1939 includes bankruptcy proceedings.

4.3 That the learned Judge was wrong to apply the interpretation of “action” taken from the United Kingdom Limitation Act 1980 which is not applicable to Zambia.

4.4 On 22nd June 2022, the parties entered a Consent Order granting liberty to the Respondent to file heads of argument and/ or any applications within thirty days of the said consent Order.

4.5 On the basis of the consent Order, the Respondents opted to file a Notice of Motion on 20th July 2022 challenging our jurisdiction to entertain the appeal on account of the Appellant’s failure to pay security for costs prior to filing the appeal.

5.0 **ARGUMENTS IN OPPOSITION TO THE APPEAL**

5.1 The thrust of the arguments in opposition to the appeal is that the learned Judge correctly interpreted the law when he found

that bankruptcy proceedings do not constitute “a fresh action” as it is not an action upon a judgment in terms of section 2 (4) of the Limitation Act 1939.

5.2 The view above is as espoused by the English case of Ridgeway Motors [Isleworth] Ltd v Alts Ltd (supra) which the court below relied upon. This argument seems to find support in the statement by the learned authors of Halsbury’s Laws of England, third edition volume 16 which states that;

“Execution does not include a petition to wind up a company, or a bankruptcy petition....”

5.3 As for the last two grounds, alleging that the learned Judge ignored the Appellant’s submissions while he fully considered those by the respondents and that the learned Judge went against his earlier ruling that bankruptcy proceedings were a fresh action, the Respondent simply disagreed. It also added that the Court was not bound to consider submissions by counsel as per the case of Kitwe City Council v Nguni².

6.0 ARGUMENTS IN SUPPORT OF NOTICE OF MOTION

6.1 The Respondent anchored its arguments on section 100(2) of the Bankruptcy Act chapter 82 of the Laws of Zambia which provides as follows;

“Orders of the Court in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal, but no appeal shall be entertained except in conformity with such rules as may for the time being be in force in relation to the appeal”

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(c) That rule 129 of the Bankruptcy Rules of England 1952 is discretionary and not mandatory

7.2 In asserting the first point of argument, the Appellant states that section 163 (4) of the Bankruptcy Act chapter 82 of the laws of Zambia provides for the application of the general bankruptcy rules made under the 2014 Act and not the 1952 rules which were promulgated under the 1926 Bankruptcy (Amendment) Act

(7.3 Under the second point of argument, the Appellant expresses the view that the coming into effect of Order X rule 8 (1) of the Court of Appeal Rules 2016, which empowers the Court of Appeal to order security for costs either upon application or of its own motion, superseded the Bankruptcy Rules of 1952

(7.4 Under the third point, the argument is that Rule 129 of the Bankruptcy Rules of England 1952, relied upon by the Respondents has a proviso that gives discretion to the Court to increase, diminish or even dispense with the security for costs.

8.0 **OUR ANALYSIS AND DECISION**

8.1 We begin our analysis by considering the motion raised by the Respondent asking us to dismiss the appeal for the reason that it was filed in breach of rule 129 of the Bankruptcy Rules of

England of 1952. The rule enjoins a prospective appellant to pay the sum of 20 pounds as security for costs.

8.2 The first issue we shall deal with is whether or not the 1952 Rules of England apply to Zambia and the Appellant is of the view that they do not because they were promulgated not pursuant to the 1914 Bankruptcy Act of England but under the Bankruptcy (Amendment) Act of 1926.

8.3 Our research has however, revealed that the Bankruptcy Act 1914 of England, was applicable to Zambia before 1967. The 1952 Bankruptcy Rules were promulgated pursuant to sections 107 (5) and 132 of the Act and the Courts of Northern Rhodesia applied both the Act and the 1952 Rules (See the case of *Re, A Bankrupt*, N.R.L.R 43).

8.4 In 1967, the Bankruptcy Act, chapter 82 of the Laws of Zambia was enacted with section 163 thereof repealing the 1914 Bankruptcy Act and the 1926 Bankruptcy (Amendment) Act of the United Kingdom.

8.5 However, section 163 (4) contains the following provision;

“Until revoked or altered under the provisions of this Act, any fees, prescribed and any general rules and orders made under the High Court Act and the Bankruptcy Act, 1914, of the United kingdom, which are in force at the commencement of this Act, shall continue in force, so far as the same remain applicable, and shall have effect as if made under this Act.”

8.6 Having earlier shown that the 1952 Rules were in force before the enactment of our chapter 82 and there being no instrument that we are aware of issued pursuant to chapter 82 of the Laws of Zambia revoking or altering the provisions of the 1952 Rules, it is our considered view that the 1952 Rules are still applicable to Zambia.

8.7 In the view we have taken above, it follows that the Appellants were required to deposit with the Court the prescribed sum of 20 pounds before, or at the time of lodging the appeal pursuant to rule 129 of the Bankruptcy Rules of the United Kingdom, 1952.

8.8 The only part we have to turn to is the proviso which gives the Court discretion to increase, diminish or dispense with the payment of security for costs all together in any special case. The provision does not prescribe what the Court may consider as special circumstances.

8.9 We are however, of the view that the fact that the Appellant did in fact deposit security for costs under the Court of Appeal Rules mitigates the breach of rule 129 of the 1952 Rules of the United Kingdom.

8.10 This is, in our view, a special case that allows us to dispense with the payment of the sum of 20 pounds in the High Court

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adopted the interpretation of the expression "an action upon a Judgment" from the said judgment as applicable to a suite for a Judgment upon a Judgment.

8.15 The learned Judge interpreted the above statement as "a new action based on a Judgment with the intention of obtaining yet another Judgment." To that end, he opined that insolvency proceedings are exempted.

8.16 Our views are that the learned Judge read into Section 2(4) of the Limitation Act 1939 words which are not there. For instance, he introduces the word "fresh" when the section simply says "an action." Therefore, based on the interpretation of the word "Action" in section 31 of the Limitation Act 1939, Insolvency proceedings are an action for being proceedings in a Court of law.

8.17 We are of the further view that the definition of the word "action" in Section 31 of the Act is simple and plain and of open application because it is employed in a demonstrative rather than a restrictive sense.

8.18 We therefore find no basis upon which the learned Judge excluded Bankruptcy proceedings from the definition of the word "action" as we find it in Section 31 of the Act".

8.19 We equally agree with the Appellant that it was a misdirection on the part of the learned Judge to apply a definition of "action" derived from the Limitation Act 1980 which is not applicable to Zambia.

8.20 It is therefore, our considered view that Bankruptcy/ Insolvency proceedings constitute an action and if the proceedings arise from a Judgment, they fall within the purview of Section 2(4) of the Limitation Act 1939.

9.0 **CONCLUSION**

9.1 The net result of our expressed views is that this appeal succeeds on grounds 1, 2 and 3 rendering grounds 4 and 5 otiose.

9.2 The Bankruptcy proceedings commenced by the Respondent are accordingly declared incompetent for being instituted out of time.

9.3 Costs are for the Appellant.

J. CHASHI
COURT OF APPEAL JUDGE

M. J. SIAVWAPA
COURT OF APPEAL JUDGE

A. M. BANDA-BOBO
COURT OF APPEAL JUDGE