

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

**CAZ/08/397/2020
APP. NO. 24/2021**

B E T W E E N:

EVANS MILIMO

AND

ZAMBIA DAILY MAIL LIMITED

ATTORNEY GENERAL



APPELLANT

1ST RESPONDENT

2ND RESPONDENT

***CORAM: Kondolo, SC, Siavwapa and Banda-Bobo, JJA
On the 3rd day of November, 2021 and 12th December, 2022.***

For the Appellant: Mr. L. C. Ng'onga of Messrs P. M. Kamanga
and Associates

For the Respondents: Ms. Mulenga of Messrs Lungu Simwanza
and Company

RULING

BANDA-BOBO, JA, delivered the Judgment of the Court.

Cases referred to:

1. Stanley Mwambazi v. Morester Farms Limited (1977) ZR 108 (SC)
2. Zambia Revenue Authority v. Jayesh Shah (2001) ZR 60
3. Standard Chartered Bank Zambia Plc v. Chanda and Another (Appeal No. 92/2009).
4. Twampane Mining Co-operation Society Limited V. E and M Storti Mining Limited (SC) 2011, V3, ZR, 67
5. Rachael Lungu Saka v. Hildah Bwalya Chibomba (sued as Administratrix of the estate of the late Jean M. Chomba and Attorney General
6. Zamtel Company Limited v. Mutawa Liuwa (SCZ No. 16 of 2002)
7. General Nursing Council of Zambia v. Mbangweta (2008) ZR Vol. 2, 105

8. Isaac Lungu v. Mbewe Kalikeka (Appeal No. 114 of 2013)
9. JCN Holdings Limited v. Development of Zambia (SCZ Judgment No. 22/2013)
10. Chikuta v. Chipata Rural Council (1974) ZR 241
11. Antonio Ventriglia and Manuela Ventriglia v. Finsbury Investment Limited (Appeal No. 2/2019)
12. Owners of the Motor Vessel "Lillian S" v. Caltex Oil

Legislation referred to

- The Court of Appeal Act No. 7 of 2016.
- Court of Appeal Rules, Statutory Instrument No. 65 of 2016
- Rules of the Supreme Court, Volume 1, 1999 White Book Edition

1.0 Introduction

1.1 By way of Notice of Motion, the Appellant, Mr. Evans Milimo, seeks an order to reverse the Ruling of a single Judge of this Court. The Ruling was rendered on 23rd April, 2021. This application is made pursuant to Section 9(b) of the Court of Appeal Act No. 7 of 2016¹.

2.0 The application is anchored on three (03) grounds, vis;

- (i) That the single Judge in his/her Ruling should have exercised his/her discretion to hear the Appellant's application for extension of time which was filed first before the Respondent's application to dismiss the matter;
- (ii) The single Judge in his/her ruling should have exercised her discretion by allowing the Appellant an

extension of time within which to file his Heads of Argument and Record of Appeal when the application was not inordinately delayed;

- (iii) The single Judge should have exercised her discretion not to condemn the Applicant in costs when the Applicant showed Court he faced economic hardships and his application has prospects of success.

3.0 Affidavit in Support

- 3.1 In the Affidavit in Support, he deposed that he filed a Notice and Memorandum of Appeal, but did not file Heads of Argument within the stipulated sixty (60) days. That on 13th January, 2021, a period of twelve (12) days after the due date, he applied for an extension of time. However, the next day on 14th January, 2021, the Respondent filed an application to dismiss the matter. That however, instead of hearing his application for extension of time, the single Judge heard the application by the Respondent. That on 23rd April, 2021, the single Judge upheld the Respondent's application and dismissed the appeal for want of prosecution and condemned him in costs.

- 4.0 It was his deposition that his lawyers received the ruling after five days, and his attempts at the earliest possible time to file an appeal to reverse the Ruling of the single Judge were thwarted by the Registry staff, who advised him to apply instead, to the Court to reverse the Ruling
- 5.0 He contended that his application to file the Record of Appeal and Heads of Argument was not inordinately delayed; as he was only a few days late; and had applied for an extension of time within the twenty-one (21) days after the lapse of the requisite sixty (60) days and even before the Respondent herein had made their application to dismiss the matter.
- 6.0 Further, that condemning him in costs has placed him and his family in a precarious position as an unemployed person, given that he had informed the Court that he had been in financial hardship and believed that he has a genuine cause to pursue his terminal benefits from his former employer. He believed that the application is in the interest of justice and ought to be granted and the Ruling of 23rd April, 2022 be reversed.

7.0 Affidavit in Opposition

7.1 The Application was opposed by way of an affidavit in opposition. It was deposed that this application has been made out of time. It was deposed that the single judge, having determined the matter on 23rd April, 2021, the Applicant ought to have made his application on or about 3rd May, 2021. That therefore having filed the application on 4th June, 2021, the Applicant was out of time. That she had been advised that the rules of this Court stipulate that an appeal to the full Court, against the decision of a single judge ought to be made within ten (10) days of the single judge's determination. That, that being the case, the Applicant ought to have sought an order for leave to appeal to the full Court out of time, since the ten (10) days period had expired. That there is no order to that effect. That therefore, the matter was improperly before Court and the application is misconceived.

7.2 It was further deposed that a careful perusal of the Ruling in contention shows that the single judge considered the application for extension of time, but could not grant the order for extension of time due to lack of compelling reasons to enable the Court extend time. Further, that the Ruling by

the single Judge was served on the Applicant's advocates on 28th April, 2021 and it was therefore not true that the same was only received on 3rd May, 2021, through the High Court pigeon hole.

7.3 It was finally contended that the Applicant had been dilatory in prosecuting the Appeal, because despite having had sight of the Ruling five (05) days from the date of delivery as alleged, he only made the application to reverse the Ruling on 4th June, 2021. We were urged to dismiss the Motion as it is improperly before us.

8.0 **Heads of Argument – by the Applicant**

8.1 The Applicant filed a list of authorities and skeleton arguments in support. In the first instance, he adverted to the Section on which the application is anchored as well as Order X rule 2(8) and Order XIII rule 3(1) of the Court of Appeal Act¹. Substantively, it was submitted that cases must be determined on merit. In support, we were referred to the cases of **Stanley Mwambazi v. Morester Farms Limited**¹, **Zambia Revenue Authority v. Jayesh Shah**² and **Standard Chartered Bank Zambia Plc v. Chanda and Another**³.

Based on the above authorities, we were urged to grant the application.

- 8.2 As regards the time frame, it was contended that the single judge ought to have granted the extension of time because the delay in making the same had not been inordinate. It was submitted that we should give the Applicant the benefit of doubt and grant him leave to file the Heads of Argument and Record of Appeal by reversing the earlier decision of the single judge. Our attention was drawn to the case of **Twampane Mining Co-operation Society Limited V. E and M Storti Mining Limited (SC)**⁴. That it was evident from this case that in matters where applications have been dismissed due to inordinate delay, parties had been given prior opportunities to file out of time, but only filed after the other parties' application to dismiss the matter was done. We were urged to reverse the single Judge on the ground that she should have heard the Applicant's application first, rather than that of the Respondent, as the Respondent's application came later in time after the Applicant had already filed his; especially that there was no inordinate delay.

8.3 To buttress the argument, our attention was drawn to our holding in the case of **Rachael Lungu Saka v. Hildah Bwalya Chibomba (sued as Administratrix of the estate of the late Jean M. Chomba and Attorney General**⁵ on the Court's powers to extend time pursuant to Order 13 rule 3. The case of **Zamtel Company Limited v. Mutawa Liuwa**⁶ was equally adverted to where the Supreme Court stated that:-

“the Appellant who sits back until there is an application to dismiss their appeal before making their own application for extension of time do so at their own peril.”

Regarding the issue of condemning the Applicant to costs, it was contended that the single judge should have exercised discretion by not condemning the Applicant in costs. In pursuance of this argument, we were referred to the case of **General Nursing Council of Zambia v. Mbangweta**⁷; where the Court held that:-

“It is trite law that costs are awarded in the discretion of the court. Such discretion is however to be exercised judiciously ...”

It was argued that the fact that the Appellant is unemployed and faces economic hardship, and therefore discretion should have been exercised in his favour, and not to condemn him in costs.

8.5 It was submitted, finally, that there is material or compelling reason which has been advanced by the Applicant to enable the Court to exercise its jurisdiction to grant the applicant's application for leave to apply to reverse the single judge's decision

8.6 **Heads of Argument in Opposition**

After setting out the genesis of this matter, we were referred to Section 9(b) of the Court of Appeal Act No. 7 of 2016¹, from which we derive powers to hear an application against the decision of a single judge. Counsel submitted that where there was a lacuna in our laws resort is had to the Rules of the Supreme Court, 1999 Edition³. To augment, our attention was drawn to the case of **Isaac Lungu v. Mbewe Kalikeka**⁸ where the court reiterated the position that resort is only had to the English practice and procedure, when there is a lacuna in our rules. We were then referred to Order

59/14/41 RSC, White Book, 1999 Edition³ which provides that:-

“... An appeal to the full court against a decision of a single lord justice (where such appeal lies as of right) is by a fresh application made within 10 days of the single Lord Justices determination ...

The ten (10) day period runs from the date on which the single lord justice gave his decision and the application by way of appeal to the full court must be set down within that ten (10) day period.”

It was contended that the above is clear that the time period to appeal to the full Court against the decision of a single judge must be made within ten (10) days of the single judge's determination.

8.8 That in *casu*, the single judge delivered her verdict on 23rd April, 2021, but the Applicant only filed this Notice of Motion for an Order to reverse the Ruling of the single Judge on 4th June, 2021. That, that being the case, this application is misconceived and is incompetently before this Court. This is because, so it was submitted, there is no order for leave

allowing the applicant to appeal to the full court outside the ten (10) day period within which one may appeal to the full court.

8.9 It was submitted that where a matter is improperly before Court, the Court has no jurisdiction to hear the matter or indeed determine or make any pronouncements in the matter. To buttress, the case of **JCN Holdings Limited v. Development of Zambia**⁹ was relied upon, where the Supreme Court held that:-

“Also it is settled law that if a matter is not properly before a court, that court has no jurisdiction to make any orders or grant remedies.”

Further that:-

“If a court has no jurisdiction to hear or determine a matter, it cannot make any lawful orders or grant any remedies sought by a party to that matter.”

8.10 It was reiterated that the motion for an order to reverse the Ruling of the single judge is improperly before us for want of an order for leave to appeal to the full court and consequently this Court cannot make any lawful orders or grant any

remedies sought by the Applicant. It was submitted further that the single judge was on firm ground to dismiss the appeal for want of prosecution, in that despite filing for an extension of time, the reasons advanced were not compelling to warrant the Court to grant an extension of time; and that this is shown at page 8 of the Ruling. That a careful perusal of the Notice of Motion will show that the grounds proffered by the Appellant to reverse the Ruling of a single Judge lack merit and are frivolous.

8.11 Further that the Applicant has been dilatory in prosecuting his appeal. That despite obtaining the Ruling by 28th April, 2021, the Applicant waited for about one month before attempting to appeal to the full court.

8.12 It was further submitted that the argument that the case be heard on merit cannot stand, as the reasons for the delay advanced by the Applicant are not compelling to warrant an extension or a reversal of the single Judge's ruling.

8.13 There was submission in rebuttal of the assertion that the Applicant had financial difficulties. Reference was made to Order 10 rule 24 of the Court of Appeal Rules, Act No. 7 of

2016¹, which allows an indigent person to apply to Court to be considered as such. That the Applicant herein did not make any application before Court to be considered as an indigent person. That in the circumstances, the Applicant cannot seek that the ruling be reversed and not be condemned in costs. In the final analysis it was contended that the single Judge was on firm ground in dismissing the appeal for want of prosecution as the reasons advanced for extension were not compelling, just like the grounds advanced in the motion, which lack merit. They applied for costs.

9.0 **Hearing** – When the matter came up for hearing, both Mr. Ng’onga and Ms. Mulenga, counsel for each party, relied on their respective documents filed into Court.

10.0 **Our Decision**

10.1 We have carefully considered the motion before us, the affidavits and skeleton arguments; including the authorities brought to our attention by counsel for each party.

11.0 Before proceeding any further, we have been challenged by the Respondent that this matter was filed way out of the

stipulated time frame for making such an application. That, that being the case, the Applicant ought to have sought leave to file the Notice of Motion. That in view of the fact that there is no order of leave to file out of time, the Notice of Motion is incompetently before us and that being the case, this Court lacks the jurisdiction to determine or indeed make any order regarding this matter.

- 11.1 We agree with counsel for the Respondent that Section 9(b) of the Court of Appeal Rules² does not provide for a time frame within which an application thereunder can be made. However, this Court has in numerous decisions guided that such an application, as the one in this matter, should be made within a reasonable timeframe. We have guided that fourteen days would be a reasonable time. We have noted the Respondent's arguments regarding Order 59/14/4/RSC³. We are of the view that the import of this Order has been misapprehended. Our reading of this Order is that it relates to appeals and not an application such as the one before us. This not being an appeal, our view is that it does not apply.

11.2 The applicant has argued that the delay to file this application was not inordinate. Further that the earlier application for extension has only been delayed by a mere twelve (12) days after the mandatory 60 days to file the Record of Appeal and Heads of Argument had lapsed. That the application to dismiss the appeal was filed the day after the applicant had applied for extension of time. That the court instead heard the application to dismiss the matter without first hearing the application for extension of time. We have considered the Record of Motion. We note that the applicant herein, filed his application for an extension of time on 13th January, 2021. We also note that the Respondent made his application to dismiss on 14th January, 2021, a day after the applicant made his application for extension of time. In her Ruling at R8, paragraph 20, the Judge stated that it is clear that the Appellant waited too long and did not take any step until the Respondent made the application to dismiss for want of prosecution. This is contrary to the evidence on record.

11.3 The application for extension of time was made earlier than the one to dismiss the action. In view of the above, the same

ought to have been heard first before the application to dismiss for want of prosecution, as it was already on record.


11.4 We, therefore, agree with the applicant's argument that the single Judge should not have heard the Respondent's application to dismiss the matter, when another application was already before court for extension of time. Further, we are of the view that the delay was not inordinate. We do not agree that this Court lacks jurisdiction to deal with this matter as in our view, the delay was neither inordinate, nor did the Appellant breach the time lines in making the application, since we have found that Order 59/14/41 RSC³ is not applicable.


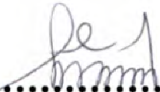
11.5 We therefore set aside the Order of the single Judge and in its place we grant an extension of time to the applicant. He must file the appeal and heads of argument within 30 days from the date of this Ruling.

11.6 As regards the issue of costs, our view is that the same were awarded on the basis of the Respondent's application to dismiss matter for want of prosecution. Having set aside the

Ruling, it means the order for costs falls away. Ultimately, we find the application has merit and it succeeds.

11.6 We make no order as to costs.


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M. M. KONDOLO, SC
COURT OF APPEAL JUDGE

	
M. J. SIAVWAPA	A. M. BANDA-BOBO
COURT OF APPEAL JUDGE	COURT OF APPEAL JUDGE