

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

CAZ/O8/303/2021
APPLICATION NO. 05/2022

BETWEEN:

**COURTYARD PROPERTIES AND MANAGEMENT
LIMITED**

APPELLANT

AND

DOWNTOWN SHOPPING COMPLEX LIMITED

1ST RESPONDENT

ZAMBIA RAILWAYS LIMITED

2ND RESPONDENT



***Coram: Chishimba, Ngulube and Banda-Bobo, JJA
On 19th May, 2022 and 26th April, 2023.***

For the Appellant: Mr. B. Moshia of Messrs Moshia and Company

For the 1st Respondent: Mr. V. K. Luswili of Messrs Iven Mulenga and Company

For the 2nd Respondent: N/A

RULING

Banda-Bobo, JA delivered the Ruling of the Court.

Cases referred to:

1. Rosemary Nyangu v. Pamodzi Plc, (SC/8/08/2021)
2. Eastern and Southern African Trade v. Finsbury Investments Limited (Application No. 27/2022)
3. Birket v. James 1977 2All ER 801
4. Tom Orlic and Another v. Mwila Chishimba and Others (SCZ/8/51/2021)
5. Nahar Investments Limited v. Grindlays Bank International (z) Limited (SCZ Appeal No. 2009/1997)
6. NFC African Mining Plc v. Techpro Zambia (2009) ZR 239

Legislation referred to:

- *The Court of Appeal Rules, Statutory Instrument No 65 of 2016*
- *Court of Appeal Act No. 7 of 2016*
- Halsbury's Laws of England, Vol. 37, 4th Edition

1.0 Introduction

1.1 This is an application by way of Notice of Motion to vary, discharge or reverse the Ruling of a single Judge of this Court dated 1st February, 2022. The application is made pursuant to Order 10 rule 2, sub rule 8 of the Court of Appeal Rules, Statutory Instrument No. 65 of 2016¹ and is accompanied by an affidavit in support and skeleton arguments.

2.0 Background

2.1 The brief background to the matter as can be ascertained from the record, is that the 1st and 2nd Respondents herein, being dissatisfied with the Ruling of the lower Court dated 12th July, 2021, desired to appeal the Ruling. To that effect, they filed on 22nd July, 2021, a Notice of Appeal and Memorandum of Appeal, which they duly served on the Appellant herein. However, the record of appeal and the heads of argument were not filed within the stipulated 60 days timeframe. The respondents confirmed this when they conducted a search on

the record. However, this Court later granted the appellants an ex-parte order for extension of time in which to file the record of appeal and heads of arguments out of time. They were granted 30 days in which to file the said documents.

2.2 As at 22nd October, 2021, at the expiration of the 30 days extension, the record of appeal and heads of argument had still not been filed. Another search was conducted by the respondents on 30th November, 2021, wherein it was discovered that the order to file the record of appeal and heads of argument within 30 days had not been complied with. Further, that no application for a further extension of time had been made.

2.3 Based on the above, the 1st respondent applied on 30th November, 2022 for dismissal of the appeal for want of prosecution. On 16th December, 2021, the appellants, after being served with the application for dismissal, filed an application for leave to file an application for extension of time in which to file the record of appeal and heads of argument out of time. They also filed an affidavit in opposition to the application to dismiss appeal for want of prosecution.

3.0 **Decision of the Single Judge**

3.1 Both applications were heard at the same time. On 21st February, 2022, the single Judge of this Court declined to grant the application to dismiss the appeal for want of prosecution.

3.2 In arriving at his decision, the single Judge took cognizance of the fact that rules of Court are made in order to ensure an orderly and speedy delivery of justice; and that a party who chose to ignore or flout the rules of court did so at their own peril. That this could lead to the dismissal of their matter. His Lordship acknowledged that indeed the time in which the appellant ought to have filed the record of appeal and heads of argument had lapsed. In dealing with the issue before him, the learned Judge looked at the factors that would warrant a dismissal, among which he said were, whether there is inordinate delay in prosecuting the appeal, the reasons for the delay and the interest of justice.

3.3 In his decision, the learned Judge stated that whether the delay is inordinate is dependent on the circumstances of each case and no period can be attached to this assessment. His

Lordship accepted the appellant's explanation that the omission was due to a miscommunication in issuing instructions to counsel. The learned Judge was of the view that despite the process showing that there were three law firms engaged by the appellant, only one firm had conduct of the matter and accepted that counsel from that firm had proceeded to attend to election petitions at the time, hence the need to have another counsel engaged. The learned Judge took judicial notice that the period in which the record was to be prepared and filed was punctuated by several election petitions which took precedence. The learned Judge found the reason given for the delay plausible. He also reasoned that the interest of justice demanded that matters be determined on their own merits.

3.4 He determined that the delay was not inordinate in the circumstances of the case. It was his view that the respondent would not be prejudiced if the application to dismiss the appeal for want of prosecution was not granted. He dismissed the application to dismiss the appeal for want of prosecution.

3.5 As regards the application for an extension of time, he found that that application was rightly before him. He proceeded to grant it, and gave the appellant seven (7) days to file the application for extension of time in which to file the record of appeal and heads of argument.

4.0 **This Application**

4.1 Dissatisfied with the single Judge's verdict, the respondent filed this application. The same was supported by an affidavit sworn by Jihad Farhat, a director in the 1st respondent company. In the affidavit, he gave the background to the matter, leading to this application. It was his deposition that the single Judge did not critically interrogate all the reasons for the delay to file the record of appeal and without any evidence of cardinal facts stated as reasons for not filing within the time. The single Judge allowed the appellants to file an application to extend time when he held that one cannot extend time which has lapsed. That this was a proper case in which to grant the application, to vary, discharge or reverse the ruling of 1st February, 2022.

- 4.2 The application was opposed by way of an affidavit in opposition sworn by Davies Mwambazi, a director in the appellant company.
- 4.3 It was his deposition that he had been advised by counsel and believed that the Judge was on firm footing in the manner he exercised his discretion, and had had regard to all the circumstances of the case when he granted the appellant's application for leave and in dismissing the respondent's application to dismiss the appeal for want of prosecution. He deposed that this is not a proper case in which this Court can reverse, vary or discharge the Ruling of the single Judge.
- 4.4 Further, that he had been advised and believed that the Rules of this Court clearly indicate that there can be no appeal from an order allowing extension of time for appealing a judgment. He averred that the appellant was desirous of appealing this matter so that it can be determined on merit. That dismissing it would be prejudicial to the appellant.

5.0 **Hearing**

5.1 At the hearing, both counsel relied on their affidavits in support and in opposition, as well as their skeleton arguments and list of authorities. Both of them made brief oral augmentations. We have noted the written submissions which we do not intend to reproduce herein.

5.2 In the oral augmentation, Mr. Luswili, counsel for the respondent/applicant in this application, stated that this Court has power to vary, discharge or reverse a Ruling of a single Judge; and therefore this application was rightly before Court, contrary to the appellant's argument. That the Section 23 (2) (a) of the Court of Appeal Act² cited by the appellant in his arguments applies to appeals and not applications of this nature. He emphasized that they were not appealing but merely seeking a reversal, variation or discharge of the single Judge's Ruling. That the main contention was that the single Judge did not interrogate the reasons advanced by the appellant for failing to file the record of appeal in time. That if he had done so, he would have dismissed the appeal. He

urged the Court to look at the affidavit in opposition to dismiss the appeal, as appear at page 25 of the record at paragraph 5.

5.3 In his oral augmentation, Mr. Mosha, counsel for the appellant submitted that the application before Court showed that the applicant has an issue with the reasoning of the Court. That this was an attempt to appeal the single Judge's ruling.

5.4 It was also his assertion that the record of appeal had already been filed, so in essence the application has been overtaken by events.

5.5 In reply, it was Mr. Luswili's contention that an appeal and an application are two different things. That Order 10 CARs does not allow an applicant to bring in new facts. Further, that the fact that the record of appeal has already been filed cannot circumvent this application. We were argued to grant the application.

6.0 **Analysis and Decision**

6.1 We have carefully considered the respondent's Notice of Motion, the affidavits for and against, the skeleton arguments relied on by each party as well as the oral submissions by

counsel. We have also considered the Ruling of the single Judge, which the applicant assails. The argument by the applicant is that the single Judge did not interrogate the reasons given for the delay to file the record of appeal, and without any evidence of cardinal facts stated as reasons for not filing within the time, they had been allowed to file the application the second time, when he held that one cannot extend time which has elapsed.

6.2 In opposing the application, the appellant agreed with the decision of the lower Court. Further, that counsel had advised that the rules of this Court clearly indicate that there can be no appeal from an order allowing extension of time for appealing from a judgment.

6.3 Section 9 (b) of the Court of Appeal Act No. 7 of 2016² gives power to a single judge as follows:-

“A single judge of the court may exercise a power vested in the court not involving the decision of an appeal, except that –

(b) In civil matter, an order, directive or decision made or given in pursuance of the powers conferred

by this Section may be varied, discharged or reversed by the court.”

6.4 The provisions of Section 9 are supplemented by Order 10 rule 2(8) of the Court of Appeal Rules (CARs)¹ on which this Motion has been anchored. The said Order is couched thus:-

“A person who is aggrieved by a decision of a single judge and who intends to have such a decision varied, discharged or reversed by the court under Section 9 (b) of the Act, shall, before the date of hearing of the application by the court file three extra copies of the proceedings including copies of the affidavits filed by the other party prior to the single Judge’s decision, for use by the court.”

6.5 From the above, it is clear that an applicant who wishes to move the full court on the decision of a single Judge, comes to the full court by way of a renewal. We are guided by the Supreme Court’s decision in the case of **Rosemary Nyangu v. Pamodzi Plc**¹, on this point; which decision we adopted in our case of **Eastern and Southern African Trade v. Finsbury Investments Limited**² where we said thus:-

“It is abundantly clear from the provisions quoted in paragraphs 2.2 and 2.3 that an application or motion comes from a single judge to the full court by way of

a renewal and ought to be presented as such. It is not an appeal requiring new grounds premised on the decision of the single judge for consideration of the full court.”

6.6 Our scrutiny of the record does not reveal that there was a departure by the applicant from what he presented before the single Judge to the renewed application before us. We are of the view that the applicant did not in any way formulate the renewed application from the single Judge to this Court in form of an appeal. This argument fails.

6.7 As regards the substantive application to vary, discharge and reverse the decision of the single Judge, extending time, it is not in issue that the single Judge had granted the appellants an extension of time which was not complied with. The learned Judge's order to file the record of appeal and heads of argument within 30 days expired on 22nd October, 2021. As at 30th November, when the applicants conducted a search on the record, the record of appeal and heads of argument had not been filed. This was more than 30 days from the due date. At that time, no application to extend time had been filed. On 30th November, 2022, the 1st respondent applied to dismiss the

appeal for want of prosecution. Upon being served with an application to dismiss the appeal for want of prosecution, the appellants, on 16th December, 2021 filed an application for leave to file an application for extension of time.

6.8 Order 10 rule 7 of the Court of Appeal Rules¹ provides that:-

“(i) if an appeal is not lodged within the time stipulated under rule 6, the respondent may make an application to Court for an order to dismiss the appeal for want of prosecution ...”

In order for such application to be granted, the applicant must show that there has been inordinate delay, and that the said inordinate delay is inexcusable and that the defendants are likely to be seriously prejudiced by the delay. In the case of **Birket v. James**³ it was held that:-

“the power (to dismiss) should be exercised only where the court is satisfied either

- (1) that the default has been intentional and contumelious, e. g disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or**
- (2) (a) that there has been inordinate delay and**

inexcusable delay on the part of the plaintiff or his lawyers, and

(b) That such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action, or is such as is likely to cause or to have caused serious prejudice to the defendant.”

6.9 Further, Halsbury's Laws of England, Vol. 37, 4th Edition³, page 337 at paragraph 448, is pertinent on this issue where it states inter alia, that:-

“... on an application to dismiss for want of prosecution, the court will take into account all the circumstances of the case, including the nature of the delay and the extent to which this has prejudiced the defendant, as well as the conduct of all the parties and their lawyers ...”

6.10 In the circumstances of this case, the delay to file the record and heads of argument, despite an extension having been granted are inexcusable and amount to inordinate delay and warranted dismissal.

6.11 We are of the view that the learned single Judge misdirected himself in granting the Order to extend time as the appellants

were reacting to the application to dismiss the appeal for want of prosecution. The application to dismiss the appeal for want of prosecution was made earlier than the application to extend time. The Judge should not have proceeded to hear the subsequent application without first determining the earlier application. Further, the reasons advanced for the delay in prosecuting the appeal are unacceptable.

6.12 In the case of **Tom Orlic and Another v. Mwila Chishimba and Others**⁴ the Supreme Court guided *inter alia* that an application for extension of time ought to be made before the expiry of the period in which to apply for an extension of time. We believe in this case that it was the respondent's application to dismiss the matter for want of prosecution that woke the appellants from their slumber. The earlier extension of time having expired at least 30 days prior to the respondents' application; the appellants were dilatory in their conduct. Litigants who sit on their rights do so at their own peril.

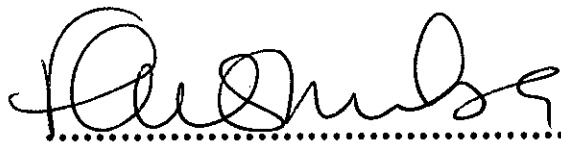
6.13 The Supreme Court has guided in a plethora of cases on the need for litigants to comply with Court rules. The case of **Nahar Investments Limited v. Grindlays Bank**

International (z) Limited⁵ and **NFC African Mining Plc v. Techpro Zambia⁶**, are but some of the cases where the apex Court guided litigants on the need to adhere to the rules of the Court for the proper administration of justice.

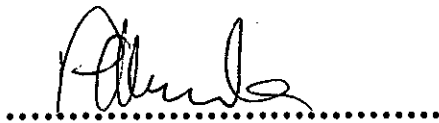
6.14 We want to agree with the applicant's counsel that the fact that the record of appeal and heads of argument have been filed can certainly not circumvent this application. It is our view that it cannot stop this Court from determining the application.

6.15 In the final analysis, it is our view that there is merit in the application. The decision of the single Judge is hereby discharged. The appeal is dismissed for want of prosecution.

6.15 Costs to follow the event, to be taxed in default.



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F. M. CHISHIMBA
COURT OF APPEAL JUDGE



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P. C. M. NGULUBE
COURT OF APPEAL JUDGE



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A. M. BANDA-BOBO
COURT OF APPEAL JUDGE