

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

**NOM 38/2022
NOM 02/2023
CAZ/08/355/2020**

BETWEEN:

DALIYO MBEWE AND 153 OTHERS

AND

B.L. HARBERT INTERNATIONAL



APPELLANT

RESPONDENT

CORAM: *Chishimba, Sichinga, and Sharpe-Phiri, JJA*
On 3rd February, 2023 and 15th February, 2023

For the Appellant:

Mr. B. Banda, Legal Aid Counsel of Legal Aid Board

For the Respondent:

Mr. Y. Yosa and Mr. I. Mung'omba of Messrs Musa Dodhia and Company

RULING

Sichinga, JA, delivered the Judgment of the Court.

Cases referred to:

1. *China Henan International Co-operation Group Company Limited v G and G Nationwide (Z) Limited SCZ Appeal No. 199 of 2016*

Legislation referred to:

1. *Court of Appeal Rules, Statutory Instrument No. 65 of 2016.*
2. *Rules of the Supreme Court 1999 Edition (White Book)*
3. *The Court of Appeal Act, No. 7 of 2016 Laws of Zambia*

1.0. Introduction

1.1. On 16th August, 2022 the applicants (Daliyo Mbewe and Others) filed a Notice of Motion for leave to file notice of intention to appeal against the judgment of this Court of 19th July, 2022. The motion is made pursuant to **Order 11 Rule 1(1) of the Court of Appeal Rules (CAR)**¹.

2. Preliminary Objection

2.1 At the hearing of the Motion, on 3rd February, 2023, Mr. Mung'omba Counsel, for the Respondent, raised a preliminary objection by way of Notice of Motion to raise preliminary objections on a point of law filed on 25th January, 2023. The said motion was made pursuant to **Order 13 Rule 5 of the Court of Appeal Rules** and **Order 33 Rule 3 and 7 of the Rules of the Supreme Court of England**² for determination of the following questions of law *in limine*, namely:

1. *Whether the Appellants' application for leave to appeal against the judgment of this Court dated 19th July, 2022 is competently before the Court considering the fact that the application has been brought outside the time limit prescribed by law; and*
2. *Whether the costs of and occasioned by this application shall be for the Respondent and ought to be borne personally by counsel for the Appellants.*

2.2 The motion is supported by an affidavit sworn by one Innocent Mung'omba, counsel for the Respondent. The gist of counsel's affidavit is that the Appellants filed their application for leave to appeal to the Supreme Court outside the prescribed period without leave of the Court. That in the lower court's Ruling of 29th July, 2021, the Appellants' counsel was cautioned against commencing actions that are doomed to fail. It was also averred that this Court at page J12 to J13 of our judgment found that the Appellants admitted that the matter in the court below was filed late and that the appeal was bereft of merit.

2.3 Mr. Mung'omba relied on the Respondent's skeleton arguments in support of the motion filed on 25th January, 2023.

3.0 Opposition to the Preliminary Issue

3.1 In opposing the motion, the Applicants filed an affidavit in opposition on 1st February, 2023 sworn by one Bentry Banda, counsel for the Respondents. The gist of his affidavit is that the motion for leave to appeal to the Supreme Court was lodged on 15th August, 2022 and not 16th August, 2022 as asserted by the Respondent's counsel in his affidavit in support. That the said defect cited is curable and inconsequential to these proceedings.

3.2 It was admitted that this Court found and adjudged that the appeal had no merit, however, the Applicant's contention is that the Court did not consider the exceptions to the law of limitations hence the application seeking leave to appeal to the Supreme Court.

3.3 In opposing the motion, Mr. Banda relied of the skeleton arguments in opposition to the motion filed on 1st February, 2023.

4.0 Respondents' submissions in reply

4.1 In reply, Mr. Mung'omba submitted that the motion to raise preliminary issue was made pursuant to **Order 33 Rule 3 of the Rules of the Supreme Court of England** which provides that:

"The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated".

4.2 In support of his submission, Mr. Mung'omba relied on the case of **China Henan International Co-operation Group Company Limited v G and G Nationwide (Z) Limited¹** to the effect that **Order 33 Rule 3 of the Rules of the Supreme Court of England** gives the Court jurisdiction to entertain a preliminary issue.

4.3 He argued that the Appellants motion for leave to appeal to the Supreme Court was based on **Order 9 of the CAR** which does not relate to civil appeals. In addition, it was submitted that the Appellants' assertion that the intended appeal raises issues of public importance is misconceived because Courts have pronounced on matters which are statute barred.

4.4 Mr. Yosa, learned co-counsel for the Respondent submitted that the Appellants did not dispute that the motion for leave to appeal was filed out of time.

5.0 Our decision

5.1 The motion raises a preliminary issue as to whether the Appellant's application for leave to appeal is competently before this Court. The Respondent contends that the application for leave to appeal is not competently before us as it was brought outside the time limit prescribed by law. On 19th July, 2022 we rendered our decision dismissing the Applicants' appeal for want of merit. **Section 13 (1) and (2) of the Court of Appeal Act (CAA)**³ provides as follows:

"(1) An Appeal from a judgment of the Court shall lie to the Supreme Court with leave of the Court.

(2) An application for leave to appeal, under subsection (1), shall be made within fourteen days of the judgment."

5.2 Our brief response to the Preliminary Issue is that **section 13 (2) CAA** requires a party aggrieved with a decision of the Court

to seek leave within fourteen days of the judgment sought to be appealed against.

5.3 In the present case, our decision having been rendered on 19th July, 2022, the fourteen days expired on or about 3rd August, 2022. The application for leave to appeal, was made on 16th August, 2022. The Applicants' contends that her application was made on 15th August, 2022. However, even if it was made on the latter date, it was still outside the prescribed period for seeking the Court's leave to appeal to the Supreme Court.

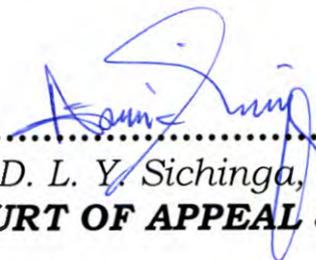
6.0 Conclusion

6.1 We find the motion for leave to appeal is incompetent and without basis. Therefore, we uphold the Respondent's preliminary objection on a point of law and accordingly dismiss the motion for leave to appeal for want of merit with costs to the Respondent to be taxed in default of agreement.



F.M. Chishimba

COURT OF APPEAL JUDGE



D. L. Y. Sichinga, SC

COURT OF APPEAL JUDGE



N.A. Sharpe-Phiri

COURT OF APPEAL JUDGE