

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

CAZ/8/85/2022
Appeal No. 90/2022

BETWEEN:

EASTERN AND SOUTHERN AFRICA TRADE
AND

APPELLANT

FINSBURY INVESTMENT LIMITED

RESPONDENT

Coram : Makungu, Sichinga, and Ngulube JJS
On 5th May, 2023 and 30th May, 2023

For the Appellant: Mr. C. J. Mumba of Messrs Chibesakunda & Co

For the Respondent: Mr. D. Chakoleka and Mr. P Chomba both of Mulenga
Mundashi Legal Practitioners

JUDGMENT

MAKUNGU, JA delivered the Judgment of the Court.

Cases Referred to:

1. *JNC Holdings Limited, Post Newspapers Limited, Mutembo Nchito v. Development Bank of Zambia, SCZ Appeal No. 07 of 2012*
2. *Mutale v. Mutale SCZ Appeal No. 141 of 2008*
3. *Giles Yambayamba v. Attorney General – SCZ Judgment No. 26 of 2015.*
4. *Barclays Bank Zambia Limited v. Jeremiah Njovu and Others – SCZ/09/21/2019.*
5. *Stanbic Bank Zambia Limited and Savenda Management Services Limited (2016 CAZ/08/040)*
6. *Leopold Walford (Z) Limited v. Unifreight (1985) ZR 203,*

7. *Gaedonic Automotives Limited and Another v. Citizens Economic Empowerment Commission* SCZ Judgment No. 39 of 2014
8. *Access Bank (Zambia) Limited v. Group Five/ZCON Business Park Joint Venture* SCZ 8/52/2014) (2016) ZMSC 24 (26/02/16)
9. *Stanley Mwambazi v. Morester Farms Limited* (1977) ZR 108
10. *Henry Kapoko v. The People* 2016/CC/0023 (2016)
11. *D. Nkuwa v. Lusaka Tyre Services Limited* (1976) ZR 110
12. *Citibank Zambia Limited v. Suhayl Dudhia* CAZ 16/2020
13. *Finsbury Investments Limited v. Antonio Ventriglia and Manuel Ventriglia*
14. *Dar Farms Transport Limited v. Moses Nundwe, Lima Liquidation/Lukanga Investments Development Limited & Mpongwe Limited* SCZ Appeal No. 46 of 2014.
15. *Twampane Mining Co-operative Society Limited v. E & M Storti Mining Limited* SCZ 001/2011
16. *John Sangwa v Sunday Hwalya Nkonde* SCZ Appeal No. 2 of 2021

Legislation referred to

1. *Rules of the Supreme Court of England 1965 (White Book) 1999 Edition*
2. *The Court of Appeal Act, No. 7 of 2016*
3. *The Court of Appeal Rules, Statutory Instrument No. 65 of 2016*
4. *The Constitution of Zambia, Chapter 1 of the Laws of Zambia*

1.0 INTRODUCTION

- 1.1 This is an appeal against part of the Ruling of Justice S.K. Newa of the High Court in cause number 2019/HP/0288. The ruling was delivered on 17th February, 2022. The part of the ruling appealed against is the refusal of the application for extension

of time within which to file notice of appeal and memorandum of appeal.

2.0 BACKGROUND

2.1 The respondent commenced the action in the Court below by a Writ of Summons and Statement of Claim on 5th March, 2019 seeking damages for conspiracy, damages for wrongful interference, interest, any other relief and costs. The appellant filed its defence into Court on 8th May, 2019.

2.2 On 6th November, 2019 the appellant took out summons seeking the determination of the following preliminary issues:

- i. *Whether the respondent's action should be struck out for being an abuse of the court process on the basis that the respondent had failed to show a sustainable cause of action as required by Order 18 Rule 19 of the Rules of the Supreme Court of England 1965 (1999 Edition);*
- ii. *Whether the action by the respondent should be struck out for being an abuse of the court process on the basis that the respondent's claims are statute barred;*
- iii. *Whether the action by the respondent should be terminated for violating the Diplomatic Immunities*

(Common Market for Eastern and Southern Africa Trade and Development Bank) Order, Statutory Instrument No. 123 of 1992;

- iv. Whether the action by the respondent falls within the scope of an arbitration agreement between the appellant and the respondent and as such, the action ought to be stayed and referred to arbitration in compliance with Section 10 of the Arbitration Act, No. 19 of 2000, and*
- v. Whether the action by the respondent should be struck out for the reason that the respondent has failed to comply with orders for directions,*

2.3 On 26th May, 2020, the Court below rendered its Ruling, determining the preliminary issues in the respondent's favour, dismissing the case and granting leave to appeal.

2.4 On 26th June, 2020 the appellant filed a Notice of Appeal and Memorandum of Appeal.

2.5 On 11th September, 2020, the respondent took out summons for an order to dismiss the appeal for irregularity. The

respondent's application was premised on the ground that the appeal was filed one day out of time without leave of Court.

2.6 On 23rd October, 2020 the appellant filed into the Court of Appeal its opposition to the respondent's summons for an order to dismiss for irregularity, as well as, its application for extension of time within which to file notice of appeal and memorandum of appeal.

2.7 The Hon. Mr. Justice M.M. Kondolo sitting alone heard the respondent's challenge to the appeal on 28th October, 2020 and thereafter reserved his ruling.

2.8 On 6th August, 2021, the Honourable Judge Kondolo delivered his ruling. In that ruling, he held that the appellant ought to have first made an application to the Court below for an extension of time to file its notice of appeal and memorandum of appeal instead of filing the documents a day late without leave of Court. Consequently, he dismissed the appeal as it was incompetently before Court.

2.9 On 6th September, 2021, the appellant filed before the Court below an application for an order for extension of time within which to file its notice of appeal and memorandum of appeal.

2.10 On 29th November, 2021, the respondent filed a notice of motion to set aside the appellant's application for extension of time within which to file its notice of appeal and memorandum of appeal for want of jurisdiction. The said application was brought pursuant to **Order 33 rule 7 of the Rules of the Supreme Court 1965 (RSC)**.

2.11 On 15th December, 2021, the appellant filed its skeleton arguments in opposition to the respondent's notice of motion. In its opposition, the appellant challenged the propriety of the notice of motion on account of the respondent's failure to comply with the provisions of **Order 33 of the RSC**.

2.12 On 17th February, 2022, the Court below delivered its ruling whereby it found that, the respondent's Notice of Motion was incompetently before it. However, the Court pronounced itself on the merits of the Notice of Motion for Extension of Time within which to appeal.

2.13 The lower Court held that if it determined the appellant's application for extension of time, it would be reversing the decision of the Court of Appeal.

2.14 Consequently, the application was dismissed for incompetence.

3.0 GROUNDS OF APPEAL

3.1 On 10th March, 2022, the appellant filed its Notice of appeal and Memorandum of appeal herein against the lower Court's Ruling dated 17th February, 2022. The grounds of appeal raised were as follows:

- i. *The Court erred in law and in fact when it proceeded to make a determination on the respondent's notice of motion dated 29th November, 2021 after making a finding that the notice of motion was incompetently before it owing to the respondent's failure to first obtain an order of the Court prior to bringing its notice of motion.*
- ii. *The Court erred in law and in fact when, as a consequence of ground 1 above it wrongly dismissed the appellant's application for an extension of time within which to file its notice of appeal and memorandum of appeal.*
- iii. *The Court erred in law and in fact when it failed to recognize that the case of Barclays Bank*

Zambia Limited PLC v. Jeremiah Njovu and others (SCZ/09/21/2019) is distinguishable from the facts of the case at hand and therefore, the findings and principles in that case are not applicable to this case.

iv. The Court erred in law and in fact when it failed to recognize that it had the authority and/or jurisdiction to hear and determine the appellant's application for extension of time within which to file its notice of appeal and memorandum of appeal, because the said application had not been heard by the Court of Appeal on its merits.

v. The Court erred in law and fact when it held that if it determined and granted the appellant's application for extension of time within which to file its notice of appeal and memorandum of appeal, it would be reversing the decision of the Court of Appeal, which it has no jurisdiction to do.

vi. The Court in failing to hear and determine the appellant's application for extension of time within which to file its notice and memorandum of appeal on the correct grounds and by applying the correct test, erred in law and in fact, as in doing so it was paying undue regard to procedural technicalities which resulted in a manifest injustice to the appellant.

4.0 APPELLANT'S HEADS OF ARGUMENT

4.1 The appellant's heads of argument filed herein on 5th May, 2022 were relied upon during the hearing of the appeal.

4.2 In summary, the appellant's arguments were as follows:-

Grounds 1 and 2 were argued together. That the court below lacked jurisdiction to hear and determine the respondent's Notice of Motion to dismiss the appellant's application for extension of time for irregularity, as the same was incompetently before it. That the remedy granted upon the same Motion is therefore a nullity. Counsel submitted that after ruling that the respondent's notice of motion was incompetent

due to the failure by the respondent to first obtain leave of court to file the motion, the court should have proceeded to hear the appellant's application for extension of time.

- 4.3 To buttress the foregoing, we were referred to the case of **JNC Holdings Limited, Post Newspapers Limited, Mutembo Nchito v. Development Bank of Zambia**¹, where the Supreme Court held *inter alia* that:-

"... 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 any remedies"

"... it is clear from the Chituta and New Plast Industries case that if a court has no jurisdiction to hear and determine a matter, it cannot make any lawful orders or grant any remedies sought by a party to that matter."

- 4.4 Reference was also made to the case of **Mutale v. Mutale**² where an appeal was dismissed because it emanated from proceedings which were a nullity as the court of first instance had no jurisdiction to hear and determine the dispute.

4.5 In light of the above authorities, counsel submitted that the lower court's order dated 6th September, 2022 dismissing the appellant's Motion for extension of time is a nullity. Counsel went on to submit that the court has discretionary power to grant an extension of time. However, it is trite that the court's discretion is not fettered and the court is not bound by previous decisions to exercise discretion in a regimented manner as held in the case of **Giles Yambayamba v. Attorney General**³. That this entails that in considering the appellant's application, the lower court was not bound by the Supreme Court's decision in the case of **Barclays Bank Zambia Limited v. Jeremiah Njovu and Others**⁴. That the court should not have uplifted the *ratio decidendi* and/or the principles applied by the Supreme Court in the **Barclays Bank** case and applied it to the case in hand. That the application for extension of time should have been considered on its own facts.

4.6 Counsel further submitted that the application for extension of time was dismissed on wrong principles of law and this Court should send the matter back to the lower court for hearing of

the application for extension of time so that it may be determined on the right principles of Law.

4.7 Grounds 3, 4 and 5 were argued in the alternative and in furtherance of the arguments under Grounds 1 and 2.

4.8 Counsel distinguished the **Barclays** case from this case. The Supreme Court in the **Barclays** case was dealing with an instance where the appeal was dismissed owing to its breach of a mandatory rule of court – the breach of which did not grant the court any discretion to make any other order than dismissal of the appeal. The appellant in that case filed its Heads of Argument and Record of Appeal into Court without leave of court.

4.9 In the present case, the appellant did have leave of court to appeal but erred only in not obtaining an extension of time within which to file the notice of appeal and memorandum of appeal. Further, in the case at hand, the rule that was breached was not a mandatory rule of Court, but Section 25 of the **Court of Appeal Act, 2016** which requires a party who is desirous of appealing to file a notice and memorandum of appeal within 30

days. This is unlike in the **Barclays** case where the applicant had not obtained leave of court.

4.10 Counsel cited the case of **Stanbic Bank Zambia Limited and Savenda Management Services Limited**⁵ where we held that section 25 of the Court of Appeal Act, although the word "shall" is used, is strictly speaking not mandatory as Order XIII of the Court of Appeal Rules, confers discretion on the court for sufficient reason to extend a time in which an appeal can be brought. On the basis of the case of **Leopold Walford v. Unifreight**⁶, counsel argued that breach of a rule that is regulatory and not mandatory will not result in the dismissal of a matter. That the Supreme Court held *inter alia* that:-

"breach of a regulatory rule, will not always be fatal as much will depend upon the nature of the breach and the stage of the proceedings reached. This, therefore, means that, as a general rule, breach of a regulatory rule is curable"

4.11 Counsel went on to submit that in the **Barclays** case, the Supreme Court held that:-

“Where leave to appeal had not been obtained, then the appellate court would not have jurisdiction”

He stated that on the other hand, the appellant herein had been granted leave to appeal, therefore this Court had jurisdiction to hear the appeal. The only mistake was not to obtain an order for leave to file the notice of appeal and memorandum of appeal out of time. That in the ruling dated 6th August, 2021 the single Judge of this Court directed that the application for extension of time be made to the lower court. This is the guidance that the appellant followed.

4.12 Counsel contended that it is under the circumstances, incorrect that if the court below granted the appellant an extension of time within which to file a notice of appeal and memorandum of appeal, it would be reversing the decision of this Court.

4.13 Counsel went on to quote part of the Ruling of the single Judge of this Court dated 6th August, 2021 where he stated that:-

“I therefore agree with Mr. Chakoleka that the application is wrongly before me as the correct court to deal with the application was the High Court Judge who issued the Ruling with regard to the appeal. The appeal having been filed

without the requisite leave of court cannot be cured by an application for extension of time within which to bring the same appeal. The application for extension is dismissed."

4.14 Counsel further referred us to the case of **Gaedonic Automotives Limited and Another v. Citizens Economic Empowerment Commission**⁷ where it was held to the effect that:-

"A matter that is not heard on its merits but dismissed on a technicality can be started afresh".

4.15 Counsel pointed out that in the **Gaedonic** case the issue was whether a High Court matter which was dismissed on a technicality could be started afresh. That the Supreme Court Justices held that litigation only comes to an end after a dispute is heard and determined on its merits by a court of competent jurisdiction. That it follows that the appellant herein has the right to relaunch its application for extension of time within which to file the notice of appeal and memorandum of appeal and if leave is granted to proceed to appeal.

4.16 He further fortified the above submissions with the case of **Access Bank (Zambia) Limited v. Group Five/ZCON Business Park Joint Venture**⁸ where the Supreme Court held *inter alia* that matters ought to be decided on their merits as opposed to being disposed of on technicalities and piecemeal.

4.17 The case of **Stanley Mwambazi v. Morester Farms Limited**⁹ was also cited to foster the argument that a party in default may be ordered to pay costs because it is not in the interest of justice to deny the right to have his case heard. Counsel went on to submit that the **Barclays case** is not binding on the lower court and this Court for it was decided *per incuriam* as the apex court did not overrule itself on the precedents that matters should be determined on their own merits rather than being disposed of on technicalities. We were beseeched to allow grounds 3, 4 and 5 of this appeal.

4.18 In the 6th ground of appeal, the appellant alleges that the lower court's failure to hear and determine the appellant's application for extension of time on correct grounds and by applying the correct test amounted to paying undue regard to procedural technicalities, and resulted in manifest injustice to the

appellant. This was argued further and in the alternative to grounds 3, 4 and 5. Counsel cited **Article 118 (2) (e) of the Constitution of Zambia** and the case of **Henry Kapoko v. The People**¹⁰ where the Constitutional Court held *inter alia* that

“Article 118 (2) (e) is not intended to do away with existing principles, Laws and Procedures, even where the same constitute technicalities. That it is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality”.

4.19 Further that each court is required to determine whether in the circumstances of the individual case,

“...what is in issue is a technicality and if so, whether compliance with it will hinder the determination of a case in a just manner.

4.20 Counsel went on to submit that the lower court has caused a manifest injustice to the appellant as it has been denied the right to be heard on its application for extension of time. Counsel proceeded to discuss the merits of the intended appeal or dismissed appeal, stating that the matters raised

were of significant public interest. He made detailed arguments on this which we believe are immaterial for our determination of the appeal before us. We therefore will not reproduce those arguments.

4.21 Counsel contended that if the court below had applied the correct principles relating to applications for extension of time, it would have arrived at a different decision. As for the applicable test, we were referred to the cases of **D. Nkuwa v. Lusaka Tyre Services Limited**¹¹ and our decision in the case of **Stanbic Bank Zambia Limited v. Savenda Management Services Limited**⁵. The court should consider:-

- a. The circumstances of the particular case;
- b. The reasons for the delay and whether there was dilatory conduct and/or malafides on the part of the appellant;
- c. Whether there was, in the circumstances inordinate delay;
- d. If it is deemed that there was an inordinate delay, the court examines the merits and grounds of appeal; and
- e. Whether the respondent will suffer prejudice if the appeal is heard.

4.22 The appellant prayed that ground 6 of the appeal be allowed and that the decision of the court below be reversed. Further that the court below be ordered to determine the application for extension of time within which to file the notice of appeal and memorandum of appeal.

5.0 RESPONDENT'S HEADS OF ARGUMENT

5.1. The respondent's heads of argument filed on 12th April, 2023 were relied upon during the hearing of the appeal. A summary of the same is as follows:

That the appellant filed its notice of appeal and memorandum of appeal against the ruling of the lower court dated 26th May, 2020 on 26th June, 2020 which was a day late as the appeal should have been filed within 30 days.

5.2 In short, counsel discussed the background to this appeal, pointing out that the application to dismiss the appeal for irregularity was filed by the respondent on 11th September, 2020. And in order to circumvent the irregularity on 23rd October, 2020, the appellant filed an application in this Court for extension of time within which to file the notice of appeal and memorandum of appeal. The parties were heard. The

respondent's application succeeded while the appellant's application was dismissed for irregularity. That the appellant filed an application before the High Court for extension of time on 6th September, 2021 more than 30 days from the Court of Appeal Ruling delivered by the single Judge on 6th August, 2021.

5.3 Both parties were heard on the application for extension of time and the respondent's motion to set aside the application for extension of time filed on 29th November, 2021. The Ruling appealed against was passed about 3 months later on 17th February, 2022.

5.4 In opposing the 1st and 2nd grounds of appeal, that the court below lacked jurisdiction to hear and determine the respondent's Notice of Motion as the same was incompetently before it, and any remedy granted upon the same motion is a nullity. Learned counsel for the respondent submitted as follows;

That the issues raised by the respondent by motion in the court below were jurisdictional in nature:-

- (a) Whether the court had jurisdiction to hear and determine the appellant's application (defendant's application dated 6th September, 2021 for extension of time within which to file the notice of appeal and memorandum of appeal, the same having been heard and dismissed by the Court of Appeal through its ruling dated 6th August, 2021.
- (b) Whether this Court has jurisdiction to grant the defendant leave to file a notice of appeal and memorandum of appeal in the Court of Appeal which dismissed the appeal.

That there are a number of authorities in this jurisdiction where the Supreme Court as well as this Court have guided:-

- (a) On the manner in which jurisdictional issues may be raised before court; and
- (b) How courts should proceed or treat jurisdictional issues once they have been raised.

5.5 Counsel cited the case of **Citibank Zambia Limited v. Suhayl**

Dudhia¹² a decision of this Court where we stated that:-

“the alleged failure by the appellant to comply with the court of appeal rules, did not preclude the court from hearing and determining a jurisdictional issue”.

Further that:-

"A jurisdictional question can be brought up at any stage of the proceedings either by formal application or viva voce, even on appeal whether or not it was raised in the court below and even where it is not pleaded in the grounds of appeal or filed in heads of argument".

- 5.6 The nature of jurisdictional questions is that, once they are brought to the attention of the court, they must be dealt with immediately. This is because if a court decides to proceed without addressing the jurisdictional issue and it is later established that it had no jurisdiction, the court will have wasted both its own time and that of the litigants because the proceedings and everything that flows from them will be rendered a nullity and of no effect. We addressed the issue of jurisdiction in the case of **Finsbury Investments Limited v. Antonio Ventriglia and Manuel Ventriglia**¹³.

- 5.7 Counsel submitted further that the said jurisdictional issues were raised by the respondent in writing and orally before the lower court. The appellant's argument is not that the lower court had the jurisdiction to allow the revival of the appeal.

Therefore, the appellant's argument that the jurisdictional issues should not have been heard after the respondent's motion dated 29th November, 2021 was dismissed, lacks merit and should accordingly be dismissed.

5.8 Learned counsel for the respondent went on to argue grounds 3, 4 and 5 of the appeal which attack the lower court for purportedly applying wrong principles pronounced in the **Barclays** case. The appellant's contention is that the lower court had the requisite jurisdiction to hear and determine the application for extension of time.

5.9 Counsel submitted that the issue raised before the court below was not whether or not the High Court had jurisdiction to hear an application for extension of time within which to file a notice of appeal and memorandum of appeal. That the question was whether the High Court had jurisdiction to hear and determine an application for extension of time within which the appellant could re-launch the appeal that had been dismissed by the Court of Appeal.

5.10 Counsel submitted that it is well settled that where a party is out of time within which to appeal against a High Court

decision, the proper court to hear an application for extension of time within which to appeal to the Court of Appeal is in the first place the High Court.

5.11 That the appellant's aim is to revive the appeal which was dismissed by the single Judge of this Court namely Mr. Justice M. M. Kondolo. The question that arises therefore is whether a person may revive an appeal which has been dismissed either on its merits or on a technicality.

5.12 According to counsel the lower was on firm ground in holding that it had no jurisdiction to hear and determine the said application for extension of time.

5.13 Counsel stated that the law has been categorically settled by the Supreme Court in the **Barclays** case that once an appeal is dismissed, whether on merit or on a technicality, such an appeal can neither be re-launched, revived or reinstated.

5.14 The respondent pointed out that the arguments made by the appellant herein are similar to the appellant's arguments in the **Barclays** case. The said arguments were made after the bank went back to the lower court upon dismissal of the appeal by the Supreme Court, to try and obtain an extension of time

within which to re-launch the appeal. The applications were refused and the bank appealed to the Supreme Court against the dismissal of its application. The Supreme Court in dismissing such arguments stated as follows;

"It will be recalled that the appeal in this matter was dismissed on account of failure by the appellant to obtain leave. The learned counsel for the respondent have, in their submissions before us, quite appropriately quoted from our judgment in Saviour Chibiya v. Crystal Gardens Lodges and Restaurant Limited where we stated that:

The appellant through his learned counsel contributed to the present mischance. Through his learned counsel, the appellant authored and filed in court a non-conforming ground of appeal. He is, therefore literally the author of his own misfortune.

We have in cases such as Philip Mutantika, Mulyata Sheal v. Kenneth Chipungu stated that a litigant who suffers any prejudice arising from the incompetence or negligence of

his/her counsel in having an appeal dismissed, should have recourse to his/her legal counsel”.

5.15 Counsel stated that the Supreme Court applied the same principles in the case of **Dar Farms Transport Limited v. Moses Nundwe, Lima Liquidation/Lukanga Investments Development Limited & Mpongwe Limited**¹⁶.

5.16 Counsel further submitted that this Court is *functus officio* in so far as the issue of the appeal is concerned as revival of the appeal is untenable according to the precedents cited above.

5.17 Counsel distinguished the **Gaedonic Automotives Limited**⁷ case from the case before us. He stated that that matter was before the court of first instance which dismissed it for want of prosecution as it had been inactive for more than 60 days. Clearly, the case was not heard on the merits. In *casu*, the appellant made an application before the High Court to dismiss the respondent’s writ and statement of claim. That application was heard and determined on its merits.

5.18 The appellant proceeded to appeal against that ruling out of time. Consequently, the single Judge of this Court dismissed the appeal on a technicality. Therefore, the appellant’s

argument that its application was not heard on the merits cannot stand.

5.19 The respondent summed up its arguments by stating that grounds 3, 4 and 5 of the appeal equally lack merit and should be dismissed with costs.

5.20 Counsel proceeded to make arguments to counter the 6th ground of the appeal which is to the effect that the lower court's failure to hear and determine the application for extension of time amounts to it paying undue regard to procedural technicalities and resulted in an injustice to the appellant.

5.21 The respondent's contention is that the lower court did not pay undue regard to procedural technicalities by dealing with the jurisdictional issues.

5.22 Further, that the single judge of this Court dismissed the appeal on the ground that it was filed out of time without leave of the High Court. Under the circumstances, the lower court was on firm ground when it proceeded to hold that it had no jurisdiction to hear the application for extension of time within which to file a notice of appeal and memorandum of appeal.

5.23 Additionally, counsel submitted that the appellant cannot find solace in the provisions of **Article 118 (2) (e) of the Constitution** for non-compliance with the Rules of Court. He cited the case of **Access Bank**⁸ in support of this submission. He finally prayed for the dismissal of the appeal with costs to the respondent.

6.0 APPELLANT'S ARGUMENTS IN REPLY

- 6.1 The appellant in reply stated that the lower court erred when it dismissed the appellant's application for extension of time since the delay in filing the notice of appeal and memorandum of appeal was only for a day. Also, that the appeal it intends to make is of considerable public interest.
- 6.2 The appellant made further arguments in reply on issues not raised by the respondent in its arguments. Such arguments will not be re-stated herein and cannot be considered because it is trite that the reply should address the issues and arguments raised by the opposing party and not raise new contentions which the respondent would not have an opportunity to respond to.

- 6.3 The appellant stated that parties who breach rules of court cannot avoid the consequences of their breach by arguing that they raised jurisdictional issues.
- 6.4 That the issues raised by the respondent in the court below are comprehensively covered in the **High Court Rules as amended by Statutory Instrument No. 58 of 2020** and **RSC**. The respondent failed to comply with the same and the court below rightly dismissed its motion to dismiss the appellant's application for extension of time.
- 6.5 Citing the case of **Twampane Mining Co-operative Society Limited v. E & M Storti Mining Limited**¹⁵, counsel submitted that it is trite law that parties must strictly comply with the rules of court, failure to which their case may be dismissed.
- 6.6 That the cases relied upon by the respondent, such as **Finsbury Investments** case¹³ and the **Access Bank** case⁴ do not aid the respondent in this appeal as it had failed to strictly comply with the rules of court.
- 6.7 With regard to the respondent's arguments under grounds 3, 4 and 5 counsel stated that at no point in the heads of argument, does the respondent address the fact that the court below was

required to exercise its discretion to hear the application for extension of time. He further argued that the lower court erred by uplifting the *ratio decidendi* of the **Barclays** case and applying it to this case.

- 6.8 Counsel stated that although the facts of the **Gaedanic** case may be different, the principles enunciated in that case apply to the case at hand. The appellant finally submitted that dismissing this appeal would lead to a grave injustice being occasioned to the appellant.

7.0 OUR ANALYSIS AND DECISION

- 7.1 We have looked at the record of appeal and ardently considered the submissions made by both parties.
- 7.2 The appellant has argued the 1st and 2nd grounds of appeal together. The 3rd to 5th grounds of appeal were argued in the alternative. The 6th ground was argued separately.
- 7.3 We shall also proceed to tackle the 1st and 2nd grounds together as they are inter-connected. We will deal with the grounds that were argued in the alternative only if the first two grounds which we consider as main grounds fail. However, the 6th ground will be dealt with separately.

7.4 **Grounds 1 & 2**

At the outset, we shall consider the propriety of the lower court's dismissal of the appellant's Motion to set aside the respondent's application for extension of time within which to file the notice of appeal and memorandum of appeal. The determination of this question will assist us in deciding whether the lower court should have proceeded to determine the appellant's application for extension of time.

7.5 We are of the view that the lower court's analysis of **Order 33 Rule 7 of the RSC** was correct. That the same can only be invoked where the issues arising would result in an action being dismissed. That was not the case as the application before court was an interlocutory one.

7.6 Further **Order 33 Rule 7 RSC** can only be invoked after the Court has made an order pursuant to **Order 33 (3) of the RSC** to the effect that a certain question or certain questions whether of fact or law or partly fact and partly law and whether raised by the pleadings or otherwise be tried before, at or after the trial of the case or matter. The court may give reasons as to the

manner in which the question shall be stated. In *casu*, it is clear that the lower court had not made such an order.

7.7 Nevertheless, the lower court was duty bound to consider the preliminary objections which were jurisdictional in nature. Thus the Court aptly dealt with the said issues, pursuant to its inherent jurisdiction as the appellant relied on the court's inherent jurisdiction as indicated in the heading of Notice of Motion to set aside the defendant (respondent's) application for extension of time within which to file a notice of appeal and memorandum of appeal (see page 91 of the record of appeal). See the case of **John Sangwa v Sunday Bwalya Nkonde**¹⁶ on the inherent jurisdiction of the High Court to entertain preliminary objections.

7.8 For the foregoing reasons, the court below erred to hold that the said motion was incompetently before it just because **Order 33 of the RSC** which was cited inter alia was inapplicable. Further, it is trite law that once jurisdictional questions are brought to the attention of the court, they must be dealt with immediately. (See the case of **Citibank Zambia Limited v. Suhayl Dudhia**¹²).

7.9 It follows that the orders which the lower court made on the preliminary issues are valid and not null and void. We shall proceed to consider the question whether the preliminary issues raised by the respondent were properly upheld by the lower court.

7.10 We are of the firm view that the lower court did not lose its jurisdiction to hear and determine the application before it for extension of time within which to file the notice of appeal and memorandum of appeal. That is because the ruling of the single judge of this Court made on 6th August, 2021 did not oust that jurisdiction. The single Judge was of the view that the application was wrongly before him as it should have been filed before the lower court first (**see Order 13 Rule 12 of the Court of Appeal Rules, 2016**). The single judge did not determine the application for extension of time on its merits.

7.11 Consequently, the lower court misdirected itself when it found that it had no jurisdiction to entertain the said application for extension of time. Under the circumstances of this particular case the dismissal of the appeal for incompetence was made for the reason that a regulatory and not a mandatory rule of the

Court of Appeal was breached by the appellant. The case of **Leopold Walford (Z) Limited v. Unifreight⁶** is to the effect that breach of a regulatory rule is curable and not fatal depending on the nature of the breach and the stage of the proceedings. We accept the submissions by learned counsel for the appellant that it was **Section 25 of the Court of Appeal Act** which was breached by the appellant. The same section provides as follows:

“Subject to section twenty-three a person who intends to appeal to the court from a judgment shall do so within thirty days of the judgment”.

We are bound by our decision in the case of **Stanbic Bank Zambia Limited v. Savenda Management Services Limited⁵** where we held inter alia that Section 25 of the Court of Appeal Act is not mandatory as Order 13 of the Court of Appeal Rules confers discretion on the court, for sufficient reason, to extend time in which an appeal can be filed.

7.12 The preliminary issues raised by the respondent were as follows:-

1. *Whether the lower court had jurisdiction to hear and determine the defendant's application dated 6th September, 2021 for extension of time, the same having been heard and dismissed by the court of appeal through its ruling dated 6th August, 2021.*
2. *Whether the lower court had jurisdiction to grant the defendant leave to file a notice of appeal in the Court of Appeal which was dismissed in the said ruling of 6th August, 2021.*

7.13 The lower court answered the preliminary issues stated above in the negative, which was erroneous for the reasons already stated herein. Nevertheless, the application for extension of time was heard but not determined on its merits.

7.14 We agree with the appellant that the lower court did not apply the correct legal principles in determining the application for extension of time, which principles have been enunciated in various authorities including the cases of **D. Nkuwa v. Lusaka Tyre Services Limited**¹¹ and **Stanbic Bank Zambia Limited v. Savenda Management Services Limited**⁵.

The lower court was supposed to consider the circumstances of the case, the reasons for the delay, whether there was dilatory conduct on the part of the applicant/appellant and whether

there was inordinate delay in applying for extension of time. And if appropriate, the merits of the proposed appeal.

7.15 We are of the view that the lower court erred in holding that it had no jurisdiction to grant an extension of time on the ground that the appeal was dismissed by the single judge of this Court. The lower court in fact had the requisite jurisdiction to hear and determine the application for the extension of time on its own merits but did not do so.

7.16 We further note that there was no affidavit in opposition filed as the appellant promptly applied to set aside the application for extension of time. Under the circumstances, the lower court's order dismissing the said application is hereby set aside. This entails that the application for extension of time is restored.

7.17 We therefore order that the same judge of the lower court should hear the application after giving directions to the parties for the filing of an affidavit in opposition and an affidavit in reply.

7.18 Since the first two grounds of appeal are allowed, the 3rd, 4th, 5th and 6th grounds of appeal become otiose.

8.0 CONCLUSION

8.1 All being said, the appeal succeeds on grounds 1 and 2. The other grounds have become otiose. The lower court's Ruling dated 17th February, 2022 is partly set aside. We order that the application for extension of time within which to file a notice of appeal and memorandum of appeal be heard by the same judge and determined on its own merits after giving the necessary directions to the parties.

8.2 Costs are awarded to the appellant. The same to be agreed upon between the parties or taxed in default of agreement.

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C.K. Makungu
COURT OF APPEAL JUDGE

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D.L.Y. SICHINGA, SC
COURT OF APPEAL JUDGE

.....
P.C. M NGULUBE
COURT OF APPEAL JUDGE