IN THE CONSTITUTIONAL COURT OF ZAMBIA 2021/CCZ/A/0030
HOLDEN AT LUSAKA
(Appellate Jurisdiction)

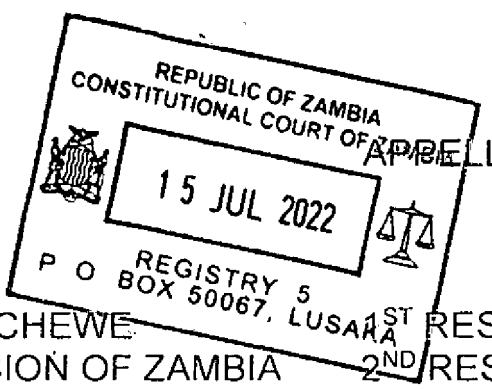
IN THE MATTER OF: ARTICLE 73 OF THE CONSTITUTION OF ZAMBIA 1991 AS AMENDED BY THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016

AND

IN THE MATTER OF: SECTION 81, 83, 89, 97, 98(C), AND 100 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016

IN THE MATTER OF: THE ELECTION OF THE MEMBER OF PARLIAMENT FOR KASAMA CENTRAL CONSTITUENCY IN THE KASAMA DISTRICT OF THE NORTHERN PROVINCE OF THE REPUBLIC OF ZAMBIA

BETWEEN:



SIBONGILE MWAMBA APPELLANT

AND

RODRICK CHISHIMBA CHEWE 1ST RESPONDENT
ELECTORAL COMMISSION OF ZAMBIA 2ND RESPONDENT

Coram: Munalula, DPC, Sitali, Mulenga, Musaluke and Mulongoti JJC. On 14th June, 2022 and 15th July, 2022.

For Appellant: Mr. B.C Mutale S.C, Ms. M. Mukuka and Mr. C. Mukanda of Messrs. Ellis and Company

For 1st Respondent: M. K. Mutti of Lukona Chambers

For 2nd Respondent: Ms. T. Phiri and Mr. M. Bwalya In-House Counsel

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RULING

Musaluke, JC delivered the Ruling of the Court.

Cases referred to:

1. Cropper v Smith (1884) 26 Ch. D. 700 (CA)
2. New Plast Industries v Commissioner of Lands and the Attorney General (2001) Z.R. 51
3. Access Bank (Zambia) Limited v Attorney General 2018/CCZ/009
4. Margaret Mwanakatwe v Charlotte Scott and the Attorney General Appeal No. 14 of 2016
5. Margaret Mwanakatwe v Charlotte Scott and Attorney General CCZ Selected Judgment No. 58 of 2018

Legislation referred to:

1. The Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016.

2. The Constitutional Court Act No. 8 of 2016

3. The Constitutional Court Rules, Statutory Instrument No. 37 of 2016.

4. The Rules of the Supreme Court of England 1965 (1999) Edition

Other Materials referred to:

1. Patrick Matibini, Zambian Civil Procedure Commentary and Cases, Durban, LexisNexis, Volume 1, (2017).

When we heard this matter, our learned sister the Honourable Lady Justice Mulenga sat with us. At the time of delivery of this Ruling, she is out of jurisdiction. This Ruling is therefore, of the majority.

[1] By a Notice of Motion filed pursuant to Orders 9 rule 19, Order 11 rule 9(2), (3) and (4) (a) and Order 12 rule 9(10) of the Constitutional Court Rules (CCR) as read with Order 59 rule 10(1) and 14(12) of the Rules of the Supreme Court of England 1965, (1999) edition (the White Book), the Appellant brought this renewed application seeking leave to amend the Record of Appeal, the Memorandum of Appeal and the Heads of Argument filed on 11th May, 2022 on the following grounds:

(i) **The Memorandum of Appeal requires amendment in order to exclude arguments and narratives, to clarify the matters in issue in the appeal, and to set out the points of law or fact wrongly decided;**

(ii) **The amendment of the Memorandum of Appeal shall necessitate the amendments to the Heads of Arguments;**

(iii) **All authorities to be relied on by an Appellant must be set out in the Heads of Argument filed by the Appellant;**

(iv) **Volume I of the Record of Appeal does not contain an index which includes Volume III of the Record of Appeal; and**

(v) **The Record of Appeal requires amendment to substitute clearer and legible copies of the documents therein for the unclear or illegible ones.**

[2] The Notice of Motion for leave to amend follows the refusal by a single judge of this Court to grant leave sought in a ruling dated 6th May, 2022. The motion was supported by an affidavit sworn by Bonaventure Chibamba Mutale S.C, the Appellant's co- advocate, who deposed that the appeal herein was lodged on 31st January, 2022 and that on or about 31st March, 2022, his law firm Messrs. Ellis & Co were engaged to act as advocates for the Appellant alongside Messrs. Iven Mulenga and Company. It was averred that his firm was availed the Record of Appeal and the Heads of Argument by their co-advocates on the 8th April, 2022. That upon perusal of the Record of Appeal and Heads of Argument, it was observed that the Memorandum of Appeal required

amendment for clear identification of the points of law or fact alleged to have been wrongly decided by the court below; clarification of the matters in issue in the appeal and deletion of portions that constitute arguments and narratives. Further, that many pages in Volume II of the Record of Appeal were illegible and that the Heads of Argument required substantial amendment in order to reflect the proposed amendments to the Memorandum of Appeal and include additional authorities. That they had since obtained clearer copies of the aforementioned pages of Volume I and II of the Record of Appeal.

[3] It was averred that the amended Memorandum of Appeal, Record of Appeal and Heads of Argument had been compiled and were ready for filing at the time that the matter came up for hearing before the full bench on 20th April, 2022. That however, the full bench directed that the application be made before a single judge and that the application was subsequently made before the single Judge who dismissed the application.

[4] That should leave to amend the Record of Appeal, Memorandum of Appeal and Heads of Argument be granted, the same would be filed within 72 hours of the order granting leave.

[5] The Appellant filed skeleton arguments in support of the motion. It was argued that in terms of Order 9 rule 19 of the CCR, a party that wishes to amend the process or any document may do so with leave of court before the conclusion of the hearing. That in terms of Order 59 rule 10 of the White Book, which was invoked by virtue of Order 1 rule 1 of the CCR, the court of appeal may make any order on such terms as the court thinks just to ensure the determination on the merits of the real question in controversy between the parties. That in the context of leave to effect amendments, Order 59 rule 10(4) of the White Book mirrors Article 118 (2) (e) of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution), which provides that in exercising judicial authority, the courts shall administer justice without undue regard to procedural technicalities.

[6] It was submitted that neither the Constitutional Court Act nor the CCR set out the purposes for which an amendment may be made. However, that it is trite law that amendments to process may be effected to correct errors and defects, and to streamline the process so as to aid in the determination on the merits of the real questions in controversy between the parties.

[7] It was submitted that in *casu,* the defect, errors and streamlining required has been set out not only in the Notice of Motion of 11th May, 2022 but also in the affidavit in support.

[8] That an Order granting leave to amend would not prejudice the Respondents, as it would not change the grounds of appeal but will in fact recast them to comply with the rules of court. Further, that the Respondents were furnished with the proposed amended process, weeks prior to this application and that the Respondents would have an opportunity to supplement their own arguments if they so wish.

[9] It was further argued that the amendment process will ensure full compliance with the requirements of Orders 3 rule 10, 11 rule 9 (10) and 12 rule 9(10) of the CCR.

[10] At the hearing on 14th June, 2021 Mr. Mutale, S.C, referred us to Dr. Patrick Matibini's text book titled "Zambian Civil Procedure Commentary and Cases" particularly Chapter 18 Volume 1, which deals with amendments. State Counsel also cited the case of **Copper v Smith**[1] wherein it was stated that it is a well-established principle that the object of the court is to decide the rights of the parties and not to

punish them for the mistakes they make in the conduct of their cases, by deciding otherwise than in accordance of their rights.

[11] It was therefore, submitted that for justice to be done in this matter, it was cardinal that the Memorandum of Appeal, the Record of Appeal and the Heads of Argument are amended. That no injustice would be occasioned to the Respondents as the nature of the amendments was mainly to delete the narratives in the Memorandum of Appeal to comply with the rules of court. That the amendments in the Heads of Argument were a consequence of the amendments to the Memorandum of Appeal, and were in no way introducing any new issues.

[12] Further, that the amendments sought to file clearer copies as the initial copies were illegible.

[13] In opposing the Appellant's motion, the 1st Respondent filed an affidavit in opposition and skeleton arguments on 20th May, 2022. The affidavit in opposition was sworn by the 1st Respondent Rodrick Chishimba Chewe, in which he deposed that he had already replied to the Appellant's Memorandum of Appeal and Heads of Argument by filing his Heads of Argument in response, which arguments address the issues, which the Appellant is trying to amend in her Memorandum of

Appeal, and Heads of Argument. Further, it is argued that the Appellant had crossed the Rubicon to amend her Memorandum of Appeal and Heads of Argument as the parties had already started arguing the appeal on merit. That the Appellant has therefore, delayed and relinquished her rights to amend the Memorandum of Appeal, Heads of Argument and Record of Appeal.

[14] In addition, the 1st Respondent argued that the Appellant had used a wrong mode to commence the action herein. As such, that the Notice of Motion is irregular and defective.

[15] In the skeleton arguments in opposition, it was the 1st Respondent's submission that the Appellant had used a wrong mode to commence this matter, which is improper and irregular as the right mode of commencement is by way of summons in line with Order 59 rule 14/2 of the White Book. To buttress this point, reliance was placed on the case of **New Plast Industries v Commissioner of Lands and the Attorney General.**[2] In that case, the Supreme Court held that the mode of commencement of any action is generally provided by the relevant statute and that where a statute provides for the procedure for commencing an action, a party has no option but to abide by that procedure.

[16] The 1st Respondent further submitted that the Record of Motion is defective as it does not comply with the relevant requirements of Practice Direction of July 26, 1995 the text of which appears in paragraph 59/9/54 of the White Book, on the basis that the Record of Motion has not been numbered consecutively; the first pages are not numbered and that the index does not correspond with the page numbers contrary to para 59/9/60 of the White Book.

[17] As regards, the Appellant's application for leave to amend, it was the 1st Respondent's submission that Order 9 of the CCR relied upon by the Appellant relates to service of process and refers to process such as a petition, originating notice of motion, originating summons *inter alia* and does not relate to appeals.

[18] It was submitted that the Appellant is in fact putting forward grounds of objections other than those set out in the Memorandum of Appeal contrary to Order 11 rule 9(3) of the CCR, which is couched in mandatory terms.

[19] In regard to the submissions on Order 59 rule 10(4) of the White Book, and Article 118 (2) (e) of the Constitution, it was the 1st Respondent's submission that the powers of this Court are clearly stated in sections

5 and 25 of the Constitutional Court Act and Article 128 of the Constitution. Furthermore, that this Court in the case of **Access Bank (Zambia) Limited v Attorney General**[3] made it clear that an Appellant cannot hide behind the provisions of Article 118(2)(e) of the Constitution for his failure to comply with the rules of court in preparing the record of proceedings or appeal.

[20] Alternatively, it was submitted that should the court grant leave to amend, the 1st Respondent should be given leave to address some of the issues the Appellant is raising in their amended Memorandum of Appeal. That to avoid prejudicing the 1st Respondent, the 1st Respondent should also be allowed to amend his petition in the lower court to encompass the issues the Appellant is raising, pursuant to section 25(1)(c) of the Constitutional Court Act No. 8 of 2016. That this is the only way that the 1st Respondent will not be prejudiced by the amendments. Further, that this court should be guided by the maxims of equity and natural justice in exercising its discretion

[21] At the hearing, counsel for the 1st Respondent Mr. Mutti, in his oral arguments repeated the arguments in the skeleton arguments.

[27] Further, section 5 of the Constitutional Court Act provides for the powers of a single judge of this Court in the following terms:

> **A single Judge of the Court may exercise a power vested in the Court not involving the decision of an appeal or a final decision in the exercise of its original jurisdiction.**

[28] It is because of the power vested in the single judge by both the Constitution and the Constitutional Court Act that she heard and determined at interlocutory stage an application by the Appellant. On 6th May, 2022, the single judge delivered a ruling and declined to allow the application to amend the Memorandum of Appeal, Record of Appeal and Heads of Argument for having been made pursuant to the wrong Order and rule of the CCR. It was the single judge's position that the application ought to have been made pursuant to Order 11 of the CCR, which deals with Appeals and Cross Appeals.

[29] Following the ruling of the single Judge, the Appellant has now moved the full Court to rehear the application for leave to amend the Memorandum of Appeal, Record of Appeal and Heads of Argument.

[30] The record shows that in the motion before us, the Appellant relied on Orders IX rule 19 of the CCR on amendment of process; Order XI rule 9(2),(3) and (4)(a) of the CCR which talk about the content of a

memorandum of appeal and that an appellant shall not without leave of court set forth any grounds of objection other than those set out in the memorandum of appeal; XI rule 9(10) and order IV rule 10 (which is not provided for in the Constitutional Court Rules) as well as Order 59 rules 10(1) and 14(12) of the White Book.

[31] Of interest is Order 59 rules 10(1) and 14 (12) of the White Book which applies to these proceedings by virtue of Order 1 rule 1 of the CCR. Order 59 rule 10 of the White Book provides as follows:

> **In relation to an appeal the Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court.....**

Further, Order 59 rule 14 (12) of the White Book provides as follows:

> **An appeal shall lie to the Court of Appeal from any determination by a single Judge, not being the determination of an application for leave to appeal, and shall be brought by way of fresh application made within 10 days of the determination appealed against.**

[32] Clearly, in terms of Order 59 rule 14(12) of the White Book, an appeal from a decision of a single judge lies to a full court by way of renewal.

[33] In the case of **Margaret Mwanakatwe v Charlotte Scott and the Attorney General**[4] the single Judge of this Court clarifying on the procedure to be followed when appealing a decision of a single judge held inter alia that:

"When the default procedure provided for in Order 59 rule 14 (12) of the White Book which is set out above, is applied to our situation, it follows that an appeal from any decision by a single Judge of this Court, other than a determination of an application for leave to appeal, can be made to the full Court comprising three or more Judges. However, the application must be brought within 10 days of the decision appealed against and takes the form of a fresh application. In terms of Order 59 rule 14 (1) all inter parte applications to the full Court or to a single Judge must be made by summons. Para 59/14/2 note 3 of the White Book states that a notice of motion is no longer the correct procedure.

[34] Clearly, the position is that an appeal from the decision of the single judge of this Court to the full Court should be made by way of summons and that the notice of motion is not the correct procedure.

[35] It is settled principle of law that where a statute provides for the procedure of commencing an action, a party has no option but to abide by that procedure. The case of **New Plast Industries v Commissioner of Lands and the Attorney General**[2] speaks to this.

[36] In view of what we have said, the provisions of Order 59 rule 10(1) and 14(12) of the White Book pursuant to which the Appellant moved this Court, the Appellant ought to have renewed the application for leave to amend the Memorandum of appeal, Heads of Argument and Record of Appeal by way of summons and not by notice of motion. In addition, the Appellant in making her application to the full Court omitted to attach the proceedings before the single judge, the ruling subject of

this renewed application and she also did not state the grounds of appeal or her dissatisfaction with the ruling of the single juddge.

[37] In the **Margaret Mwanakatwe v Charlotte Scott and the Attorney General**[5] we guided that:

> ***"This Court is bound by the Constitution and all the other laws which govern or regulate the exercise of its jurisdiction. Further, it is obliged to adjudicate in accordance with the law, including observance of compliance with procedural requirements. It is particularly important for this Court which is one of the two apex courts of the judicature of Zambia to enforce strict compliance with the Rules of this Court with regard to the mode of commencement as parties seek relief from the Court"***

[38] We note that the application for leave to amend the record of appeal, memorandum of appeal and heads of argument before the single Judge was made by way of summons. This being a renewed application before the Court should similarly have been brought by summons particularly in light of the requirements of Order 59 rule 14 (1) of the White Book which states that every application to the Court of Appeal, a single judge or the registrar which is not made *exparte* must be made by summons. Order 59 rule 14 (1) read with Order 59 rule 14 (12) which provides for an appeal to the Court from a determination by a single judge being a fresh application, makes it imperative that the application before the Court must be brought by way of summons. A party therefore, has no option to bring an appeal to the Court by way of notice of motion.

[39] It is therefore, our considered view that the application herein by the Appellant is improperly before us as it was commenced by notice of motion instead of summons. It is trite law that a court has no jurisdiction to entertain claims of a party in an action, which is wrongly commenced. The renewed application before the full Court by the Appellant having been improperly commenced, means that this Court does not have the requisite jurisdiction to hear and determine the application before it.

[40] The application fails on that account and it is dismissed.

[41] Notwithstanding the dismissal of the application, this Court has inherent jurisdiction to make appropriate orders for the just determination of matters before it. This is in line with the provisions of Article 271 of the Constitution which provides that:

> ***"271. In this Constitution, a power given to a person or an authority to do or enforce the doing of an act, includes the necessary and ancillary powers to enable that person or authority to do or enforce the doing of an act."***

[42] We therefore order the Appellant to withdraw volumes I and II of the record of appeal and substitute all the illegible pages with clear pages. The Appellant shall file the corrected volumes I and II of the record of appeal within five days of the date of this Ruling to expedite the hearing of the appeal.

[43] Each party to bear own costs incidental to this application.

M .M. Munalula JSD

Deputy President - Constitutional Court

A. M. Sitali

Constitutional Court Judge

M. Musaluke

Constitutional Court Judge

J.Z. Mulongoti

Constitutional Court Judge