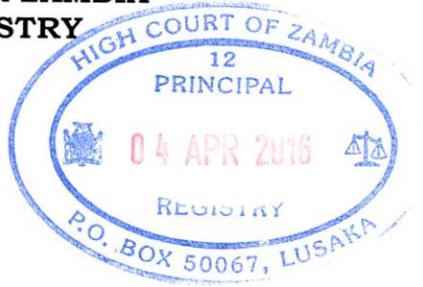


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(CIVIL JURISDICTION)

2014/HP/A/0020



BETWEEN:

DANIEL MWIZABI
PROGRESS MUYUMBANA

JACK ZULU

COLLIES MWEETWA

KAFUE DISTRICT COUNCIL

COMMISSIONER OF LANDS

AND

ALEX MUMBA

APOSTOLIC REVIVAL EVANGELICAL MINISTRIES

1ST APPELLANT

2ND APPELLANT

3RD APPELLANT

4TH APPELLANT

5TH APPELLANT

6TH APPELLANT

1ST RESPONDENT

2ND RESPONDENT

BEFORE HONOURABLE MRS. JUSTICE P.C.M. NGULUBE IN CHAMBERS

FOR THE 1st - 4th APPELLANTS : Mr Mutale- Messrs BCM Legal Practitioners

FOR THE 5th AND 6th APPELLANTS : Not in attendance

FOR THE RESPONDENTS : Mr Kabwe- Messrs Hobday Kabwe and
Company

R U L I N G

Cases referred to:

1. Zambia Telecommunications Company Limited vs Mulwanda and Ngandwe (Appeal no. 63/2009) [2012] ZMSC 13
2. Chikuta v Chipata Rural Council (1984)

3. Lewanika and Others vs Chiluba (1998) Z.R. 79
4. Walusiku Lisulo v Patricia Anne Lisulo (1998) 75

Legislation referred to:

1. The High Court Act, Chapter 27 of the Laws of Zambia

This is an Application for Review of the Ruling dated 20th September, 2015 which dismissed the Appeal for want of prosecution. The Application was made pursuant to Order 39 , rule 1 of the High Court Rules.

In the Affidavit in Support of the Application, Learned Counsel for the Appellants deposed that the Appellants had failed to file the Record of Appeal due to failure to secure the Chairman's proceedings as the file had been missing. As a consequence, a letter had been written to the Lands Tribunal asking for the Chairman's proceedings. Produced was a copy of the said letter. That all efforts to secure the said proceedings had proved fruitless.

When the matter came up for hearing, Learned Counsel for the Appellants relied on the Affidavit in Support of the Application and submitted that order 39 of the High Court Rules gives the Court discretion to review or vary any Order or Judgment delivered by the Court on sufficient reasons.

That it was difficult for the Appellants to lodge a record of appeal despite the Court's Order because the record of proceedings at the Lands Tribunal could not be traced.

In response, Mr Kabwe, Learned Counsel for the Respondents relied on the written submissions in opposition in which the Respondents relied on **Zambia Telecommunications Company Limited vs Mulwanda and Ngandwe (Appeal no. 63/2009) [2012] ZMSC 13**. He submitted that in the absence of grounds of Appeal there was no basis upon which the application for review was being made and that the absence of the Record of Appeal utterly diminished the Appellant's prospects of success. That the Ruling of 20th September, 2015 was well grounded. That the Appellants had not shown due diligence in the manner they conducted the Appeal and Order 39 could not come to their aid.

Learned Counsel further added that according to **Chikuta v Chipata Rural Council (1984)**, Affidavits sworn by Counsel ought not to be entertained.

It was Counsel's prayer that there being no record of appeal nor an application to file one out of time, the prospects of a review succeeding had been diminished.

In reply, Mr Mutale submitted that he had deposed to the Affidavit in support of the application as there were no contentious contents. He submitted that it

would be a miscarriage of justice if the appeal was dismissed on a technicality. That the Appellants had demonstrated diligence and Counsel thus prayed that the Court exercises its discretion to review the Order of 20th September, 2015.

I have considered the Affidavit evidence and the submissions made on behalf of both parties. Order 39 (1) of the High Court Rules provides as follows-

"Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision."

The Supreme Court of Zambia has pronounced itself on the powers that Order 39 confers on this Court by stating in Lewanika and Others vs Chiluba (1998) Z.R. 79, that-

"Review under Order 39 is a two staged process, that is to say, first showing or finding a ground considered to be sufficient, which then opens the way to the actual review. Review enables a Court to put matters right. However, I do not believe that the provision exists simply to afford a dissatisfied litigant the chance to argue for an alteration to bring about a result considered more acceptable to him."

The Supreme Court further reiterated this position in Walusiku Lisulo v Patricia Anne Lisulo (1998) 75, by stating that-

"Order 39 Rule 1 of the High Court Rules is not designed for parties to have a second bite. Litigation must come to an end and successful parties must enjoy the fruits of their Judgments."

The basis of the Appellant's application is that they have been unable to secure the proceedings of the Lands Tribunal which in turn has prevented them from filing the Record of Appeal in time. I have perused through the Record and I note that while the Notice to Appeal was filed in April, 2014, the Appellants only started pushing for the said proceedings in September, 2015 when the Respondents had made two applications to have the Appeal dismissed for lack of prosecution. This in itself highlights gross laxity on the part of the Appellants to the prejudice of the Respondents who have been denied the enjoyment of the fruits of the Judgment passed in their favour.

I further note that the Appellants have had enough time in which to inform this Court of their failure to secure the said proceedings but had neglected to do so, which fact indicates their laxity in the conduct of this Appeal. The said laxity has caused an inordinate delay in the prosecution of this Appeal.

In **Nahar Investments Limited vs Grindlays Bank International (Z)**

Limited(1984) Z.R. 81, the Supreme Court has stated thus-

"in the event of inordinate delay or unfair prejudice to the Respondent, the Appellant can expect the Appeal to be dismissed for want of prosecution notwithstanding that he has a valid and otherwise perfectly acceptable explanation."

Based on the foregoing, there is no sufficient ground advanced by the Appellant to warrant the review of the Ruling dated 20th September, 2015. I accordingly dismiss the Application with costs to the Respondent.

Dated this 4th April, 2016



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P. C. M. NGULUBE
HIGH COURT JUDGE