

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2016/HP/1939



BETWEEN:

ANGEL MULENGA

PLAINTIFF

AND

**NEIGHBOURS CITY ESTATE
LIMITED**

DEFENDANT

KATAMBI BULAWAYO

APPLICANT

For the Plaintiff:

*Mr. C. Simukonda- Messrs Ferd
Jere and Company*

For the Defendant:

*Mr. N. Botha- Messrs Makebi Zulu
Advocates*

Intended Applicant:

*Mr. D. Musheya- Messrs Wright
Chambers.*

R U L I N G

Cases referred to:

- 1. Kearney Company Limited v. Agip (Z) Limited and Asphalt and Tarmac (1985) Z. R. 7.**
- 2. Stanley Mwambazi v. Morester Farms Limited (1977) Z.R. 108.**
- 3. Access Bank (Z) Limited v. Group Five. Zcon Business Park Joint Venture (Sued as a Firm) (2014) SCZ/8/52.**

Legislation referred to:

- 1. The Constitution of Zambia (Amendment) Act No 2 of 2016.**

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

3. The Rules of the Supreme Court, (White Book) 1999 Edition.

The delay in delivering the ruling is regretted. This is due to heavy work load.

This is a ruling on the Defendant's application to set aside the Notice of Appeal for irregularity from a decision of the Registrar to the Judge in Chambers.

The application is made pursuant to Order 2 rule 2 of the Rules of the Supreme Court 1999 Edition and is supported by an affidavit deposed to by **NKULA BOTHA**, the advocate seized with conduct of this matter.

He deposed that the Notice of Appeal is irregular in form and content as the content is that of summons. In addition, that the Notice of Appeal does not reveal the exact provision of the law that the appeal is anchored on.

The Applicant opposed the application by the Defendant and the affidavit was deposed to by **DANIEL MUSHENYA**, the advocate seized with conduct of the matter on behalf of the Applicant.

He denied that the Notice of Appeal was irregular and deposed that it was in compliance with the rules of the Court. That in any event, there was no requirement that the Notice required to be in a prescribed form.

At the hearing of the application, learned counsel for the Defendant Mr. N. Botha relied on the affidavit in support and the skeleton arguments filed into Court.

Equally, learned counsel for the Applicant Mr. D. Mushenya relied on the affidavit in opposition and the skeleton arguments. I shall not replicate the contents of the arguments filed suffice it to mention that I have carefully considered them.

On behalf of the Plaintiff, learned counsel Mr. C. Simukonda did not advance any arguments but left it to the court's determination.

As I have already alluded to, the Defendant seeks an Order to set aside the Notice of Appeal filed by the Applicant contending that it is irregular in form and content. The irregularity according to the Defendant is that the Notice is in the form of summons and there is no reference to the sub-rule pursuant to which the Notice has been filed.

The Applicant on the other hand contends that the rules do not provide the form the Notice should take; that in any event, if there is an irregularity, the same is not fatal but can be cured.

The relevant Order under which an appeal lies to the High Court from the decision of the Deputy Registrar is **Order 30 rule 10 (1)** of the High Court Rules. It provides as follows:

“(1) Any person affected by any decision, order or direction of the Registrar may appeal therefrom to a Judge at chambers. Such appeal shall be by notice in writing to attend before the Judge without a fresh summons, within seven days after the decision, order or direction complained of, or such further time as may be allowed by a Judge or the Registrar. Unless otherwise ordered, there shall be at least one clear day between service of the notice of appeal and the day of hearing. An appeal from the decision, order or direction of the Registrar shall be no stay of proceedings unless so ordered by a Judge or the Registrar.”

It is clear from the foregoing that any person dissatisfied with the decision of the Registrar may appeal to the Judge at chambers by filing a Notice in writing without a fresh summons. It is important to note that although an appeal to a Judge at chambers is a fresh

application as guided by the Supreme Court in the case of **Kearney Company Limited v. Agip (Z) Limited and Asphalt and Tarmac⁽¹⁾**, there is no requirement to file a fresh application. A Notice in writing is sufficient.

In the present case, the Notice filed by the Applicant has taken the form of summons. In my view, this is irregular as all that was required was for the Applicant to file a Notice of Appeal. However, it being a procedural irregularity, it is not fatal as it does not affect the substance that it is an Appeal.

On the issue that the Notice does not reveal the exact provision of the law the appeal is anchored on, I have noted that the Notice has made reference to the Order 30 rule 10. What has been omitted is sub rule 1. In my view, this is also not incurably defective as it can be cured by citing the correct provision of the law.

I am in this regard guided by the case of **Stanley Mwambazi v. Morester Farms Limited⁽²⁾**, where the Supreme Court held that:

“It is the practice when dealing with bonafide interlocutory applications for courts to allow issues to come to trial despite the default of the parties; where a party is in default he may be ordered to pay

costs but not in the interest of justice to deny him the right to have his case heard.”

Similarly, in the case of **Access Bank (Z) Limited v. Group Five. Zcon Business Park Joint Venture (Sued as a Firm)**⁽³⁾ which has been cited by both parties, the Supreme Court reaffirmed its position that matters should as much as possible be determined on their merits rather than be disposed of on technical or procedural points.

Moreover, I am guided by Article 118 (e) of the Constitution that justice should be administered without undue regard to procedural technicalities.

It is for these reasons that I decline to set aside the Notice of Appeal as the irregularities are not fatal but can be cured by an amendment. The application is therefore dismissed but considering the circumstances of this case and that costs are in the discretion of the Court, I make no order as to costs.

In the interest of justice, I invoke my powers under Order 3 rule 2 of the High Court Rules and grant leave to the Applicant to amend the Notice of Appeal by filing it in its proper form and by citing the complete Order pursuant to which the Notice of Appeal has been

filed. The Notice shall be filed within ten (10) days from the date of this Order. The Appeal shall be heard on 15th October, 2020 at 08:45 hours.

Delivered in Lusaka this 20th day of August, 2020.

M.C. Kombe

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M.C. KOMBE
JUDGE