

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

2011/HPC/0201



BETWEEN:

**BASCOM ENTERPRISES
GILLIAN CASILLI
DIEGO CASILLI
RICHARD ANTHONY HADLEY**

**1ST PLAINTIFF
2ND PLAINTIFF
3RD PLAINTIFF
4TH PLAINTIFF**

AND

**BHARTI AIRTEL ZAMBIA HOLDINGS BV
AIRTEL NETWORKS ZAMBIA PLC
SECURITIES AND EXCHANGE COMMISSION**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT**

**CORAM: Hon. Lady Justice Dr. W.S. Mwenda in Chambers at Lusaka
on the 3rd day of February, 2020.**

For the Plaintiffs: Mr. J. Madaika of Messrs. J&M Advocates

*For the 1st and 2nd
Defendants: Ms. E. L. Sitali of Messrs. Mulenga Mundashi
Legal Practitioners*

For the 3rd Defendant: Ms. M.C. Kaoma of KMG Chisanga Advocates

RULING

Cases referred to:

1. *Zambia Revenue Authority v. Shah* (2001) Z.R. 60.
2. *Nyampala Safaris (Z) Limited and 4 Others v. Zambia Wildlife Authority and 6 Others*, SCZ/8/179/2003.
3. *Carminie Safaris Zambia Limited and Another v. Zambia National Tender Board and 6 Others*, Appeal No. 145/2003.
4. *Sonny Paul Mulenga and Vismer Mulenga (Both personally and practicing as SP Mulenga International) v. Chainama Hotels and Elephant's Head Hotel Limited and Investrust Mrchant Bank Limited* (1999) Z.R. 101.
5. *D.E. Nkhuwa v. Lusaka Tyre Services Limited* (1977) Z.R. 43.
6. *Henry Kapoko v. The People*, S. J. No. 43 of 2016.

7. *The People v. The Patents and Companies Registration Agency, ex parte Finsbury Investments Limited and Another*, S. J. No. 28 of 2018.
8. *Stanley Mwambazi v. Morrester Farms* (1977) Z.R. 108.
9. *Zambia Revenue Authority v. The Post Newspaper*, SCZ Judgment No. 18 of 2016.
10. *Mususu Kalenga Building Limited, Winnie Kalenga v. Richmans Money Lenders Enterprises*, S.C.Z. Judgment No. 4 of 1999.
11. *Barclays Bank Zambia Plc v. Zambia Union of Financial Institutions and Allied Workers* (2007) Z.R. 106.

Legislation referred to:

1. Order 3, rule 5 of the Rules of the Supreme Court of England, 1999 Edition (the White Book).
2. Order 10, rule 4 of the Court of Appeal Rules, S. I. No. 65 of 2016 (the Court of Appeal Rules).
3. Order 3, rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.
4. Article 118 (2) (e) of the Constitution of Zambia (Amendment) Act, No. 2 of 2016.
5. Order 10, rule 5 of the Court of Appeal Rules.
6. Order 59, rule 13 (1) of the White Book.
7. Order 59, rule 14 (18) of the White Book.

There are two applications by the Plaintiffs, namely, the application for leave to appeal out of time (hereinafter referred to as “the First Application”), and the application for an order to stay the hearing of the 1st and 2nd Defendants’ application to expunge documents pending hearing and determination of application for leave to appeal out of time (hereinafter referred to as the “Second Application”).

The First Application was made pursuant to Order 3, rule 5 of the Rules of the Supreme Court of England, 1999 Edition (hereinafter referred to as “the White Book”) and Order 10, rule 4 of the Court of Appeal Rules, Statutory Instrument No. 65 of 2016 (hereinafter called “the Court of Appeal Rules”), as read together with Order 3, rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia (hereinafter

referred to as “the High Court Rules”). The Application was filed into court on 8th November, 2018 and is accompanied by an affidavit (hereinafter referred to as “the First Affidavit in Support”); and a List of Authorities and Skeleton Arguments of even date.

The First Affidavit in Support was sworn by one, Lweendo Haangala, the Head of the Legal Department in the 1st Plaintiff Company and it was her testimony that this Court, on 8th October, 2018, rendered a ruling in favour of the 1st and 2nd Defendants and that the deponent read through the ruling; and is dissatisfied with the Court’s findings.

The deponent further deposed that there was an inadvertent delay in instructing the advocates for the Plaintiffs to appeal against the said ruling, which said delay was neither intentional nor meant to disrespect this Court.

The deponent testified that the 1st Plaintiff desires to appeal against the whole ruling which she believes has high prospects of success. To this end, the deponent produced exhibits “LH1” and “LH2”, being copies of the Notice of Appeal and Memorandum of Appeal, respectively.

In the Skeleton Arguments and a List of Authorities augmenting the First Affidavit in Support, Counsel for the Plaintiffs submitted that for the First Application, he was relying on Order 3, rule 5 of the White Book and Order 3, rule 2 of the High Court Rules, which he contended, clothed this Court with the power to grant the order sought in the First Application.

Counsel for the Plaintiffs referred the Court to the case of *Zambia Revenue Authority v. Shah*¹, to support his submission that in

striking a balance between hearing of the Plaintiffs' appeal on the merits, and having regard to the rule of procedure that an appeal from an interlocutory decision must be made within fourteen (14) days of the said decision, this Court should address its mind to whether the delay was inordinate and whether the Defendants will be prejudiced by this Court granting the orders sought in the Applications herein.

Counsel for the Plaintiffs, thus, contended that the delay in seeking leave to appeal was not inordinate and falls within the ambit of a technicality that can be corrected by this Court granting the orders sought in the Applications herein. That, justice should not be prevented from taking its course by a mere technicality. To this end, Counsel for the Plaintiffs referred the Court to Article 118 (2) (e) of the Constitution of Zambia (Amendment) Act, No. 2 of 2016.

In concluding his arguments, Counsel for the Plaintiffs submitted that no injustice will be caused to the Defendants by a grant of leave to appeal out of time and further, that it has been demonstrated by the First Affidavit in Support, through exhibits "LH1" and "LH2", that the Plaintiffs' appeal is neither frivolous nor vexatious and has prospects of success. That, it is in the interest of justice that leave to appeal out of time be granted, so as to prevent the Plaintiffs' right of recourse to a superior court from being curtailed.

The First Application is opposed. However, I have noted that in pursuance of opposing the said Application a combined affidavit (hereinafter referred to as "the Combined Affidavit in Opposition"), was filed in respect of both the First and Second Applications herein.

Therefore, in order for an orderly presentation of the summary of the Applications herein and the parties' respective positions, I shall straight away, summarise the Second Application and then proceed to giving the Defendants' position in opposition.

The Second Application was made pursuant to Order 10, rule 5 of the Court of Appeal Rules as read together with Order 3, rule 2 of the High Court Rules. The Application was filed into court on 21st November, 2018 and is accompanied by an affidavit (hereinafter referred to as the "Second Affidavit in Support"); Skeleton Arguments and a List of Authorities of even date.

The Second Affidavit in Support was also sworn by Lweendo Hangaala, the head of the Legal Department in the 1st Plaintiff company, and it was her testimony that on 8th October, 2018, a ruling was rendered by this Court, finding merit in the preliminary issues raised by the 1st and 2nd Defendants and dismissing the Plaintiffs' application for leave to issue and serve a *subpoena duces tecum*. That, the Plaintiffs are desirous of appealing against the whole ruling which has reasonable prospects of success as demonstrated by the draft grounds of appeal. To support this assertion, the deponent produced exhibits "LH1" and "LH2", being copies of the Notice of Appeal and Memorandum of Appeal.

The deponent further averred that the grounds couched in the said exhibits "LH1" and "LH2" speak to the documents that the 1st and 2nd Defendants seek to expunge in their application filed before this Court and that if this Court were to proceed to hear the 1st and 2nd Defendants' application to expunge the said documents, the Plaintiff

would be prejudiced and their application for leave to appeal would be rendered a mere academic exercise, as the documents that are subject to the Plaintiffs' appeal may no longer be available.

The Second Affidavit in Support is augmented by Skeleton Arguments, also filed into court on 21st November, 2018, the essence of which is that no prejudice will be occasioned to the 1st and 2nd Defendants if the Court grants the order of stay of application to expunge documents from the 3rd Defendant's Bundle of Documents, pending hearing and determination of the application to appeal out of time.

Counsel for the Plaintiffs, thus, submitted that in determining an application for stay, the Court must look at all the surrounding circumstances of the matter. In this regard, Counsel argued that the Plaintiffs have demonstrated desire and preparedness to appeal and that the Court must take the course that does the most justice. To this end, Counsel cited Order 3, rule 2 of the High Court Rules.

Referring to Order 10, rule 5 of the Court of Appeal Rules, Counsel contended that an appeal does not operate as a stay of execution and therefore, that this is a fit and proper case for this Court to grant a stay of the 1st and 2nd Defendants' application to expunge documents. In a similar vein, Counsel also referred the Court to Order 59, rule 13 (1) of the White Book.

Counsel further cited the cases of *Nyampala Safaris (Z) Limited and 4 Others v. Zambia Wildlife Authority and 6 Others*² and *Carmine Safaris Zambia Limited and Another v. Zambia National Tender Board and 6 Others*³, to support his contention that a stay of execution is

only granted on good and convincing reasons. That, the application for stay must therefore demonstrate the basis on which it is being granted and that there must be reasonable prospects of the applicant succeeding at appeal, as the courts do not make a practice of depriving a successful litigant of the fruits of its litigation. In this regard, Counsel for the Plaintiffs submitted that the Plaintiffs have, in the Second Affidavit in Support, more than demonstrated that their application to appeal out of time will be rendered nugatory and academic if an order of stay of application to expunge documents, by the 1st and 2nd Defendants, is not granted, as the documents which are subject of the appeal will be expunged. That, the Plaintiffs have exercised their right of appeal after being dissatisfied with the ruling of this Court and that if this Court proceeds to hear the 1st and 2nd Defendants' application to expunge documents, the Court will be hindering the Plaintiffs' right of appeal and ends of justice.

As earlier stated, a combined affidavit in opposition was filed by the 1st and 2nd Defendants, in respect of both the First and Second Applications. The said affidavit (hereinafter referred to as "the Affidavit in Opposition"), was sworn by one Jason Dalitso Chulu, the Legal and Regulatory Specialist in the employ of the 1st Defendant Company. It was his testimony that the record shows that two applications have been made by the Plaintiffs, namely:

- (i) An application for leave to appeal out of time, against the ruling of this Court, dated 8th October, 2018; and
- (ii) An application for stay of the 1st and 2nd Defendants' application to expunge documents from the 3rd Defendant's Bundle of Documents.

The deponent deposed that with respect to the application for leave to appeal out of time, the Plaintiffs have not provided a reasonable explanation for their failure to apply for leave to appeal against the ruling of this Court within the time prescribed by the rules of court.

The deponent further deposed that he had been advised by the 1st and 2nd Defendants' advocates that when considering an application for leave to appeal and an application for stay of proceedings or execution, the court is required to preview the prospects of success of an intended appeal. That, the Plaintiffs' proposed appeal has no reasonable prospects of success.

To augment the Combined Affidavit in opposition, Counsel for the 1st and 2nd Defendants, filed into court Skeleton Arguments, the gist of which is that the First and Second Applications have no merit and that the proposed appeal has no real prospects of success. Further, that the Plaintiffs have not advanced any reasonable explanation for not exercising their right to appeal and therefore, are not entitled to have the Applications decided in their favour.

Counsel for the 1st and 2nd Defendants cited Order 59, rule 14 (18) of the White Book and the case of *Sonny Paul Mulenga and Vismer Mulenga (Both personally and practicing as SP Mulenga International) v. Chainama Hotels and Elephant's Head Hotel Limited and Investrust Mrchant Bank Limited*⁴, to support her contention that in both applications for leave to appeal and for stay of proceedings or execution, the principles converge in that in both, the court should preview the prospects of success of the proposed appeal. In this regard, Counsel for the 1st and 2nd Defendants submitted that the

Plaintiffs' intended appeal against the ruling of this Court, dated 8th October, 2018, has no real prospects of success because the subject matter of the appeal raises no question of importance upon which further argument and decision of the Court of Appeal is warranted. That, the subject matter of authentication of documents executed outside Zambia has been the subject of judicial pronouncement in at least four supreme Court judgments which have settled the law on the issue.

Counsel further submitted that a perusal of the grounds of appeal raised by the Plaintiffs reveals that there are no issues raised that have not been settled by previous decisions made on the question of authentication.

Counsel also contended that the Plaintiffs have not given a reasonable explanation for the failure to lodge the application for leave to appeal within the time allowed. In this regard, Counsel argued that the grant of an extension of time as well as of a stay, is discretionary and must only be exercised where a party in default has brought before court, some material on which the court can exercise its discretion, which discretion must only be exercised in very limited circumstances. To support this position, Counsel cited the case of *D.E. Nkhuwa v. Lusaka Tyre Services Limited*⁵, and submitted that the First Affidavit in Support does not disclose a reasonable explanation for the failure to lodge the appeal within the time allowed by the law, as the failure has been attributed to inadvertence.

Responding to the Plaintiffs' reliance on and application of Article 118 (2) (e) of the Constitution, Counsel for the 1st and 2nd Defendants referred the Court to the cases of *Henry Kapoko v. The People*⁶ and *The People v. The Patents and Companies Registration Agency, ex parte Finsbury Investments Limited and Another*⁷, and submitted that the said Article is not intended to do away with existing principles, laws and procedures, even where the same constitute technicalities. That, the Article is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality. Counsel thus, submitted that owing to the fact that the Plaintiffs have not advanced any reasonable explanation for the delay in applying for leave to appeal, there can be no manifest injustice in denying both the First and Second Applications herein. In this regard, Counsel prayed that the Applications be dismissed and that the *ex parte* order staying the 1st and 2nd Defendants' application to expunge documents be discharged.

At the hearing of the First and Second Applications, Counsel for the Plaintiffs further submitted that the reason for their delay in seeking leave to appeal as required by law is that their clients were still consulting on the ruling of 8th October, 2018 and thus, the instructions to appeal came late. That, the said delay was not deliberate, inordinate or excessive.

Counsel for the Plaintiffs added that there is merit in the intended appeal in that the document in question was tendered by the 1st and 2nd Defendants to the 3rd Defendant as a Statutory Regulator for companies listed on the Lusaka Stock Exchange. That, the question that the superior Court needs to determine is whether the same

having been tendered by the 1st and 2nd Defendants for purposes of the mandatory buy-out offer of the minority shareholders in the 2nd Defendant company, can still be said to be a foreign document as relates to the same minority shareholders. Counsel thus, submitted that this is not a frivolous or vexatious issue.

Referring to the case of *Stanley Mwambazi v. Morrester Farms*⁸, Counsel for the Plaintiffs submitted that the breach of failing to file an application for leave within time is merely a regulatory breach.

Further submitting on the Second Application, Counsel for the Plaintiffs argued that no prejudice will be occasioned to the Defendants because their application will merely be stayed and not dismissed, meaning that the Court can still hear the application at a later date after the proposed appeal is determined by the Court of Appeal.

In response, Counsel for the 1st and 2nd Defendants argued that a party cannot raise an estoppel against a statute and therefore the submission by counsel for the Plaintiffs, on the question which the superior court needs to consider, is misconceived. That, this being the case, there are no new issues that the intended appeal raises for determination by the superior Court.

Submitting on behalf of the 3rd Defendant, Ms. Kaoma indicated that she had no objection to the First and Second Applications as she was in agreement with the Plaintiffs that the delay was not excessive and that as Counsel for the Plaintiff had put it, they had no instructions at the time. Particularly, with respect to the Second Application, Counsel for the 3rd Defendant stated that she was not objecting to

the same, to the extent that if leave to appeal is granted by this Court, the outcome of that appeal will have an effect on the application that will have been stayed. In this regard, Counsel for the 3rd Defendant prayed for costs occasioned by the hearing.

I have carefully considered the parties' Affidavits, Skeleton Arguments and the authorities cited.

It is not in dispute that this Court, following the 1st and 2nd Defendants' application to state questions of law in the form of a special case as preliminary issues, delivered a ruling dated 8th October, 2018, in favour of the 1st and 2nd Defendants.

It is also clear from the record that the ruling did not indicate whether or not leave to appeal was granted to any party dissatisfied with the said ruling and, further, it is not in dispute that after the ruling was rendered, no application for leave to appeal against the ruling was made within the statutory period of fourteen (14) days of such order.

The 1st and 2nd Defendants, thus, proceeded, on the strength of the said ruling, to file an application to expunge documents from the 3rd Defendant's Bundle of Documents on 8th November, 2018, but before the same could be heard, the Plaintiffs made the First and Second Applications herein, for leave to appeal out of time and for stay of the 8th November, 2018 application.

The Plaintiffs, in their First and Second Applications have argued that this Court should exercise its discretion in favour of granting the two Applications, while the 1st and 2nd Defendants have opposed the same, stating that the grounds advanced in the said Applications do not warrant orders in favour of the Applications.

enjoyment of a Judgment, unless there are good and sufficient grounds. Stay of Execution should not be granted for mere convenience... Neither should it be granted on sympathetic or moral considerations. Secondly, in exercising its discretion whether to grant the stay or not, the Court is entitled to preview the prospects of success of the proposed appeal...

...We wish to emphasize that the prospect of success of a pending appeal is a key consideration in deciding whether or not to grant stay of execution of a judgment appealed against...In short, the Court should stay pending possible victory. It should not stay pending loss.”

The Plaintiffs stated that they have demonstrated the prospects of their appeal succeeding, as evidenced in the Memorandum of Appeal exhibited as “LH2”. The grounds of appeal in the said memorandum have been tabulated as follows:

“1. The learned Trial Judge erred in law and fact when she held that the Share Sale Agreement is a foreign document when its purpose and effect was to purchase shares held in a company incorporated in Zambia and listed on the Lusaka Stock Exchange;

2. The learned Trial Judge erred in law and fact when she failed to address her mind to the fact that the Share Sale Agreement was submitted to the 3rd Defendant as part of the legal documentation to justify the mandatory buyout offer to the minority shareholders. The document thereby became part of the documentation that was considered and applied in the mandatory buyout offer and, in that regard, became a document capable of being used in Zambia as it was part of the transaction concluded in Zambia; and

3. The learned Trial Judge erred in law and fact when she applied the provisions of the Authentication of Documents Act, Chapter 75 of the Laws of Zambia to a document that she had not seen and no opportunity of reading as it was not on the court record and neither had it been produced in full in any affidavit on record.”

I have perused the ruling of 8th October, 2018, delivered by this Court and I have noted the issues that were raised in contention and opposition therein by the Plaintiffs. I will not engage in the exercise of reproducing the same as I believe the parties hereto have copies of the same on their respective files, for easy reference.

A careful look at the issues raised by the Plaintiffs in the said ruling, as against the grounds of appeal indicated in exhibit "LH2" clearly reveals that the Plaintiffs have raised wholly novel issues that they did not raise when arguing their objection to the application that culminated into the ruling they now seek to challenge. The Supreme Court has, on more than one occasion, settled the question of whether or not a party can raise issues on appeal that were not raised before the lower court. To this end, the Supreme Court stated, in the case of *Mususu Kalenga Building Limited, Winnie Kalenga v. Richmans Money Lenders Enterprises*¹⁰, that:

"We have said before and we wish to reiterate here that where an issue was not raised in the court below it is not competent for any party to raise it in this court."

Further and more recently, the Supreme Court held in the case of *Barclays Bank Zambia Plc v. Zambia Union of Financial Institutions and Allied Workers*¹¹, that:

"Where an issue was not raised in the court below it is not competent for any party to raise it in the appellate court."

In light of the pronouncement by the Supreme Court above, I am of the view that the Plaintiffs have failed to demonstrate the prospects of their appeal succeeding in that the very grounds of appeal that they have raised, in my opinion, consist of issues that were not raised

before this Court; and which have breached the long-standing rule that parties cannot raise new issues on appeal that they did not raise before the trial court.

Having found as above, I see no reason for proceeding to dwell on examining the second issue, namely, whether the Plaintiffs have advanced cogent reasons for their failure to apply for leave to appeal against the ruling of 8th October, 2018, within time. Even if I were to find that the Plaintiffs have advanced cogent reasons for their delay in filing their application for leave to appeal within time, the same would still have to be subject to determination of whether or not the intended appeal has prospects of succeeding. In this regard, the second issue therefore, falls off because the greater ground to have to establish in an application for leave to appeal, whether within or out of time, is that there are prospects of the appeal succeeding should it proceed to be heard by the Court of Appeal.

With regard to the order of stay of proceedings that is being sought by the Plaintiffs herein, the principles set in the *Zambia Revenue Authority v. The Post Newspaper*⁹ case cited above, are very clear and need no further enunciation. The said principles are in harmony with yet another Supreme Court judgment, namely, *Sonny Paul Mulenga & Vismar Mulenga (Both personally & practising as SP Mulenga International) and Chainama Hotels Limited and Elephants Head Hotel Limited v. Investrust Merchant Bank Limited*⁴ (cited by Counsel for the 1st and 2nd Defendants), where it was held that:

“An appeal does not automatically operate as a stay of execution and it is pointless to ask for a stay solely because an appeal has been entered. More is required to be advanced to persuade the court

below or this court that it is desirable, necessary and just to stay a judgment pending appeal. The successful party should be denied immediate enjoyment of a judgment only on good and sufficient grounds."


Indeed, it is clear from these authorities that more has to be shown by an applicant, for the Court to be inclined to grant an order for stay of execution. However, as my findings above indicate, the Plaintiffs herein have failed to demonstrate why leave to appeal should be granted herein, let alone, why an order staying the hearing of the 1st and 2nd Defendants' application to expunge documents from the record, is necessary.

In view of the foregoing I find no merit in both the First and Second Applications herein. The same are accordingly dismissed and the *ex parte* order for stay of application to expunge documents from the 3rd Defendant's Bundle of Documents pending hearing and determination of application for leave to appeal out of time, granted on 21st November, 2018, is discharged forthwith.

Costs of the Applications herein are awarded to the 1st and 2nd Defendants, and to the 3rd Defendant, to be agreed by the parties or taxed in default thereof.

Leave to appeal is denied.

Dated at Lusaka the 3rd day of February, 2020.


W.S. MWENDA (Dr)
HIGH COURT JUDGE