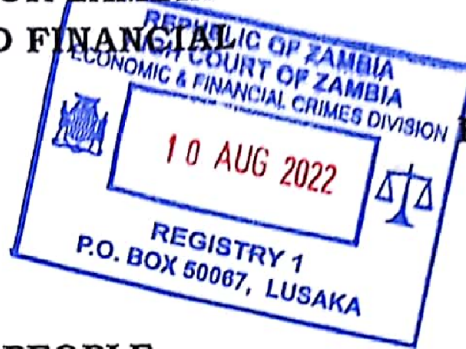


**IN THE HIGH COURT FOR ZAMBIA
AT THE ECONOMIC AND FINANCIAL
CRIMES COURT
HOLDEN AT LUSAKA
(Criminal Jurisdiction)**



HPEF/01/2022

THE PEOPLE

APPELLANT

V

RONALD KAOMA CHITOTELA

RESPONDENT

BEFORE: Hon. Mr. Justice E.L. Musona
Hon. Lady Justice S. Wanjelani
Hon. Mr. Justice C. Zulu
on 10th August, 2022.

For the Appellant: Mr. E. Mbewe (Anti-Corruption Commission)

For the Respondent: Mr. B. Mwelwa of Messrs Linus E. Eyaa and Co.

RULING

MUSONA J. DELIVERED THE RULING OF THE COURT.

Case referred to:

1. *Anuj Kumar Rathi Krishna v The People SCZ Judgment No. 19 of 2011*

Legislation referred to:

1. *Section 80 of the Anti-Corruption Act No. 3 of 2012 of the Laws of Zambia*
2. *Section 324 of the Criminal Procedure Code Chapter 88 of the Laws of the Republic of Zambia*
3. *Section 71 (1) of the Forfeiture of Proceedings of Crime Act No. 19 of 2010 of the Laws of Zambia.*
4. *Section 322 of Chapter 88 of the Laws of the Republic of Zambia.*

This is a Ruling on a preliminary objection by the Respondent for an order to dismiss an appeal for want of jurisdiction.

The brief background in as far as this application is concerned is as follows:

The Respondent was charged with Two (2) counts of possession of Property suspected of being Proceeds of Crime contrary to Section 71

(1) of the Forfeiture of Proceeds of Crime Act No. 19 of 2010 of the Laws of Zambia.

What is cardinal to note is that when the Respondent appeared before the Subordinate Court at Lusaka, the learned Magistrate discharged him of both counts. According to the lower court, the discharge of the Respondent was on the footing that there was an undertaking by the Anti-Corruption Commission (ACC) not to prosecute the Respondent in terms of Section 80 of the Anti-Corruption Commission Act No. 3 of 2012. That section provides as follows;

80 (3) The Commission may tender an undertaking, in writing not to institute criminal proceedings against a person who;

(a) Has given a full and true disclosure of all material facts relating to past corrupt conduct and illegal activity by that person or others; and

(b) Has voluntarily paid, deposited or refunded all property the person acquired through corrupt or illegal activity.

(4) A settlement or undertaking under this section shall be registered in court.

Aggrieved with the decision of the court below to discharge the Respondent based on the undertaking, the Appellant lodged an appeal in the Economic and Financial Crimes Court a division of the High Court. The Grounds of Appeal are as follows;

1. The trial court erred on point of law by discharging the Accused person herein when it held that arraigning the accused after a settlement would amount to double jeopardy before invoking Section 277 of the Criminal Procedure Code Chapter 88 of the Laws of Zambia.
2. The trial court misdirected itself on a point of law when it held that arraigning the accused was tantamount to double jeopardy as provided for under Section 138 of the Criminal Procedure Code Chapter 88 of the Laws of Zambia when no plea was taken before any other court of competent jurisdiction for purpose of trial.
3. The trial court below misdirected itself to go into the merits of the settlement without giving the prosecution an opportunity notwithstanding that the defence submission was anchored on Section 138 of the Criminal Procedure Code Chapter 88 of the Laws of Zambia.
4. Other grounds to follow.

Following this appeal, the Respondent filed summons for an order to dismiss appeal for want of jurisdiction based on the following objections:

1. That this Honourable Court has no jurisdiction to hear and determine this Appeal in its current form when the Undertaking dated 24th June, 2019 not to institute Criminal proceedings made by the Anti-Corruption Commission (hereinafter called "the Respondent") pursuant to Section 80 of the Anti-Corruption Act Number 3 of 2012 has not been set aside before instituting any Criminal Proceedings against the Applicant; and
2. That this Hounourable Court has no Jurisdiction to hear and determine this Appeal in its current form as it is incomplete as the Appellant has not demonstrated that the Application to appeal out of time was made as the said Application to appeal out of time ought to be part of this Record of Appeal.

What we discern from this Summons as well as the affidavit in support thereof, is the argument that this Court has no jurisdiction to hear and determine this appeal. It follows that if we find that we have jurisdiction we should proceed to hear and determine the

appeal. But if it is found that this court has no jurisdiction to hear and determine this appeal, then to dismiss the appeal for want of jurisdiction.

There are two (2) objections in the summons for an order to dismiss appeal for want of jurisdiction. We have decided that we discuss these two (2) objections seriatim. The first objection reads as follows:

1. **That this Honourable Court has no Jurisdiction to hear and determine this Appeal in its current form when the Undertaking dated 24th June, 2019 not to institute Criminal proceedings made by the Anti-Corruption Commission (hereinafter called "the Respondent") pursuant to section 80 of the Anti-Corruption Act Number 3 of 2012 has not been set aside before instituting any Criminal Proceedings against the Applicant.**

We have studied this first objection. What we note from this objection is that the interlocutory remedy being sought by the Respondent, is actually Ground one (1) in the Notice of Appeal. Delving into this

objection will in essence be dealing with the merits and demerits of Ground one (1) of the Appeal. In this regard we are well guided by the case of **Anuj Kumar Rathl Krishna v The People** (1). In that case, the Supreme Court when hearing an application for bail pending appeal refused to discuss the merits of the main appeal. The Supreme Court stated thus:

"We are reluctant to go into the merits of the main appeal and we would rather concentrate on the merits of the [bail pending] appeal before us. We hold the view, that it will be prejudicial to both parties if we delve into the merits of the grounds of appeal filed in support of the main appeal."

A party should not drag court even by way of summons into discussing the issues pending in the appeal. We should cross a bridge, but only when we reach it. We defer this objection to the substantive appeal.

The second objection reads as follows:

2. **That this Honourable Court has no Jurisdiction to hear and determine this Appeal in its current form as it is incomplete as the Appellant has not demonstrated that the Application**

to appeal out of time was made as the said Application to appeal out of time ought to be part of this Record Appeal.

What we discern from the above quotation is that the Respondent is arguing that the Appellant appealed to this court out of time without leave of this court. It is trite law that when one wishes to appeal after the expiry of the period within which to appeal, the intending appellant ought to seek Leave of Court permitting the intending Appellant to appeal. No appeal shall be filed out of time without Leave of Court, and if filed, to the extent that it would have been filed without Leave of Court, such appeal shall be incompetent.

The question which we now ask ourselves is, "did the Appellant file their appeal out of time without Leave of Court?"

We have read the Appellant's Affidavit in Opposition to summons for an order to dismiss appeal for want of jurisdiction. The Appellant has averred in paragraph 9 of their said affidavit that the Appellant filed in the lower court a Notice of Appeal together with an application

for leave to appeal out of time in the prescribed Form 33 of the ***Criminal Procedure Code Chapter 88 of the Laws Zambia.***

We have looked at ***Section 324 of the Criminal Procedure Code Chapter 88 of the Laws of the Republic of Zambia.*** That section reads as follows:

“324. (1) Where the period has expired within which, under section three hundred and twenty-two, an appeal shall be entered, an appellant may nevertheless make application in the prescribed form for his appeal to be heard and shall in support of any such application enter an appeal, and the form of application shall be attached to the Notice of Appeal when that Notice is filed with or transmitted to the Court below and the appellate court.”

The Appellant has vehemently argued that they complied with the said Section 324 of the Criminal Procedure Code Chapter 88 of the Laws of the Republic of Zambia, and the notice of appeal and the application to appeal out of time were produced and marked as “SM1”. These were duly stamped with the Seal of the court below,

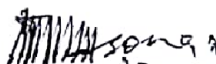
dated 3rd June, 2022. The Appellant in their said affidavit further averred that the record of appeal prepared by the court below and transmitted to this court has a missing page. That this can be seen from the Index of the record of appeal at Item No. 3 described as the **"Notice of Appeal"** with the number of pages being Roman numeral **"iv - vi"** on the Record of Appeal. The Record of Appeal itself, however has no page **vi** and skips to Arabic numeral **'1'** which is item No. 4 on the Index of the record of appeal.

We have found that this explanation is on firm ground and have found no reason to doubt it. We are satisfied that the application for leave to appeal out of time was lodged properly, but it is the court below which did not file it, and this created a wrong impression that the Appellant filed their notice of Appeal out of time without leave of court.

Since it is now clear that the Appellant actually filed an application for Leave to Appeal out of time, the Respondent's argument fails and is accordingly dismissed.

In conclusion, and for avoidance of doubt, since the application to appeal out of time was properly filed together with Notice of Appeal, we exercise our discretion pursuant to the proviso in Section 322 of the Criminal Procedure Code Chapter 88 of the Laws of Zambia to grant the application and hear the Appeal.

**DELIVERED AND SIGNED AT LUSAKA THIS THE 10TH DAY OF
AUGUST, 2022**



**HON. MR. JUSTICE E. L. MUSONA
HIGH COURT JUDGE**



**HON. MRS JUSTICE S. M. WANJELANI
HIGH COURT JUDGE**



**HON. MR. JUSTICE C. ZULU
HIGH COURT JUDGE**