IN THE HIGH COURT FOR ZAMBIA **2024/HP/A005**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF: **SECTION 10(5) OF THE IMMIGRATION AND DEPORTATION ACT NO 18 OF 2010 OF THE LAWS OF ZAMBIA.**

IN THE MATTER OF: **RULE 3 OF THE HIGH COURT (APPEALS) (GENERAL) RULES, STATUTORY INSTRUMENT NO. 6 OF 1984**

AND

IN THE MATTER OF: **AN APPEAL AGAINST THE DECISION OF THE HONOURABLE MINISTER OF HOME AFFAIRS AND INTERNAL SECURITY TO REJECT THE APPELLANT'S APPEAL AGAINST THE REJECTION OF HIS APPLICATION FOR RENEWAL OF INVSTORS PERMIT NO. IP276059/11-21 ISSUE UNDER FILE NO. (P-2846/17)**

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
PRINCIPAL REGISTRY
22 APR 2024
CASHIER 1
PO BOX 50067, LUSAKA

BETWEEN:

LEON BENJAMIN HENRY PENNINGTON **APPELLANT**

AND

THE ATTORNEY GENERAL **RESPONDENT**

Before the Honorable Mr Justice C. Kafunda in Chambers on the 22nd day of April, 2024

For the Appellants : *I Simbeye – Malisa & Partners*

For the Respondents : *Mrs Chisenga Kaonde Mwanza – Attorney General's Chambers*

RULING

CASES REFFERED TO

1. ***African Banking Coorporation Zambia v Mubende Country Lodge Limited SCJ No 116/2016***
2. ***Kashimoto Conservancy Limited v Darrel Alexander Watt CAZ Appeal No 146 of 2019***
3. ***Comprehensive HIV AIDS Management programme Limited v Investrust Bank Limited CAZ Appeal No 189/2019***

LEGISLATION REFERRED TO;

1. ***Rules of the Supreme Court of England. (Whit Book) 1999 Edition***
2. ***High Court (Appeals) (General) Rules, Statutory Instrument No 6 of 1984***

BACKGROUND

This is a Ruling on the Respondent's notice of motion for the determination of point of law made pursuant to **Order 14A Rule 1 of the Rules of the Supreme Court of England (White Book) 1999 Edition ("RSC")** which provides as follows;

> ***"14A/1 1.—(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that—***
>
> > ***(a) such question is suitable for determination without a full trial of the action, and***

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein."

The question for determination in the notice of motion, is whether or not, the Court can proceed to hear the appeal in this case without a record of appeal prepared and filed into Court by the Appellant.

The aforesaid Appeal was lodged by way of a notice of appeal accompanied by heads of arguments in support of the appeal, which were filed by the Appellant on 26th January, 2024. That was following the grant of leave to the Appellant for extension of time within which to appeal on 16th January, 2024. The appeal is against the decision of the Honourable Minister of Home Affairs and Internal Security to reject the Appellant's appeal to the Minister against the rejection of his application for renewal of an investor's permit.

AFFIDAVIT EVIDENCE

The Respondent filed an affidavit in support of the application sworn by Chisanga Lenga Kasonde, wherein it was deposed that

the Appellant's claims in the originating process raise serious issues of law and which are addressed in the notice of motion for the determination of points of law.

The Appellant filed an affidavit in opposition on 25th March, 2024 sworn by Isaac Simbeye, an Advocate practicing in the firm of Malisa and Partners, the Appellant's advocates. The said affidavit was set aside at the hearing of the matter.

SKELETON ARGUMENTS

In support of the application, the Respondent filed Skeleton arguments wherein it was argued that the requirement that an Appellant should prepare and file a record of appeal is essential and goes to the root of the appeal herein. That failure to file the same, renders the appeal null and void. Reliance was placed on **Rule 5(1) of the High Court (Appeals)(General) Rules 1984 ("the rules")** which provides as follows;

> ***"5.(1)The Appellant shall prepare the record of appeal which shall be bound in a book form with an outer cover of stout paper and may, if extensive, be in more than one volume."***

Order 14A RSC should be such that, upon such determination, the entire matter maybe finally determined, subject to any appeal. It was further contended that questions that do not lead to the determination of the entire matter are not suitable for consideration under **Order 14A RSC**. It was submitted that the determination of the question relating to the record of appeal cannot finally determine the matter and thus the question brought by the Respondent is not one envisaged under **Order 14 A RSC**. It was further submitted that the Respondent's motion is incompetent because the Respondents have not given notice of intention to defend. The Appellant submitted that the Supreme Court had an opportunity to interpret the import **of Order 14A RSC** in the case of ***African Banking Coorporation Zambia v Mubende Country Lodge Limited***[1] wherein the Court guided as follows;

> ***It is plain from the preceding paragraph that there are certain requirements which must be satisfied before a matter can be disposed off on a point of law. One such requirement, according to Order 14A/1-2/2, RSC is the giving of notice of intention to defend....***

..... view that we take is that what constitutes the notice of intention to defend, in the context of our rules, is the filling of the memorandum of appearance accompanied by a defence. It therefore follows that the filling of the memorandum of appearance with the defence is a pre-requisite to launching an application under Order 14 A, RSC. The record shows, as we alluded earlier, that contrary to the mandatory requirements of Order 11 Rule 1 of the High Court Rules, the appellant did not file the memorandum of appearance accompanied by a defence before invoking Order 14 A, RSC. Consequently, we cannot fault the trial judge in finding that the conditions favourable for invoking Order 14 A, RSC were not present.

Furthermore, the cases of ***Kashimoto Conservancy Limited v Darrel Alexander Watt***[2] and ***Comprehensive HIV AIDS Management programme Limited v Investrust Bank Limited***[3] were relied upon.

The Appellant also submitted that the appeal being against the State, the Respondent cannot competently move the motion under **Order 14A RSC** because such motions cannot be raised in matters by or against the State. In support of the aforestated position, the Respondents cited **Order 14A Rule 2 (2) RSC** under the heading ***'Effect of the Rule'*** which states that:

"This order does not apply to any proceedings by or gainst the Crown, nor does it limit the powers of the court under O.18, r.19 or any provisions of the RSC."

HEARING

The matter came up for hearing on 27th March, 2024. Counsel for both parties were present in Court.

During the course of the hearing, I set aside the Appellant's affidavit in opposition for being incompetent as no leave to extend time within which to file the affidavit, as earlier ordered, was obtained.

Counsel for the Respondent informed the Court that the notice of motion was premised on **Order 14A Rule 1** as read together with **Order 33 Rule 7** of the **RSC** and relied on the affidavit in support of the application and skeleton arguments filed on 6th March, 2024. In augmenting, learned Counsel pointed out that the appeal is improperly before Court without the record of proceedings being availed to both the Court and the Respondent.

In response, learned counsel for the Appellant reiterated that the Respondent has not met the pre-conditions for invoking **Order**

14A Rule 1 RSC and that the obligation to avail the record of proceedings actually lies with the Tribunal.

In reply, learned counsel for the Respondent clarified that the application is anchored on **Order 14A Rule 1 RSC** and **Order 33 Rule 7 RSC**. Counsel metained that the obligation to prepare the record of appeal lies with the Appellant.

DETERMINATION

I have had occasion to consider the evidence and the arguments presented by both parties.

The question for my consideration is, whether or not, this Court can proceed to hear the appeal without a record of appeal prepared and filed into Court.

The Respondent contended that this Court cannot proceed to hear the appeal without the record of appeal as the requirement to file the record of appeal is mandatory. That the failure to file the same renders the appeal null and void. In response, the Appellant does not dispute that it has not filed the record of appeal but states that the same is in the exclusive possession of the Director General of the Immigration Department and the Ministry of Home Affairs and

Internal Security. It is the position of the Appellant that the record of appeal has not been availed to the Appellant and yet it is the duty of the Respondent to avail documents that would form the record of appeal. Thus, the Respondent cannot seek to dismiss the appeal on the basis of its own flaws.

For purposes of clarity, ***Rules 3(1), 5(1)(2) (5) and (6), of the rules*** are reproduced below;

> ***"3. (1) Any person desiring to appeal to the High Court from a decision of a Tribunal shall, within thirty days of the date of the issue of the order containing the decision, give notice of appeal as hereafter provided.***
>
> ***5.(1) The Appellant shall prepare the record of appeal which shall be bound in book form with an outer cover of stout paper and may, if extensive, be in more than one volume.***
>
> ***(2) The Tribunal shall make available to the appellant copies of all relevant documents which are necessary for the purpose of preparing the record of appeal and which are in the exclusive possession of the Tribunal.***
>
> ***(5) The Appellant shall forward to the Tribunal the record of appeal, and such number of copies thereof as the Registrar may determine, and the Tribunal shall, if satisfied in that behalf, certify as correct the record of appeal and each copy thereof forwarded to it.***

(6) The appellant shall within thirty days of receiving the certified copies referred to in subrule (5), forward –

a) to the Registrar the record of appeal and such number of copies thereof as the Registrar may determine; and

b) one copy thereof to the Respondent, if any."

It is clear from the foregoing rules that, by virtue of **Rule 3**, the Appellant is required to file in the notice of appeal within thirty days of the decision appealed against and that the time can be extended by a Court pursuant to ***Rule 10 of the rules*** which provides as follows;

"10 A Judge of the High Court may, for sufficient reasons shown in form HC 9(A) (G) 3, extend the time for doing anything under these Rules."

It is not in dispute that the notice of appeal was filed on 26th January, 2024 after the Court extended the time within which to file the appeal on 16th January, 2024.

In terms of ***Rule 5(1) of the rules***, the requirement to file in a record of appeal is mandatory and the obligation to prepare the record lies with the Appellant. This provision being couched in

mandatory terms, implies that a record of appeal must be filed by the Appellant before the appeal can proceed to be heard.

Whereas the obligation to prepare the record of appeal lies with the Appellant, ***Rule 5(2) of the rules,*** places on the Tribunal, an obligation to avail relevant documents to the Appellant for the purpose of the Appellant preparing the record of appeal. The aforesaid obligation on the part of the Tribunal is also mandatory.

Upon acquiring the relevant documents from the Tribunal, an Appellant is required, going by the provisions of ***Rule 5(5) of the rules***, to prepare and present the record of appeal to the Tribunal for certification.

By virtue of the provisions of **Rule 5(6) of the *rules***, the Appellant is required to prepare and forward the record of appeal to the Registrar of the High Court within 30 days from the date of certification by the Tribunal.

It is therefore clear from the foregoing, that the record of appeal can ordinarily only be prepared after relevant documents have been availed to the Appellant by the Tribunal. This is because it is the Tribunal which was seized with the matter subject of appeal, including the records/documents for the said matter.

In *casu,* the Respondent has not demonstrated that the Tribunal availed the requisite documents to the Appellant to enable him prepare the record of appeal and thereafter have it certified as set out above. On the other hand, the Appellant has demonstrated that the Respondent has not responded to his letter requesting for a record of proceedings. I am therefore inclined to agree with the Appellant's submission that the Respondent seeks to ride upon it's own flaws to dismiss the Appeal.

For the foregoing reasons, I hold that the Respondent's application lacks merit and it is hereby dismissed. Consequently, I direct the parties as follows;

i. *The Respondent shall avail the to the Appellant the record of proceedings within 14 days from the date of this Ruling.*
ii. *The Appellant shall prepare and forward the record of appeal to the Tribunal within 14 days from the date of receipt of record of proceedings for certification.*
iii. *The appellant shall file in the record of appeal within thirty days from the date of certification.*

On account of the position I have taken above, I will not address the other issues raised by the Appellant relating to the competency of the Respondent's application.

The Appellant is awarded Costs, to be taxed in default of agreement.

Leave to Appeal is granted.

Delivered at Lusaka the 22nd day of April, 2024

C. KAFUNDA
HIGH COURT JUDGE