TWAMPANE MINING CO-OPERATIVE
SOCIETY LIMITED
v
E AND M STORTI MINING LIMITED

SUPREME COURT
CHIRWA., MWANAMWAMBWA, AND MUYOVWE, JJS.,
1st MARCH, 2011 and 9th NOVEMBER, 2011.
(S.C.Z. Judgment No. 20 of 2011)

[1] Civil Procedure - Appeal - Time limit for - Application for extension of time - Grounds for granting.

[2] Civil Procedure - Appeal - Time limit for - Whether attempts at ex curia settlement stop the time running out within which to appeal.

This was an appeal against the Ruling of the Kitwe High Court which refused to grant the appellant an extension of time within which to appeal.

Held:

1. The position of the law is that ex curia settlement discussions do not, and cannot stop the time running within which to appeal.

2. To use ex curia settlements discussions as an excuse for failure to comply with the rules of Court is to do so at one's peril.

3. Applications for extension of time should be made promptly.

4. An appellate Court is entitled to look into the merits of the appeal when considering an application for extension of time.

5. It is important to adhere to Rules of Court in order to ensure that matters are heard in an orderly and expeditious manner.

6. Those who choose to ignore Rules of Court do so at their own peril.

7. The appellant did not merit to be granted an extension of time because it sat on its rights by not appealing within the prescribed period; by not filing its application for extension of time promptly and also by failing to attend the arbitration proceedings whose award was final.

Cases referred to:

1. Gatti v Shoosmith [1939] 3 ALL E.R. 916.
2. Ratnam v Cumarasamy and Another [1964] 3 ALL E.R. 933.
3. Nkhuwa v Lusaka Tyre Service Limited (1977) Z.R. 43.
4. Attorney-General v Achiume (1983) Z.R. 1.
5. Palata Investment Limited and Others v Burt and Sinfield Limited and Others [1985] ALL E.R. 517.
6. Attorney-General v Ndhlovu (1986) Z.R. 12.
7. Mulenga and Others v Investrust Merchant Bank Limited (1999) Z.R. 1
8. Bank of Zambia v Tembo and Others (2002) Z.R. 103.

Legislation referred to:

1. High Court Act, cap. 27, Order 2, Rule 2.
2. Rules of the Supreme Court Order 3, Rules 49 and 50 and Order 59/4/17.

Works referred to:

1. A.G. Guest, Chitty on Contract, General Principles, 26th Edition (London, Sweet and Maxwell, 1989).
2. Halbury's Laws of England, Volume 28.

K. Bota of Messrs William Nyirenda and Company for the appellant.
S.A.G. Twumasi of Messrs Kitwe Chambers for the respondent.

MUYOVWE, J.S.: delivered the judgment of the Court. This is an appeal against the Ruling of Kitwe High Court which refused to grant the appellant an extension of time within which to appeal.

The brief background to this case is that the Ruling intended to be appealed against was delivered on the 16th of April, 2009. Leave to appeal to the Supreme Court was granted by the Court below without formal application at the time the Ruling was delivered. The respondent had 30 days from that day to file the appeal but failed to do so. The application for leave to appeal out of time was only filed on 24th June, 2009.

In her Ruling the learned judge found that the appellant waited for 39 days after the time for appeal had expired to make the application for extension of time. She noted that the explanation put forward by the appellant for the failure to file the application in time was because it had to consult amongst its members who are dispersed in different towns. The Court below found that the length of the delay, especially that the matter arose as a result of an arbitral award, could not be regarded as short and that the appellant had sat on its rights. Further, the Court found that the attempt at ex-curia settlement only arose after the application was filed into Court and refused to take judicial notice of the fact that the matter had room for ex-curia settlement. According to the learned judge there was no evidence that the parties attempted to settle the matter out of Court before the appellant ran out of time. And that the prospect of the appellant succeeding on appeal was dim and that the affidavit in

support did not show that the appeal had any prospect of success. The learned judge dismissed the application with costs.

Dissatisfied with the Ruling of the Court below the appellant filed three grounds of appeal as follows:

1. the honourable judge erred in law and in fact when she disallowed the application to extend time within which to appeal;
2. the honourable judge below erred in law and fact when she delved into issues intended to be appealed upon;
3. the honourable judge erred in law and fact when she did not take judicial notice of the ex-curia settlement discussions when it was on record that this was the case.

On behalf of the appellant learned counsel Mr. Bota filed his heads of arguments and List of Authorities.

Learned counsel combined his arguments in grounds one and three. He referred us to Order 2, Rule 2, of the High Court Rules. He contended that the lower Court ought to have exercised its discretion in view of the fact that the reason for the delay in appealing was due to the fact that parties were engaged in discussions for ex-curia settlement. That the Court below erred when she refused to take judicial notice of this fact as it was clear from the record that the ex-curia settlement discussions had been in progress. He referred us to the hearings held on 4th August, and 15th September, 2009, respectively. He submitted that the Court below refused to take judicial notice of the ex-curia settlement negotiations on the ground that the attempt at ex-curia settlement only arose after the current application was filed in Court. He argued that in the absence of evidence to this effect, the lower Court was not entitled to arrive at such a conclusion adding that this is a proper case for this Court to upset the finding of fact in terms of Attorney-General v Achiume (4), and Attorney-General v Ndhlovu (6).

Turning to ground two Mr. Bota submitted that the lower Court ought not to have considered the merits of the intended appeal. He submitted that having granted leave to appeal, the learned judge contradicted herself when she concluded that the intended appeal had no merit.

He urged us to uphold the appeal and extend time for the appellant to file its appeal against the arbitral award which was made in default of hearing the appellant.

On behalf of the respondent, Mr. Twumasi filed heads of arguments.

In response to ground one he submitted that it is settled law that adherence to Rules of Court is essential, and ought to be strictly followed. He cited Order 59/4/17 of the Rules of the Supreme Court, and stated that the discretionary power of the Court under Order 3, Rules 49, and 50, of the Rules of the Supreme Court to allow extension of time within which to lodge an appeal out of time is not a rubber stamp to condone a litigant's failure to abide by the Court Rules. He relied on the case of Nkhuwa v Lusaka Tyre Service Limited (3).

He further submitted that in accordance with Order 59/4/17 of the Rules of the Supreme Court, the Court must be satisfied with the reasons advanced for the delay; consider the length of the delay; the prejudice that the respondent May, suffer and the prospects of the appeal succeeding. Further, he argued that in this case the delay was unreasonable and cited Gatti v Shoosmith (1) and Ratnam v Cumarasamy and Another (2). counsel also referred us to the case of Bank of Zambia vs. Tembo and Others (8), and submitted that the 39 days lapse in this case cannot be said to be reasonable. Further, Mr. Twumasi pointed out that the delay by the appellant prejudiced the respondent and its conduct shows lack of interest to prosecute the appeal, and is a ploy to delay the matter at all costs. And that in view of modern communication technology, which we were invited to take judicial notice of, the reason advanced that there was a delay in consulting its members who are dispersed in the country should be rejected.

In response to ground two, Mr Twumasi submitted that in cases of this nature, it is not enough to state the reason for delay but it also important to show that the appellant's intended appeal has prospects of success. counsel pointed out that the appellant has not alluded to this aspect in his affidavit. In support of this argument, the case of Mulenga and Others v Investrust Merchant Bank Limited (7), was cited. He referred again to Order 59/4 /17 of the Rules of Supreme Court and to the case of Palata Investment Limited and Others v Burt and Sinfield Ltd and Others (5). Mr. Twumasi submitted that the appellant was afforded the opportunity to attend the arbitration proceedings, but chose not to. He contended that it is evident that in this case, there is no new point of law which the appellant would like this Court to deliberate on.

In response to ground three, it was submitted that negotiations do not stop the time from running. In support of this argument Mr. Twumasi referred us to Page 608 of Volume 28 of Halsbury's Laws of England, and paragraph 1949 of Chitty on Contract, General Principles (supra) at page 1267.

It was argued further, that this ground of appeal is a mere after thought as ex-curia settlement discussions were not the reason for the delay. He contended that the reason put forward by the appellant for the delay is that it had to consult its members who are dispersed in the country. That, therefore, whether or not the learned judge took judicial notice of the ex-curia settlement discussions would not be of any assistance to the appellant. He submitted that the ex-curia settlement discussions came much later, and that this fact was conceded by the appellant during the hearing of the matter in the Court below. He urged the Court to dismiss the appeal as it is devoid of merit.

We have considered the Ruling appealed against, and the submissions filed by both parties. We have also perused the record of appeal. We intend to deal with all three grounds of appeal at the same time.

First of all, Mr. Bota took issue with the Court's finding at R4 of the Ruling where she said:

“I turn from that to the point that has been made by Mr. Bota that the Court should take judicial notice of the fact that the matter has had room for ex curia settlement. I do not find this point very

impressive, since attempt at ex curia settlement only arose after the current application was filed into Court. There is no evidence that the parties attempted to settle the matter out of Court before the defendant ran out of time. I accordingly reject that contention."

We agree with the learned judge's conclusion that there is no evidence that the parties attempted to settle the matter ex-curia before the appellant ran out of time. This is an important consideration which May, have been of assistance to the appellant. A perusal of the record of appeal shows that the Court was advised that the parties were talking and indications are that this was after the default. We hold the view, that ex-curia settlement discussions cannot cure such default, and we shall come back to this point later in our judgment. It appears to us that having realized that it had run out of time, the appellant decided to engage the respondent into ex-curia settlement discussions. Mr. Bota's argument that we should reverse the lower Court's finding in terms of Attorney-General v Achiume (4), and Attorney General v Ndhlovu (6), is untenable.

In any event, we agree with Mr. Twumasi that whether there were ex-curia settlement negotiations commenced before the appellant filed his application for extension of time cannot be of any help to the appellant. This is because this was not the reason given for failure to appeal on time and neither was it the deciding factor in this case. In fact the learned judge did not refuse to acknowledge that there were ex-curia settlement discussions. She refused to accept the discussions as the reason for the delay. The learned judge was very clear in her Ruling that the delay by the appellant in lodging its appeal despite leave being granted immediately was unreasonable. With leave to appeal in its hand, the appellant should have taken the necessary steps expeditiously. And having failed to appear for the arbitration proceedings, one would have thought that the appellant would have woken from slumber, and acted quickly but this was not to be and its own complacency has landed it in this Court.

In the case of Nkhuwa v Lusaka Tyre Services Limited (3), which is quite explicit on this point, it was held that:

i. the granting of an extension of the time within which to appeal is entirely in the discretion of the Court, but such discretion will not be exercised without good cause; and
ii. in addition to the circumstances of the delay and the reasons therefore which provide the material on which the Court May, exercise its discretion another most important factor is the length of the delay itself."

We stated further at page 47 that:

"The provisions in the rules allowing for extension of time are there to ensure that if circumstances prevail which make it impossible, or even extremely difficult for parties to make procedural steps within prescribed times, relief will be given where the Court is satisfied that circumstances demand it. It must be emphasised that before this Court is able to exercise this discretion to grant relief there must be material before it on which it can act."

In this case, the Ruling was delivered on 26th April, 2009, and leave to appeal was granted to the appellant on the same day, yet the appellant only filed the application for leave to appeal out of time on

24th June, 2009. As the lower Court observed, the appellant waited for 39 days after the time for appeal had expired to make the application for extension of time. Further, we agree with the Court below that the length of the delay cannot be regarded as short, and this is compounded by the fact that this matter arose out of an arbitral award.

In fact in Nkhuwa v Lusaka Tyre Services Limited (3), the case of Ratnam v Cumarasamy and Another (2), was considered with approval. In that case, the appellant failed to take the necessary steps because he was hoping for a compromise with the other party, but this did not materialise, and the Court refused to accept such reasoning and said:

"The Rules of Court must prima facie be obeyed and in order to justify a Court in extending the time during which some step in procedure requires to be taken there must be some material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time-table for the conduct of litigation."

From the Ruling, it is evident that the learned judge bore the above authority in mind. Mr. Twumasi raised an important point that in fact the appellant's argument in ground three that the lower Court should have taken judicial notice of the ex-curia settlement discussions was an afterthought. We agree with him. Indeed, the record of appeal shows that the reason given by the appellant for the delay is that it was consulting its members. This is conceded to by counsel for the appellant in his submissions.

The position of the law is that ex-curia settlement discussions do not and cannot stop the time from running. This principle was ably espoused by the learned authors of Chitty on Contract, General Principles paragraph 1949, at page 1267, where they stated, inter alia, that once time has started running, it continues until proceedings are commenced or the claim is barred. Parties must bear in mind that ex-curia settlement discussions May, fail, or succeed, hence the reason to be prudent enough to prepare for any eventuality, watch the time and take the necessary steps as provided in the Rules of Court. To use ex-curia settlement discussions as an excuse for failure to comply with the rules is to do so at one's peril as we stated in Nkhuwa v Lusaka Tyre Services Limited (3).

Further, in an application for extension of time, the lower Court was at large to consider the prospect of success of the appeal. Under Order 59/4/17 of the Supreme Court Rules, it is stated that an application for extension of time should be made promptly.In the case of Palata Investments Ltd. and Others v Burt & Sinfield Ltd and Others (5), the Court said at page 521:

"....in cases where the delay was very short and there was an acceptable excuse for the delay, as a general rule the appellant should not be deprived of his right of appeal and so no question of the merits of the appeal will arise. We wish to emphasise that the discretion which fell to be exercised is unfettered, and should be exercised flexibly with regard to the facts of the particular case. No doubt in some cases it May, be material to have regard to the merits of the appeal, because it May, be wrong, and indeed May, be an unkindness to the appellant himself, to extend his time for appealing after he has allowed the time to elapse, to enable him to pursue a hopeless appeal.....The whole of this matter, it seems.....depends on whether or not we can properly look on the delay in this case as being an

exceptional one."

The delay in the Palata Investment Limited and Others vs. Burt & Sinfield Limited and Others (5), case was three days, and it was also found that there would be no prejudice to the other party. As we have stated, the delay in this case was definitely unreasonable and the excuse unacceptable. Further, Order 59/4/17 of the Rules of the Supreme Court allows the Court to look into the merits of the appeal when considering an application for extension of time. And we find no contradiction in the fact that the learned judge granted leave to appeal and also later considered the merits of the appeal and found none. By its default, the appellant opened its case for further scrutiny and lost any advantage that was due to it initially. We cannot, therefore, fault the Court below as it properly exercised its discretion having regard to the circumstances of the case.

In sum, the appellant did not merit to be granted an extension of time because it sat on its rights - by not appealing within the prescribed period; by not filing its application for extension of time promptly, and also by failing to attend the arbitration proceedings whose award was final. Indeed, there is no need to appeal for the sake of appealing when the appeal has no prospect of success. In this regard, we cannot over-emphasize the importance of adhering to Rules of Court as this is intended to ensure that matters are heard in an orderly and expeditious manner. Allowing this appeal would be tantamount to us encouraging laxity and non-observance of rules by practitioners and litigants in general. We repeat what we said in Nkhuwa v Lusaka Tyre Services Limited (3), that those who choose to ignore Rules of Court will do so at their own peril.All the three grounds of appeal, therefore, fail.

We find no merit in this appeal and it is dismissed with costs to be taxed in default of agreement.

Appeal dismissed.