

BP ZAMBIA PLC
v
ZAMBIA COMPETITION COMMISSION
TOTAL AVIATION AND EXPORT LIMITED
TOTAL ZAMBIA LIMITED

SUPREME COURT
SAKALA, C.J., SILOMBA, AND CHIBOMBA, JJS.,
3rd November, 2009 and 22nd November, 2011.
(S.C.Z. Judgment No. 21 of 2011)

[1] Civil Procedure - Limitation of action - Competition and Fair -Trading Act - Whether action is statute barred.

[2] Civil Procedure - Enlargement of time - Whether Court has power to enlarge time within which certain acts should be done, if action is statute barred.

This was an appeal against the decision of the High Court at Lusaka in which the trial judge held that the appellant could not be joined to the action because it was statute barred, under section 15 of the Competition and Fair Trading Act, which provides that any person who is aggrieved by a decision of the Commission made under the Act May, within 30 days appeal to the High Court.

Held:

1. It is clear from the provisions of section 15 of the Competition and Fair Trading Act, that any person who is aggrieved by the decision of the Commission under the Act May, appeal to the High Court within 30 days of notice of that decision.
2. Although Oder 3/5/1 of the Rules of the Supreme Court empowers the Court to extend, or abridge the time within which certain acts should be done, the Court has no discretion to extend or abridge time where a statute provides no such discretion. section 15 of the Competition and Far Trading Act does not provide for such discretion.
3. section 15 of the Competition and Fair Trading Act is very precise and provides clearly that an appeal should be lodged within 30 days.
4. Order 12/7 of the Rules of the Supreme Court empowers the Court to extend time for making an application for leave for abridgment of time where the matter is already in Court.
5. No substitution of a plaintiff can be allowed where the claim is statute barred, and that the Court cannot enlarge a time limit which a statute has specified.

6. Order 15/5 of the Rules of the Supreme Court provides that no person shall be added, or substituted as a party after the expiration of any relevant period of limitation.

7. Joinder of a party as a defendant, where the claim is time barred is not an irregularity which can be waived, because the action is time barred under Order 15/6/2A.

8. section 15 of the Competition and Fair Trading Act acts like the Statute of Limitation because it does not give the Court any discretion to extend time within which an appeal to the High Court shall be lodged by any person who is aggrieved by the decision of the Competition and Fair Trading Commission.

9. The trial judge was therefore on firm ground when he held that the appellant's right of appeal was statute barred because no appeal had been filed within the period stipulated in section 15 of the Competition and Fair Trading Act.

10. As a general rule, after the expiry of any relevant period of limitation under the Limitation Act, no person will be allowed to be added, or substituted as a party either as a plaintiff or defendant.

Cases referred to:

1. Queen v the Judge of the City of London Court [1892] Q.B. 273.
2. Mabro v Eagle Star and British Dominions Insurance company Limited [1932] 1 K.B. 485.
3. Hodgson v Armstrong and Another [1966] ALL E.R. 594.
4. Kamouh v Associated Electrical Industries International Limited [1980] Q.B. 199
5. Liff v Peasely and Another [1980]1 ALL E.R. 623.
6. Fennegan v Parkside [1998]1 ALL E.R. 598.
7. Royal Trading Limited v Zambia Revenue Authority (2000) Z.R. 86.
8. New Plast Industries v The Commissioner of Lands and Another (2001) Z.R. 86.
9. Zambia Consolidated Copper Mines v Chileshe (2002) Z.R. 86.
10. Mutale v The Attorney General and Another S.C.Z. judgment Number 14 of 2007(unreported).
11. United Engineering Group Limited v Mungalu and Others (2007) Z.R. 30.
12. Kumbi v Zulu (2009) Z.R. 183.

Legislation referred to:

1. Competition and Fair Trading Act, cap. 417, s.15.
2. High Court Act, cap. 27, s.10, Orders vi, and 14(5).
3. Interpretation and General Provisions Act, cap. 2, s.37.
4. British Extension Act, cap. 10.
5. English (Extent of Application) Act cap. 11.

6. Customs and Excise Act cap 322, 164(4).

Work referred to:

Rules of Supreme Court Orders 3/5/1; 12(7); 15/5; 15/6/4; and 15/6/7.

S. Lungu of Messrs Shamwana and Company for the appellant.

J. Banda of Messrs A.M. Wood and Company for the 1st respondent.

M. Sakala of Messrs Corpus Legal Practitioners for the 2nd and 3rd respondents.

CHIBOMBA, J.S.: delivered the judgment of the Court. When we heard this appeal, Mr. Justice Silomba sat with us. He has since retired. This judgment is therefore by the majority. This is an appeal against the decision of the High Court at Lusaka, in which the learned judge held that the appellant could not be joined to the action because its action was statute barred.

The appellant had applied in the Court below to be joined to the action commenced by the 2nd and the 3rd respondents against the 1st respondent. The application was made pursuant to Order 14(5) (1) of the High Court Rules, and Order 15(6) of the Rules of the Supreme Court (RSC), 1999 Edition.

The gist of the affidavit in support of that application was that the appellant and the 2nd respondent were each 50 percent shareholders in Jet Fuel Storage Facility at the Lusaka International Airport which the parties ran as a joint venture with Mobil Oil Zambia Limited. A dispute arose between the 2nd respondent and the appellant on the interpretation of the Joint Venture Agreement. The dispute was referred to arbitration for settlement. The arbitral award was that the 2nd respondent should offer its 50 percent shareholding to the appellant in line with the Joint Venture Agreement. The 2nd respondent offered the said 50 percent shares to the appellant which the appellant accepted. The 1st respondent was alleged to have involved itself in the said sale of shares between the appellant and the 2nd respondent, by claiming that there were competition issues surrounding the intended sale of shares. The 2nd and 3rd respondents, by appeal filed in the High Court's Commercial Registry, challenged the 1st respondent's interference into shareholding of the Joint Venture.

The appellant then applied to be joined to the cause claiming that it had an interest in the action as it would be affected by whatever decision the Court would make as it owned 50 percent shares in the Joint Venture which was the subject of that litigation. The 1st, the 2nd and the 3rd respondents opposed the application for joinder. The ground for the objection was that the appellant's action was statute barred under section 15 of the Competition and Fair Trading Act (the Act), which provides that any person who is aggrieved by a decision of the Commission made under this Act may, within 30 days appeal to the High Court.

In his Ruling dated 12th June, 2008, the learned judge agreed with the respondents that the action was statute barred as the appellant had not filed its appeal against the decision of the 1st respondent within the 30 days stipulated in section 15 of the Competition and Fair Trading Act.

Dissatisfied with this decision, the appellant appealed to this Court raising two grounds of appeal as follows:

“1. That the learned judge in the Court below erred in law and in fact by finding that the appellant's right of appeal was statute barred; and

2. That the learned judge in the Court below erred in law and in fact when he found that the provision of Order 15 Rule 6/4 of the Rules of the Supreme Court prevented the appellant from being joined to the proceedings before Court.”

For clarity's sake, we must mention here that the appellant also commenced an action in the principal registry of the High Court under cause No. 2007/HP/023, in which it sought to challenge the decision of the 1st respondent by judicial review. This action resulted into appeal No. 190 of 2008, which is a subject of a separate judgment. However, before the application by the 2nd and 3rd respondents for joinder could be heard, the learned judge dismissed the appellant's application for judicial review, on application by the 1st defendant, on ground that the action was wrongly commenced as section 15 of the Competition and Fair Trading Act provides an appeal as a mode of commencement of an action by any one aggrieved by the decision of the Commission made under the Act. He also awarded costs to all the three respondents. After the dismissal of its case, the appellant sought to be joined to cause No. 2007/HPC/308, resulting into this appeal, the subject of this judgment.

In support of this appeal, the learned counsel for the appellant, Mr. Lungu, relied on the arguments in the appellant's heads of arguments. On the first ground of appeal, it was submitted that the learned judge in the Court below erred by finding that the appellant's right of appeal was Statute barred on ground that no appeal had been lodged within the period of 30 days from the date of the decision in issue.

It was submitted that, however, Order 3/5/1 of the Rules of the Supreme Court, allows the Court to extend or abridge time. Order 3/5/1 of the RSC provides that:-

“The Court May, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules, or by any judgment, order or direction, to do any act in any proceeding.”

Further that the object of this rule is to give the Court discretion to extend time so as to avoid injustice to the parties. That in *Fennegan v Parkside* (6), the Court in England held that the absence of good reason for delay was not sufficient reason for the Court to refuse to exercise its discretion to extend time for appeal under this rule.

It was pointed out that in the current case, a good reason for the delay was given; but that the learned judge refused to accept it. That in the interest of justice, the learned judge should have allowed the joinder so as to allow the appellant to prosecute its case against the respondents and so that the case could be heard and determined on its merits. The case of *Kumbi v Zulu* (12), was cited in which we held that:-

“Where there has been failure to comply with the order within a specified period, that does not necessarily mean that, the action is dead or defunct or that the Court is deprived of jurisdiction or power to extend time for doing a specific act within a specified time.”

It was contended that Order 12(7) of the RSC confirms this positions. Order 12/7 provides that:-

“The Court shall have power for sufficient reason to extend time for making any application, including an application for leave to appeal and for bridging any appeal taking any step in or in connection with any appeal notwithstanding that the time limited for such purpose was so limited by the order of the Court, or by these rules or any written law.”

It was submitted that on the strength of the above provisions, the Court below ought to have ordered joinder, notwithstanding that the 30 days statutory period had expired especially in the instant case where there was already an existing appeal from the 2nd and 3rd respondents challenging the same decision. That the appellant was, therefore, in the same position as the 2nd and the 3rd respondents.

It was pointed out that the guiding principle for the judge in the Court below should have been to dispense justice as opposed to dismissing the application on the basis of non-compliance with the statutory provision. That, therefore, this appeal should succeed on this ground.

In support of the second ground of appeal, it was submitted that the learned judge in the Court below erred when he found that Order 15/6/4 of the RSC prevented the appellant from being joined to the proceedings.

It was argued that the learned judge failed to consider all the provisions of the law relating to joinder after the limitation period has elapsed. And that he also failed to marry these provisions to the facts of this case as the same Rules provide for an exception to the general rule as Order 15/6/4 states that: -

“First, where the relevant period was current at the date when proceedings were commenced and it is necessary for the determination of the action that the new party be added or substituted (see para. 5(a), and S. 35(5) and (6) of the 1980 Act). For this purpose, but except in a case to which the law of another Country applies and the law of England and Wales does not apply, the addition or substitution of a new party will be treated as “necessary” if the Court is satisfied that one of the following conditions is fulfilled:

(a) the new party is a necessary party to the action, in that property is vested in him at law or in equity and the plaintiff's claim in respect of an equitable interest in that property is liable to be defeated unless the new party is joined (para. 6(a) above);

(b) the relevant cause of action is vested in the new party and the plaintiff jointly but not severally (para. 6(b), and see O.15, r. 4 (2)); and

(c) the new party is sued jointly with the defendant and is not liable severally with him and failure to join the new party might render the claim unenforceable (see para. 6(e).”

That, therefore, the Rule that does not allow joinder after expiration of the relevant period of limitation is simply a general rule. And that the facts and situation at hand fall under the exception in paragraph (b) above as the appellant was jointly aggrieved with the 2nd and the 3rd respondents by the decision of the 1st respondent. It was contended that the appellant's cause of action against the 1st respondent is in fact vested in both the 2nd respondent and the appellant.

In buttressing his argument, he also cited the case of *Mabro v Eagle Star and British Dominions Insurance (2)*, in which the Court in England held that a plaintiff could not be added three years after the expiry of the limitation period, even though there was a discretionary power to extend the time.

It was contended that this Court, being vested with such discretionary powers, ought to take into consideration the exceptions to the general rule, and apply it to the facts of this case. And that this appeal must therefore succeed.

On the other hand, the learned counsel for the 1st respondent, Mr. Banda, relied on the heads of arguments filed into Court. It was submitted, in response to ground one, that the Court below did not err when it found that the appellant's right of appeal was statute barred as section 15 of the Act provides that such an appeal shall be lodged within 30 days. That in this case, the appellant did not lodge its appeal within the 30 days prescribed. That, therefore, since the appellant did not exercise its right of appeal as provided by the statute, its application for joinder was statute barred. Further, that Order 15/5 of the RSC provides that no person shall be added, or substituted as a party after the expiry of any relevant period of limitation unless either-

“(a)the relevant period was current at the date when proceedings were commenced and it is necessary for the determination of the action that the new party should be added, or substituted, or
(a) the relevant period arises under the provisions of section 11 and 12 of the Limitation Act 1980, and the Court directs that those provisions should not apply to the action by or against the new party.”

It was pointed out that in *Kamouh v Associated Electrical Industries International Limited (4)*, the Court in England held that “No substitution of a plaintiff where the claim is statute barred.” That therefore, after the expiration of any relevant period of limitation, no person can be added or substituted as a party as can be seen from the cases of *Liff v Peasely and Another (5)*, and the case of *Hodgson v Armstrong and Another (3)*.

It was argued that the case of *Mutale v The Attorney General and Another (10)*, and the case of *Queen v The Judge of the City of London Court (1)*, show that if the words of an Act are clear, they must be followed even though they lead to manifest absurdity.

It was submitted that the provisions of section 15 of the Act must therefore be followed to the letter. The case of Royal Trading Limited v Zambia Revenue Authority (7), was cited in which we held that:-

“section 164(4) of the Customs and Exercise Act operates like the Limitation Act of 1939, and the section does not give the Court any discretion to extend time within which such action shall be commenced.”

We were, accordingly, urged to dismiss the first ground of appeal.

In response to the second ground of appeal, it was submitted that the learned judge did not err when he found that the provisions of Order 15/6/4 of the RSC prevented the appellant from being joined to the proceedings. It was argued that the Court below was on firm ground when it stated that it was bound to follow the provisions of Order 15/6/4. That this Court stated in the case of Kumbi and Zulu (12), that as a general rule, after the expiry of any relevant period of limitation no person may be allowed to be added or substituted as a party either as a plaintiff or as a defendant. That, therefore, this appeal should be dismissed with costs to the 1st respondent.

The learned counsel for the 2nd and the 3rd respondents, Mr. Sakala, relied on the filed heads of arguments. In response to ground one, it was submitted that the learned judge was on firm ground when he ruled that the appellant's appeal was statute barred. Our attention was drawn to section 15 of the Act; section 10 of the High Court Act, and Order VI rule 1 of the High Court Rules as amended. Section 10 and Order VI/1 provide that:-

“section 10

The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act and the Criminal Procedure Code, or by any other written law, or by such rules, order or directions of the Court as may, be made under this Act, or the said Code, or such written law, and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.”

“Order VI

(1) Except as otherwise provided by any written law or these Rules every action in the High Court shall be commenced by writ of summons endorsed, and accompanied by a full statement of claim.”

It was pointed out that the appellant was legally bound to commence its action in accordance with section 15. And that this Court has consistently held that the mode of commencement is dependant upon the relevant Statute as was stated in New Plast Industries v The Commissioner of Lands and Another (8), where this Court stated that:-

“In our view, it is not entirely correct that the mode of commencement of any action largely depends on the relief sought. The correct position is that the mode of commencement of any action is

generally provided by the relevant Statute. Thus, where the statute provides for procedure of commencing an action, a party has no option but to abide by that procedure. Section 10 of the High Court Act, chapter 27 is couched in very clear terms on the issue of practice and procedure...”

It was submitted that section 15 of the Act provides a time limit of 30 days for commencement of appeals. Further, that this Court, considered inter alia, the import of section 164(4) of the Customs and Exercise Act in *Royal Trading Limited v Zambia Revenue Authority* (7).

Reference was also made to section 37 of the Interpretation and General Provisions Act, which provides that:-

“Where in any written law a time is prescribed for doing any act, or taking any proceedings and power is given to a Court or other authority to extend such time, then, unless a contrary intention appears, such power may, be exercised by the Court or other authority although the application for the same is not made until after the expiration of the time prescribed.”

It was pointed out that the effect of these provisions is that where a Statute provides a time limit for doing a certain act, then the time for doing such an act can only be extended if there is an express provision in that Statute permitting such extension. That, therefore, the ratio decidendi in *Royal Trading v Zambia Revenue Authority* (7), applies to the Competition and Fair Trading Act as it does not provide for an extension of time within which an appeal must be lodged. That in *United Engineering Group Limited v Mungalu and Others* (11), this Court stated that:-

“The appellant was pleading that the action by the respondents was statute barred. Section 28(1), is not a mere rule stipulating time. The Act is a statute. Limitations of action are not only those that directly fall or are specifically mentioned in the Limitation Act of 1939. Any Act of Parliament can provide limitations and a plea of statute bar can be taken as a defence or preliminary point.”

It was submitted that, therefore, the learned judge in the Court below was on firm ground when he held that the appellant's right to appeal was statute barred.

On the arguments relating to multiplicity of actions concerning this appeal and appeal No. 190 of 2008, we will deal with these issues under appeal No. 190 of 2008.

In response to the second ground of appeal, it was submitted that the learned judge did not err when he found that Order 15/6/4 of the Rules of the Supreme Court, prevented the appellant from being joined to the proceedings before him. It was argued that the learned judge properly pointed out that there was no dispute as to whether the appellant had an interest in the outcome of the action before him.

It was submitted that the Limitation Act, 1939, and the holding in *United Engineering Group Limited v Mungalu and Others* (11), were without prejudice to section 15 of the Act. The case of *Mabro v Eagle Star and British Dominions Insurance company Limited* (2), was cited in which the Court in England refused to allow a party or a cause of action to be added where the effect would amount into

defeating the defence of the Statute of the Limitation.

Further, that Order 15/6/7 of the RSC, 1973 edition, states that leave to add a defendant will not be granted after the expiry of any relevant period of limitation affecting the proposed defendant. And that in *Liff vs. Peaseley and Another* (5), the Court in England stated that:-

(i) The joinder, contrary to the rule of practice, of a person as a defendant when the claim against him was time-barred was not a mere irregularity of process which could be waived by entry of an unconditional appearance to the amended writ, because the joinder took away an accrued right of defence under the 1939 Act...Since the claim against him was already time-barred when he was joined, he was entitled to an order under the RSC Order 15, r 6(2)(a), that he cease to be a party to the action, because either he was a person "who was improperly...made a party,' within rule 6(2)(a), or, as soon as it was known that he would plead the limitation defence, he had 'ceased to be a proper party,' within rule 6(2)(a)."

It was submitted that section 15 of the Act as read with Order 15/6/4 of the RSC, 1999 edition, act as an insurmountable bar to the appellant joining the proceedings whether as a co-respondent or co-appellant. And that in the case of *Zambia Consolidated Copper Mines v Chileshe* (9), this Court considered the issue of a party who sought to amend pleadings by adding a claim which had become time barred. This Court, in dismissing the application, stated that:-

"In this case it is clear to us that the claim introduced by the plaintiff after the amendment was not a form of modification, development or variation of the claim filed in 1998. It is clear to us that the amendment was applied for in order to defeat the statute of Limitations."

It was contended that on this authority, it was incompetent to join the appellant to the proceedings in the Court below to appeal out of time in contravention of section 15 of the Act. That, therefore, this appeal should be dismissed with costs.

We have seriously considered this appeal together with the arguments advanced in the respective heads of arguments, the authorities cited therein and the judgment by the learned judge in the Court below. We have also considered the oral submissions by the learned counsel for the parties.

With respect to the first ground of appeal, the question is whether the learned judge in the Court below erred when he found that the appellant's right of appeal was statute barred. It is clear from the provisions of section 15 of the Competition and Fair Trading Act that any person who is aggrieved by the decision of the Commission made under that Act, May, appeal to the High Court within 30 days of notice of that decision. section 15 requires no strict interpretation as it speaks for itself. Therefore, although Order 3/5/1 of the RSC empowers the Court to extend, or abridge time within which certain acts should be done, our firm view is that the Court has no discretion to extend, or abridge time where a statute provides no such discretion.

In the current case, the Competition and Fair Trading Act, gives no such discretion to the Court.

We do not therefore agree with the appellant's contention that our decision in *Kumbi v Zulu (2)*, ousted the provisions of statutes as to time limits. Therefore, as much as we agree that cases should be heard, and determined on their merits, instead of dismissing them on grounds of irregularity, this cannot override Statutory provisions. Our firm view is that the case of *Kumbi v Zulu (2)*, and the provision of Order 12/7 of the RSC, should be understood in their own right.

Further, our understanding of the provision of Order 12/7 is that it empowers the Court to extend time for making any application, or an application for leave for abridgment of time where the matter is already in Court. Therefore, the argument that joinder should have been allowed notwithstanding that the 30 days period prescribed by the Statute had expired simply because there was already an existing appeal by other parties, challenging the same decision, flies directly in the teeth of the decisions in *Kamouh v Associated Electrical Industries International Limited (4)*, and *Hodgson v Armstrong and Another (3)*, in which the Courts stated respectively that no substitution of a plaintiff can be allowed where the claim is statute barred, and that the Court cannot enlarge a time limit which a statute has specified.

It is also our further view that section 15 of the Act is very precise, and provides clearly that an appeal should be lodged within 30 days. In the current case, there is no dispute that the appellant did not lodge an appeal within the said 30 days. Further, Order 15/5 of the RSC provides that no person shall be added or substituted as a party after the expiration of any relevant period of limitation.

In *Kamouh v Associated Electrical Industries International Limited (4)*, the Court in England also made it clear that no substitution of a party will be made where the claim is statute barred. In *Liff vs. Peasely and Another (5)*, it was clearly pointed out that joinder of a person as a defendant where the claim against him is time barred is not merely an irregularity which can be waived, but an irregularity which cannot be waived as the action is already time barred under Order 15/6/2A. The case of *Hodgson v Armstrong and Another (3)*, illustrates that the time in a Statute is a requirement of a statute and that the Court cannot enlarge the time limit which a statute has specified. The Court, in this case, went on to state that Courts have to apply a statute in a manner in which the Statute can be held to have been contemplated, and that if the words in the Statute are clear, then those words must be followed even though they lead to manifest absurdity as was held in *Queen v The Judge of the City of London Court (1)*.

In *Royal Trading v Zambia Revenue Authority (7)*, we made it clear that in interpreting the provision of section 164(4) of the Customs and Exercise Act, that the section operates like the Limitation Act of 1939, as it does not give the Court any discretion to extend time within which such action shall be commenced. We similarly hold in the current case as section 15 of the Competition and Fair Trading Act acts like the statute of Limitation as it does not give the Court any discretion to extend time within which an appeal to the High Court shall be lodged by any person who is aggrieved by the decision of the Competition and Fair Trading Commission.

We, therefore, agree that the learned judge in the Court below was on firm ground when he

held that the appellant's right of appeal was Statute barred as no appeal had been filed within the period stipulated in section 15 of the Act.

On the second ground of appeal, the appellant's main contention was that the learned judge in the Court below should not have ruled that Order 15/6/4 of the RSC prevented the appellant from being joined to the proceedings before him as he did not consider all the provisions of the law relating to joinder of a party after the expiration of the limitation period.

Our response is that Order 15/6/4 of the RSC provides that as a general rule, after the expiry of any relevant period of limitation under the Limitation Act, no person will be allowed to be added, or substituted as a party either as plaintiff or defendant. In *Queen v The Judge of the City of London Court* (, the Court in England stated that the relevant cause of action is vested in the new party and the plaintiff jointly but not severally. Therefore, although it has been argued that the appellant was jointly aggrieved by the decision of the 1st respondent just like the 2nd respondent and that the cause of action against the 1st respondent was jointly vested in both the 2nd respondent and the appellant, our view is that after the expiry of the relevant period of limitation, no person may, be allowed to be added or substituted as a party either as a plaintiff or defendant.

In *Mabro v Eagle Star and British Dominions Insurance Company Limited (2)*, the Court in England made it clear that a party, will not be allowed to be joined to a cause if the effect would be to allow the cause of action, or defence which is statute barred as a result of time limitations. On this authority, we hold that the learned judge in the Court below was on firm ground when he held that Order 15/6/4A of the RSC prevented the appellant from being joined to the proceedings before him as the appellant's action was statute barred.

We, therefore, find no merit in the second ground of appeal as the rules clearly state that a joinder which is contrary to the Statute of Limitation will not be allowed.

The sum total is that this appeal has failed on the ground that it has no merit. It is accordingly dismissed with costs to the 1st, the 2nd and the 3rd respondents, to be taxed in default of agreement.

Appeal dismissed.