

IN THE SUPREME COURT OF ZAMBIA

SCZ/8/043/2013

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

CHRISTOPHER LUBASI MUNDIA

APPELLANT

and

ZAMBIA ELECTRICITY SUPPLY

CORPORATION LIMITED

RESPONDENT

Before Hon. Mrs. Justice E.N.C Muyovwe on the 28th May, 2013 at 09:00 hours.

For the Appellant: Mr. C. L. Mundia S.C., Messrs C.L.Mundia & Company

For the Respondent: Mrs. N.C. Sikazwe, Acting Chief Legal Officer

R U L I N G

Cases referred to:

- 1. Nahar Investments Vs. Grindlays Bank Limited (1984) Z.R. 81**
- 2. Robbie Tembo vs. National Milling Corporation, National Milling Company and Yusiku Mainga Appeal No. 30/2002**

This is a Ruling on an application by the respondent to dismiss the appeal for want of prosecution pursuant to Rule 55 of the Supreme Court Rules.

The gist of the affidavit in support, sworn by Kasumpa Mwansa Kabalata, is that the appellant filed a Notice of Appeal on 7th February, 2013. That on 12th April, 2013 the respondent conducted a search at the Supreme Court Registry and the search revealed that the appellant had not filed the Record of Appeal and Memorandum of Appeal within the required 60 days from the date of filing the Notice of Appeal. That the appellant's failure to file the Record of Appeal within the stipulated time is fatal as it amounts to want of prosecution.

On the other hand, the appellant in his affidavit in opposition admitted that the Notice of Appeal was filed on 7th February, 2013. He stated that the delay in filing the Memorandum of Appeal and the Record of Appeal was due to the delay in obtaining the record of proceedings from the High Court. Further, that in fact due to the workload of the Trial Court, arrangements were being made to have the Judge's notes typed under the supervision of a Court official. That in the premises, the application to file the record of appeal out of time would be filed after obtaining leave from Court. That in the circumstances, the respondent's application be refused so that the appeal is heard on the merits as the delay was not due to negligence or disregard of

the Rules of the Court but due to circumstances beyond the appellant's control.

On behalf of the respondent (the applicants,) Mrs. Sikazwe relied on the affidavit in support and pointed out that there is no application by the appellant for extension of time within which to file the record of appeal. It was submitted that the appellant was only awakened to this fact after the respondent had made this application to dismiss the appeal and that this is evident in the affidavit in opposition. Counsel relied on the case of **Nahar Investments Vs. Grindlays Bank Limited**¹.

In reply, State Counsel Mundia, submitted that he was relying on his affidavit in opposition in its entirety. He highlighted the difficulties he encountered in securing the record of proceedings from the lower Court as stated in his affidavit. He relied on the case of **Robbie Tembo vs. National Milling Corporation, National Milling Company and Yusiku Mainga**² that the Supreme Court has given guidance that in the interest of justice, matters should be determined on merit and not on technicalities. He submitted that the delay in this case has not been deliberate and also the period is not inordinate since he filed the appeal on 7th February, 2013. He prayed that the appellant

be allowed to prosecute his appeal and that if his objection is upheld he would file the application for leave to file the record of appeal out of time the following day.

Mrs. Sikazwe responded that while the delay is not inordinate, the appellant failed to file an extension of time and cannot, therefore, use the respondent's application as the basis for which to file for leave to file the record out of time. She prayed that the respondent's application be granted.

I have considered the affidavit evidence before me as well as the submissions by learned Counsel and authorities cited.

It is trite law that after filing a Notice of Appeal, the appellant must file the Record of Appeal within 60 days. In this case, State Counsel Mundia, who is the appellant in this matter, admitted that he did not file the Record of Appeal as required by the rules. It is also not in dispute that he did not file any application for extension of time within which to file the record of appeal or even for leave. He has, however, argued that the failure to comply with the Rules is due to the fact that the proceedings in the lower Court were not typed on time and that in fact he has made

arrangements to have them typed. That he intends to file his application for leave, if this application does not succeed.

Learned Counsel for the respondent, Mrs. Sikazwe relied on the case of **Nahar Investments vs. Grindlays Bank Limited** in which the Supreme Court held:

- (i) Appellants who sit back until there is an application to dismiss their appeal before making their own application for extension of time, do so at their own peril.**

The Appellant clearly sat back on his rights. He should have heeded the counsel of the Supreme Court in the **Nahar Case** where they said:

We wish to remind appellants that it is their duty to lodge records of appeal within the period allowed, including any extended period. If difficulties are encountered which are beyond their means to control (such as the non-availability of the notes of proceedings which it is the responsibility of the High Court to furnish), appellants have a duty to make prompt application to the court for enlargement of time. Litigation must come to an end and it is highly undesirable that respondents should be kept in suspense because of dilatory conduct on the part of appellants.

The important point to note here is that before the time lapses, an appellant should apply for extension of time to file the record of appeal. In this case, no such application was filed until the respondent applied to dismiss the appeal. Indeed, the

appellant cannot use this application as an opportunity to get leave to apply to file the record of appeal out of time.

State Counsel Mundia cited the case of **Robbie Tembo²**

I have perused the case and without going into the details of the case, I find that it cannot assist the appellant in this application.

Further, at this stage, I am allowed to preview the merits of the appeal and my view is that the appeal has no prospects of success.

Having considered the application, I find that it has merit and the appeal is dismissed with costs to the respondent to be taxed in default of agreement.

Delivered in Chambers on this 28th day of May, 2012.

.....
E.N.C. MUYOVWE
SUPREME COURT JUDGE