IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 192/2013**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

PIUS NGOI **APPELLANT**

AND

NELSON GEORGE DAKA (Police Reservist) **1ST RESPONDENT**

THE ATTORNEY GENERAL **2ND RESPONDENT**

Coram: **Mwanamwambwa, DCJ, Musonda and Chinyama, JJS**
on 5th April, 2016 and 3rd November, 2017

For the Appellant	:	Filed Notice of Non-Appearance
For the 1st and 2nd Respondents	:	Mr. Fredrick Imasiku, Senior State Advocate

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J U D G M E N T

MUSONDA, JS, delivered the Judgment of the Court

Legislation referred to:

1. **Order 39(2) of the High Court Rules, CAP. 27.**

This appeal is arising from a Ruling of a High Court Judge sitting at Lusaka and dated 22nd July, 2013 in terms of which the learned High Court Judge declined to entertain an application which had been launched by the plaintiff, now appellant, whereby

the appellant sought to have the court review an 'unless order' which it had pronounced on 12th July, 2011 and in terms of which the court below ordered that the matter in question be struck off the active Cause List for non-attendance by the parties. In the same order the court granted the applicant concerned liberty to restore the matter to the active list, within 14 days from the date of the making of the order failing which the matter in question was to stand dismissed for want of prosecution.

The relevant history and background circumstances which culminated in having the court below pronounce the order which generated the disaffection which is now being expressed through the appeal now before us are of the plainest.

On 1st August, 2007 the appellant, then plaintiff, instituted a court action in the High Court of Zambia at the Principal Registry at Lusaka seeking a variety of reliefs against the respondents, then defendants.

Following the expiry of the 14-day period within which the respondents were directed to enter appearance and the said appearance not having been entered, the appellant proceeded to

file a Notice of intention to apply for leave to enter a default judgment.

While the appellant was awaiting the appointment of date of hearing relative to the said Notice of intention for leave to enter a default judgment, a Notice of Hearing was issued by the dealing court announcing a date for a status conference.

On 12th July, 2011, the matter came up for a status conference. On that date, none of the parties appeared before the judge below. Consequently, the learned judge ordered that the matter be

> ***"... struck off the cause list with liberty to restore within 14 days of the date hereof:- default of which it shall stand dismissed for want of prosecution."***

According to the record, the matter was not restored to the active list within the period which the court had ordered.

On 16th September, 2011, counsel for the appellant filed an application for an extension of the time within which the appellant could apply for the restoration of the matter to the active list.

On 13th July, 2012, the lower court rendered its Ruling declining to extend the time within which the appellant could apply to have the matter restored to the active list. The basis of the court's refusal to grant the extension of time which had been sought by the appellant was that by the time the appellant's application was being filed, that is, on 16th September, 2011, the matter stood dismissed in accordance with the terms of the court's order dated 12th July, 2011. Under those circumstances, the lower court generously guided the appellant to first seek to have the order dismissing the action reviewed or set aside before seeking the court's indulgence to extend the period within which the restoration application could be mounted.

On 27th May, 2013, the appellant filed an application seeking to have the court below review its order dismissing the appellant's action. This application was launched pursuant to order 39(2) of the High Court Rules, chapter 27 of the Laws of Zambia.

In its Ruling dated 22nd July, 2013, the court below refused to grant the appellant's application seeking a review of that court's 'unless order' dated 22nd July, 2011. The basis of the court's refusal to review its earlier order was that the appellant had failed

to comply with the requirement of Order 39(2) of the High Court Rules which provides as follows:

> **"2. Any application for review of any judgment or decision must be made not later than fourteen days after such judgment or decision. After the expiration of fourteen days, an application for review shall not be admitted, except by special leave of the judge on such terms as seem just."**

The reasoning of the court below was that Order 39(2) is not only couched in mandatory terms but requires that an application for review must be made within fourteen days of the judgment or decision being sought to be reviewed. The court further noted that if an applicant seeking to enjoy the respite offered by Order 39(2) fails to prompt the court within 14 days, they must first secure special leave of the court before proceeding to apply for a review.

In the context of the matter which was before it, the court below reasoned that the appellant had filed his application after almost two years after the date on which the order which he was seeking to have the court review was pronounced. The court further noted that as the appellant was well outside the 14 day period prescribed under Order 39(2), there was need for him to secure special leave before proceeding to launch his application.

In the absence of the said special leave, the court below took the position that it had no jurisdiction to entertain the belated application to review and accordingly declined to entertain the same.

The appellant was not satisfied with the judgment of the court below and has now escalated his displeasure to this court on the basis of the following grounds:

GROUND ONE

The Court below erred in law and fact by dismissing the Appellant's case basing its ruling on the unamended pleadings when the Appellant had already filed in the amended pleadings which the court should have considered.

GROUND TWO

The court below erred in law and fact by dismissing the case disregarding the Appellant's case without first of all considering the merits of the case more especially that the Appellant had already filed in the amended pleadings.

GROUND THREE

The Court below erred in law by rejecting the Appellant's application for leave to review the matter despite the Appellant bringing it to the attention of the Court that the Appellant's pleadings were amended and filed before the Court on the date which was specified by the Court.

GROUND FOUR

The Court below erred in law and fact by dismissing the claim without giving an opportunity to the parties to be heard despite the

fact that the Appellant amended his pleadings which were actually before the court before the delivery of the Ruling.

GROUND FIVE

The Court below misdirected itself by ignoring the fact that the cause of the delay in applying for the restoration of the case to the active cause list is the illness of the dealing Advocate who was ill for a long time and omitted to hand over the file.

Counsel for both the appellant and the respondents filed their respective Heads of Argument in which they articulated the positions which they had respectively taken in the appeal.

One issue which instantly struck us when we examined the appellant's Heads of Argument in relation to the Memorandum of Appeal was the clear incongruity or lack of consistency between the grounds of appeal as they were presented in the Memorandum of Appeal (as reproduced above) and the grounds which were purportedly argued in the appellant's Heads of Argument.

Quite apart from the fact that the Memorandum of Appeal contained five (05) grounds, the Heads of Argument which were subsequently filed and canvassed by the appellant revolved around three (03) grounds. These three grounds, as we have hived them

from the appellant's Heads of Argument, were couched in the following terms:

> **GROUND ONE**
>
> **The court misdirected itself in law and fact by overlooking the facts (sic.) that the cause of the delay was the illness of the advocates who had conduct of the matter.**
>
> **GROUND TWO**
>
> **The trial court should have considered the history of the case and exercised its discretion after noting the fact that this case had advanced to the level of entry of judgment, thereby consider the plaintiff's desire to conclude the case.**
>
> **GROUND THREE**
>
> **There was a reorganization of the Principal Registry and a lot of cases were being re-allocated following the retirement and/or transfer of a good number of judges who had reached retirement age. In the present case, Judge Sunkutu who was handling this case was transferred to Ndola High Court.**

What is immediately apparent even from a cursory examination of the grounds of appeal as they are presented in the Memorandum of Appeal in relation to those which are argued in the appellant's Head of Argument is that only one ground, namely, Ground Number 5, in the Memorandum of Appeal is argued as the first ground of appeal in the appellant's Heads of Argument.

Accordingly, we have deemed grounds 1 to 4 as having been abandoned.

Arising from our preceding observations, we shall treat this appeal as having been inspired by the solitary ground which we have identified above.

The gist of the arguments which learned counsel for the appellant canvassed around the solitary ground in question was that the *'unless order'* which the court below pronounced and which we earlier referred to had arisen under circumstances which were attributable to the appellant's counsel's prolonged illness.

For his part, Mr. Imasiku, the respondents' counsel's reaction to the above argument was that the appellant's delay of over two years to make the necessary application was both unreasonable and inexcusable given that the appellant was being represented by a firm of advocates which had other advocates that could have taken up the matter in the absence of the advocate who had been indisposed. The respondents' counsel went on to adopt the lower court's reasoning regarding the meaning and effect of order 39(2) of the High Court Rules, CAP. 27 so far as this rule related to

belated applications for review which arise after 14 days of the decision or judgment sought to be reviewed. Counsel accordingly concluded by submitting that the court below was perfectly entitled to reject the appellant's application on the basis that the appellant had not secured special leave.

At the hearing of the appeal, counsel for the appellant did not attend but filed a Notice of non-appearance pursuant to Rule 69(1) of the Rules of this Court, chapter of the Laws of Zambia. However, Mr. Imasiku, did appear before us and confirmed his full reliance upon the respondent's filed Heads of Argument. Beyond this confirmation, Mr. Imasiku indicated that he only wished to emphasise that the court below was on firm ground when it refused to review its earlier ruling. We were accordingly urged to dismiss the appellant's appeal with costs for lack of merit.

We have considered counsel for the parties' respective opposing arguments in the context of the lonely ground which had inspired this appeal and can immediately confirm that the appellant totally misapprehended the basis for the lower court's decision to decline to entertain the appellant's application which

had been anchored on Order 39(2) of the High Court Rules, chapter 27 of the Laws of Zambia.

As counsel for the respondents appears to have appreciated in his arguments, Order 39(2) of the High Court rules provides for two review 'windows'. For the purpose of this illustration, we shall refer to the first window as the ordinary window. Under this window, a disaffected litigant wishing to have a decision or judgment of a High Court judge reviewed must launch the necessary application within 14 days from the date when the judgment or decision will have been pronounced.

The second window, on the other hand, is what we may describe as the special window.

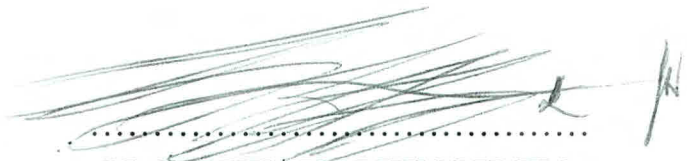
This window must be distinguished from the ordinary window in the sense that, unlike the latter, this window would be available to a disaffected litigant who, for one reason or other, fails to mount their review application within the 14-day time limit. For this type of litigant, there is no automatic right to mount or file the review application. Rather, this litigant must go through two stages: firstly, they must secure special leave of the court to file their review

application. Secondly, if, and only if, special leave is granted, the litigant can then proceed to file their application for review.

In the case at hand, the first or ordinary review window was unavailable to the appellant because he was out of time. Having been out of time, the only review window which was available to the appellant was the second special window. However, the appellant failed to comply with the prescribed condition-precedent to invoking the special window by securing special leave. This was the basis for the lower court's refusal to entertain the appellant's application by which he had sought to have the order of the learned Judge dated 12th July, 2011 reviewed.

Having regard to what we have canvassed above, what we earlier identified as the appellant's solitary ground of appeal and the arguments which were advanced to buttress the same were wholly misconceived as they had no bearing on the meaning and effect of what the court below had pronounced itself upon.

Consequently, this appeal fails. The respondents will have their costs which, unless agreed, should be taxed.



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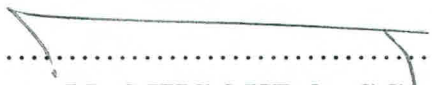
M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE



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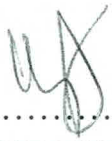
M. MUSONDA, SC
SUPREME COURT JUDGE



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J. CHINYAMA
SUPREME COURT JUDGE