

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)**

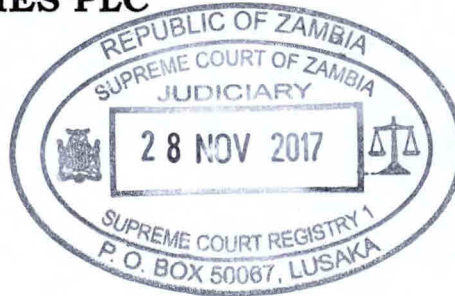
SCZ /9/17/2012

BETWEEN:

ZAMBIA BREWERIES PLC

APPELLANT

AND



THE PEOPLE

RESPONDENT

**CORAM: Mwanamwambwa DCJ, Kajimanga and Kabuka, JJS
On 20th October, 2016, 22nd November, 2016 and
28th November, 2017**

FOR THE APPELLANT:

Mr. A. Tembo, Messers Tembo
Ngulube & Associates

FOR THE RESPONDENT:

Mrs C. M. Hambayi, Chief State Advocate,
National Prosecution Authority

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

1. Stanley Mwambazi v Morester Farms Limited (1977) Z. R. 144
2. D. E. Nkhuwa v Lusaka Tyre Services Limited (1977) Z. R. 59

3. Nahar Investment Limited v Grindlays Bank International Zambia Limited (1984) Z. R. 81

Legislation referred to:

The Supreme Court Act Chapter 25, rule 12

The appellant brought this notice of motion, to set aside a ruling of a single judge of the Supreme Court which declined to grant leave to the appellant to file its appeal out time.

The events that led to this motion are these. The appellant was convicted by the Subordinate Court for the offence of recklessness and negligence contrary to section 23(f) of the Penal Code Cap 87. Being dissatisfied with the decision of the Subordinate Court, the appellant appealed to the High Court which upheld the Subordinate court's decision. The High Court judgment did not expressly grant leave to appeal to this court. Also being dissatisfied with the judgment of the High Court, the appellant was desirous of appealing against the said judgment to this court.

According to the appellant, it was unable to file a notice of appeal within 14 days as stipulated by law because it was still reviewing and studying the High Court judgment and instructions to appeal were only given to the appellant's advocates after the expiry of the said

period. As a result of the delay, the appellant applied for leave to appeal out of time before a single judge of this court but the application was dismissed on the ground that it was not a proper case for the court to grant an extension of time to appeal. The appellant has now appealed against the said decision before the full bench on the grounds that the single judge of this court erred when she stated that the appellant's failure to file its motion on time was inordinate; and also when she failed to exercise her discretion to grant the appellant leave to file its appeal out of time so as to allow the appeal to be heard on its merits, thereby attaining the ends of justice. That in the premises, this court should allow this motion by granting the appellant leave to file its appeal out time, otherwise the appeal will not be heard and determined on the merits.

At the hearing of this motion, Mr. Tembo, the learned counsel for the appellant applied for leave to file heads of argument out of time and we granted the application. Mrs. Hambayi, the learned Chief State Advocate was given 14 days to file heads of argument in response on behalf of the respondent.

In the appellant's heads of argument in support of this motion,

counsel submitted that the single judge of this court erred when she found that the appellant's failure to lodge its appeal on time was inordinate and that consequently, she failed to exercise her discretion to grant the appellant leave to file its appeal out of time so as to allow the appeal to be heard on the merits. Reliance was placed on the case of **Stanley Mwambazi v Morester Farms Limited**¹, where Gardner, J. S. stated at page 146 that:

“Where a party is in default he may be ordered to pay costs, but it is not in the interest of justice to deny him the right to have his case heard. I would emphasize that for this favourable treatment to be afforded to the applicant there must be no unreasonable delay, no mala fides and no improper conduct of the action on the part of the applicant.”

Counsel submitted that the appellant's failure to appeal to this court within the stipulated 14 days, as alluded to in the affidavit in support of its application for leave to appeal out of time, was not without due excuse. That the appellant had been reviewing and studying the judgment of the court below and instructions to appeal were only issued upon the appellant being satisfied that it had high prospects of succeeding on appeal to this court. According to counsel, the appellant cannot be said to be guilty of unreasonable delay, mala

fide or improper conduct and that therefore, the single judge of this court erred in dismissing the appellant's application for leave to appeal out of time. While conceding that the appellant was in default, counsel argued that the appellant made the application to lodge an appeal out of time so as to have its appeal heard on the merits.

It was counsel's further contention that based on the **Stanley Mwambazi**¹ case, the single judge of this court was duty bound to exercise her discretion to grant the appellant leave to appeal out of time as that would have been in the interest of justice.

The appellant also relied on the cases of **Nkhuwa v Lusaka Tyre Services Limited**² and **Nahar Investment Limited v Grindlays Bank International Zambia Limited**³, which he contended, are instructive on applications of this nature. Counsel's final submission was that this is a proper case where the principles enunciated by the cases relied on by the appellant should apply. He accordingly urged us to set aside the ruling of the single judge delivered on 5th September 2012 and to grant the appellant leave to lodge its appeal out of time.

In response to the appellant's heads of argument in support of the motion, the respondent filed written heads of argument in which it

was submitted that the respondent did not oppose the motion.

After considering the appellant's application, the single judge of this court reasoned at page R3 of her ruling, *inter alia*, as follows:

"I must say that I find the reason for the delay in appealing rather unacceptable ... In my view, the delay in appealing is inordinate. It appears that the applicant adopted a laissez-faire attitude in spite of the 14 days period prescribed within which to appeal. Certainly, for the applicant to take more than six months to make a decision to appeal and even apply for an extension of time within which to appeal speaks volumes and this cannot be condoned. I find that this is not a proper case for me to grant [an] extension of time to appeal. The application lacks merit and I dismiss it."

Rule 12 of the Supreme Court Rules Chapter 25 of the Laws of Zambia states as follows:

"The court shall have power for sufficient reason to extend time for making any application, including an application for leave to appeal, or for bringing any appeal, or for taking any step in connection with any appeal, notwithstanding that the time limited therefor may have expired, and whether the time limited for such purpose was so limited by the order of the court or by the rules or by any written law" (emphasis added).

And in the **Stanley Mwambazi**¹ case, we emphasized that a defaulting party will only be offered a favourable treatment if the delay

is not unreasonable and the applicant is not guilty of improper conduct.

The view we take is that on the facts and circumstances of this case there can be no reason to fault the single judge. The sole reason advanced by the appellant for not appealing within the stipulated time is that it was still reviewing and studying the High Court judgment. The record shows that the High Court judgment was delivered on 16th January, 2012. The summons for leave to appeal to the Supreme Court out of time was filed on 13th August, 2012. This means that the appellant was reviewing and studying the judgment of the High Court for a period of more than six months. Interestingly, the said High Court judgment is only five pages long. It is, therefore, inconceivable and we are astonished, that the appellant would have taken such a long period of time to review and study a short judgment. We must emphasize that in applications of this nature, the length of time that has elapsed is always a material consideration in the grant or refusal of leave to appeal out of time.

For an applicant to benefit from this court's discretionary powers under rule 12 of the Supreme Court rules, he/she must provide

sufficient reason or show good cause for the delay. In the present case, the appellant has lamentably failed to do so. Needless to underscore, the principle to be applied in an application such as this one is that whilst the granting of an extension is entirely in the discretion of the court, such discretion will not be exercised in favour of the appellant without good cause. As aptly found by the single judge of this court, the reason given by the appellant for the delay is unacceptable. We may add that it is fanciful. Further, we also find the delay to be so inordinate that no reasonable tribunal can accord the appellant a favourable treatment. We, therefore, have no hesitation in saying that this is not a case where the court should exercise its discretion in favour of the appellant by granting the extension of time sought.

For these reasons, we are driven to the inescapable conclusion that this motion lacks merit and it is accordingly dismissed with costs.



M. S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE



C. KAJIMANGA
SUPREME COURT JUDGE



J. K. KABUKA
SUPREME COURT JUDGE