IN THE SUPREME COURT OF ZAMBIA **Appeal No. 013/2016**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

B E T W E E N :

GERTRUDE LUMAI **1ST APPELLANT**

MABVUTO BANDA **2ND APPELLANT**

AND

PAUL KAICHE **1ST RESPONDENT**

DIOCESE OF MONGU DEVELOPMENT CENTRE **2ND RESPONDENT**

Coram: **Mwanamwambwa DCJ, Malila and Mutuna, JJS on 2nd October, 2018 and 14th November, 2018**

For the Appellants:	No appearance
For the 1st Respondent:	No appearance
For the 2nd Respondent:	Mr. N. Inambao of Messrs ICN Legal Practitioners

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J U D G M E N T

Malila JS, delivered the judgment of the court.

Case referred to:

1. *Bernard Kutalika v. Dainess Kalunga, Appeal No. 73 of 2013*

Legislations referred to:

1. *Supreme Court Rules, chapter 27 of the laws of Zambia*
2. *Societies Act, chapter 119 of the laws of Zambia*

This appeal is fraught with numerous irregularities. The court would have preferred to engage counsel for the appellants to offer some explanation on many lingering background and procedural questions. However, counsel for the appellant opted to file a notice of non-appearance pursuant to Rule 69 of the rules of the Supreme Court, chapter 27 of the laws of Zambia.

We have stated in previous appeals including that of *Bernard Kutalika v. Dainess Kalunga*[1], that much as parties to an appeal are perfectly within their rights to file a notice of non-attendance and thereby avert or minimise costs, the party who does so instantly deprives himself or herself of the opportunity to offer such explanation in aid of that party's position in the appeal as the court may consider apposite. Such clarifications may be necessary for easier comprehension of the chronology of events preceding the appeal which may not be apparent from the record of appeal or the arguments purporting to supporting the appeal. This could be in spite of, and in some cases, because of, the heads of argument filed.

A party who opts, as the appellants did in this appeal, not to appear at the hearing by filing a rule 69 notice, may put their position in the appeal in a precarious situation as it places their appeal documents and the heads of argument in a *fait accompli.* We shall shortly revert to this issue. In the meantime, we give the background narration of the facts and procedure in the lower court relative to this appeal.

The two appellants were traders engaged in the business to purchasing rice from peasant farmers in the Western Province of Zambia for resale. On diverse occasions, the two rice traders purchased quantities of unpolished rice with a view to having it polished first before being packed for resale.

The second respondent owned or operated a warehouse in Mongu and was also engaged in the business of polishing rice for profit or reward. It appears that some informal practice had emerged whereby some rice traders, such as the appellants, would deposit their rice in the second respondent's warehouse and collect it at their convenience after it had been polished by the second respondent.

The first appellant claims that between 1st October and 31st December, 2012, she bought 560 x 50kg bags of unpolished rice from peasant farmers spread across Western Province. She desired to have that rice polished by the second respondent before resale. Following an agreement that the first appellant entered into with a Mr. Paul Kaiche, a servant, agent or employee of the second respondent, the first appellant deposited the 560 x 50 kg bags of unpolished rice in the second respondent's warehouse for safe custody.

In December 2012, the first appellant withdrew 200 of the 560 bags, leaving 360 bags in the second respondent's warehouse. When in January 2013 she went to collect the remainder of her rice, she was advised that Mr. Kaiche, who kept the keys to the warehouse, had for a couple of days not reported for work and had not surrendered the keys. Eventually, when the warehouse was opened, a total of 112 bags of unpolished rice belonging to the first appellant could not be accounted for. The market value of the missing rice was pegged at K20,160.00.

The second appellant's circumstances, as he narrated them, closely mirrored those of the first appellant. In August 2012, he bought 157 x 50kg bags of unpolished rice. He also had intended to have the rice polished by the second respondent before resale. Like the first appellant, the second appellant deposited his rice in the second respondent's warehouse following an agreement of sorts that he made with a Mr. Charles Akakandelwa who was the Manager of the second respondent.

Between October and November 2012, the second appellant collected a total of 27 bags of rice in the presence of Mr. Paul Kaiche, the store keeper. In January 2013, the second appellant sought to collect the remaining 130 bags of rice but was advised that the store keeper had disappeared with the key to the warehouse.

When the warehouse was subsequently opened, it was discovered, much to the irritation of the second appellant, that only 44 bags of his rice were available. A total of 86 bags could not be accounted for. The market value of the missing rice was K15,480.00.

The two appellants then commenced proceedings separately in the Subordinate Court at Mongu. They each ultimately obtained a default judgment against the second respondent and an employee of the second respondent in either case. Those default judgments were later set-aside and the matters consolidated and heard on the merits as one action.

The learned magistrate who heard the consolidated action found that the first appellant had lost 112 x 50kg bags of unpolished rice while the second appellant had lost 86 x 50kg bags of unpolished rice. That rice, according to the finding of the learned magistrate, went missing while in the second respondent's custody.

The magistrate, however, held that there was no evidence whatsoever to show that either appellant had paid the second respondent for use of its warehouse to store the rice. The learned magistrate went further and held that the appellants had been allowed by the first respondent to store the rice. He further found that the first respondent, and not the second respondent, was liable to the appellants for the 112 x 50kg and the 86 x 50kg bags of

unpolished rice that went missing. The second respondent was exonerated.

Unhappy with that judgment, the appellants appealed to the High Court on grounds that the magistrate was wrong to have found that as there was no contractual nexus between the appellants and the second respondent on account of want of consideration, the appellants' claims against the second respondent could not succeed. The argument by the appellants was that bailment arose even in circumstances where there was no contractual arrangements between the bailor and the bailee.

The second ground of appeal was that it was wrong for the court to have held, against the weight of evidence, that the second respondent could not be held vicariously liable. The third ground of appeal was that the magistrate was wrong to hold that the first respondent did not have permission from the second respondent when he involved himself in storage arrangements with the appellants and, therefore, that such arrangements were not the second respondent's business.

In a very unusual judgment delivered on the 18th November, 2015 under cause No. HTA/07/2013, the High Court upheld the judgment of the Subordinate Court. We say unusual because in the said judgment the learned High Court judge made repeated references to parties that did not exist. Throughout that judgment, he referred to the first and second appellant when there was only one appellant reflected in the cause before him, thus distorting the verity of the factual narrative.

According to the memorandum of appeal produced in the record of appeal, it is against judgment of the High Court in cause No. HTA/101/07/2013 that the present appeal was launched.

Four grounds of appeal appear in the record of appeal. They are framed as follows:

1. *The learned trial judge misdirected himself in law and in fact when he found that the appellants had not demonstrated in any way that the second respondent whether directly or by implication agreed to keep the said bags of rice.*

2. *The learned trial judge misdirected himself in law and in fact when he found that by allowing the appellants to succeed, he would open up a pandora's box because then employees would know that even if they steal from work, their employers would cover up for them.*

3. *The learned trial judge misdirected himself in law and in fact when he found that the appellants had not demonstrated to the court that it is part of this usual course of business to offer warehouse facilities and the first respondent in receiving the said rice had the blessings of the second respondent.*

4. *The learned trial judge misdirected himself in law and in fact when he found that the appellants had exhibited that the bags claimed were indeed the correct number of bags deposited and that the number claimed to be missing are the correct number of bags missing.*

We had at the outset of this judgment lamented that irregularities and lapses characterises this appeal.

Although both parties had, through their respective counsel, filed heads of argument to support what they viewed as the merits and demerits of the appeal, we are of the settled view that as presented, the record of appeal and/or the documents in it are riddled with fatal inconsistencies, flaws and factual misstatements which are decidedly fatal.

A properly prepared record of appeal should tell, with facility, the chronology of events making up the appellant's story. The record of appeal in the present case does not do so. It is bedevilled by critical lapses and omissions. First of all, the judgment from which the present appeal arises had three parties to it, namely, Mabvuto

Banda, as appellant, and Charles Akakandelwa and Eugine Lubinda, as first and second respondent respectively. In the current appeal, the first appellant is Gertrude Lumai while the second is Mabvuto Banda. Paul Kaiche is the first respondent and the Diocese of Mongu Development Centre is the second respondent.

It is not immediately obvious from the record why Gertrude Lumai, who was not a party to cause No. HTA/07/2013 from which this appeal has arisen, is a party to the appeal. It equally is not clear why Paul Kaiche who was not a party to the proceedings in cause No. HTA/07/2013 is a party to the current appeal. It is likewise unclear why Charles Akakandelwa and Eugine Lubinda who were parties to the judgment appealed against are not parties to the appeal.

These are issues upon which we would have sought clarification from counsel for the appellant were they present at the hearing of the appeal. We needed to have the factual and procedural matrix explained to us since it is not apparent from the record.

When we asked Mr. Inambao, counsel for the second respondent, to clarify the position, he was unable to offer any satisfactory explanation either. This did not surprise us a great deal

given that he was representing one of the respondents and not the appellant and, therefore, his allegiance lay elsewhere than to the appellants. Even Mr. Inambao's explanation that two cases had been running parallel in the Subordinate Court, did not ease our anxieties in regard to the mix-up of the parties.

Second, the Diocese of Mongu Development Centre did not appear in proceedings in the lower court giving rise to this appeal, but does appear in the appeal before us, and yet no description of the legal status of this respondent is given. Is it a limited company, a company limited by guarantee, or merely an unincorporated entity? In other words, is it an entity capable of being sued in its own name? Again, this is an issue upon which we would have benefitted from the appellants' explanation had their counsel availed himself. Mr. Inambao explained that the Diocese of Mongu Development Centre was registered under the Societies Act, chapter 119 of the laws of Zambia and that it should have been sued through its Trustees.

Although we were, of course, not convinced with Mr. Inambao's answer, particularly as regards suing a society through Trustees, he appeared encouraged to go on to submit that the appeal was wrongly before the court and should be dismissed.

Our view is that the presentation of the documents in the record of appeal leaves much to be desired. It typifies the ultimate repudiation of critical courts rules designed to assist this court in evaluating the merits or otherwise of an appeal. The requirements for presenting a properly prepared and rule-compliant record of appeal within the intendment of rule 58 of the rules of the Supreme Court do not exist merely to irritate or frustrate appellants. They exist to facilitate a logical and orderly flow of appeal proceedings.

As presented, and in the absence of any additional clarification from the appellant or its counsel, the record of appeal is abysmal to say the least. It is not for us to second guess what could have transpired in the lower court on matters not evident from the record. We are afraid, therefore, that in its present state, this appeal cannot

be considered. It is incompetent and is accordingly dismissed with costs to be taxed in default of agreement.

M. S. Mwanamwambwa
DEPUTY CHIEF JUSTICE

M. Malila
SUPREME COURT JUDGE

N. K. Mutuna
SUPREME COURT JUDGE