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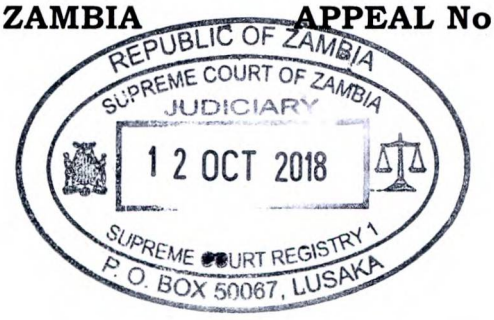
IN THE SUPREME COURT FOR ZAMBIA **APPEAL No. 014/2016**

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

IMASIKU MWANALUSHI **APPELLANT**

AND

FINANCE BANK ZAMBIA LIMITED **RESPONDENT**

CORAM: Wood, Musonda and Kabuka, JJS.
On 2nd October, 2018 and 12th October, 2018.

FOR THE APPELLANT: N/A

FOR THE RESPONDENT: N/A

JUDGMENT

Kabuka, JS, delivered the Judgment of the Court.

Cases referred to:

1. Ruth Kumbi v. Robinson Kaleb Zulu, S.C.Z Judgment No. 19 of 2009.
2. Samuel v. Linzi Dresses Limited [1980] 1. All E.R. 803.

Legislation and Other Works referred to:

1. Supreme Court Practice (White Book) 1999, Edition Order 35 rule 1 (1), (2), (3).

2. High Court Rules, Cap. 27, Order 2 rule 2.
3. Halsbury's Laws of England 4th Edition, Volume 37, paragraph 32.

The appellant appeals against an order of the High Court declining to entertain his application to restore a dismissed matter to the active cause list.

The relevant background facts are that the matter had come up for continued trial before the High Court on 26th February, 2015 but the respondent applied for an adjournment, to which the appellant did not object. The trial judge granted the application and the matter was adjourned to the 9th of April, 2015 and 14th May, 2015 for continued trial. On 9th April, 2015, counsel for the appellant was not in attendance and no explanation was communicated to the court for his said absence. As the matter had been given two trial dates, counsel for the respondent applied that it be adjourned to the next scheduled date for trial, the 14th of May, 2015. The judge indulgently gave what she termed a 'benefit of doubt' to the appellant and accordingly, granted that application.

When the matter came up for continued trial on the 14th of May, 2015, counsel for the appellant was, again, not in attendance before

court. The trial judge then, noted that, counsel for the appellant had been absent at the last sitting and he was again, not in attendance without communicating the reasons for his absence. Upon taking into account that counsel was aware the two dates had been diarised by the court, the learned trial judge proceeded to make an unless order striking off the matter from the active cause list, with liberty to restore within 21 days, in default of which the matter was to stand dismissed.

Following the order made by the learned trial judge, no application to restore the matter was made by the appellant until the 21 days lapsed. In terms of the 'unless order', the matter accordingly stood dismissed and on the 10th of June, 2015 the court signed a formal order to that effect.

The record shows that a month later, on 17th June, 2015 the appellant made an application for leave to restore the dismissed matter to the active cause list, out of time. The application was stated to have been made pursuant to **Order 35 Rule 1 (1) of the Rules of the Supreme Court (White book) 1999, Edition** and the case of **Ruth Kumbi v Robinson Kaleb Zulu**[1] was relied upon as authority

for proceeding that way. On 19th June, 2015 the learned judge made an endorsement on the appellant's application to restore the matter to the active cause list out of time, stating that the application was misconceived as the matter was dismissed on 11th June, 2015. Following the refusal by the judge to entertain the application to restore, the appellant obtained leave to appeal the said refusal, on the 25th of August, 2015. He is now pursuing the appeal on one ground only, stating that:

1. **the learned judge erred in law and fact when she held on 19th June that the appellant's application for leave to file application to restore matter to the active cause list, out of time, was misconceived as the action was dismissed on 11th June, 2015.**

In the heads of argument filed in support of his sole ground of appeal, the appellant contends that, the order made by the learned trial judge was a misdirection at law, both in terms of Supreme Court decisions and the Rules of Court. The appellant relied on the case of **Ruth Kumbi[1], Order 2 Rule 2 of the High Court Rules, Cap. 27 of the Laws of Zambia, Halsbury's Laws of England 4th Edition, Volume 37, paragraph 32,** and the English case of **Samuels v Linzi Dresses Limited[2]** for the proposition that, where an 'unless' order

had been made and was not complied with, a court has jurisdiction to extend the time, but the power or discretion was to be exercised cautiously and with due regard to maintaining the principle that orders were made to be complied with.

Counsel for the appellant argued that, he had sought leave of court to file an application for restoration out of time, but that the trial judge declined to entertain it on the basis that the matter stood dismissed. Counsel contended that, this holding was a misdirection on the part of the learned trial judge and his submission was that, the matter was still subsisting and capable of being restored irrespective of the dismissal. That a mere failure to restore the matter within 21 days did not 'kill' the case.

At the hearing of the appeal, there was no attendance by counsel for the parties. Having satisfied ourselves that service of the Notice of Hearing the appeal was duly effected on their respective advocates, we adjourned the matter for judgement.

We have considered the record, the Heads of arguments filed by counsel for the appellant and cases to which we were referred from

which we note that, counsel was aware of the expiry of the 21 days granted in the unless order. We have held in numerous past decisions that, when the effect of an order made by the court results in a sanction which is postponed for a specified period of time, to allow a party take the necessary steps required to avoid the said sanction, the sanction automatically takes effect on expiry of the stated period.

In this case, 21 days from 14th May, 2015 ended on 3rd June, 2015 although the formal order issued by the court was dated 10th June, 2015. This means that, on 17th June, 2015 when the appellant was applying to have the matter restored, the matter infact already stood dismissed. The endorsement on the application of 19th June, 2015 by the learned trial judge in which she erroneously referred to 11th June, 2015 as the date from which the dismissal took effect did not alter the fact that the matter was indeed dismissed at the time the application to restore was made on 17th June, 2015. In the premises, there was nothing to restore or extend, as the matter had been determined by dismissal for want of prosecution, when the

appellant failed to restore the same to the active cause list within the required 21 days.

As a result, the appellant's application to restore in the circumstances of this case, was misconceived and irregular for being procedurally wrong, as an application to restore by itself, cannot set aside a valid order of dismissal earlier made by the court, which was still subsisting. The appellant's submission was to the effect that, such an unless order does not bring a matter to an end on the merits as it is still in the discretion of the court to set it aside on a proper application made to it. We agree. And, we wish to further clarify that, in certain circumstances, the avenue open to a litigant would be to commence a fresh action. On the particular facts of this case, before us and now subject of the present appeal, however, **Supreme Court Practice Order 35 rule 2 paragraphs 1, 2 and 3** are instructive on how a party faced with such a situation ought to proceed in their quest to secure a reversal of the dismissal, following which an application for restoration of the matter can then, be pursued. The relevant paragraphs of **Order 35** read as follows:

35/2/1 **" (1) Any judgment, order or verdict obtained where one party does not appear at the trial may be set aside by the**

> **court, on the application of that party, on such terms as it thinks just.**
>
> **(2) An application under this rule must be made within 7 days after the trial."**
>
> **(3) The court has a discretion under O.3, r 5, to extend the period of 7 days....."** (underlining for emphasis only)

On the facts of this case, we are satisfied that the matter indeed stood dismissed when the appellant attempted to have it restored to the active cause list on 17th June, 2015. The sole ground of appeal faulting the trial judge for having so found, fails for those reasons and the appeal is hereby dismissed.

As the respondent did not defend the appeal, we make no order as to costs.

A.M. WOOD
SUPREME COURT JUDGE

M. MUSONDA
SUPREME COURT JUDGE

J.K. KABUKA
SUPREME COURT JUDGE