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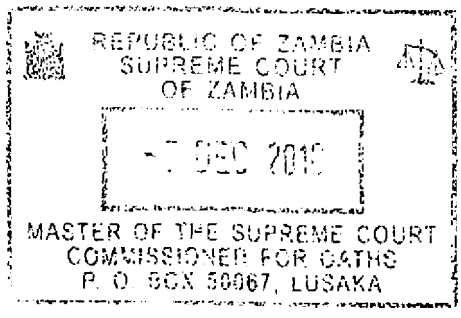
IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

APPEAL NO. 68/2016
SCZ/8/301/2015

(Civil Jurisdiction)

BETWEEN:



NGOSA CHABALA — **APPELLANT**

AND

FRIDAY MUSENGO — **1ST RESPONDENT**

CUMA KAWANDA MUNDIA — **2ND RESPONDENT**

ZCCM INVESTMENTS HOLDINGS PLC — **3RD RESPONDENT**

Coram: **Wood, Malila, and Mutuna, JJS**
on 4th December, 2018 and 7th December, 2018

For the Appellant: Mr. C. Tafeni, Suba Tafeni & Associates

For the 1st Respondent: N/A

For the 2nd Respondent: N/A

For the 3rd Respondent: N/A

JUDGMENT

Malila, JS, delivered the Judgment of the Court

Cases referred to:

1. *Teddy Puta v. Ambidwire Friday, Selected Judgment No. 43 of 2017.*
2. *Robert Lawrence Roy v. Chitakata Ranching Co. Ltd. (1980) ZR 198.*
3. *Edward Chilufya Mwansa and 194 Others v. Konkola Copper Mines Plc Appeal No. 99/2015.*

The facts underlying this appeal are in some respects analogous to those of *Teddy Puta v. Ambidwire Friday*[1], a case decided by this court in September, 2017. Like in *Teddy Puta*[1] the contest here is over the sale of a Zambia Consolidated Copper Mines (ZCCM) pool house. It is between a party in physical possession of the property and another in possession merely of a certificate of title. Again, as in the *Puta case*[1] here too, the dispute is between a ZCCM employee who was not a sitting tenant and a non-ZCCM employee who was a sitting tenant. Beyond this, the case assumed its own peculiarities.

The genesis of the contestation lies in the decision by ZCCM to sell the disputed house. In rather unusual circumstances, the house in question was offered to the two disputants at different times. The situation was compounded when each of the offerees accepted the offer and paid the purchase price. One of the offerees swiftly obtained a certificate of title to the house.

The legal fight was at the behest of the title holder who sought an order for possession of the house. It was first launched in the Kalulushi Subordinate Court of the First Class as way back as 2005. Since then the parties have been enmeshed in

litigation. The parties, at least the first respondent, expects the present appeal to provide an epilogue to this long and painful dispute.

The house in issue is No. 40 Lwitikila Lane, Kalulushi. It was offered to the first respondent at a price of K1,200,000 on 22nd September, 1997. He was an employee of ZCCM but was not in occupation of the house though he had applied to buy a ZCCM house. A contract of sale dated 20th February, 1998 was subsequently concluded between ZCCM and the first respondent. An assignment was also prepared, executed and registered. Certificate of Title No. 37307 was subsequently issued to the first respondent. It was dated 7th April, 2005. Upon going to the house to take occupation, the first respondent found the appellant in occupation of the same.

On being entreated to quit, the appellant waved his letter of offer of the house from ZCCM at the first respondent and declined to vacate the house. The first respondent thereupon headed to the ZCCM offices to lodge a complaint. ZCCM reacted by writing to the appellant, advising him that the house in issue had been sold to the first respondent and that he could consider

entering into a tenancy agreement with the new owner. The appellant was defiant. For him, the position was basic. There was an offer, an acceptance of the offer and consideration moved from the offeree. In a word, a valid contract was consummated. He thus ignored the advice of ZCCM and rebuffed the first respondent's repeated plea that he vacates the house.

From the appellant's perspective, the short background narrative was that he had been in occupation of the house from 1995 up to the time ZCCM offered it to him. At the time he took occupation, he was employed by the Seventh-Day Adventist Church. The letter of offer of the house from ZCCM was dated 19th August, 1999. The purchase price was K 1,200,000 payable over 12 months. He accepted the offer on 24th March, 2000. He paid for the house in full before ZCCM wrote to him on 23 March, 2006 withdrawing the offer and asking him to get his refund of the purchase price. The reason for the withdrawal was that the house had been wrongly offered to him.

We have stated already that the present appeal arises from an action for possession of the house at the instance of the first respondent. Judgment was delivered against the appellant on

26th March, 2009. The court ordered the appellant to pay K1,000,000 as security for costs in the event that he wished to appeal the judgment. This sum, the appellant claims he paid though he did not lodge his appeal in accordance with Order 44 rule 3(1) of the Subordinate Courts (Civil Jurisdiction Rules) made under the Subordinate Courts Act, chapter 28 of the laws of Zambia. That Order provides that:

> *"Every appellant shall within thirty days of the date of the judgment or decision against which he intends to appeal file with the Clerk of Court and be served upon the other party to the suit."*

It would appear that following the judgment of the court in March 2009, the appellant, rather than appeal the judgment, chose to apply to the Subordinate Court to review its judgment pursuant to Order 38 rule 1 of the Subordinate Courts (Civil Jurisdiction) Rules, chapter 28 of the laws of Zambia, which provides that:

> *"Any magistrate may, upon such grounds as he shall consider sufficient and either on application by an party to a cause or matter or of his own motion, review any judgment or decision given by him (except where an appeal is not withdrawn) and upon such review, it shall be awful for him to open and rehear such cause or matter, wholly or in part, and take fresh evidence, and reverse, vary or confirm his previous judgment or decision provided that the magistrate shall not*

hear any evidence or take any fresh evidence unless he shall have reason to believe that, there has been a miscarriage of justice."

In declining the application to review, the court held that as the ground upon which the applicant relied was to produce a letter from the Legal Counsel of ZCCM dated 24th September 2008, where the purchase price for the house was demanded, there was, in truth, no fresh evidence which could not have been discovered and produced at the time of the hearing and the judgment. Relying on the decision in *Robert Lawrence Roy v. Chitakata Ranching Co. Ltd*[2], the learned Magistrate, in his ruling dated 16th July 2009, dismissed the application.

An application to lodge appeal out of time was subsequently filed on 3rd March, 2015 – some six years late! In his supporting affidavit the appellant gave, as the reason for not proceeding with the appeal, within the period prescribed by Order 44 rule 3(1) of the Subordinate Court (Civil Jurisdiction) Rules, the fact that a political settlement had been promised to resolve the issues that had arisen surrounding the sale of some ZCCM houses, particularly to non-ZCCM employees. The whole matter had thus to his understanding stalled pending the settlement. This

position only changed when the respondent swang into action in his quest to obtain vacant possession of the house.

The application for leave to appeal out of time was considered by the learned Magistrate who declined to grant it. In his ruling of 1st April 2015, the learned Magistrate noted that the application was over five years too late and the reason given for the delay was unsatisfactory.

The appellant then appealed against that refusal to a judge of the High Court. In his very brief ruling covered in barely two pages, delivered on 8th October, 2015, the learned judge dismissed the application, reasoning very simplistically as follows:

> *"The application for leave to appeal out of time was rejected by Honourable Kaoma in a ruling dated 1st April, 2015.*
>
> *That being the case, the appellant cannot now come to this court, to have his appeal heard. This is irregular and contrary to the provisions of the law. His application for leave to appeal out of time having been rejected by the court a quo, his option lay in appealing the decision declining his application which he has not done."*

It is that short decision of the High Court that has so aggrieved the appellant that he has now come before us, enlisting three grounds framed as follows:

GROUND 1

The lower court erred in law and fact in its ruling when it made a conclusion that the appellant was only appealing against the judgment of the Subordinate Court out of time after seeing the 1st respondent's application for vacant possession when in fact not.

GROUND 2

The lower court erred in law and fact by not taking into consideration that the 1st respondent illegally bought two houses from the 3rd respondent namely: House No. D6-190 Wusakile, Kitwe, and House No. 40 Lwitikila Street, Kalulushi, contrary to the 3rd respondent's policy.

GROUND 3

The lower court erred in law and in fact in not taking into account that the appellant having paid security for costs had also paid for the appeal in the Subordinate Court even though the court clerk assigned to assist him did not give him a receipt for the appeal.

At the hearing of the appeal, Mr. Tafeni introduced himself as representing the appellant though he had not filed a notice of appointment of advocates. There was no appearance for any of the respondents.

Upon satisfying ourselves from the record kept by the Clerk of Court that the notices of hearing were served on each of the respondents on the 12th October 2018, we decided to proceed in the absence of the respondents.

Mr. Tafeni then rose to address the court. He indicated that he was retained on Friday last, the 30th November 2018, by the appellant and that although he was furnished with the record of appeal he had not had sight of the heads of argument. His instructions were to seek an adjournment to enable him study the record and prepare the heads of argument. He applied accordingly.

We declined Mr. Tafeni's application as the appellant had all the time from the 12th April 2016 when he filed the record of appeal to engage counsel. In any case, he had filed, together with the record of appeal, some home grown heads of argument which we would have expected Mr. Tafeni to have read, noted and taken the necessary action before the hearing. In refusing the application, we undertook to pay the closest attention to the appellant's heads of argument already filed.

None of the respondents had filed any heads of argument, and granted that there was an affidavit of service of the record of appeal and heads of argument, and also confirmation that the notice of hearing had been served on each of the respondents, we were content to proceed to consider the merits of the appeal.

Viewed against the subsistence of the appeal before the learned High Court judge and what he in fact stated in his brief ruling, the grounds of the appeal before us, as we have reproduced them earlier on in this judgment, appear to be louder than the ruling they seek to challenge.

The notice of appeal set out in the record of appeal leaves no doubt whatsoever as to what the appellant is appealing against. It is the ruling of the High Court given on 8th October 2015. A perusal of the grounds of appeal as structured by the appellant, however, leave no illusion whatsoever that what the appellant is in effect appealing against is the decision of the Subordinate Court relating to the vacant possession application passed against him in respect of the subject house. It is not about the refusal by the High Court to allow him to appeal out of time.

Ground 1 of the appeal alleges that the lower court (i.e. the High Court) came to the conclusion that the appellant was only appealing against the judgment of the Subordinate Court out of time after seeing the first respondent's application for vacant possession.

A perusal of the two-paged ruling of the learned High Court judge reveals that he made no such conclusion as is being attributed to him. All the learned judge stated was the historic fact that in February 2015, when the first respondent applied for vacant possession of the house, the appellant had filed a notice of appeal together with the grounds of appeal and affidavit in support of an application to appeal out of time. The decision that the appellant attributes to the learned High Court judge was in fact made by the Magistrate on 1st April 2015, in his ruling declining leave to appeal out of time.

Under ground two, the allegation against the learned High Court judge is that he did not take into consideration the fact that the first respondent illegally bought two houses from the third respondent.

Indeed the learned High Court judge did not, in his ruling, take any such issue into consideration. There was no need for him to do so given that the appeal was against the refusal to grant leave to appeal.

The bottom line is that the appellant required leave to appeal out of time. That leave was declined. He could only have proceeded with the substantive appeal if he had successfully obtained leave to appeal. The lower court judge had no business dealing with the substance of the appeal from the decision of the Magistrate while the issue of leave to appeal out of time remained unresolved. To put the point in less elevated language, without leave to appeal being granted to the appellant, the High Court judge could not deal with the appellant's substantive appeal against the Magistrate's judgment. Ground two has no merit either.

In ground three, the appellant alleges that the lower court did not take into account the fact that the appellant's paying for security for costs is tantamount to paying for the appeal. That is an incredible claim to make. Payment of security for costs can never be equated to filing an appeal.

Technically, the High Court judge had no jurisdiction dealing with issues that did not arise in the ruling of the Subordinate Court of the 1st April, 2005. That ruling properly confined itself to the issue of leave to appeal out of time. The learned judge could thus not be faulted. Ground three is equally destitute of merit.

It scarcely requires emphasis that grounds of appeal should be concisely and elegantly drafted and straight to the point so that the error complained of, be it of fact or law, is apparent on its face. Each ground of appeal must be addressed to a specific aspect of the court's holding and should briefly state the sense in which the decision complained of is perceived to be wrong or contrary to the known legal position. None of the grounds set out in this appeal keeps within these bounds of relevance.

It seems to us that the appellant may have grossly misapprehended the issues that should have fallen for determination in this appeal. This is unsurprising given that the appellant was not legally represented. In *Edward Chilufya Mwansa*

and 194 Others v. Konkola Copper Mines Plc[3] the appellant, as the appellant in the present case, delayed filing their notice of appeal by a period of over five years because they were exploring administrative and political settlements to their grievances. We held, among other things, in dismissing the appeal in that case that:

> *"We started our judgment by stating that justice is blind. We meant by that expression that justice is applied impartially and objectively to all. It does not distinguish between friends and strangers; between the rich and the poor; the socially privileged and the socially disadvantaged; the employer and the employed. Thus, the law and rules regarding time limits apply across the board regardless of the social and economic circumstances of the person involved."*

In the present case, therefore, it is immaterial that the appellant was not legally represented. Compliance with the legal requirements, including those establishing a symbiosis between the portions of the judgment causing grievance and the grounds of appeal, apply as much to appellants who are legally represented as to those who are not. In this regard, all of the appellant's grounds of appeal fall short in this vital respect.

Consequently the whole appeal is bereft of merit and is accordingly dismissed.

As regards costs, we are fully alive to the fact that although they are awarded in the discretion of the court, the award of costs should normally be guided by the principle that costs follow the event. The effect of this is that the party that calls forth the event by instituting the action, will bear the costs if the suit fails. If, however, such party shows legitimate occasion by successful suit, then the defendant or respondent will bear the costs.

The facts of this case, taken in perspective, reveal that the real culprit that sowed the seed of discord in the first place was the third respondent (ZCCM). It is that party's action of offering the same property to two individuals and accepting the purchase prices from each of them that created the parties' expectations upon which the whole action hinges. We believe the costs, at least part of them, should be borne by the third respondent.

We order costs against the appellant and the third respondent to be borne in the ratio 30% and 70% respectively. These shall be taxed if not agreed.

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A. M. WOOD

SUPREME COURT JUDGE

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M. MALILA

SUPREME COURT JUDGE

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N. K. MUTUNA

SUPREME COURT JUDGE