

**IN THE SUPREME COURT OF ZAMBIA**  
**HOLDEN AT LUSAKA**  
***(CIVIL JURISDICTION)***

**SCZ/8/169/2016**

BETWEEN:

**JOHN PETER MWANZA**

**APPELLANT**

**AND**

**RODGERS TEMBO**

**TEDDY MTONGA**

**BARNABAS CHOLA**



**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

**3<sup>RD</sup> RESPONDENT**

**Coram: Phiri, Hamaundu and Malila, JJS.**

On 17<sup>th</sup> October, 2017 and 23<sup>rd</sup> October, 2019

For the appellant : Mr M.Z.Mwandenga, Messrs M.Z.  
Mwandenga & Co

For the respondents : Mr L. Saboi, Messrs Ganje Mhango &  
Company

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**JUDGMENT**

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**Hamaundu, JS** delivered the Judgment of the court

Cases referred to:

1. **Nkhuwa v Lusaka Tyre Services Limited (1977) ZR 43**
2. **Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited (2011) 3 ZR 67**
3. **Zulu v Avondale Housing Project Limited (1982) ZR 172**

**4. Nahar Investment Limited v Grindlays Bank International (Zambia) Limited (1984) ZR 81**

The appellant, through this motion, seeks leave of the court to file his record of appeal out of time. Briefly, the background to this application is this: Being dissatisfied with a judgment of the High Court, the appellant filed a notice of appeal, together with the memorandum of appeal, on 10<sup>th</sup> June, 2016. Seven months down the line, the appellant had not filed his record of appeal: According to the rules, he should have filed within 60 days of the notice of appeal. On 1<sup>st</sup> February, 2017, the appellant applied before a single Judge of this court for leave to file his record of appeal out of time. The reason cited for his failure to do so within the period stipulated by the rules was that, during the period in issue, his uncle became hospitalized, and the appellant was the one who was financially responsible to attend to the illness. The appellant went on to say that, as if his uncle's illness was not enough, his mother also suffered an illness and was hospitalized. The appellant again was responsible financially to attend to his mother's illness. According to the appellant, the two

illnesses drained him financially; so that he had no money to pay his advocates for them to reproduce and file 16 copies of the record of appeal. The single judge was not satisfied with the reason cited, stating that the appellant had not produced any proof of the expenses he incurred on the two illnesses. For that reason, the single judge held that the appellant had not shown sufficient reason to be allowed to file the record of appeal out of time and, consequently, dismissed the application. The appellant has renewed the application before us, citing the same reason.

On behalf of the appellant, learned counsel, Mr Mwandenga, argued that this is a proper case in which the appellant ought to be given leave to file the record of appeal and heads of arguments out of time in the interest of justice. This argument was based on three arguments; first, we were asked to take judicial notice of the fact that when a person is looking after an ailing relative it is not unusual for such a person to incur expenses without bothering to request for receipts or to keep a tab on the expenditure. According to counsel, the real question here was whether insufficiency of funds with which to prosecute an appeal should be considered to be sufficient reason within the context of **Rule 12(1)** of the **Supreme Court Rules**.



According to counsel, that was sufficient reason. The case of **Nkhuwa v Lusaka Tyre Services Limited**<sup>(1)</sup> was relied upon to support the appellant's submission that the lack of funds rendered it extremely difficult for him to pursue his appeal within the prescribed times.

Secondly we were referred to our decision in **Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited**<sup>(2)</sup> where we said that the court is allowed to look into the merits of the appeal when considering an application for extension of time. Counsel argued that, in this case, the appellant's prospects of succeeding on his appeal are very high in that the judgment, having confirmed that the appellant was holder of title to the land in dispute, failed to grant him the full remedies that he sought, namely; damages for trespass and also eviction of the respondents. It was submitted here that the judgment was inconclusive and was contrary to our guidance in the case of **Zulu v Avondale Housing Project Limited**<sup>(3)</sup>, which is that it is the duty of courts to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality.

Thirdly, and finally, it was argued that the grant of leave to the appellant to file his record of appeal out of time will not prejudice the respondent.

We did not receive arguments from the respondents.

We wish, to quote some of the statements that we have made in previous cases. In **Nkhuwa v Lusaka Tyre Services Limited**, we said:

**“it is regrettable that in recent years legal practitioners in this country have approached the need to comply with the rules as to time with complete nonchalance. This court has had occasion in the past to comment adversely on the attitude of legal practitioners to compliance with other rules of procedure but it is time that all legal practitioners were made to understand that where the rules prescribe times within which steps must be taken these rules must be adhered to strictly and those practitioners who ignore them do so at their own peril. The provisions in the rules allowing for extensions of time are there to ensure that if circumstances prevail which make it impossible or even extremely difficult for parties to take procedural steps within prescribed times relief will be given where the court is satisfied that circumstances demand it. It must be emphasized that before this court is able to exercise this discretion to grant such relief there must be material before it on which it can act”**

In **Nahar Investment Limited v Grindlays Bank International (Zambia) Limited<sup>(4)</sup>**, we said:

“We wish to remind appellants that it is their duty to lodge records of appeal within the period allowed, including any extended period. If difficulties are encountered which are beyond their means to control (such as the non-availability of the notes of proceedings which it is the responsibility of the High Court to furnish), appellants have a duty to make prompt application to the court for enlargement of time. Litigation must come to an end, and it is highly undesirable that respondents should be kept in suspense because of dilatory conduct on the part of appellants.”

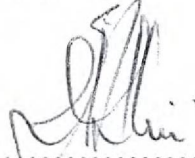
In **Twampane Mining Co-operative Society Ltd v E & M Storti, Mining Ltd**, we said:

“In this regard, we cannot over-emphasize the importance of adhering to Rules of Court as this is intended to ensure that matters are heard in an orderly and expeditious manner.”

In the motion before us, we can only repeat what we said in **Nahar Investment Limited v Grindlays Bank International (Zambia) Limited** that litigation must come to an end; and that it is not desirable for litigants to keep their opponents in suspense. In this case, the reason advanced by the appellant for his failure to file



his record of appeal was that he had run out of funds to pay his advocates to prosecute the appeal. Our question is; should the respondent have been kept in indefinite suspense until such time that the appellant's financial situation had improved? Certainly not, especially when one considers the fact that there were other more affordable sources of legal representation available to the appellant; such as legal aid. In our view, therefore, the reason advanced by the appellant does not constitute sufficient ground for us to allow him to file the record of appeal out of time. Accordingly, we dismiss the motion, with costs to the respondents.



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G. S. Phiri  
**SUPREME COURT JUDGE**



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E. M. Hamaundu  
**SUPREME COURT JUDGE**



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M. Malila  
**SUPREME COURT JUDGE**