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IN THE SUPREME COURT OF ZAMBIA APPEAL NO.156/2016

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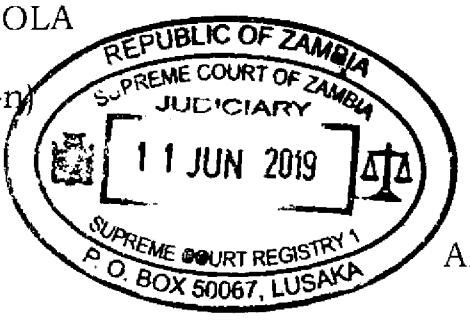

(Civil Jurisdiction)

BETWEEN:

ISAAC BANDA APPELLANT

AND

ZCCM INVESTMENT HOLDINGS PLC 1ST RESPONDENT

VERONICA CHIKOLWA MALITOLI 2ND RESPONDENT

MORDON MALITOLI 3RD RESPONDENT

CORAM: Musonda, Ag DCJ, Kaoma and Kajimanga, JJS.
On 4th June, 2010 and 11th June, 2019

For the Appellant: N/A
For the 1st Respondent: Mr. B. Mbilima- In-House Counsel
For the 2nd and 3rd Respondents: Mrs. L. Mbaluku of Mbaluku and Company

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J U D G M E N T

Kaoma, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Grace Zimba and Others v Attorney-General and Others (Appeal No. 200 of 2013)**
2. **Zambia Consolidated Copper Mines Limited v Elvis Katyamba and others (2006) Z.R. 1**

Legislation referred to:

1. **High Court Rules, Cap 27, Order 2 Rule 2, and Order 3 Rule 2**
2. **Constitution of Zambia (Amendment) Act No. 2 of 2016, Article 118 (2) (e) (f)**
3. **Supreme Court Rules, Cap 25, Rule 69 (1)**
4. **Supreme Court of Zambia Act, Cap 25, section 25 (1)(a)**

This appeal arises from a refusal by the High Court at Kitwe to extend the time within which to restore the matter to the active cause list.

The brief background facts to the matter as can be discerned from the record of appeal are that the appellant, a former employee of the 1st respondent and the 2nd and 3rd respondents were fighting for a house which had belonged to the 1st respondent and was sold first to the appellant and later to the 2nd respondent, a wife of the 3rd respondent.

The battle for this house incited the appellant to take out a court action against the respondents seeking, as against the 1st respondent, an order for specific performance of an agreement of sale entered into between him and Zambia Consolidated Copper Mines Limited in1998; an order for possession of the house; and damages for loss of use of the premises. As against the 2nd and 3rd respondents, the appellant claimed mesne profits for the occupation of the house at economic rates from January, 1999.

After the matter was set down for trial, there were several adjournments, mainly at the instance of counsel for the 2nd and 3rd respondents who would not be available for trial for one reason or another.

Initially, the appellant would travel from South Africa where he was based. But because of the many adjournments, State Counsel Banda, who was representing the appellant, decided that he would only inform him to travel when he was sure that the matter would take off. However, on 20th March, 2014 he disclosed that he had a breakdown in communication with his client who was still very keen to come and testify. The court granted the appellant a last adjournment to 23rd May, 2014.

The matter came up next on 12th September, 2014 before another judge. Ms. Kumwenda who appeared on behalf of the appellant informed the court that they received communication from the appellant the previous day that his application for a change in immigration status was being processed and he had been advised not to travel as he may be prevented from entering South Africa under the new laws effective May, 2014.

Learned counsel for the 1st respondent proposed that the matter be adjourned sine die until such a time when the appellant's immigration status would be resolved. Counsel for the 2nd and 3rd respondents concurred. On her part, counsel for the appellant could only agree with the proposal by her learned colleagues.

The judge agreed that the matter be adjourned *sine die* with liberty to restore within 90 days, expressing hope that by that time, the appellant should be ready to proceed.

However, the matter was not restored. On 27th March, 2015 the judge issued a notice of hearing to the parties, who attended before her on 14th May, 2015. At that meeting, State Counsel Banda informed the court that they would file an application for extension of time and to restore the matter to active cause list as the appellant was ready to proceed.

The judge directed the appellant to proceed to make the necessary application so that the action was restored. She granted the appellant 7 days in which to make the application.

The next day the appellant filed summons to restore the matter pursuant to **Order 3 Rule 2** of the **High Court Rules, Cap 27**. The application came up for hearing on 1st July, 2015. The 1st respondent did not object to the application but the 2nd and 3rd respondents objected on the basis that the application was defective. Counsel's argument was that the matter having been adjourned for a specific period, technically stood dismissed at the expiration of that period; and that the appellant should have applied for extension of time before applying for restoration.

After hearing the parties, the judge adjourned the matter for ruling. The ruling was only delivered on 2nd October, 2015. The judge agreed with the 2nd and 3rd respondents that the appellant ought to have first applied for extension of time. Therefore, she struck out the application to restore the matter for irregularity and advised the appellant to first apply for extension of time if she was to entertain his application to restore the matter.

On 13th October, 2015 the appellant applied for extension of time within which to restore the matter pursuant to **Order 2 Rule 2** of the **High Court Rules**. He asserted in his affidavit that at the lapse of the 90 days his immigration application had not been finalised and he was still unable to attend court. He also stated that he was desirous of proceeding with the matter.

The application was heard on 2nd March, 2016. Again, the 1st respondent did not object to the application. As usual, counsel for the 2nd and 3rd respondents objected, arguing first that the appellant did not advance any reason as to why the application to restore was not made within the period of 90 days; and that the application for extension of time ought to have been made within the 90 days because after the time lapsed there was nothing more to extend.

Secondly, counsel alleged that the application was irregular as it was brought under a wrong section; and thirdly, that there was no valid reason for the delay or material on which the application could be based. To support this argument she cited a decision by a single Judge of this Court in the case of **Grace Zimba and others v Attorney General and others**[1], where the Judge, quoting the case of **Zambia Consolidated Copper Mines Limited v Elvis Katyamba and others**[2] held that where the time has expired, the court cannot and will not extend the time because there is nothing more left to extend.

Nonetheless, counsel accepted that the court has discretion to extend time where there is material upon which the discretion could be exercised but in this case no justifiable explanation was given for the delay as the application to restore did not depend on the appellant's immigration application process. She also argued that the appellant had failed to prosecute the matter as seen from the many adjournments at his instance since 2010. The court was implored to dismiss the application with costs.

In determining the application, the learned High Court judge examined **Order 2 Rule 2** of the **High Court Rules** and opined that this provision empowers the court to extend and

abridge time for taking any step, filing any document or giving notice. Hence, the application was properly before her.

The judge then posed a question whether she could extend the time within which the matter should be restored to active cause list when the time had expired. Following the decision of the single Judge of this Court in **Grace Zimba and others v Attorney General and others**[1], the judge opined that the application for extension of time could not be granted as the time had come to an end and there was nothing to extend. She noted that any guidance she had given could not override the holding of this Court which takes precedence and is binding on that court.

However, the judge went on to agree with the 2nd and 3rd respondents that there was no material upon which she could exercise her discretionary power to grant an extension as the appellant had not given any explanation for the inordinate delay. She further said it was not enough for the appellant to say he was desirous to have his case determined on its merit as those who sit back do so at their own peril since there can be no unqualified right to extension of time.

As a result, the learned judge denied the application for extension of time and dismissed it with costs.

She went even further to state that the net effect of her ruling was that the action stood dismissed for want of prosecution.

The appellant was dissatisfied with the decision, prompting this appeal on the following two grounds:

1. **The court below erred and misdirected itself in law and fact in addressing the question it raised as follows: *"The question therefore, is whether or not this court can extend time within which the matter should be restored to the active cause list when the time has expired."* The court's finding on that question was that there was nothing to extend when in fact the court rejected the appellant's earlier application to restore the matter to the active cause list out of time.**

2. **The court's ruling was erroneous at law in finding that the appellant had not given any explanation for the inordinate delay, when the record will show that in the appellant's affidavit in support of summons to restore matter to active cause list, reasons were given for delay. In any event, it is a constitutional principle of law that justice shall be administered without undue regard to procedural technicalities.**

Learned counsel for the parties filed heads of argument to support the respective positions they have taken in this appeal. However, learned counsel for the appellant did not attend the hearing of the appeal or file a notice of non appearance as required by **Rule 69(1)** of the **Supreme Court Rules, Cap 25** even when they were aware of the hearing of the appeal, having been served with notice on 4th April, 2019. Because of the position we have taken in this appeal, which will become clear shortly, we shall not go into a review of the arguments.

We hasten to state firstly, that the grounds of appeal as framed in the memorandum of appeal include what appears to us to be arguments. We have said many times before that this is not allowed by the rules of Court. Ordinarily, we would have declined to hear this appeal on this ground alone.

Be that as it may, we have read thoroughly the two grounds of appeal in an effort to understand what the real issue in this appeal is. As we see it, the issue raised by ground 1 is whether the High Court has discretion to extend the time to restore a matter to the active cause list when the time has expired while the issue raised by ground 2 is whether there was any good reason advanced by the appellant for not restoring the matter within the 90 days period.

The two grounds of appeal clearly relate to the application the learned High Court judge was dealing with, that is, the application for extension of time within which to restore the matter to the active cause list.

However, as we have mentioned above, after declining to extend the time and dismissing that particular application, the learned High Court judge went further to dismiss the entire action for want of prosecution.

The difficulty we have is that the two grounds of appeal do not, in any way challenge the dismissal of the action by the learned High Court judge or seek to reverse or vacate the order of dismissal of the action.

We wish to pause here to observe that counsel for the appellant took a cavalier approach to the appeal, as seen from the manner the grounds of appeal were framed and the failure by counsel to attend the hearing of the appeal without filing a notice of non appearance as required by **Rule 69(1)**, above.

We would have been inclined to deal with the grounds of appeal as presented before us but the view we take is that unless the dismissal is reversed, proceeding with the appeal, on the two grounds as framed, would accomplish nothing.

In other words, even if we were to agree with the appellant that the learned High Court judge had power to extend the time even though the application was filed after the 90 days period had expired [*and that would be a correct decision*], and even if we were to find that there was material on which the learned High Court judge could exercise her discretion to extend the time, that would not reverse the dismissal.

It is for this reason that we have decided not to delve any further into this appeal as doing so would serve no useful purpose, other than wasting valuable judicial time. It would just be an exercise in futility as the action would remain dismissed!

As we conclude, we wish to point out that while in terms of **section 25(1)(a)** of the **Supreme Court of Zambia Act, Cap 25** this Court has wide power, on the hearing of an appeal, to confirm, vary, amend or set aside the judgment appealed from or give such judgment as the case may require, such power will not extend to settling grounds of appeal or defining the case for the appellant. A court, including an appellate court can only adjudicate on a matter that is before it and has no jurisdiction to deal with a matter that is not brought before it.

Therefore, this appeal fails out of its own inanition as it does not deal with the real issue. We dismiss it with costs to be taxed in default of agreement.

M. MUSONDA
ACTING DEPUTY CHIEF JUSTICE

R.M.C. KAOMA
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE