

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

SCZ/8/31/2019

BETWEEN:

MANYANDO MUTUKWA



APPELLANT

AND

ATTORNEY GENERAL

MINISTRY OF HEALTH HEADQUARTERS

UNIVERSITY TEACHING HOSPITAL

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

CORAM: Musonda, DCJ, Kajimanga and Kabuka JJS
On 3rd November 2020 and 10th November 2020

For the Appellant :

In person

For the Respondents:

Mrs. K. N. Mundia, Principal State Advocate and Mr. P. Ndovi, Principal State Advocate

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Legislation referred to:

1. Rules of the Court of Appeal, Order 13, Rule (3)(2)
2. Rules of the Supreme Court, Rule 12

This is the appellant's motion to discharge, vary or reverse the ruling of the single judge of this court delivered on 23rd October 2019. In her affidavit in support of the motion, it is disclosed that a single judge of this court delivered a ruling dismissing her application on 23rd October 2019. The delay in filing the summons for an extension of time before a single judge of the Court of Appeal was due to her illness as per the sick note which she tendered. The reason given to the single judge of this court for the delay was genuine and the appeal [against the judgement of the Court of Appeal] should be determined on the merits. She would suffer grave injustice if the ruling [of the single judge of this court] was allowed to stand. Furthermore, the appeal has prospects of success and she wishes to be heard, hence this motion. She therefore prayed that this court should exercise leniency in considering her application.

The respondents' affidavit in opposition discloses that the appellant filed a complaint before the Industrial Relations Court seeking among others, salary arrears and leave days. In its judgment delivered on 23rd November 2017, the court dismissed the action for lack of merit. On 16th April 2018, the appellant appealed to the Court of Appeal which dismissed her appeal on 14th February 2019. The

Court of Appeal did not grant leave to appeal and on 26th March 2019, the appellant applied for an extension of time within which to apply for leave to appeal. On 16th April 2019, a single judge of the Court of Appeal delivered her ruling and dismissed the application. Being dissatisfied with the ruling of the single judge, the appellant applied to discharge, vary or reverse the ruling before the full bench.

The affidavit also discloses that on 5th September 2019 the Court of Appeal dismissed the application following which, the appellant applied for leave to appeal out of time before a single judge of this court. On 23rd October 2019, a single judge of this court dismissed the appellant's application for leave to appeal out of time against the judgment of the Court of Appeal delivered on 14th February 2019. This court ought to disregard the sick note exhibited to the appellant's affidavit in support because it was handed to the single judge of the Court of Appeal during the rendering of her ruling. Premised on the foregoing the full court (Court of Appeal) maintained the position of the single judge, that the appellant did not provide the court with material to use in exercising its discretion to extend time and further, her claims of illness were unsubstantiated.

The affidavit further discloses that the sick note was never properly before the court or record, if at all. The appellant did not exhibit any document before the single judge of this court to validate the reasons for the delay on her part. The appellant made the wrong application which was inordinately delayed. Further, that the proposed grounds of appeal reveal that this appeal had no reasonable prospects of success and they do not disclose sufficient grounds for this court to grant leave to appeal out of time.

The appellant's affidavit in reply discloses that contrary to the respondents' assertion, there has been evidence to show that she was ill and it should be regarded by this court. She properly exhibited the sick note before the single judge to validate the reasons for the delay on her part. She would suffer prejudice in the event that leave was not granted because she has accrued a lot of expenses in the process of filing court documents as she could not afford to pay legal fees. Her appeal has real prospects of success in this court and the proposed grounds of appeal disclose sufficient basis for this court to grant her leave to appeal out of time.

The appellant did not file heads of argument in support of her motion. The respondents filed heads of argument. After citing

various authorities which we consider unnecessary to reproduce, the learned counsel for the respondents submitted that while it was noted that the appellant was in person, the initial error in this matter occurred before the Court of Appeal. The application that should have been made by the appellant was for leave to appeal out of time against the decision of the Court of Appeal as the 21 day window created by Order 13, rule (3)(2) of the Court of Appeal Rules was no longer applicable. However, going by the sentiments of the single judge of this court at page R5, the application was deemed to be one for leave to appeal out of time. In essence, this is supposed to be a renewed application before the full court.

It was submitted that the foregoing notwithstanding, the single judge of this court did not err in finding that the applicant had not provided sufficient reason to be granted an order for leave to appeal out of time. The learned judge considered all the reasons given by the appellant before exercising the court's discretionary powers under rule 12 of the Supreme Court Rules. The main reason for the delay in making the application, it was contended, has been attributed to illness and this is allegedly justified by a sick note dated 11th February 2019. This submission of the appellant's state of

affairs is misplaced as it occurred prior to the delivery of the final judgment of the Court of Appeal. Therefore, it was argued, her illness if at all there was any, occurred before the delivery of the judgment. Furthermore, the sick note may state that the appellant was given 30 days but however, she happened to be present during the delivery of the judgment by the Court of Appeal, therefore, she cannot cry foul today.

It was further submitted that the grounds of appeal do not reveal any prospects of success and they appear to be a cocktail of grievances against the denial for leave to appeal out of time and the main matter. They are further infused with arguments and narratives. We were accordingly urged to dismiss the appellant's application with costs.

We have considered the affidavit evidence, respondents' heads of argument and the ruling of the single judge of this court from which this motion arises. The relevant portion of the ruling of the single judge appears at pages R5 – R6 in the following terms:

"The contents of the applicant's affidavit in support of the notice and the one in reply do not give much assistance. In her oral augmentation of her affidavit in reply to the affidavit in opposition to her application the applicant stated, however, that she had obtained a sick note from the hospital she

attended as well as a letter from the bank to show her financial constraints and account for the delay.


I have perused the record before me and have not seen the sick note or the bank letter mentioned by the applicant. It is not enough for the applicant to simply allege that there was evidence to substantiate her claims without producing that evidence. I should also explain that the financial woes experienced by an applicant is not a good reason to grant the application even if it is confirmed by a bank...

I find, therefore, that the applicant has not provided sufficient reason to enable me grant her an order for leave to appeal out of time. The application is accordingly dismissed..."

At the hearing of this motion the appellant conceded that she did not produce any documentary evidence, the sick note to be specific, before the single judge of this court to support her application. On the facts of this case the single judge cannot be faulted for concluding as he did, that the applicant had not provided sufficient reason to enable him grant her an order for leave to appeal out of time. We fully embrace his conclusion. There was no evidence deployed by the appellant to support her application. We, too, cannot be expected to perform a miracle in favour of the applicant out of nothing.

The net result is that this motion lacks merit and it is accordingly dismissed. This conclusion notwithstanding, we make


no order for costs, given the appellant's circumstances.



M. MUSONDA
DEPUTY CHIEF JUSTICE



C. KAJIMANGA
SUPREME COURT JUDGE



J. K. KABUKA
SUPREME COURT JUDGE