

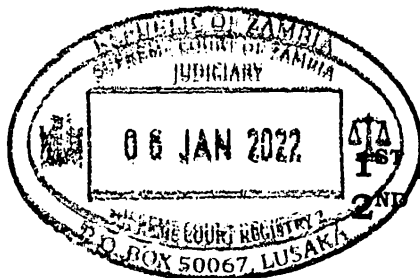
**IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**SCZ 8/03/2021**

BETWEEN:

**NELLY MULENGA  
WELLINGTON MUSUPILA**



**1<sup>ST</sup> APPELLANT  
2<sup>ND</sup> APPELLANT**

**AND**

**BONIFACE CHILAMBWE FUNDAFUNDA  
EVA KABWE FUNDAFUNDA  
IRENE FUNDAFUNDA  
GEORGE CHISHA FUNDAFUNDA  
KENNETH KAPIYA FUNDAFUNDA**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT  
4<sup>TH</sup> RESPONDENT  
5<sup>TH</sup> RESPONDENT**

**Coram: E. M. Hamaundu, JS**

For the Appellants: Mrs. K.M. Kabalata, Mesdames Chalwe & Kabalata  
Legal Practitioners

for the Respondents: Ms. Nkumbwizya Alikipo, Messrs Simeza Sangwa &  
Associates

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**R U L I N G**

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**Legislation referred to:**

1. The Supreme Court of Zambia Act, Section 4
2. The Supreme Court Rules, rule 48

**HAMAUNDU, JS**, delivered the ruling of the Court.

The respondents apply for extension of time in which to apply to the bench of this court to vary the decision that I made in my ruling of 26<sup>th</sup> October, 2021. The background to this application is this: The applicants had applied for leave to appeal to the Supreme Court

against a judgment of the Court of Appeal. In the ruling aforesaid, I granted the applicants leave to appeal. The reason that the respondents have given for their failure to file the application in time is that they only received the ruling after the time for filing that application had already lapsed.

According to the affidavit sworn by the respondents' counsel, the respondents were not notified that the ruling had been delivered because the same was not placed in their advocates' pigeon hole. Counsel averred that the respondents only became aware of it when it was served on them by the appellants on 8<sup>th</sup> November, 2021.

At the hearing, learned counsel for the applicants, in opposing the application, submitted that this application is academic because the applicants have already prepared and filed the record of appeal, as well as the head of arguments. She argued that, in the circumstances, the applicants stand to suffer great prejudice if the ruling is varied.

Counsel for the respondents maintained that they were not aware of the ruling.

I have heard the arguments advanced in opposition of this application. However, the right to escalate an application to the full

bench is one that is availed to every party by **section 4** of the **Supreme Court Act, Chapter 25** of the **Laws of Zambia** and Rule **48** of the **rules** contained therein. That right cannot be extinguished except by the default or omission of the party. In this case, the respondents have said that they were not aware that the ruling had been delivered until it was brought to their attention by the applicants who served it on them. There appears to be truth in what the respondents are saying: First, it is correct that the ruling was reserved to an unspecified date. Secondly, the letter that the respondents have exhibited shows that counsel for the applicants served on the respondents the ruling, together with the notice of appeal and the memorandum of appeal. The letter was stamped as having been received on the 8<sup>th</sup> November, 2020<sup>1</sup>. The question is, why would the respondents be served with the ruling, which ought to have already been in their possession, unless the applicants felt that the respondents might not have been aware of the ruling. In the circumstances, I am not satisfied that there was omission or default on the part of the respondents. It follows that they cannot be denied their right to escalate the application to the full bench.

Further, unlike other interlocutory applications which can be waived when they become academic, an application for leave to


appeal from the Court of Appeal involves issues of jurisdiction. So, where a still wishes to escalate the application for leave, that avenue must first be exhausted before the court can assume jurisdiction to hear the appeal.

As regards the fears by the applicants that they will suffer prejudice if the respondents are allowed to escalate the application, I do not see that prejudice. I am aware, for instance, that the appeal has been put on the cause list for the January 2022 sessions. But the appeal can simply be removed from the cause list while the application is being heard and then put back on the cause list if the full bench upholds the grant of leave.

In the circumstances, I will grant this application. The respondents are granted 14 days from the date hereof to file their application.

Each party will bear their own costs.

Dated the ..... 2<sup>nd</sup> day of ..... January 2022

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