

IN THE SUPREME COURT OF ZAMBIA SCZ/8/03/2022
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

HENRY SAMPA

BIA ZAMBIA LIMITED

AND

ABHISHEK VIJAYKUMAR PATEL

1ST APPELLANT

2ND APPELLANT

RESPONDENT



Coram: Chinyama, JS, in Chambers on 10th February, 2022 and on 22nd March, 2022.

For the Appellant: Mr. Kizito Mwiinga, William Nyirenda and Company.

For the Respondent: Mr. Robert Mwanza, Robert and Partners

R U L I N G

Cases referred to:

1. *D. E. Nkhuwa v Lusaka Tyre Services Limited* (1977) ZR 43.
2. *Twampane Mining Co-operative Society Limited v Storti Mining Limited*, S.C.Z. Judgment No. 20 of 2011

Statutes referred to:

1. *Supreme Court Rules (SCR), Chapter 25, Rules 12(1)(2), 48(1).*
2. *Court of Appeal Act, No. 7 of 2016, Section 13(2).*
3. *Statutory Instrument No. 26 of 2012, section 6(a).*

1. The applicant, BIA Zambia Limited, according to the caption in the summons, seeks leave to file an application for leave to appeal out of time. The application is supported by an affidavit which also cites in the caption that it is in support of summons for extension of time within which to file application for leave to appeal. The application is further supported by written submissions in which the caption states that the application is for an order of extension of time within which to file an application for leave to appeal. These captions are not consistently framed even though they relate to the same application. It is desirable that terminology used in captions or titles in applications and supporting documents is consistently the same to avoid confusion or misunderstanding in ascertaining the relief sought.
2. Notwithstanding the varying terminology in the captions, it is clear that the applicant acknowledges that it has fallen out of time in relation to renewing the application for leave to appeal and now seeks permission to file the application for leave to appeal out of time. In relation to applications

for extension of time, Rule 12(1)(2) Supreme Court Rules (SCR), Chapter 25, Laws of Zambia, states-

12. (1) The Court shall have power for sufficient reason to extend time for making any application, including an application for leave to appeal, or for bringing any appeal, or for taking any step in or in connection with any appeal, notwithstanding that the time limited therefor may have expired, and whether the time limited for such purpose was so limited by the order of the Court or by these Rules, or by any written law.

(2) An application to the Court for an extension of time in relation to a judgment or the date of expiration of the time within which the application ought to have been made shall be filed at the registry within twenty-one days of the judgment or such time within which the application ought to have been made unless leave of the Court is obtained to file the application out of time;

(3) ...

3. The summons and all the supporting documents are dated 31st January, 2022. There were no oral arguments.
4. The respondent opposes the application and filed the affidavit in opposition as well as written submissions in support. It is clear from the opposing documents that the respondent regards the application as one seeking permission to file an application for leave to appeal out of time. There were equally no oral arguments.

5. The gist of the application is that on 4th December, 2020, a single Judge of the Court of Appeal delivered a ruling in which the Judge allowed the applicant, who was the 2nd respondent in the matter, to file a supplementary record of appeal. On 29th July, 2021, a panel of the Court of Appeal reversed the ruling of the single Judge. On 11th August, 2021, the applicant applied to the Court of Appeal, for leave to appeal to the Supreme Court against the decision. On 7th December, 2021, the Court of Appeal delivered a ruling declining to grant the application.
6. The applicant did not come to the Supreme Court to renew the application for leave within 14 days of the refusal by the Court of Appeal (that is to say by 21st December, 2021) as required under Rule 48(1) SCR. By the time the applicant was filing the application now before me, more than one month had elapsed.
7. According to the applicant, the reason for the inability to file within time was that Mr. William Nyirenda S.C., Counsel seized with conduct of the matter on its behalf had tested positive for Covid-19 on 4th December, 2021 and

only tested negative on 17th December, 2021. He was thereby unable to attend to the matter. There was, as a result of Mr Nyirenda's condition, a closure of the law firm's offices to allow for testing of all staff and fumigation (of the offices).

8. The situation was, according to the applicant, compounded by the absence of the applicant's Chief Executive Officer, who had travelled to Germany on holiday and could not be reached for instructions whether or not to proceed with the application for leave to appeal. Hence the delay in bringing the application.
9. It was argued, citing Rule 48(1) SCR, Rule 12(2) SCR and the case of **D. E. Nkhuwa v Lusaka Tyre Services Limited**¹, that the reasons given for the delay in filing the application for leave to file the application for leave to appeal out of time should suffice to enable me to exercise discretion to grant the application.
10. The substance of the opposition to the application is that the applicant has failed to put up proper reasons why the application for leave to appeal was not filed within time

bearing in mind, as I understand the argument, that Mr Nyirenda recovered from the Covid infection before time, in terms of Rule 48(1) SCR, had expired and, particularly, considering that there was another advocate who was acquainted with the matter. Alternatively, that there is no reason why the applicant failed to come to court expeditiously after the lapse of time and that the excuse that the applicant's Managing Director was out of jurisdiction should not be entertained given the prevailing communication channels available these days. It was argued, in any event, that the applicants' intended application for leave to appeal to the Supreme Court has not met the threshold for grant of leave to appeal by the Court (prescribed in section 13(2) of the Court of Appeal Act No. 7 of 2016).

11. In response to the opposing affidavit and arguments, the applicant contends that it has provided plausible grounds on which the application should be granted; that the delay in bringing the application is not inordinate. I was urged not to pay attention to the argument that the application

should fail on the ground that the applicant's intended application for leave to appeal has not met the prescribed threshold for grant of leave to appeal by the Court because we have not reached the stage at which the consideration must be made.

12. I have considered the application and the contending positions taken by the parties. Rule 12(1) SCR cited in paragraph 2 above confers in the Court power, where sufficient reason is given, to grant an extension of time within which to file an intended application. Rule 12(2) SCR also cited in paragraph 2 above requires the application for extension of time to be filed within 21 days, in the case before me, from the date after the 14 days allowed under Rule 48(1) SCR expired.
13. The applicant had up to 21st December, 2021 to file the application for leave to appeal in regular time. The application was not filed. The applicant, therefore, fell out of time. To comply with Rule 12(2) referred to above, the applicant needed to file the application for leave to appeal out of time within 21 days from 21st December, 2021. That

is to say, by 11th January, 2022. The applicant did not do so and only came to Court with the present application on 31st January, 2022.

14. Clearly, the application is, in my understanding, in breach of Rule 12(2) stated above. It appears to me that the intention in the rule, brought in as an amendment and qualification to Rule 12(1) (see Statutory Instrument No. 26 of 2012, section 6(a)), is to provide a time frame within which action in the case of delayed applications must be taken. Obviously, Rule 12(1) left alone was problematic as it allowed indolent parties to take advantage of the permissive provisions by bringing applications for extension well out of time. This led the Court in cases such as **Nkhuwa** and **Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited**², to craft restrictive principles aimed at promoting the expedited resolution of cases. In the **Nkhuwa**¹ case, it was held that-

- i. **the granting of an extension of the time within which to appeal is entirely in the discretion of the Court, but such discretion will not be exercised without good cause; and**
- ii. **in addition to the circumstances of the delay and the reasons therefore which provide the material on which**

the Court may, exercise its discretion another most important factor is the length of the delay itself.

Further at page 47 that:

“The provisions in the rules allowing for extension of time are there to ensure that if circumstances prevail which make it impossible, or even extremely difficult for parties to make procedural steps within prescribed times, relief will be given where the Court is satisfied that circumstances demand it. It must be emphasised that before this Court is able to exercise this discretion to grant relief there must be material before it on which it can act.

15. In the case of ***Twampane Mining Co-operative Society Limited²***, it was held, among other issues, that-

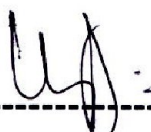
1. ...
2. ...
3. **Applications for extension of time should be made promptly.**
4. **An appellate Court is entitled to look into the merits of the appeal when considering an application for extension of time.**
5. **It is important to adhere to Rules of Court in order to ensure that matters are heard in an orderly and expeditious manner.**
6. **Those who choose to ignore Rules of Court do so at their own peril.**

16. Rule 12(2) SCR is, therefore, a response to these challenges so that applications for extension of time must be made within the time stipulated in the rule except where leave to file the application out of time (that is to say, outside the 21 days, in which case the application must have been filed

before the expiration of that period) has been obtained. I should add that where the applicant is not aware of the delivery of the judgment, ruling or decision to which the application relates time begins to count from the date when the judgment, ruling or decision was served on the applicant. Any application falling outside the stipulated time frame cannot be entertained. This is the only way, in my understanding, in which the rule can be given effect.

17. For the sake of clarity, my further understanding of the rule is that, where the application for extension is brought within the 21 days, the applicant still has to provide sufficient reason to move the Court to grant the extension and the viability of the grounds of appeal may be one of the issues to be considered.
18. Those who come to Court seeking remedies must take it upon themselves to acquaint themselves with the law and rules that may impact their cases. It is no excuse that the party was not aware of the law or rules of Court.
19. Coming to the application before me, the applicant fell out of time after the close of Court registry business on the 11th

January, 2022 when the 21 days expired. The outcome is that there is no merit in the application and I dismiss it with costs to the respondent to be agreed or taxed in default.

A handwritten signature in black ink, appearing to read 'J. Chinyama', is positioned above a horizontal dashed line.

J. CHINYAMA
SUPREME COURT JUDGE