

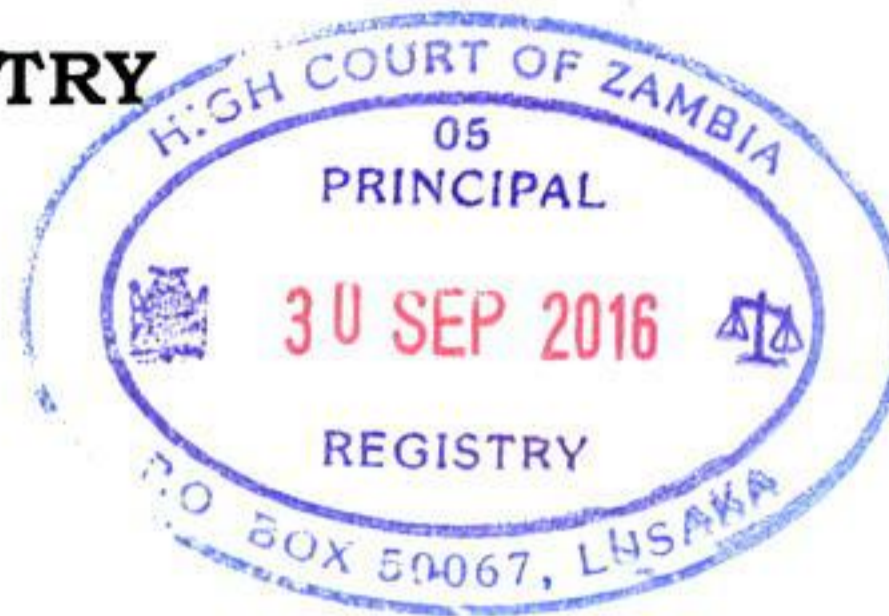
**IN THE HIGH COURT FOR ZAMBIA**

**2013/HP/1330**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**B E T W E E N :**

BEATRICE ZULU MORICE

**PLAINTIFF**

**AND**

KASONGO MUKONKELA

**DEFENDANT**

**Before Honorable Mrs. Justice M. Mapani-Kawimbe on 30<sup>th</sup> September, 2016**

*For the Plaintiff* : *Mr. Z. Simposya, Messrs MSK Advocates*  
*For the Defendant* : *Mr. M.Z. Mwandenga, Messrs M.Z. Mwandenga & Company*

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## **R U L I N G**

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**Legislation Referred To:**

1. *Supreme Court Act, Chapter 25*
2. *High Court Act, Chapter 26*

**Case Authorities Referred To:**

1. *Nkhuwa Vs Lusaka Tyre Services Limited (1977) Z.R 43*

This is the Plaintiff's application for leave to appeal out of time pursuant to Order 12, Rule 1 and Order 50 Rule 2 of the Supreme Court Rules. It is supported by an affidavit dated 4<sup>th</sup> May, 2016, an affidavit in reply and skeleton arguments both dated 21<sup>st</sup> September, 2016.

The affidavit in support was sworn by **Beatrice Zulu Morice** who deposed that on 11<sup>th</sup> September, 2015, the Court delivered a judgment, which she is not satisfied with. That she intends to appeal the decision of the Court to the Supreme Court. She also avers that she was unable to file her appeal in time due to her absence from Zambia as shown in the exhibit marked "**BZM 1**".

The Defendant filed an affidavit in opposition dated 22<sup>nd</sup> August, 2016, deposed by **Kasongo Mukonkela**. He states that an appeal against the Court's judgment was supposed to be filed within thirty days from the date of judgment. He contends that the Plaintiff did not file an appeal within the prescribed time and that the rules of the Supreme Court only allow enlargement of time if appeals out of time are made promptly, upon good grounds, with an explanation for the delay and if the intended appeal has merit.

The Defendant also contends that the application for leave to file an appeal out of time ought to have been made to the Supreme Court and not the Court of first instance. The Defendant further

contends that the Plaintiff had been promptly informed of the judgment and the costs in the judgment by her advocates, as shown in the exhibit marked "**KM2**", in the affidavit in opposition.

The Plaintiff filed an affidavit in reply on 27<sup>th</sup> September, 2016. It was sworn by **Felix Chakuamba Zulu** who states that the Plaintiff resides in France. Further, that her reasons for not filing an appeal in time were stated in the affidavit in support. He avers that leave to appeal out of time lies with the Court of first instance that gave judgment and not the Supreme Court, thus the application.

When the matter came up for hearing on 27<sup>th</sup> September, 2016, the parties elected to rely on their affidavits and the skeleton arguments. The skeleton arguments in the case of the Defendant were filed on 23<sup>rd</sup> September, 2016. I am grateful to both Learned Counsels for their industrious submissions. They are on record and will be referred to in my ruling.

Before I delve into the merit of the application before me, I wish to allay the Defendant's erroneous perception regarding the Court's jurisdiction viz this application.

Order 12 Rule 1 of the Supreme Court Rules sets out the following:

**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.**

Order 50 Rule 2 of the Supreme Court Rules provides that:

**50. (2) In all other cases application to the High Court for leave to appeal to the Court shall be by motion or summons, which shall state the grounds of the application, and shall, if necessary, be supported by affidavit. Such application shall be intitled and filed in the proceedings from which it is intended to appeal, and all necessary parties shall be served. If leave is granted, the order giving leave shall be included in the record of appeal. If leave is refused, the order refusing leave shall be produced on any application for leave to appeal made subsequently to the Court.**

My understanding of Order 12 Rule (1) cited above is that this Court is empowered to hear applications for leave to extend time within which a notice of appeal can be filed or leave to appeal out of time. In both situations, the Court has jurisdiction to hear such applications. It is only when a Court of first instance refuses to grant leave that a further application can lie with a higher Court. In other words, an interlocutory application such as the one before me must first be heard by a Court of first instance. On the other hand

Order 50 Rule (2), provides the process by which such applications can be made.

Having made that point clear, the gist of the Plaintiff's application as discerned from the affidavit evidence, skeleton arguments and oral submissions of her Learned Counsel, is that she was unable to lodge an appeal in time because she resides outside Zambia.

From the Defendant's affidavit evidence, skeleton arguments and oral submissions, Learned Counsel for the Defendant opposes the Plaintiff's application on the ground that the applicant has inordinately delayed to file her intended appeal. The Defendant also contends that the Plaintiff being well aware of the Court's Judgment should have lodged her appeal within thirty days after the delivery of Judgment.

I agree with Learned Counsel for the Plaintiff that the Court has requisite powers to do what is just in the interest of justice in terms of Order 3 Rule 2 of the High Court Rules. In so doing, I find it necessary to reprise certain facts in this case which are of the essence. The judgment in this case was delivered on 11<sup>th</sup> September, 2015 by Honorable Mrs. Justice M.S Mulenga J, as she then was. The Plaintiff was granted leave to appeal in that judgment. The Defendant in his affidavit in opposition states that the Plaintiff was informed of the Court's judgment by 16<sup>th</sup>

September, 2016. The relevant portion of the affidavit in opposition is quoted as follows:

*"That I am informed also by Mr. Mwadenga that so soon after the judgment was delivered he wrote a letter dated 14<sup>th</sup> September, 2015 to the Plaintiff's advocates demanding for costs and by a reply dated the 16<sup>th</sup> September 2015 the said advocates responded inter alia saying that they had referred same to their client who was in France for instructions. Copies of the letter dated 14<sup>th</sup> September 2015 and 16<sup>th</sup> September 2015 are produced and shown to me marked exhibits "KM1" and "KM2" respectively."*

I wish to state that this fact in the affidavit in opposition was not gainsaid by the Plaintiff.

In his submissions, Learned Counsel for the Defendant argued that the Plaintiff who being well aware of the judgment had several means at her disposal of communicating her instructions to her advocates, but failed to do so. He cited the case of **Nkhuwa Vs Lusaka Tyre Services Limited**, where the Supreme Court held *inter alia* that:

*" (a) The granting of an extension of time with which to appeal is entirely in discretion of the Court, but such discretion will be exercised without good cause:*

*(b) 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.*

I take judicial notice that there are a variety of means of communication available to people living in different parts of the world. That being the case, I am inclined to agree with the Defendant's submission that the Plaintiff could have used other means of communicating her instructions to her advocates.

By not doing so, she inclined herself to inordinate and inexcusable delay on her decision to appeal the Court's judgment for over a year. I therefore, find that the Plaintiff's reasons for delay are unacceptable given that her physical presence in Zambia for the purposes of issuing instructions was not necessary. On that basis, I refuse to exercise my discretion in her favour.

I cannot overemphasize the fact that there must be an end to litigation. The successful party in this case the Defendant, should not be denied the fruits of his judgment. I therefore, hold that the Plaintiff's application is frivolous, misconceived and an abuse of the process of the Court. It is hereby dismissed with costs to the Defendant to be taxed in default of agreement.

Leave to appeal is granted.

**Dated this 30<sup>th</sup> day of September, 2016.**

.....*M. Mapani*.....  
Hon. Mrs. Justice M. Mapani-Kawimbe  
**HIGH COURT JUDGE**