



NOTICE OF APPEAL

IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL No. CAZ/08/047/2016

BETWEEN:

JORDAN FLOWER
MATT THOMPSON FLOWER

1ST APPELLANT
2ND APPELLANT

AND

CDC GROUP PLC
YORK FARM LIMITED

1ST RESPONDENT
2ND RESPONDENT

Before the honourable Justice F. M. Chisanga this day of 4th January 2017

*For the Appellants: Ms. G. Mutemi of Messrs Theoties Mataka & Sampa
Legal Practitioners*

For the Respondents: Mr. Y. Yosa of Messrs Musa Dudhia & Company

RULING

Cases referred to

1. *ZRA vs Shah (2000) ZR 60*

2. ***Stanley Mwambazi vs Morrester Farms Ltd (1977) ZR 108***
3. ***D. E. Nkuwa vs Lusaka Tyre Services Ltd (1977) ZR 43***
4. ***Revice vs Prentice Hall Incorporated (1969) 1 ALL ER 773***
5. ***Twampane Mining Cooperative Societies Ltd vs E And M Storth Mining Limited (2011) ZR 67 Vol. 3***
6. ***Musumba vs the Council of the Copperbelt University SCZ/262/2011***

This is an application for extension of time within which to lodge an appeal against the judgment of the court below, delivered on the 5th September 2016. The reason given for the application is that the appellant has been unable to retrieve the proceedings of the court below in respect of the ruling appealed against despite various attempts, to enable it compile the record of appeal within the 60 day period stipulated by the Court of Appeal Rules. Skeleton arguments in support of the application are on record, and I will shortly refer to them.

The application is opposed through an affidavit sworn by one Yosa Grandson Yosa, counsel seized with conduct of the matter on behalf of the respondent. His objection is that the appellants have not exhibited proof that they requested for the record of proceedings, nor proof that they communicated the urgency attendant on the requirement for them to obtain the record of proceedings in view of the impending deadline of the 60 days in which they were required to lodge the record of appeal. It is further deposed that the appellants have not indicated how soon they will be able to obtain the record of proceedings.

The arguments advanced in support of the application, as per the skeleton arguments filed on the applicant's behalf are that premised on ***ZRA vs Shah***¹, the rule breached by the appellant is regulatory, and the matter should be interrogated on its merits. Reference is made to ***Stanley Mwambazi vs Morrester Farms Ltd***² to buttress the argument that the matter ought to be determined on the merits. In urging the court to grant the application, further reference is made to ***D. E. Nkuwa vs Lusaka Tyre Services Ltd***³.

At the hearing, learned counsel for the appellants, Ms. Mutemi argued that the delay was short, and the excuse for the delay acceptable. That was sufficient reason for granting the application. Learned counsel purported to distinguish the *Nahar Investment* case by pointing out that the Supreme Court referred to dilatory conduct, inordinate delay and unfair prejudice, and on that basis refused the application. That according to learned counsel, is not the case here.

It was additionally argued that the rule breached was regulatory and, therefore the breach is curable and not fatal. She urged the court to grant the application.

Opposing skeleton arguments have been filed in on the respondent's behalf. It is contended that no sufficient reason warranting extension of time has been demonstrated, contrary to Gardner Acting Chief Justice's dictum in **D. E. Nkuwa vs Lusaka Tyre Services Ltd**³. Learned counsel's view is that evidence of the efforts made to obtain the record of proceedings ought to have been produced in this application. A casual statement of difficulty without stating what made it difficult and what steps were taken to mitigate the difficulty is not sufficient, in learned counsel's view. Referring to **Revive vs Prentice Hall Incorporated**⁴, where Lord Denning said that the court regards time very differently from what they did in the 19th Century, the court is urged to regard time even more strictly than was done in those days.

It is submitted in effect that the appeal is hopeless. Thus, it would be cruel to grant extension of time for such a case. The premise of this submission is **Twampane Mining Cooperative Societies Ltd vs E and M Storth Mining Limited**⁵.

Learned counsel for the respondent, Mr. Yosa, stressed the submissions contained in the skeleton arguments and urged the court to dismiss the application.

Ms. Mutemi responded by asking the court to take judicial notice of the steps taken by litigants to obtain proceedings from the court below. She argued that the merits of the appeal should not be looked into as the period of delay is short.

I have considered the application, and the arguments on which it is sought to persuade me to accede to the application. I have equally ruminated on the grounds of opposition. It is correct to assert, as done by the applicant, that this court is reposed with power to extend time within which a step is required to be taken under the Court of Appeal Rules, in order XIII rule 3. Sub rule 3 of that rule is of moment to this application. It enacts:

“(3) *The court may for sufficient reason extend time for making an application, including an application for leave to appeal, or for bringing an appeal, or for taking any step in or in connection with any appeal, despite the time*

limit having expired, and whether the time limited for that purpose was so limited by the order of the court, by these rules or by any written law”.

This rule leaves no doubt that even after expiry of the period within which a step may be taken, it is competent to apply for extension of time in which a step may be taken. Where sufficient reason exists, the court will readily grant an extension. I should state that the rule is a replica of rule 12 of the Supreme Court Rules. Similar applications have been made to the Supreme Court pursuant to that rule. I need only refer to a couple of authorities from that court. ***Nkuwa vs Lusaka Tyre Services Limited***³ is one such case. An application for extension of time to lodge an appeal was made. The reason for the delay was that counsel seized with conduct of the matter had left the country. The application was refused on account of the fact that that was the second time the application to extend time was being made, and for the same reason. Additionally, the applicant had inordinately delayed to make the application. Sufficient reason to extend time was non-existent.

Musumba vs the Council of the Copperbelt University⁶ is a more recent case where time within which to file the record of appeal had expired. The appeal was dismissed as a result. The applicant applied to set aside the order of dismissal, explaining in his application that the transcript of proceedings in the court below could not be availed to the appellant by the Registrar of the High Court of Lusaka. The court refused to restore the appeal. The reason given was that the applicant had inordinately delayed to file the application as a period of six months had passed. The court noted that the applicant only made the application to extend time when confronted with an application for dismissal of the appeal for want of prosecution.

What emerges from these authorities is that the length of the delay is of relevance to an application for extension of time, in addition to the reason for the delay. In the present case, the delay in applying for extension of time in which to file the record of appeal is only 2 days after expiry of the 60 days. The reason given is that the transcript of proceedings is not ready. In my view, that reason is sufficient. I say so because I take cognizance of the fact that follow-ups for records of proceedings are in some instances made verbally. I consider that I should give the appellant a benefit of doubt as a result. I however urge learned counsel to, in future, make such follow-ups in writing, so as to have a record of the same.

The delay in applying for extension of time is by a day only. The failure to obtain the transcript of proceedings is sufficient reason, warranting extension of time. It must be kept in view that this is not an application for leave to appeal, or for extension of time for filing a notice of appeal. It is for extension of time within which to file the record of appeal, the notice of appeal having already been filed. I thus do not conceive the need to interrogate the prospects of success as invited by the respondent.

For the reasons assigned, I extend time for filing the record of appeal. The appellant will file in its record of appeal within 30 days from today. The costs hereof will be in the cause.

Dated the^{4th}.....day of.....^{January}.... 2017



F.M. CHISANGA
HIGH COURT JUDGE