

IN THE COURT OF APPEAL OF ZAMBIA

CAZ/08/068/2016

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

MARASA HOLDINGS LIMITED
(T/A HOTEL INTERCONTINENTAL)



AND

NAMENDA SYLVIA SINDILA
HARRIET KASANADA CHISANGA

1ST RESPONDENT

2ND RESPONDENT

Before the Hon. Mr. Justice Justin Chashi in Chambers on 16th January 2017

For the Applicant:

N/A

For the 1st and 2nd Respondents:

V. Mulenga (Mrs), Messrs Chilupe and Permanent Chambers

R U L I N G

Cases referred to:

1. *Chikuta v Chipata Rural Council (1974) ZR 241*

Legislation referred to:

2. *The Court of Appeal Act, Act No. 7 of 2016*

A perusal of the record shows that the Appellant filed a Notice of Appeal and Memorandum of Appeal in this matter on the 25th of October 2016.

On the 23rd of December 2016, they filed an application by way of a Summons for an Order to extend time within which to file the record of appeal and heads of arguments pursuant to Order 13 Rule 3 (1) of the ***Court of Appeal Rules (CAR)***.

According to the affidavit in support of the application deposed to by Nchimunya Mweene Ng'andu, Counsel with conduct of the matter, at the time this application was being made, the proceedings in the Industrial Relation Division of the High Court which are to form part of the record of appeal had not been finalised and submitted to the Appellant for inclusion in the record of appeal. That as a result, the Appellant was not in a position to file the record of appeal and heads of arguments within the prescribed time, hence the application.

When the application came up for hearing on 12th January 2017, Counsel for the Appellant was not present. Mrs. Mulenga, Counsel for the Respondents submitted that they had not been served with any affidavit in this matter and as such they had not filed an affidavit in opposition.

Counsel however stated that she was ready to proceed on a point of law. She in that respect drew the attention of the Court to the provisions of Order 13 of **CAR²** and submitted that according to the rules, applications for extension of time are to be brought by way of notice.

Counsel in that respect relied on the authority of **Chikuta v Chipata Rural District¹**, where the Supreme Court held that where an Act provides for the mode of commencement, it is that mode to be used by a party bringing or seeking to bring an action before Court.

It was Counsel's contention that the application be dismissed with costs for use of the Summons as opposed to the notice as provided for by the rules.

Order 13, Rule 3 (1) of **CAR²** provides as follows:

"3. (1) The Court may for sufficient reason extend the time for:

(a) Making an application, including an application for leave to appeal

(b) Bringing an appeal; or

(c) Taking any step in or in connection with an appeal”.

Subrules (3) and (4) goes on to state as follows

“(3) The Court may for sufficient reason extend time for making 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 limited 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”

(4) An application to the Court for an extension of time under this rule shall-

(a) In criminal cases, be substantially in Form 22 set out in the first schedule and

(b) In civil cases, be substantially in Form 23 set out in the first schedule”.

From the aforestated rules, I agree with Counsel for the Respondents that the application by the Appellant should have been by way of Notice substantially as provided for under Form 23 as prescribed under Order 13 Rule 3 (4) (b) of **CAR²** and not by Summons.

However, I am of the view that the non compliance by the Appellant is not fatal as to necessitate the dismissal of the application forthwith as this is a curable situation.

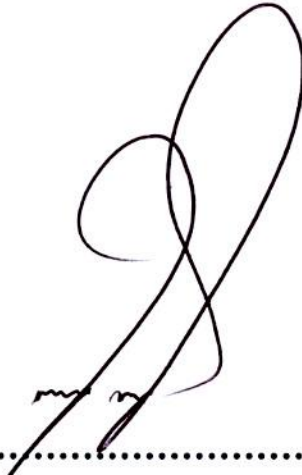
In order to safeguard and ensure that the Appeal is heard on its merits, I wish to invoke the provisions of Order 8 of **CAR²** which involves amendment of process and Order that the Appellant does amend the process by way of substitution of the Summons with the appropriate Notice within the next fourteen (14) days from the date hereof failure to which the Appellant's Application shall automatically stand dismissed.

Before I rest this ruling, I note that Counsel for the Respondent cited the case of **Chikuta v Chipata Rural District¹**. That case dealt with the issue of mode of commencement of actions. It is

therefore inapplicable in this situation where we are dealing with an interlocutory application.

I award costs of the application to the Respondent.

Delivered at Lusaka this 16th day of January 2017.



A handwritten signature in black ink, consisting of several large, overlapping loops and a long, sweeping tail that extends downwards and to the left. The signature is positioned above a horizontal dotted line.

Justin Chashi

COURT OF APPEAL JUDGE