

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

CAZ/08/15/2016

BETWEEN:

RAPHAEL MACHIPISA CHIMBANDI

EDITH CHIMANKATA KANYEMBA

AND

MAXWELL MUKWAKWA

CATHERINE CHIME



1ST APPELLANT

2ND APPELLANT

1ST RESPONDENT

2ND RESPONDENT

Before the Hon. Mrs. Justice J.Z. Mulongoti
In Chambers on the ^{19th} day of ^{January}, 2017.

For the Appellants: Mr. E. Khosa of Messrs Yalenga & Associates

For the Respondents: Mr. Wilfred Mwenya of Messrs Lukona Chambers

RULING

Cases referred to:

1. *D.E Nkhuwa v. Lusaka Tyre Services Ltd (1977) Z.R 43*
2. *Twampane Mining Co-operative Society Ltd v. E & M Storti Mining Ltd (2011) Vol.3 Z.R 67*

Legislation referred to:

Court of Appeal Rules SI No. 65 of 2016

This is an application for leave to file Notice of Appeal out of time. The appellants made the application by summons filed into court on 6th October, 2016 pursuant to Order 59 Rule 14(17) of the Rules of the Supreme Court (RSC) 1999 edition. The summons was supported by an affidavit sworn by Ray Lubinda a learner legal practitioner in the employ of Nganga Yalenga and Associates, the appellants' advocates.

He deposed that the appellants were supposed to file the Notice of Appeal within 30 days after delivery of the judgment on 19th August, 2016 but they only received the judgment on 6th September, 2016. Attempts were made to file the Notice of Appeal per exhibit "RL3" and to apply for a stay but the documents could not be signed because the Registrar was not in the office to sign. Thus, the delay in filing the Notice of Appeal is not deliberate and an extension of time in which to file it will not prejudice the respondents.

I set 12th October, 2016 as a date of hearing the application inter partes. Only the appellants' counsel attended court on that date. He informed the Court that the respondents were served with the pleadings pertaining to the application and the notice of hearing. However, counsel stated that he did not file an affidavit of service. The matter was adjourned to 16th November, 2016 after counsel intimated that he would be out of jurisdiction till the 14th of November, 2016.

On 16th November, 2016 both parties were represented. Counsel for the appellants, Mr. Khosa, informed the Court that the respondents were not objecting to the application and that the parties had consented and would file the necessary documents. The respondent's counsel confirmed this position. On 28th November, 2016 a consent summons was filed pursuant to Order 59 Rule 14 of the RSC. It was accompanied by a consent order duly signed by the parties and pending for the Court's signature. I set the 8th of December, 2016 as the date of hearing the consent summons but the parties did not turn up. I adjourned to 16th of December, 2016 and still no one turned up. I then reserved the matter for ruling.

Having perused Order 59/14/23 of the RSC, which provides for out of time applications, I am of the considered view that the application for consent summons and the consent order are misconceived. The RSC

do not provide for parties to consent to lodge an appeal or any other application out of time. This conduct by the parties is tantamount to circumventing the law. The RSC are clear that the applicant must state in the affidavit the circumstances that caused the delay or why the appeal was not made in time. The Court will then consider these and decide whether to allow the extension or not. I will therefore, not sign the consent order but instead consider the original application of leave to file the notice of appeal out of time.

I note that even this application was made pursuant to Order 59 Rule 14 of the RSC. It is trite law that in this country we resort to the white book (RSC) when there is a lacuna in our laws; which is not the case in casu. The Court of Appeal Rules (CAR) empower the Court to extend time within which to make an application, bring an appeal or take any step in or in connection with an appeal per Order XIII Rule 3 of the CAR, which is couched 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) *Bring an appeal; or*
 - c) *Taking any step in or in connection with an appeal.*

(2) *An application to the Court for extension of time in relation to a judgment or the date of expiration of time within which the application ought to have been made, shall be filed in the Registry within twenty one days of the judgement 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) *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 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.

I will therefore, in the interest of justice deem this application to have been made pursuant to the Court of Appeal Rules.

Let me state from the outset that an application for extension of time as the one before me, is in the discretion of the Court. As afore stated as a Court I must consider the reasons for the delay as well as the length of the delay. The Supreme Court has elucidated in several cases like **D.E Nkhuwa v. Lusaka Tyre Services Ltd**¹ that *“the principle to be applied is that whilst the granting of such extension is entirely in the discretion of the Court, such discretion will not be exercised in favour of the appellant without good cause. 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 have already alluded to the reasons, the appellants have stated that caused the delay. The appellants are contending that the judgment which was delivered on 19th August, 2016 was received by them on 6th September, 2016. Further, after that they tried to file a Notice of Appeal and an application for an order for a stay but the Registrar of the High Court was not in the office to sign. I must state that I find the reasons for the delay to be flimsy. The appellants do not state why they only received the judgment on the 6th September, 2016. They also do not state on what date they attempted to file the Notice of Appeal after receiving the judgment on 6th September, 2016. By that date (6th September, 2016) they still had time as the 30 days had not expired. The appellants have also not stated for how long the registrar was reportedly out of the office. If anything, the practice is such that if the registrar is out, the assistant registrar or someone is assigned to act in their position. Accordingly, I find that the reasons advanced by the

appellants are not sufficient to warrant me to exercise the discretion to extend time in their favour.

I have also considered the grounds of appeal in the draft memorandum of appeal exhibit 'RL2' and I am of the considered view that the prospects of success are minimal. I am fortified by the Supreme Court decision in **Twampane Mining Co-operative Society Ltd v. E & M Storti Mining Ltd²**. Consequently, the application for extension of time is denied. Each party to bear own costs.

Delivered at Lusaka this ^{19th} day of ^{January} 2017.



J.Z. Mulongoti
Court of Appeal Judge