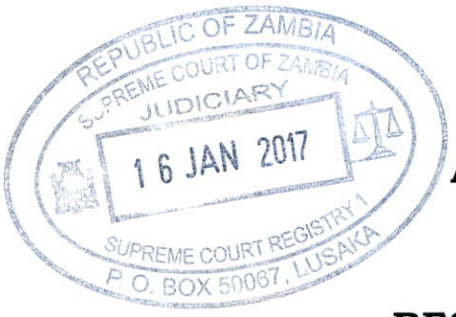
IN THE SUPREME COURT OF ZAMBIA **SCZ/118/2015**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:



FRANCIS MWANAKAYAYA **APPLICANT**

AND

ZCCM LIMITED **RESPONDENT**

CORAM: **Mwanamwamba DCJ, Kajimanga, and Kabuka JJS**
On the 20th day of October, 2016 and 16th January, 2017.

FOR THE APPLICANT: In Person, Mapulanga Village, Chief Chembe, Luano Boma.

FOR THE RESPONDENT: N/A
ZCCM Investment Holdings Plc
C/o Messrs Kaite Legal Practitioners.

JUDGMENT

Kabuka, JS, delivered Judgment of the Court.

Cases referred to:

1. Mugala v ZCCM Limited 1996/HN/ (Unreported)
2. D.E. Nkwuwa v Lusaka Services Limited (1977) ZR 43 (SC).

Legislation referred to:

1. The Supreme Court Rules, r. 12 (1), Cap.25.

By a ruling dated the 25th of August, 2015 a single judge of this court dismissed the Applicant's application in which he was seeking leave of this court, to file his appeal before the Industrial Relations Court, out of time.

The background to the matter is that by a ruling dated 15th April, 2015 the Industrial Relations Court had denied the Applicant leave to file his appeal out of time and the Applicant appealed against the ruling. On 26th August, 2015 a single judge of this court who heard the appeal upheld the decision of the Industrial Relations Court and dismissed the Applicant's application. In his Notice of Motion filed on 18th March, 2016, the Applicant has now applied before us, to reverse the said dismissal.

The Applicant however, claims that the Industrial Relations Court had infact granted him leave to file his appeal out of time. That a single judge of this court should not have made orders dismissing his applications made before him in which he was, allegedly, merely seeking to amend his Notice of Appeal, Memorandum of Appeal, and for leave to file his Record of Appeal out of time.

The facts on record show that, on the 16th of July, 1998 the Applicant filed a Complaint against the Respondent, his former employer, before the Industrial Relations Court. He was in that matter, claiming payment of full terminal benefits, compensation and any other relief the court would deem fit.

In its Answer denying the Applicant's claims, the Respondent contended that, six years earlier on 30th November, 1992, it had declared the Applicant redundant and paid him all his benefits. In 1996 other former employees of the Respondent, who were declared redundant together with the Applicant in 1992, commenced an action before the High Court in the case of **Mugala v ZCCM Limited (1).** Following a decision in the said case, the Applicant was in 1996 paid additional monies in form of compensation.

Upon hearing evidence on his Complaint for underpayment of terminal benefits, the Industrial Relations Court in a judgment delivered on 22nd March, 2006, found that the Applicant had recovered all the benefits to which he

was entitled through the redundancy payment the Respondent had made to him in 1992; and the additional payment of 1996 which was made following the High court decision in the *Mugala* case. The Applicant's Complaint was accordingly dismissed for lack of merit.

Facts on record also show that, the Applicant received his copy of the judgment dated 22nd March, 2006 soon after it was delivered. In explaining the reasons for the nine (9) years delay in lodging his application for leave to appeal out of time, the Applicant contended that, before the judgment was delivered he had migrated to settle in the Luano Valley. Whilst there, he became gravely ill and was so incapacitated by the illness that he could not travel to Lusaka to file his appeal. He only managed to do so in December, 2014 when he went to seek the services of Legal Aid. Thereafter, his application for leave to appeal out of time was filed in January, 2015.

The record shows that in a ruling rendered after hearing his application for leave to file his appeal out of time, the Industrial Relations Court noted that, the

Applicant acknowledged receiving a copy of the judgment soon after it was delivered on 22nd March, 2006, but failed to lodge the appeal or give instructions to someone to do so on his behalf during the period of the alleged prolonged illness. The court accordingly found that the delay was in the circumstances, inordinate and inexcusable and dismissed the application to file appeal out of time. Leave to appeal that decision to this court was however granted to the Applicant.

A single judge of this court who heard the appeal found that the Applicant had not convincingly explained the reasons for the delay. After considering that it had taken the Applicant nine (9) years to apply for leave to file his appeal out of time, the single judge was of the view that, the delay was indeed inordinate and inexcusable. He accordingly upheld the Industrial Relations Court ruling declining him leave and dismissed the Applicant's appeal.

The Applicant has now filed a motion before us in apparent renewal of his application for leave to file his appeal out of time, which was dismissed by the single judge.

Contrary to that position, we have noted that in the body of this Notice of Motion, the Applicant states that he is seeking for permission to amend the Notice of Appeal and Memorandum of Appeal 'already filed on record,' to include a claim that there are prospects of the appeal succeeding; which fact was not considered by the single judge when he, allegedly, dismissed the application to amend his Notice of Appeal; Memorandum of Appeal; and for extension of time within which to lodge his Record of Appeal.

In paragraphs 8-11 of his affidavit in support of the motion, the Applicant's contentions are to the effect that, his application to file appeal out of time was granted by the Industrial Relations Court in its ruling dated 16th April, 2015. Pursuant thereto, the Applicant on the 30th April, 2015 filed his Notice of Appeal and Memorandum of Appeal, exhibited as documents "FM1-3" to his said affidavit.

By separate applications dated 23rd and 24th June, 2015, the Applicant applied to amend the said documents and also for leave to file his Record of Appeal out of time. The applicant claims that these applications were both

heard by the single judge of this court who declined to grant them. According to the Applicant, he now wants us to reverse the single judge and grant him leave to amend these documents which according to his affidavit evidence, have already been filed.

Having perused the record, we are satisfied that what the ruling of the Industrial Relations Court dated 16th April, 2015 considered, was an application made by the Applicant for leave to file his appeal against a judgment that had been delivered nine (9) years earlier, on 22nd March, 2006. This is the application that was dismissed. He appealed against this dismissal and the single judge of this court who heard his appeal equally dismissed it. The Applicant has renewed his application for leave to appeal out of time which is the motion now before us. In the circumstances, the motion properly ought to have been one seeking to reverse the order of dismissal which was made by the single judge. This is not, however, the issue raised by the Applicant in his Notice of motion.

The Applicant in the Notice of motion before us, is addressing different issues. He states that he is seeking for permission to file his Record of Appeal out of time; and to amend the Notice of Appeal and Memorandum of Appeal to include the ground that, his appeal has prospects of success which issue was not considered by the single Judge when he dismissed the appeal.

We appreciate that the Applicant is acting in person and his approach appears to be based on his erroneous understanding that the Industrial Relations Court had granted him leave to file his appeal out of time which he had earlier sought, when in fact not. In view of the Industrial Relations Court's dismissal of his said application, no document relating to the appeal could have been properly filed on record, when leave to do so out of time had been declined by the court. We accordingly find that the purported Notice of Appeal and Memorandum of Appeal were irregularly filed and they are hereby expunged from the record.

We have perused the documents filed on record, heard the Applicant's arguments and submissions. We find the real issue which was before the single judge of this court and subject of his ruling appealed against by the Applicant still remains, whether the Applicant is entitled to an order for leave to file his appeal out of time, against the judgment of the Industrial Relations Court dated 22nd March, 2006. Rule 12 (1) of the Supreme Court Rules, Cap. 25 which allows a party extension of time for taking any step provides that:

> **"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 taking any appeal, notwithstanding that the time limited therefor may have expired, and whether the time limited for such purpose was so limited by order of the court or by these Rules, or by any written law."**

The purport of the above Rule has been considered by this court in a number of cases including that of **D.E. Nkwuwa v Lusaka Services Limited (2)** where we clarified the position in the following words:

> **".....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 take procedural steps within time, relief will be**

granted if the court is satisfied that circumstances demand it."

In the event, we find the question to be resolved in this motion is whether, the Applicant has brought before us sufficient material on the basis of which we can consider that the circumstances in which he found himself, excuse the delay.

According to his affidavit evidence, the explanation offered by the Applicant for his failure to file his Notice of Appeal for nine (9) years is that, he was ill and the illness left him immobile. As observed by the Industrial Relations Court, when considering this excuse, *'there was really no evidence'* (presumably medical evidence), placed before the court to support the Applicant's said claim. The court below further considered that, even if the said excuse were to be accepted, the Applicant still did not offer any explanation for not having sent someone else to lodge the Notice of Appeal on his behalf.

In considering the matter when it came before him, the single judge of this court also noted that, the Applicant did acknowledge his delay in failing to file the Notice of Appeal

timely and explained it by using the misfortune of his illness and the inaccessibility of the area where he is now residing. The judge however, found that the period of nine (9) years delay was still too long and that it was inordinate and inexcusable in the circumstances.

In arguing the matter before us, the Applicant has re-iterated the same position that Luano area is very remote and is inaccessible as it is surrounded by mountains. He has explained that the area was not serviced by Flying Doctor Services for seven years following the gunning down of their plane by the Mailoni brothers who had been terrorizing the area. For the said reason, his explanation before us was that, he had actually been receiving treatment from a Traditional Healer, a 'Dr. Mwape' from Luapula, thereby ruling out the existence of any medical documents to support his claim that he was ill. We note in this regard, that the Applicant has still offered no explanation as to why he did not send someone else to file his appeal on his behalf. This is notwithstanding that, at the hearing of the motion he confirmed before us that he received the

judgment of 22nd March, 2006 within one month of its delivery.

We have considered the arguments and submissions and sympathise with the Applicant for the predicament in which he found himself.

The facts of this case disclose that judgment was delivered on 22nd March, 2006 and at the hearing of the appeal, the Applicant confirmed he received it within a month of that date which was certainly by 30th April, 2006. The Applicant was entitled to appeal this judgment within thirty (30) days but did not do so until about December, 2014 when he applied for leave to appeal out of time. This was long after the time allowed for doing so had lapsed.

In the premises, the Respondent having paid him his dues, was clearly entitled to assume that the Applicant would not be appealing the judgment in issue. The Respondent's argument that the Applicant's delay to pursue the appeal for nine (9) years would be prejudicial to its defence, appears well founded in the circumstances and a single judge of this court who accepted that argument,

cannot be faulted for having come to the conclusion that the delay was inordinate and inexcusable. As we have said before in other cases, justice is not only for the Applicant but also for the Respondent.

We find that the delay of nine (9) years in the circumstances of this case is certainly inordinate and no justifiable explanation has been advanced before us to excuse it. These are the reasons that we are unable to sustain the motion. We accordingly uphold the single judge and the motion is hereby dismissed.

The matter having proceeded undefended, we find an appropriate order on costs is for each party to bear their own costs and we so order.

M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

C. KAJIMANGA
SUPREME COURT JUDGE

J.K. KABUKA
SUPREME COURT JUDGE