IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO. SCZ/8/49/2015**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

CHISANGA MUSHILI MULENGA **APPLICANT**

AND

ZESCO LIMITED **RESPONDENT**

Coram : **Mwanamwambwa DCJ, Musonda and Mutuna JJS**

On 23rd January 2017 and 3rd February 2017

For the Applicant : **Mr. A. Mbambara of Messrs Mbambara Legal Practitioners**

For the Respondent : **Mr. P. Mulenga, In-house counsel, ZESCO Limited**

J U D G M E N T

Mutuna JS, delivered the Judgment of the court.

Cases referred to:

1) *Nahar Investment Limited v Grindlays Bank International (Z) Limited (1984) ZR page 99*
2) *John Sangwa, Siweza Sangwa and Associates v Hotellier Limited and Ody's Works Limited SCZ/8/402/2012*

3) *Stanely Mwambazi v Morester Farms Limited (1977) ZR 108*

Other works referred to:

1) *Supreme Court Rules, Cap 25*
2) *The Supreme Court Practice, 1999 volume 1*

This is a motion by the Applicant in which he seeks to set aside a ruling of a single judge of this court delivered on 19th January 2016, by which she dismissed the Applicant's appeal for failure to file the record of appeal and heads of argument in accordance with the Rule 54 of the ***Supreme Court Rules***. In seeking to set aside the ruling of the learned single judge, the Applicant is also applying for leave of this court to file the record of appeal and heads of argument out of time.

The motion is supported by an affidavit sworn by one Anock Mbambara, and skeleton arguments.

The Respondent has opposed the motion by way of an affidavit and skeleton arguments.

The few undisputed facts leading up to the motion that we are able to discern from the record are that, on 6th March 2015 the Applicant filed a notice of appeal against a decision of the High Court. He did not subsequently file the

record of appeal and heads of argument in accordance with Rule 54 of the ***Supreme Court Rules***. Therefore, on 17th December 2015, the Respondent filed an application to dismiss the appeal before a single judge of this court. After the learned single judge heard the application she dismissed the appeal on the ground that there had been inordinate delay on the part of the Applicant in prosecuting the appeal. In making the said finding she relied on our decision in the case of ***Nahar Investment Limited v Grindlays Bank International (Z) Limited***[1], in which we held that Appellants who sit back until there is an application to dismiss their appeal before making an application for extension of time do so at their own peril; and in the event of inordinate delay or unfair prejudice to a Respondent, the Appellant can expect the appeal to be dismissed.

The Applicant is unhappy with the decision of the learned single judge, hence this motion, whose supporting evidence contends that the Applicant was unable to file the record of appeal on time because the High Court record from which the appeal emanates, was misplaced until sometime in August 2015. It also discloses the efforts made

by counsel for the Applicant to locate the record in the court below and have the notes on it typed after it was found. The evidence concludes by contending that counsel for the Applicant only realized that there was an application to dismiss appeal on 21st December 2015 when he was about to file an application for leave to file the record of appeal out of time.

The Applicant's arguments as contained in the skeleton arguments can best be described as submissions that were seeking to open the door to the relief of leave to extend time within which to file the record of appeal and heads of argument pursuant to rule 12 of the ***Supreme Court Rules***. The importance of this fact is apparent in the latter part of this judgment.

In summary, the arguments remind us of our jurisdiction under rule 12 of the ***Supreme Court Rules*** and Order 3 rule 5 of the ***Supreme Court Practice*** (***White Book***), to extend time for making an application. It was also contended that in cases similar to this one, we have in the past granted leave for the enlargement of time and merely condemned the defaulting party to costs. Reliance was made upon our decision in the case of ***John Sangwa,***

Simeza Sangwa and Associates v Hotellier Limited[2]. In doing so, a passage that was allegedly extracted from the said case was quoted which we have not found in the ruling. Counsel for the Applicant did concede at the hearing that there was no such passage in the said case and we have, therefore, not reproduced it in this judgment.

Concluding arguments on the motion, it was contended that there has been no undue delay by the Applicant as it was no fault of his that he failed to file the record of appeal in the prescribed time. To support this argument the Applicant selectively quoted a portion from our holding in the case of ***Stanley Mwambazi v Morester Farms Limited***[3], as follows:

> *"It is the practice in dealing with bonafide interlocutory applications for courts to allow traible issues to come to trial despite the default of the parties; where a party is in default he may be ordered to pay costs, it is not in the interest of justice to deny him the right to have his case heard".*

We were urged to allow the motion.

The evidence opposing the application led by the Respondent contended that the efforts made by the

Applicant to enlarge time for filing the record of appeal were only taken after the expiry of the prescribed sixty days while, the arguments in opposition explained the effects of Rules 54 and 55 in terms of the time for filing the record of appeal and consequences of default. They also reviewed our decisions in the ***Nahar Investment*** and ***John Sangwa*** cases on the consequences of default by a party in filing the record of appeal.

The arguments concluded by explaining that the Applicant had omitted to mention that the preferential treatment we prescribed in the ***Mwambazi*** case can only be granted to a defaulting party where there is no undue delay, mala fide or improper conduct.

We were urged to dismiss the application.

We have considered the ruling of the learned single judge, the evidence presented and the arguments by counsel.

As we have stated in the earlier parts of this judgment, the Applicant seeks an order to set aside the ruling of the learned single judge and a further order granting leave to file record of appeal and heads of argument out of time. He

has relied upon rule 12 of the ***Supreme Court Rules*** and Order 3 rule 5 of the ***White Book***. The Applicant also adduced evidence contending that his failure to file the record of appeal was occasioned by the loss of the record in the court below.

In the our decision of ***John Sangwa, Simeza Sangwa and Associates***[2] referred to us by Applicant we reminded counsel that we are alive to the provisions of rule 12 of the ***Supreme Court Rules*** and added that the rule is not intended to allow litigants and counsel to ignore the time limit prescribed for certain steps to be taken in proceedings before this court. The rule, in our considered view, is meant to be resorted to where circumstances arise whereby a party fails or anticipates that he will fail to comply with the rules as to time. This must be done promptly and not after the defaulter's memory has been jolted by the opposite party applying to dismiss the appeal. In expressing the foregoing views we considered what we stated in the ***Nahar*** case at page 82 as follows:

> *"We wish to remind appellants that it is their duty to lodge records of appeal within the period allowed, including any extended period. If difficulties are*

encountered which are beyond their means to control (such as the non availability of the notes of proceedings which it is the responsibility of the High Court to furnish), appellants have a duty to make prompt applications to the court for the enlargement of time ... Indeed, as a general rule, appellants who sit back until there is an application to dismiss before making their own frantic application for an extension, do so at their own peril. If the delay has been inordinate or if in the circumstances of an individual case, it appears that the delayed appeal has resulted in the respondent being unfairly prejudiced in the enjoyment of any judgment in his favour, or in any other manner, the dilatory appellant can expect the appeal to be dismissed for want of prosecution ..."

The foregoing passage spells out what we have come to accept as good practice in terms of ensuring that the rules as to time are adhered to and steps a party must take to ensure that he remedies any delay. Sadly, often times, as in this case, counsel do not abide by the said practice.

Counsel for the Applicant has advanced a very valid reason for the failure to comply with the time set for filing

the record of appeal which was initially loss of the record in the court below and the subsequent delay in typing of the notes on the record. This is a valid reason for a court to enlarge time. It was therefore, incumbent upon him, immediately the sixty days were drawing near, to apply for an extension of time given the problems that beset him. He instead chose to wait and see, which on the authority of the ***Nahar*** case, was at his client's peril who now must bear the full brunt of the delay. Further, we cannot accept the contention made in the motion that the learned single judge misdirected herself when she held that the Respondent's application to dismiss the appeal had merits in view of the guidance we have given above. The issue before the learned single judge was whether rule 54 of the ***Supreme Court Rules*** as to the time for filing of the record of appeal had been complied with. The evidence on record revealed that no such record of appeal had been filed and no proper reasons were advanced for the delay. Further, there was no application filed before or after the application to dismiss appeal was filed by the Applicant, as in the ***John Sangwa*** case, for leave to file record of appeal and heads of argument out of time. The learned single judge's

hands were, therefore, tied to considering only the application to dismiss appeal for want of prosecution.

We do not also accept the argument that there was no inordinate delay. The learned single judge found that there was such inordinate delay in view of the fact that there was a time lapse of seven months on the part of the Applicant between the expiry of the sixty days, prescribed for filing of the record of appeal, and application to dismiss appeal for want of prosecution. To the extent we have said that an application for enlargement of time must be made promptly, i.e, immediately before or soon after expiry of the sixty days, we cannot fault the finding by the learned single judge that there was inordinate delay.

The net effect of our findings is that there is no merit in the motion and we accordingly dismiss it with costs. The same are to be taxed in default of agreement.

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M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

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M.C. MUSONDA, SC
SUPREME COURT JUDGE

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N.K. MUTUNA
SUPREME COURT JUDGE