

(1140)

SELECTED JUDGMENT NO. 32 OF 2017
IN THE CONSTITUTIONAL COURT OF ZAMBIA

Appeal No.9 of 2016
2016/CC/A009

HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

IN THE MATTER OF: **LOCAL GOVERNMENT ELECTIONS RELATING TO MULONGA WARD HELD IN ZAMBIA ON THE 11TH AUGUST 2016.**

IN THE MATTER OF: **THE CONSTITUTION OF ZAMBIA CHAPTER 1 OF THE LAWS OF ZAMBIA ARTICLE 46, 54 AND 73.**

IN THE MATTER OF: **THE ELECTORAL PROCESS ACT NO. 35 OF 2016 SECTIONS 81, 82, 83, 84, 85, 86, 87, 89, 92, 94, 97, 98, 99, 100 AND 110**

AND

IN THE MATTER OF: **THE ELECTORAL CODE OF CONDUCT 2016**

BETWEEN:
INONGE MUBIKA
AND
MUKELABAI PELEKELO



APPELLANT

RESPONDENT

CORAM: **Chibomba, PC, Sitali, Mulenga, Mulembe and Munalula, JJC on 8th December 2016, on 26th January 2017 and on 28th July 2017**

For the Appellant: **Ms. M. Mushipe of Mushipe and Associates**
For the Respondent: **Mr. E. M. Eyaa and Mr. J. Tembo, of K.B.F Partners**

RULING

Munalula, JC, delivered the ruling of the Court

Cases referred to:

1. Kapoko v The People 2016/CC/0023
2. Hakainde Hichilema and Another v Edgar Chagwa Lungu and Others 2016/CC/0031
3. Finnegan v Parkside Health Authority [1998] 1 All E.R. 595
4. D. E. Nkhuwa v Lusaka Tyre Services Limited (1977) Z.R. 43 (S.C.)
5. New Horizon Printing Press Limited v Waterfield Estates Limited and Commissioner of Lands (2012) 1 Z.R. 268
6. Twampane Mining Cooperative Society Ltd v E AND M Storti Mining Ltd (2011) 3 Z.R. 67

Legislation referred to:

The Constitution of Zambia (Amendment) Act No. 2 of 2016
The Constitutional Court Act No.8 of 2016
The Constitutional Court Rules S.I. No. 37 of 2016, O.10 r.2; O.15 r.7

Works referred to:

The Rules of the Supreme Court, 1999 edition (White Book)

This Ruling relates to two applications by the Appellant. The first application was made on 8th December 2016. The second application was made on 26th January 2017 by Notice of Motion dated 29th December 2016. For convenience we will first consider the second application which is premised on the first application.

By way of background, the first application is for extension of time in which to file the record of appeal and heads of argument, as the record was filed out of time and the heads of argument had not been filed at all. After hearing the Application, the Court adjourned for Ruling. Before the Court could deliver the Ruling, the Appellant filed the second application seeking

(1142)

to arrest the pending Ruling in order to pave way for a formal application under the Constitutional Court Rules, published as S.I. 37 of 2016 (hereinafter referred to as "the Rules"), seeking the same relief of leave to file the record of appeal out of time.

The second application made by way of motion dated 29th December, 2016 and filed under Order X rule 2 and Order XV rule 7 of the Rules, seeks, and we quote:

- 1. An order to discharge order adjourning the matter for ruling pending the hearing of an application to file record of appeal out of time.***
- 2. An order for extension of time in which to file into Court the record of appeal.***

The parties were heard on 26th January 2017. Having heard the parties and after all due consideration we have resolved as follows; that the second application for extension of time in which to file into Court the record of appeal has no merit as there is already an application before the

(1143)

Court made on 8th December, 2016 for the same relief. The application to discharge the order adjourning the matter for ruling also has no merit and it falls away as a consequence of the failure of the renewed application for extension of time. The second application is therefore dismissed in *toto*.

We now move to consider the first application for leave to file the record of appeal and heads of argument out of time made in Court on 8th December 2016. The pertinent facts leading to the Application are as follows: The Appellant filed a notice of appeal together with the memorandum of appeal, in the Constitutional Court Registry on 12th October, 2016. The record of appeal was filed on 14th November, 2016. It did not include the Appellant's heads of argument. When the matter came up for hearing on 8th December 2016 a preliminary issue was raised on the competence of the appeal due to noncompliance with the format and time limits set out in Order XI of the Rules.

After being prodded by the Court, counsel for the Appellant conceded that the record of appeal was filed out of time and the heads of argument had not been filed at all. She said she was unable to file the

(1144)

record of appeal and written heads of argument within the 30 days provided under the Rules or to make an application for extension of time due to ill-health. She pleaded that the court should treat the failure to file the record of appeal together with the heads of argument, on time, as a technicality falling within Article 118(2)(e) of the Constitution of Zambia as amended by Act No.2 of 2016 (hereinafter referred to as the Constitution). She apologised for the negligence in prosecuting the case and sought leave of the Court to file the record of appeal and heads of argument out of time.

In his *viva voce* response, counsel for the Respondent argued that the Application was incompetent before the Court. Further that the requirement to file a record of appeal together with heads of argument in time is mandatory and not a technicality. Counsel stated that the Appellant cannot be given leave to file a record of appeal out of time, when a record of appeal was before the Court, and it had not been withdrawn. Counsel further argued that the Appellant had engaged several other counsel who were on record, and who could have filed the record of appeal within the prescribed time if counsel was unwell. Respondent's counsel therefore prayed that the Application be dismissed.

(1145)

In her brief reply, counsel for the Appellant submitted that she was relying on the Constitution as the supreme law which supercedes the Rules. In her view, Article 118(2)(e) is not an ornament and should supercede the Rules so that the case can be heard on the merits and the procedural technicality cured. She also referred us to the need to enforce Article 18 on the right to be heard.

We have carefully perused the record on file and find that the record of appeal was filed on Monday, 14th November, 2016 when it should have been filed by Friday, 11th November, 2016. By virtue of Order XV rule 6, the intervening days of Saturday 12th November and Sunday 13th November are excluded days that do not count in computing the extent of the delay. The delay is one day, but it is nevertheless a breach of Order XI rule 5. It is also on record that the skeleton arguments were not filed at all.

We begin with the argument that Article 118 (2) (e) should take precedence over the Rules. For convenience Article 118 (2) (e) reads:

118. (1) The judicial authority of the Republic derives from the people of Zambia and shall be exercised in a just manner and such exercise shall promote accountability.

(1146)

(2) In exercising judicial authority, the courts shall be guided by the following principles:

.....

(e) justice shall be administered without undue regard to procedural technicalities;

.....Whilst we agree with counsel for the Appellant that the right to be heard and the principle that matters should be heard on the merits are pillars of our Constitution and system of adjudication, we see no reason to invoke the provisions of Article 118(2)(e) in this case, for two reasons. First, Article 118 (2) (e) should be used appropriately. It is trite that in answering legal questions, the starting point is the relevant rule of law or procedure. In this case it is Order XI rule 5, which like other rules of this Court, derives authority from the Constitutional Court Act No. 8 of 2016 (hereinafter referred to as the Act), which in turn derives its authority from the Constitution by virtue of Articles 120 and 272 of the Constitution which read as follows:

120. (3) The following matters shall be prescribed:

(a) processes and procedures of the courts;

and

272. Parliament may enact legislation to give effect to an Article or a provision in this Constitution which—...

(b) provides for a process or procedure to be taken, followed

(1147)

or prescribed;...*(emphasis added)*

Section 31 of the Act reads in part: **31. (1) The Chief Justice may by statutory instrument, make rules for regulating -**

(a) the practice and procedure of the Court, and with respect to appeals, or reviews by, the Court;

(b) the time within which any requirement of the rules is to be complied with;

(emphasis added)

The Rules may in terms of ranking lie at the bottom of the legal hierarchy but they are important means to realising the substantive provisions of the Constitution both in letter and spirit. They operationalize the Constitution including Article 118 and enable the Court to function effectively. By following the Rules, this Court is able to dispense justice in an orderly and overtly fair manner. In short, the Rules have their own purpose to serve. As we stated in ***Kapoko v The People***¹ Article 118 (2) (e) is not intended to do away with court rules and procedures.

(1148)

Secondly, we wish to state that Article 118(2) (e) is not the only principle at stake. Specifically the principle of timely justice found in Article 118 (2) (b) must also be considered in this case. Article 118 (2) (b) reads as follows:

118. (1) The judicial authority of the Republic derives from

the people of Zambia and shall be exercised in a just manner and such exercise shall promote accountability.

(2) In exercising judicial authority, the courts shall be guided by the following principles:

.....

(b) justice shall not be delayed;

.....

The application before the Court is to file process out of time in an election petition appeal where time is of the essence. The majority judgment in ***Hakainde Hichilema and Another v Edgar Chagwa Lungu and Others***² shows the importance that this Court attaches to the timely disposal of election petitions.

Be that as it may, a distinction must be drawn between a presidential election petition and a local government petition such as the one on which this Application is based. There is no time frame given in the Constitution, the Act or the Rules for the disposal of appeals relating to local government

(1149)

election petitions. This means there is a measure of flexibility. We are fortified in this, by the Rules themselves. Order XV rule 7 states that this Court may extend time limited by the Rules except where the time limit is in the Constitution. In our view, this matter should have been argued on the basis of Order XI rule 5 read in conjunction with other rules regulating the appeal process in order to determine whether this Court can allow the Appellant to file the record of appeal and skeleton arguments out of time. The Rules are not only the correct starting point but they also contain adequate flexibility.

We have considered Order XI rule 5 in relation to Order XV rule 7 and in our view, the provisions are in line with case law which gives the Court a discretion to enlarge time where the circumstances so demand and where the application for such enlargement is not inordinately tardy. Order XI rule 5 reads as follows:

5. Subject to Rule 4 and any extension of time, the appellant shall, within thirty days after filing a notice of appeal, lodge the appeal by filing in the Registry twenty hard copies of the record of appeal together with heads of argument and an electronic copy of the record of appeal.

(Emphasis added)

(1150)

The rule on the face of it appears to be couched in mandatory terms. It provides for thirty days in which to file the heads of argument and record of appeal with effect from the date of filing the notice of appeal. However it does not shut out the possibility of an extension of the thirty day period provided. Indeed, Order XV rule 7 allows this Court to extend time by providing as follows:

7. The Court may extend time limited by these Rules, or by a decision of the Court, except where time is specifically limited by the Constitution.

(Emphasis added)

To elaborate what is meant by extension of time in Order XV rule 7, we considered the Rules of the Supreme Court, 1999 (White Book). Order 3 rule 5 of the White Book and the note thereto indicates that the court has a discretion to extend time in the interest of justice both before and after the time within which to act has run out. It reads:

(1) The court may on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction to do any act in any proceedings.

(1151)

(2) The court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

(Emphasis added)

We have perused both Zambian and English authorities on this subject and find that they support the court's discretion to extend time subject to certain considerations. Primarily, there must be no inordinate delay and there should be good reason for the failure to meet the deadline.

In ***Finnegan v Parkside Health Authority***,³ Hirst, LJ, having traversed the English authorities on the subject, stated that in dealing with matters of extension of time,

"...the starting point is RSC Ord 3 r 5 itself, which explicitly confers the widest measure of discretion in applications for extension of time, and draws no distinction between various classes of cases."

His further statement in the same case is that:

"...the Mortgage Corp case [1996] TLR 751...follows precisely the same line of principle, and again expressly rejects the notion that the absence of a good reason is always and in itself

(1152)

sufficient to justify the court in refusing to exercise its discretion; that case moreover lays down clear guidelines requiring the court to look at all the circumstances, and to recognise the overriding principle that justice must be done."

Coming to our local jurisprudence, we find the courts are more circumspect but nevertheless accept that courts have discretion to allow an extension of time. In the case of *D. E. Nkhuwa v Lusaka Tyre Services Limited*,⁴ Gardner Ag DCJ, as he then was, stated that *"...whilst the granting of such an extension is entirely in the discretion of the court, such extension will not be exercised without good cause"*. In *New Horizon Printing Press Limited v Waterfield Estates Limited and Commissioner of Lands*⁵, Matibini J. accepted the reasoning in the Nkhuwa case that:

"...rules of court must prima facie be obeyed. And in order to justify a court in extending the time in which some step-in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If this were not the case, then it follows that a party in breach would have an unqualified right to extension of time. And this will in turn defeat the raison d'etre for the rules of court.

(Emphasis added)

(1153)

Further, in the case of *Twampane Mining Cooperative Society Ltd v E AND M Storti Mining Ltd*,⁶ Muyovwe, JS, stated that:

"...the appellant did not merit an extension of time because it sat on its rights - by not appealing within the prescribed period; by not filing its application for extension of time promptly..."

We now return to the specific circumstances of the application before us. We have taken note that the appeal in this case is being heard in a new Court with new appeal rules that set up a more onerous regimen for the filing of process such as the requirement that heads of argument must be filed together with the record of appeal within thirty days. In comparison, the Supreme Court allows sixty days. Furthermore, and as noted already, the record of appeal was in this case filed only one day late. As soon as the Appellant's counsel became aware that the record of appeal was late, she applied for leave to file out of time. We further take note that the Respondent did not take advantage of Order XI rule 6 to apply for dismissal of the case. That rule reads:

6. If an appeal is not lodged as provided in rule 5 the Respondent may make an application to the Court for an order

(1154)

dismissing the appeal for want of prosecution, or alternatively for such other order with regard to the appeal as the Respondent may require.

The Respondent's counsel only reacted to the late filing of the record after the Court brought it to the attention of the Appellant and the Appellant's counsel had made an application for leave to file out of time. The Respondent's inconvenience, therefore, does not appear to be so great that it cannot be compensated by an order for costs should the main matter be resolved in his favour. Taking into account all the circumstances of the case and the fact that there was no inordinate delay between the lapse by the Appellant and the attempt to remedy the defect, we are satisfied that this is an appropriate case in which to exercise our discretion to allow the Appellant to file the record of appeal and skeleton arguments out of time. Leave is accordingly granted.

We also order that the record of appeal and heads of argument be filed within 7 days of the date of this Ruling; in default of which the entire

(1155)

appeal shall stand dismissed. Costs shall be in the cause.



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H. Chibomba
President
Constitutional Court



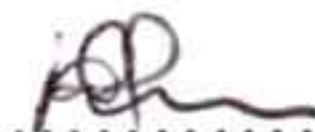
.....
A.M. Sitali
Constitutional Court Judge



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M.S. Mulenga
Constitutional Court Judge



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E. Mulembe
Constitutional Court Judge



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M.M. Munalula
Constitutional Court Judge