IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 212/2014**

HOLDEN AT KABWE

(CIVIL JURISDICTION)

BETWEEN:

DONALD CHILOLO **APPELLANT**

AND

SEKOU DIAWARA GALEDOU *(T/A BAKORE SHOP)* **RESPONDENT**

CORAM: Wood, Kajimanga and Musonda, JJS.

On 1st August, 2017 and 17th August, 2017.

For the Appellant: *No Appearance*

For the Respondent: *No Appearance*

JUDGMENT

Wood JS delivered the judgment of the Court.

Legislation referred to:

1) *Rule 51 of the Supreme Court Rules, Cap 25 of the Laws of Zambia.*

Works referred to:

1) *Order 62 of the Rules of the Supreme Court, 1999 Edition.*

This is an appeal against a ruling of the High Court dismissing the appellant's application to stay the respondent's taxation proceedings against the appellant.

In 2008, the appellant commenced cause number 2008/HK/291 (the "first action") against the respondent for mesne profits. The appellant obtained judgment, levied execution and seized the goods which were in the shop he had let out to the respondent. In 2011, the respondent issued a writ against the appellant in cause number 2011/HK/286 ("the second action") for K18,180.00 for goods seized but stolen or destroyed. Judgment was entered in favour of the respondent in the second action for K18,180.00 together with costs on 27th December, 2013. On 19th May, 2014, the respondent filed a notice of taxation and a bill of costs for taxation. This application was resisted on the ground that no leave was obtained and in any event the same was hopelessly out of the three months time limit set by Order 62 rule 29 RSC for filing an application for taxation of costs. The Deputy Registrar rejected the appellant's argument on 13th August, 2014. This prompted the appellant to file a notice of appeal to a Judge at chambers on 21st August, 2014. On 6th October, 2014, the Judge agreed with the Deputy Registrar and dismissed the appeal on taxation, hence this appeal.

The appeal is predicated on one ground namely, that the trial court erred in law and in fact when it found that the respondent had actually complied with Order 62 rule 29 RSC by filing the bill of costs on 19th May, 2014 over a judgment which was delivered on 27th December, 2013 when that was not the case.

The appellant argued that from the heading of the bill of costs, it is clear that the bill of costs is premised on the judgment of the court delivered on 27th December, 2013. The bill of costs was filed five months after delivery of the said judgment and no leave was sought to file it out of time. It was further contended by the appellant that the learned judge fell into error when he held that it would not only have been discourteous to proceed to taxation in the face of an application to stay judgment but that the appellant herein would have been prejudiced. This was so because rule 51 of the Supreme Court Rules, Cap 25, of the Laws of Zambia provides that an appeal shall not operate as a stay of execution.

Rule 51 reads as follows:

> *"An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the high court or the court so orders and no intermediate act or proceeding shall be invalidated except so far as the court may direct."*

The appellant argued that the application for a stay of execution of the judgment in the court below was anchored on a pending application to appeal out of time. In the light of rule 51, both the application for leave to appeal out of time and the application to stay execution of the judgment of 27th December, 2013 could not operate as a stay of execution or of proceedings. These two pending applications were not in any way a legal basis on which the delay could be anchored. The appellant further argued that the costs which attached to the later ruling of the lower court dated 29th April, 2014 had their own three months grace period within which they ought to have been filed and were in fact duly filed by the respondent.

In concluding his argument, counsel quoted Order 62/29/2 RSC on the effect of non-compliance. Order 62/29/2 states that:

"This rule sets out the procedure by which taxation proceedings are commenced in the Supreme Court Taxing Office. It is essential that the requirements of rule 29 are strictly followed. Failure to comply will result in a penalty and possibly return the bill to the bottom of the queue.

Counsel argued that the words *"It is essential that the requirements of rule 29 are strictly followed"* clearly mean that this rule is not a regulatory rule but a mandatory one which must be adhered to and any party who does not adhere to mandatory rules does so at his own peril.

The respondent has conceded that taxation proceedings must be commenced within three months after the judgment direction, order, award or other determination as stated in O.62, r.29 RSC but has nevertheless argued that the period starts to run after the judgment, direction, order, award or other determination is signed or otherwise perfected. The respondent argued that the judgment of 27th December, 2013 was not perfected as it was subsequently subjected to a number of interlocutory applications by the appellant himself. The interlocutory applications were, according to the respondent, encumbrances that clearly stopped the respondent from

proceeding with the taxation proceedings and it would have been discourteous to the court to proceed and file a taxation application every time the appellant's interlocutory application was dismissed with costs. In the circumstances, the court below did not err in deciding as it did because the appellant orchestrated numerous applications subsequent to the judgment which rendered it difficult for the respondent to file taxation proceedings. The respondent urged us to dismiss the appeal as it was an abuse of court process and also a futile attempt by the appellant to deny the respondent the enjoyment of the fruits of his judgment.

This appeal has raised three issues. The first issue is whether or not the respondent should have been allowed to file his bill of costs for taxation out of time and without leave. The second issue is whether or not the judgment was perfected and the third and last issue is whether common courtesies extended to the appellant by the respondent given the applications made by the appellant, overrode the need for compliance with the rules in connection with a bill of costs for taxation.

It can be seen from the heads of argument of both parties that the parties are agreed that the time limit set in O.62, r. 29 RSC for a taxation application is within three months after the judgment, direction, order, award or other determination was entered, signed or otherwise perfected. The only difference in interpretation relates to whether the interlocutory applications automatically extended the time within which the application for taxation should have been made. The solution to this difference in interpretation can be found in O.62, r.8 RSC.

The relevant part of O.62, r.8 states that:

"8.- *(1) Subject to paragraph (2), the costs of any proceedings shall not be taxed until the conclusion of the cause or matter in which the proceedings arise.*

(2) If it appears to the Court when making an order for costs that all or any part of the costs ought to be taxed at an earlier stage it may, except in a case to which paragraph (3) applies, order accordingly.

(3) No order may be made under paragraph (2) in a case where the person against whom the order for costs is made is an assisted person within the meaning of the statutory provisions relating to legal aid.

(4) –

(5) –

(6) –

(7) –

(8) –

(9) Where it appears to a taxing officer on application that there is no likelihood of any further order being made in a cause or matter, he may tax forthwith the costs of any interlocutory proceedings which have taken place."

The effect of O.62, r.8 is explained in Order 62/8/1 RSC as follows:

"62/8/1 Effect of rule – This rule states the new principle that costs are not to be taxed until the conclusion of the proceedings irrespective of the stage in the proceedings at which the order is made unless the court expressly orders an earlier taxation. In such cases, it will order "Taxation forthwith."

Thus the decision in Allied Collection Agencies v. Wood [1981] 3 All E.R. 176 has in effect been reversed.

"... a cause or matter... is concluded when the court in question has finally determined the matters in issue, whether or not there is an appeal from that determination", per Saville J. Rafsanjan Pistachio Producers Corporation v. Bank Leumi (U.K.) Ltd November 4, 1992, Review of Taxation (unrep.).

It is quite apparent from our reading of this rule that a court can order costs to be taxed even before the whole matter is concluded by the delivery of a judgment. Even in cases where

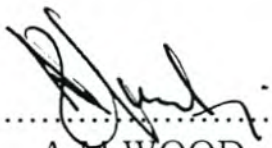
there is an appeal, costs can, according to O.62/3/10 RSC, be taxed and paid to the plaintiff's advocate on his personal undertaking to return the same if the appeal be successful.

Common courtesies between practitioners are laudable but they do not override rules of procedure which are meant to provide for the conduct of litigation in an orderly and predictable manner. We do not therefore agree with the conclusion reached by the learned judge in his ruling that because there were other applications at the behest of the appellant which were pending, it would have been discourteous for the respondent to proceed to taxation.

The respondent has argued that the judgment had not been perfected and as such he could not proceed to taxation. According to O.62/29/3 RSC, the term "perfected" means the date upon which the order was authenticated by receiving the seal of the court. It also means that a party has protected his rights in the judgment by giving notice that he intends to pursue collection. Thus a judgment must be recorded to perfect it. Recording the judgment typically requires obtaining a writ of *fieri*

facias. We disagree with the argument that it was not perfected for two reasons. Firstly, the matter was concluded within the meaning of O.62, r.8 RSC as judgment was entered in favor of the respondent and secondly, the respondent took no steps to apply for extension of time as provided by O.62, r.21 RSC. The respondent cannot, therefore, rely on the argument that he was constrained by the numerous interlocutory applications from proceeding to apply for taxation of his costs as he was bound to comply with the limitation period or in the alternative, to apply for an extension of time within which to file his application for taxation of his costs.

For the reasons we have given above, we allow this appeal and set aside the ruling of the lower court with costs to the appellant to be agreed or taxed in default of agreement both here and in the court below.



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A.M.WOOD

SUPREME COURT JUDGE

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C. KAJIMANGA
SUPREME COURT JUDGE

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M. MUSONDA, SC
SUPREME COURT JUDGE