

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

CAZ/08/183/2017

BETWEEN:

RICHARD M. CHIZYUKA
RIBERCM LIMITED

AND

FIRST ALLIANCE BANK LIMITED



1ST APPLICANT
2ND APPLICANT

RESPONDENT

Before the Hon. Mrs. Justice J.Z. Mulongoti
In Chambers on the 15th day of September, 2017.

For the Applicants:
For the Respondent:

Mr. M. Haimbe of Sinkamba Legal Practitioners
Mr. M. Achiume of M.K. Achiume & Associates

R U L I N G

Cases referred to:

1. *Clementina Banda v. Boniface Mudimba* (2011) Z.R. 162 Vol. 3
2. *Stanbic Bank (Z) Limited v. Savenda Management Services Limited*
2016/CAZ/08/040
3. *Ruth Kumbi v. Caleb Robson Zulu* (S.C.Z Judgment No. 19 of 2009)
4. *Nkhuwa v. Lusaka Services Limited* (1977) Z.R. 43

Legislation referred to:

1. *Court of Appeal Rules, Statutory Instrument No. 65 of 2016*
2. *Court of Appeal Act No. 7 of 2016*

This ruling relates to two applications made by the applicant simultaneously. The first application is for leave to appeal out of time against the Ruling of the High Court dated 5th June, 2017. The second application is for an order to stay execution or sale of stand no. 24, Jesmondine, Lusaka (the property) pending appeal.

At this stage it is necessary to say a little about the background to the two applications. The respondent commenced a mortgage action against the applicants in the High Court and obtained judgment in its favour dated 5th May, 2016. The judgment gave the applicants 30 days within which to settle their indebtedness failing which the respondent would be entitled to foreclose and take possession of the mortgaged property. The applicants defaulted and attempted to renegotiate repayment terms with the respondent.

In September, 2016, the respondent took out a writ of possession of the property which was the subject of the mortgage action. On 11th October, 2016, the applicants applied to stay execution pending an application, dated (10th October, 2016) to set aside the writ of possession. The applicants obtained an ex parte order for stay.

After the inter partes hearing, the court below dismissed the application for stay on 5th June, 2017 stating that the application to set aside the writ of possession had no prospects of succeeding. Accordingly, the ex parte order for stay was discharged. The applicants then renewed their application for stay before the Court of Appeal pursuant to Order VII Rule 1 (1) of the Court of Appeal Rules. My learned brother Justice Sichinga dealt with that application. By his Ruling dated 5th July, 2017, the application was dismissed for being misconceived on the ground that there

was no appeal pending from the Ruling or Judgment of the Court below for the Court of Appeal to assume jurisdiction.

The first application for leave to file notice of appeal out of time is made pursuant to Order XIII Rule 3 (3) of the Court of Appeal Rules (C.A.R) by summons and affidavit sworn by the 1st applicant, Richard M. Chizyuka. The gist of his affidavit is that the applicants are dissatisfied with the decision of the High Court and wish to exercise their right of appeal but they have run out of time. That the failure to lodge the appeal within the stipulated period is not deliberate but due to the fact that upon receiving the High Court Ruling of 5th June, 2017, exhibited as 'RMC2' of the affidavit, the applicants opted to renew the application for stay and by the time the Ruling was rendered, they had run out of time within which to lodge the appeal. The decision to renew the application and not to appeal immediately was premised solely on the advice of their previous counsel on record. The delay is not inordinate and that the respondent will not be prejudiced if leave to lodge the appeal out of time is granted.

The second application to stay execution or sale of stand no. 24, Jesmondine, Lusaka is also made by summons supported by an affidavit deposed by the 1st applicant. He deposed, inter alia, that the applicants intend to appeal against the Ruling of 5th June, 2017 by which the ex parte order for stay was discharged. That the Ruling and the reasons for filing the Notice of Appeal and Memorandum of Appeal are as stated in the affidavit in support of summons for leave to appeal out of time. The intended appeal has prospects of success and the delay is genuinely arising from the erroneous advice of their counsel then. The appeal is premised on the fact that the respondent assured the applicants that it would not enforce judgment if they paid an amount of money towards the

debt but the respondent filed a writ of possession despite that assurance. Further, that if the stay is not granted, the respondent will be at liberty to dispose of the property such that the application to appeal out of time may be rendered nugatory.

Learned counsel for the applicants filed skeleton arguments in support of both applications. It is contended that the Ruling dated 5th June, 2017 will be reversed due to the assurance the respondent gave to the applicant that it would not execute the judgment if the applicants fulfilled a condition as this amounts to a waiver which should act as an estoppel. The case of **Clementina Banda v. Boniface Mudimba**¹ was cited as authority.

Citing Order XIII Rule 3 (2) and the case of **Stanbic Bank (Z) Limited v. Savenda Management Services Limited**², it is submitted that there are circumstances in this case which warrant the grant of leave to appeal out of time. Counsel also relied on the case of **Ruth Kumbi v. Caleb Robinson Zulu**³ that a stay should be granted to maintain the status quo. It is the further submission of counsel that the application for leave has merit and if the stay is not granted, it will be rendered nugatory.

The respondent filed an affidavit in opposition to summons for leave to file application to stay execution pending an application to extend time in which to appeal. The deponent is Steven Zulu its Credit Manager. Essentially, the respondent oppose both applications on the promise that the applications ought to have been made before the High Court as it is the Court which may grant leave to appeal out of time or stay of execution pending appeal to this Court.

Learned counsel for the respondent also filed written arguments in which it is reiterated that both applications must be made in the High Court as the procedure for appealing is comprehensively provided for under Order X of the C.A.R.

At the hearing, the applicants were represented by Mr. Haimbe while the respondent was represented by Mr. Achiume. Both counsel relied on the affidavits and the skeleton arguments. Mr. Haimbe submitted *viva voce* that the Ruling of the High Court already granted leave to appeal. He added that the provisions of Order XIII Rule 3 (2) and Rule 3 (3) of the Court of Appeal Rules are clear that this Court has authority to extend time for making an application or bringing an appeal.

I have considered the affidavit evidence and the submissions by counsel.

I must state from the outset that the Ruling which the applicants intend to appeal against expressly granted them leave to appeal. Problems arose when the applicants decided to erroneously pursue another course of action instead of appealing within the prescribed period if indeed they were aggrieved by the Ruling of the court below. However, as rightly argued by their new counsel Mr. Haimbe, since leave was already granted, this Court has jurisdiction to deal with the application for leave to extend the time for bringing an appeal.

Section 13(3) of the Court of Appeal Act provides that:

“13. (3) The Court may grant leave to appeal where it considers that—

(a) The appeal raises a point of law of public importance;

(b) It is desirable and in the public interest that an appeal by the person convicted should be determined by the Supreme Court;

(c) The appeal would have a reasonable prospect of success; or

(d) There is some other compelling reason for the appeal to be heard.”

Of relevance here is section 13(3)(a), (c) and (d). In order for the Court to grant leave to appeal, the applicant ought to show that the appeal would have reasonable prospects of success or that there are some other compelling reasons for the appeal to be heard.

Additionally, Order XIII Rule 3 upon which the application for extension of time is premised states that the Court may extend time for sufficient reason. Thus, the grant or refusal to extend time for taking any step or bringing an appeal is discretionary. Of course this discretion must be exercised judiciously. In order to extend the time for bringing an appeal, the applicants must demonstrate that there is some material to compel this Court to exercise its discretion in their favour.

We stated in **Stanbic Bank (Z) Limited v. Savenda Management Services Limited**, also cited by counsel, that in determining an application for extension of time within which to appeal, the Court will have regard to the circumstances of the delay, the reasons for the delay, and the length of the delay. In certain instances, the merits of the proposed appeal will be considered.

In casu, the Ruling which the applicants seek to appeal against was delivered on 5th June, 2017. The application for leave and stay were filed on 17th July, 2017. The reason for the delay is that they were erroneously

advised by counsel. I am of the considered view that this reason must be considered together with other reasons and circumstances of the case to determine if there is sufficient reason to warrant the grant of leave to appeal out of time.


The deponent of the affidavits supporting the application stated that the proposed appeal is contained in the affidavit. However, upon perusal of the record and said affidavit I did not see the Memorandum of Appeal and the Notice of Appeal. Be that as it maybe, it is clear that the applicants defaulted on the mortgage facility and are owing the respondent. The applicants contend that they were given assurances after the foreclosure order, that the respondent would not enforce the judgment if they paid some money. Perusal of the affidavits in support shows that the applicants have not demonstrated that such assurances were made. Even assuming they were, the applicants have still not shown that they made any payments towards fulfilling the alleged condition to avoid execution. Therefore, I am of the considered view, that there are no prospects of success of the proposed appeal.

I have also scrutinised the writ of possession and find that there are no *prima facie* grounds to warrant it being set aside. As earlier pointed out, this Court is entitled to preview the merits in order to determine whether there are any prospects of success of the proposed appeal. This Court will not exercise its discretion to extend time without good cause. I am fortified by the decision of the Supreme Court in **Nkhuwa v. Lusaka Services Limited**⁴. Thus the first application for leave to appeal out of time lacks merit and is accordingly dismissed.

Having declined to grant the application for an order for leave to appeal out of time, I will not delve into the second application to stay execution or sale of stand no. 24 Jesmondine Lusaka because it is anchored on the first application. Since leave to appeal has not been granted, it follows that the application to stay execution or sale of the property fails and is dismissed accordingly.

I award costs to the respondent to be taxed failing agreement.

Delivered at Lusaka this 15th day of Sept, 2017.


J.Z. Mulongoti
Court of Appeal Judge