

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

IT
CAZ/08/069/2017

BETWEEN:

VICTOR MADIABI

AND

ABRAHAM SHINTUBA



APPELLANT

RESPONDENT

*Coram: Hon. Justice D.Y. Sichinga in Chambers
On the 22nd day of September, 2017*

*For the Appellant: Ms. G.N. Mukuluwamtiyo – Senior Legal Aid
Counsel*

*For the Respondent: Mr. M. Chitundu of Messrs Barnaby and
Chitundu Advocates*

RULING

Cases referred to:

1. *Tom Orlic and another v. Mwila Chishimba and others*
SCZ/8/51/2014
2. *Bere Marabesa v. Mrs. Munthali* CAZ/08/07/2017

Other authorities referred to:

1. *Court of Appeal Rules, Court of Appeal Act No. 7 of 2016, SI No. 65 of 2016*

This is the respondent's application to dismiss appeal for want of prosecution pursuant to Order 10 Rule 6 as read with Rule 7 of the Court of Appeal Rules Act No. 7 of 2016. The application is supported by an affidavit filed on 19th July, 2017 and sworn by one Florence Munsaka Machiya. She attests to the fact that the appellant lodged an appeal to this court on 17th March, 2017 after being dissatisfied with the judgment of the court below. That since the filing of the said appeal, the appellant has failed and neglected to take further steps to prosecute the appeal by way of filing the record of appeal within the stipulated time of sixty days from the date of lodging the appeal. She deposes that the appellant obtained an order of stay of execution of the judgment of the court below, and that the same was an abuse of the court system.

In his oral submissions, Mr. Chitundu relied on the affidavit in support and urged the court to dismiss the appeal for want of prosecution with costs.

The appellant opposed the application and relied on an affidavit in opposition filed into court on 19th September, 2017. The gist of the affidavit is that the appellant has failed to file his record of appeal and heads of argument due to the delay by the court below to transmit the typed records of proceedings to him. Further, it is deposed that the record of proceedings was completed on 15th September, 2017 and that the appellant is desirous to prosecute his appeal. In addition, Ms. Mukuluwamtiyo, on behalf of the

appellant, submitted that the appellant was unrepresented prior to 18th September 2017, and this compounded his inability to apply for an extension of time within which to file the record of appeal. She urged the court not to employ the provisions of order 10 Rule 6 as read with Rule 7 in a vacuum. However, to consider the circumstances that caused the delay in this matter.

In his reply, Mr. Chitundu submitted that it was clear from the record that the appeal was lodged on 17th March, 2017. That the appellant had 60 days from that date within which to file the record of appeal. The period expired on 17th May, 2017. He argued that four months had since elapsed from the 17th May, 2017 and there was no application to extend the time for filing the same. He submitted that following the respondent's application to dismiss the appeal, the appellant could not file and extend time within which to file the record. Counsel argued that that should have been done before the respondent moved this court for dismissal of the appeal. He relied on the case of **Tom Orlic and another v. Mwila Chishimba and Others**⁽¹⁾ in which the Supreme Court held that after an application to dismiss a matter for want of prosecution has been filed, the court cannot entertain an application for extension of time within which to file the record. Counsel also cited the case of **Bere Marabesa**⁽²⁾ in which this court dismissed the appeal for want of prosecution with costs.

I am grateful for counsel's submissions. I have intently considered the application together with the affidavits filed. Order X Rule 6 and Rule 7 pursuant to which this application is made provide:

"6. Subject to an extention of time and to an order made under Order XIII rule 3, the appellant shall, within sixty days after filing a notice of appeal -

- (a) lodge the appeal by filing in the Registry twenty one hard copies of the record of appeal together together with heads of argument and an electronic copy of the record of appeal;***
- (b) pay the prescribed fee in respect of the appeal; and***
- (c) pay into court the sum of two thousand fee units as security for the costs of the appeal.***

7. If an appeal is not lodged within the time stipulated under rule 6, the respondent may make an application to the court for an order dismissing the appeal for want of prosecution, or alternatively, for such other order with regard to the appeal as the respondent may require."

In casu the record shows, as highlighted by Mr. Chitundu, that the appellant lodged his appeal on 17th March, 2017. Thereafter, he took no further steps to lodge his appeal by filing in the Registry

twenty one copies of the record of appeal together with the heads of argument, and pay the requisite fees. Ms. Mukuluwamtiyo, on behalf of the appellant, has argued that the appellants delay in lodging the appeal was as a result of the record of proceedings not having been prepared. She submitted that the record of proceedings were not prepared until the 15th September, 2017. It is not clear as to why the appellant had not sought to apply to extend the time within which to file the record of appeal and heads of argument. As earlier pointed out by Mr. Chitundu, the 60 days expired in May, 2017. Since then to the time when the respondent sought to make this application in July 2017, another two months had elapsed without any appropriate application by the appellant to file the record of appeal and heads of argument out of time.

In my view, the appellant has not provided this court with a compelling reason for the delay. He merely sat on his rights, and I would consider such delay inordinate. I agree with the respondent's submissions that this court should not entertain an application for extension of time within which to file the record because the appellant has not made any effort to file an application for leave to file the record of appeal out of time. Further, I am bound by Wood, SJ's holding in the case of **Tom Orlic and another v. Mwila Chishimba and Others (supra)** where he held inter alia that an application for extension of time ought to be made before the expiry of the period in which to apply for an extension.

I am thus inclined to dismiss the appeal for want of prosecution as prayed, with costs to the respondent to be taxed in default of agreement.

Delivered at Lusaka in Chambers on the 22nd day of September, 2017



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D.Y. Sichinga
COURT OF APPEAL JUDGE