

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

CAZ/08/227/2017

B E T W E E N :

D. TEMBO HOSPITAL COMPLEX LIMITED
BISHOP SCOT MWANZA
LILLIAN MWANZA (Married Woman)
GETRUDE MWANZA
RUTH MWANZA
LASTON MWANZA
CHOKANGA MWANZA
(A minor by Bishop Mwanza his next friend)
CHATEKA MWANZA
(A minor by Bishop Mwanza his next friend)

1ST APPELLANT
2ND APPELLANT
3RD APPELLANT
4TH APPELLANT
5TH APPELLANT
6TH APPELLANT
7TH APPELLANT
8TH APPELLANT

AND

RIDE SIKAONA
ATTORNEY GENERAL

1ST RESPONDENT
2ND RESPONDENT

Before Justice F. M. Chishimba in chambers.

For the Appellants : Mr. Mumba of Messrs A.D. Mwansa Mumba & Associates

For the 1st Respondent : Mr. Sitali and Mr. Katolo of Messrs Milner & Paul Legal Practitioners.

For the 2nd Respondent : N/A

R U L I N G

CASES REFERRED TO:

1. Miyanda Vs. Handau [1993-1994] Z.R. 18
2. Beatrice Nyambe Vs. Barclays Bank (Zambia) Limited Plc [2008] ZR 195 Volume 2 (HC)

LEGISLATION AND OTHER WORKS REFERRED TO:

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

3. The Rules of the Supreme Court of England (White Book) 1999 Edition

The Appellants had filed an application for leave to file the Notice of appeal out of time pursuant to **Order 13 Rule 3 of the Court of Appeal Rules Statutory Instrument number 65 of 2016**, supported by an affidavit. When the application came up for hearing on the 26th of September, 2017, the 1st Respondent raised a preliminary issue, objecting to the Applicants' application. The preliminary issue was made pursuant to **Order 14A of the Rules of the Supreme Court of England (White Book) 1999 Edition**. The Respondents contend that the application for an extension of time within which to file the Notice of Appeal out of time by the Appellants ought to have been made, initially, in the High Court. Upon the sought order not being granted, the Applicants would be at liberty to renew the application before this court.

The applicants relied on the affidavit sworn by its Counsel, Mr. Mumba, dated 28th September, 2017. It was stated that the Applicants had initially made an application for leave to appeal under CAZ/8/196/2017 before Honourable Justice J. Chashi. The application was dismissed in a ruling dated 22nd August, 2017 in which the Judge directed the Applicants to file a

formal application namely ***“the Notice and Memorandum of Appeal out of time before this Court”***.

The Applicants filed into Court skeleton arguments dated 6th October, 2017. It was contended that the ex-tempo Ruling by Justice Chashi directed that a formal application be made by the Appellants for leave to file notice and memorandum of appeal out of time. I was referred to the provisions of the **Constitution of Zambia, Court of Appeal Act** and **Rules** regarding the creation and constitution of the Court of Appeal.

The Applicants argued that the application is properly before this court, having been made following Justice Chashi's direction. Further, that the Court did not direct that a formal application be made before the High Court. I was referred to the case of ***Miyanda Vs. Handau*** ⁽¹⁾ where the Court stated that the mention of things excludes things not mentioned. The Appellants further referred to the provisions of **Rule 2 (1) of the Court of Appeal Rules, Statutory Instrument Number 65 of 2016** with regards what constitutes proceedings.

It was argued that the Respondents have not shown any indication, in line with **Section 9 (b) of the Court of Appeal Act No. 7 of 2016** and **Order 10 Rule 2 (8) of the Court of Appeal Rules**, that they intend to have Justice Chashi's Ruling varied or reversed. Further, pursuant to Justice Chashi's Ruling the 1st Respondent made a demand of ZMW50, 000.00 as costs awarded by the Court following the dismissal of the Appellant's application. This is an indication that the 1st Respondent was not aggrieved by the Court's decision.

The Appellants further, contend that the preliminary issue raised by the 1st Respondent is frivolous and an abuse of Court process. Further, that the 1st Respondent has disregarded the direction by Justice Chashi which action amounts to contempt of Court. I was referred to a High Court decision of **Beatrice Nyambe Vs. Barclays Bank (Zambia) Limited Plc** ⁽²⁾ where Judge Wood as he then was warned against the defiance of Court orders.

It was submitted that the preliminary issue raised by the 1st Respondent has unnecessarily occasioned three adjournments therefore the Respondents ought to be condemned in costs. The

Appellants prayed that its application be granted and the preliminary issue raised by the 1st Respondent be dismissed.

I have considered the preliminary issue raised by the 1st Respondent namely that the application for extension of time within which to give Notice of appeal is not properly before this Court as the Court has no jurisdiction to hear the application in its current form. That the application ought to have first been made in the lower Court, then upon refusal, renewed before this Court.


The brief facts precipitating the issues raised are that being dissatisfied with the Judgment of the Court below, the Applicants sought leave to appeal in the High Court, which was unnecessary and rightly refused as no leave to appeal the main Judgment was required. The Applicants then made the same application for leave to appeal before a single Judge of this Court, which was dismissed. The single Judge of the Court of Appeal then proceeded to state that the applicants should seek extension of time in which to give Notice of Appeal.

In my view, the Judge ought to have stated that the application for extension of time within which to give Notice of

Appeal be made in the Court below first as the time had already run out. Leave of the Court below to file the Notice of appeal/Memorandum out of time was required. Upon refusal, leave would then be sought from this Court. I therefore uphold the preliminary issues raised. I do not have jurisdiction to deal with application as leave to file Notice of Appeal out of time must be first made in the Court below before it can be renewed upon refusal by the Court below.

For the foregoing reasons, I accordingly uphold the preliminary issue raised that the application for extension is improperly before me. It goes without stating the obvious that the application for extension stands dismissed. The applicants must seek leave to appeal out of time from the Court below.

Dated the 28th day of November, 2017



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Hon. Mrs. Justice F. M. Chishimba
COURT OF APPEAL JUDGE