

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

**CAZ/08/259/2017**

**BETWEEN:**

**FREDRICK MUNGANYA KAMAYA**

**AND**

**GALAUNIA FARMS LIMITED**



**APPELLANT**

**RESPONDENT**

**Before the Hon. Mrs. Justice J.Z. Mulongoti**  
**in Chambers on the 16<sup>th</sup> day of February, 2018.**

*For the applicant:*

*Ms. O. Zulu of Mesdames Mushipe & Associates*

*For the respondent:*

*Mr. M. Ndalameta of Musa Dudhia & Co*

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## **R U L I N G**

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**Cases cited:**

1. *Revici v. Prentice Hall Incorporated and others* (1969) 1 ALL ER 773

**Legislation referred to:**

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

This is the ruling on the applicant's application for extension of time within which to file the Record of Appeal.

At this stage, it is necessary to say a little about the background of the matter. The applicant had applied for special leave for review of a ruling of the High Court dated 30<sup>th</sup> November, 2016. On 29<sup>th</sup> March, 2017 the High Court dismissed the application for lack of merit. Leave to appeal was not granted. Upon application, on 2<sup>nd</sup> May, 2017, leave was granted to appeal

within 30 days failing which the application would stand dismissed. The applicant failed to comply with this Order. On 7<sup>th</sup> June, 2017, he applied to restore the application for leave to appeal to active cause list and to extend time to appeal. On 13<sup>th</sup> September, 2017, the High Court judge heard the application for review by invoking Order III rule 2 of the High Court Rules. The judge reviewed the Order of 2<sup>nd</sup> May, 2017 and extended the time within which the appellant could appeal by 14 days. The record shows that the applicant only filed the Notice and Memorandum of Appeal on 25<sup>th</sup> September, 2017 but failed to file the Record of Appeal within 60 days, hence the application before me.

The application is made by Notice. It is supported by an affidavit sworn by Martha Mushipe, the applicant's counsel. The gist of her affidavit is that the applicant failed to file the Record of Appeal within 60 days from 25<sup>th</sup> September, 2017 because the respondent delayed to file a Notice of Address. This is despite having served the appellant with the Notice and Memorandum of Appeal. It was further deposed that the respondent only filed the Notice of Address on 20<sup>th</sup> November, 2017 and served it on the appellant on 22<sup>nd</sup> November, 2017. The applicant's deadline was 24<sup>th</sup> November, 2017. In consequence, the applicant failed to file the Record of Appeal within the stipulated time because the record would have been incomplete without the respondent's Notice of Address. And that the failure to file the Record of Appeal on time was not as a result of inordinate delay or blatant disregard of the rules of court because the failure was caused by the delayed Notice of Address. The draft Record of Appeal was exhibited as "MM/1".

The respondent did not file an affidavit in opposition.

At the hearing, the applicant was represented by Ms. Zulu while the respondent was represented by Mr. Ndalameta.

The applicant's counsel relied on the affidavit in support of the application on record.

The respondent's counsel argued the application orally on points of law. He submitted that a plain reading of Order V rule 2 sub rule 3 CAR shows that the appellant should expect to receive a Notice of Address for service within 14 days of serving the Notice of Appeal. That in the present case, it should have been no later than 27<sup>th</sup> November, 2017. He contended that if no Notice of Address is forthcoming, that should not hold the preparation of the Record of Appeal because Order X rule 9 sub rule 5 paragraph e CAR permits the appellant to include in the Record of Appeal a mere statement of the last known address of the respondent who has not filed a Notice of Address for service. He submitted that in this case, the address would be the place where the Notice and Memorandum of Appeal were served as stated in the affidavit in support. That going by the appellant's time line, he had up to 27<sup>th</sup> November, 2017 to file the Record of Appeal. Paragraph 8 of the affidavit in support shows that the applicant admitted that the Notice of Address was received on 22<sup>nd</sup> November, 2017, 5 days before the deadline. However, no explanation has been given as to why the Record of Appeal was not filed promptly. According to counsel, there is no reasonable excuse for the delay. The applicant has failed to explain why the 60 day period was not adequate even assuming the Notice of Address was not received. He argued that in the absence of reasonable excuse, no indulgence should be granted to the appellant. Counsel relied on the case



of **Revici v. Prentice Hall Incorporated and others**<sup>1</sup> in support of his argument. He prayed that the application be dismissed with costs.

I have considered the affidavit evidence and the submissions by counsel. In terms of Order X rule 6 CAR, the applicant is required to file the Record of Appeal within 60 days from the time the Notice of Appeal is lodged. In the event that the 60 day period lapses without the Record being filed, the applicant has a second chance to file it out of time within 21 days from the date the 60 day period lapsed pursuant to Order XIII rule 3 sub rule 2 CAR which provides that-

*“An application to the Court for extension of time in relation to a judgment or the date of expiration of the time within which the application ought to have been made, shall be filed in the Registry within twenty one days of the judgment or such time within which the application ought to have been made, unless leave of the Court is obtained to file the application out of time.”*

The applicant lodged the appeal on 25<sup>th</sup> September, 2017. The 60 day period within which he was required to file the Record of Appeal lapsed on or about 24<sup>th</sup> November, 2017. The applicant made this application on 15<sup>th</sup> December, 2017 which was within the 21 day period after the expiry of the 60 day period as envisaged in Order XIII rule 3 sub rule 2, which 21 days were expiring on 15<sup>th</sup> December, 2017.

I note that the applicant did not specify under which sub rule of Order XIII rule 3 the application was made, which provides for extension of time. I note that the Notice of extension of time was issued pursuant to Order XIII rule 3 sub rule 4 which prescribes that an application for extension of time


shall be substantially in Form XXIII set out in the first schedule. I opine that this defect is not fatal but curable. I deem the application to have been made pursuant to Order XIII rule 3 sub rule 2 more so that it was within the 21 days and the application is for extension of time anyway. I note Mr. Ndalameta's arguments that there is no reasonable excuse for the delay. I am of the considered view that counsel would have been on firm ground had the application been made pursuant to Order XIII rule 3 sub rule 3 CAR which provides that-

*"The Court may for sufficient reason extend time for making an application, including an application for leave to appeal, or for bringing an appeal, or for taking any step in or in connection with any appeal, despite the time limited having expired, and whether the time limited for that purpose was so limited by the order of the Court, by these Rules, or by any written law."*

Clearly, Order XIII rule 3 sub rule 3 gives the court discretion to extend time for sufficient reason. However, it is invoked where the applicant has failed to comply with the initial 60 days and the 21 days extension under Order XIII rule 3 sub rule 2. As aforestated, the applicant was within the 21 day period.

In light of the foregoing, the application is granted. The Record of Appeal should be filed within 30 days from today. Costs in the cause.

Delivered at Lusaka this 16<sup>th</sup> day of February, 2018.

  
**J.Z. Mulongoti**  
**Court of Appeal Judge**