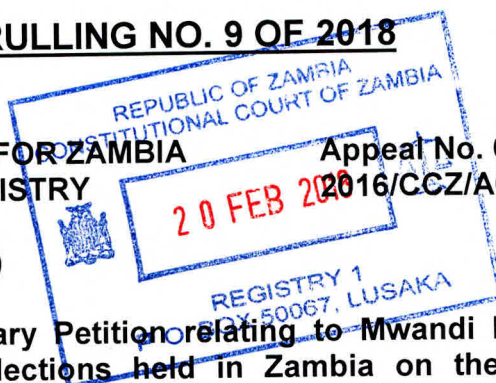


SELECTED RULLING NO. 9 OF 2018

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IN THE CONSTITUTIONAL COURT FOR ZAMBIA
AT CONSTITUTIONAL COURT REGISTRY
HOLDEN AT LUSAKA
(CONSTITUTIONAL JURISDICTION)

Appeal No. 6 of 2017
2016/CCZ/A045



In the matter of: The Parliamentary Petition relating to Mwandi Parliamentary Constituency elections held in Zambia on the 11th day of August, 2016.

And

In the matter of: Articles 46, 54, and 73 of the Constitution of Zambia Act Chapter 1 volume 1 of the Laws of Zambia.

And

In the matter of: Sections 81, 82, 83, 84, 87, 89, 91, 92, 94, 96, 97, 98, 99, 100 and 110 of the Electoral Process Act No. 35 of 2016.

And

In the matter of: Electoral Code of Conduct 2016

BETWEEN:

DR. MICHAEL LIWANGA KAINGU

APPELLANT

AND

SILILO MUTABA

RESPONDENT

Chibomba, PC, Mulenga, Mulembe, Mulonda and Munalula, JJC.
On 4th October, 2017 and on 20th February, 2018.

For the Appellant: Mr. T. Chali of HH Ndlovu and Company.
For the Respondent: Mr. P. Mulenga of Mulenga and Wallace Advocates.

R U L I N G

Chibomba, PC. Delivered the Ruling of the Court.

Cases referred to:

1. Access Bank (Z) Limited v Group Five/Zcon Business Park Joint Venture (Suing as a firm) SCZ/8/52/2014.
2. D. E. Nkhuwa v Lusaka Tyre Services Ltd (1977) Z.R. 59.
3. Twampane Mining Cooperative Society Limited v E and M Storti Mining Limited (2011) Z.R. 67.
4. July Danobo (T/A Juldun Motors) v Chimsoro Limited (2009) Z.R. 148.
5. Sikalangwe Luke vs. Chisha Sephirine and the Electoral Commission of Zambia CCZ Appeal No. 5/2016.
6. Henry Kapoko v The People Selected Judgment No. 43 of 2016.
7. NFC Milling PLC v Techpro (Z) Limited (2009) Z.R. 236.
8. Philip Mutantika and Mulyata Sheal S. v Kenneth Chipungu, SCZ Judgment No. 13 of 2014

Legislation referred to:

1. The Constitutional Court Rules (CCR), 2016.

Other work referred to:

1. The Rules of the Supreme Court of England, 1999 Edition.

When this matter came up for hearing of the appeal, the learned Counsel for the Respondent informed the Court that the Respondent, on 8th February, 2017 filed a Notice of Motion to Raise Preliminary Issues, which he requested the Court to first consider before hearing the appeal. The Notice of Motion was filed pursuant to Order 11 rule 12 of the **Constitutional Court Rules (CCR), 2016** as read together with Order 33

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rule 3 of the Rules of the Supreme Court, 1999 Edition (**RSC**). The preliminary issues raised are as follows: -

- “(i) Whether or not this Appeal is competent and properly before Court on account of the incomplete and defective Record of Appeal.
- (ii) Whether or not in terms of the Rules of Court particularly Order II Rule 9 (4) of the Rules of the Constitutional Court, this Appeal is not liable to be dismissed for being in breach of the rules of Court.”

In support of the Notice of Motion, Counsel for the Respondent, Mr. Mulenga, relied on the Affidavit in Support and Skeleton Arguments filed which he augmented with oral submissions. The thrust of Counsel's argument was that the Appeal before us should be dismissed as it was incompetent and defective in material respects that are cardinal and fundamental for its proper determination. The grounds given were that the evidence of PW1 to PW4 appearing in the Record of Proceedings from pages 220 to 255 relate to a totally different Cause from the one before us and that it is also not properly sequenced and that certain portions are missing between pages 316 to 348. Counsel contended that this was contrary to Order 11 rules 5, 6 and 9 (1) and (4) (a) and (j) of the **CCR**. Lastly, that the Heads of Argument served on the Respondent relate to a different Cause and that this is contrary to Order 11 rules 5, 6 and 9 (10) of the **CCR** .

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As authority to support the above arguments, Mr. Mulenga referred to the case of **Access Bank (Z) Limited v Group Five /Zcon Business Park Joint Venture (suing as a firm)**¹ in which the Supreme Court stated that the Constitution never meant to oust the obligations of litigants to comply with procedural imperatives as they seek justice from courts. To further buttress this position, Counsel cited the cases of **D.E. Nkhuwa v Lusaka Tyre Services Ltd**² and **Twampane Mining Cooperative Society Limited v E and M Storti Mining Limited**³ in which the Supreme Court stated that rules of court ought to be strictly adhered to and that litigants who choose not to comply, do so at their own peril. He also referred to the case of **July Danobo (T/A Juldans Motors) v Chimsoro Farms Limited**⁴ in which the Supreme Court dismissed the Appeal on ground of failure to prepare the Record of Appeal in the prescribed manner. Counsel submitted that in the case of **Sikilangwe Luke v Chisha Sephirine**⁵, this Court dismissed the appeal for failure to prepare and file the Record of Appeal in the prescribed manner but went further to guide that it is not every breach of a rule relating to preparation of a record of appeal that is fatal. In winding up, Counsel's prayer was that this Court should dismiss the appeal as it was defective in

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a material way that rendered it incompetent and irregular as it offends the rules of this Court.

In opposing the issues raised in the Respondent's Notice of Motion, the learned Counsel for the Appellant, Mr. Chali, relied on the Affidavit in Opposition filed which he augmented with oral submissions. He conceded that the Record of Proceedings relating to PW1 to PW4 is not for Mwandi Constituency but for Mulobezi Constituency. That the two cases were heard by the same Judge and the parties were represented by the same lawyers. Hence, proceedings for PW1 to PW4 in the Mulobezi Constituency case were erroneously filed in this appeal. He argued that the error was as a result of Court Reporters who gave him wrong proceedings. And that once the Respondent noticed the defects on the Record of Appeal, he was obliged to file a Supplementary Record of Appeal as provided under Order 11 rule 10 (1) of the **CCR**. Counsel then applied for leave to amend the Record of Appeal and implored the Court not to dismiss the appeal on ground that the defects identified were a procedural technicality which are curable. He also relied on Article 118 (2) (e) of the Constitution which enjoins the courts of law in this country to, in exercising

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judicial authority, be guided by the principle that justice shall be administered without undue regard to procedural technicalities.

In reply, Mr. Mulenga relied on the Affidavit in Reply. He submitted that Counsel for the Appellant failed to discharge his duty to ensure that the correct and proper documents were filed in accordance with the Rules of Court. He reiterated that the irregularities were fundamental to the life of the whole Appeal and urged us to dismiss the appeal.

We have seriously considered the Notice of Motion to Raise Preliminary Issues together with the arguments advanced in the Respondent's Skeleton Arguments, the oral submissions and the authorities cited by the learned Counsel for the respective parties. It is our considered view that the main question raised in this Notice of Motion is whether the Appeal in this matter should be dismissed on ground that it is incomplete, defective and incompetent as it breaches the rules of this Court cited. In other words, can the defects identified be said to be so fundamental that it can be held that they go to the root of this appeal so that it should thus be dismissed?

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We wish to state from the onset that as guided in the case of **Sikalangwe Luke v Chisha Sephirine and Electoral Commission of Zambia**⁵, it is not every breach of a rule relating to the preparation of the record of appeal that is fatal. We must also state that the power of the court to dismiss or not to dismiss a defective record of appeal on ground of breach of procedural rules is discretionary. It follows that where the rule breached is only regulatory, the Court can allow an Appellant to cure the defect. However, where the breach is fundamental or where it goes to the root of the appeal, the Court is duty bound not to use its discretionary power and ignore such a breach.

We also note that three defects have been identified in this matter, namely, the serving of Heads of Argument relating to a different appeal and not to this appeal on Counsel for the Respondent; the wrong sequencing of proceedings in certain portions of the Record of Appeal; and the wrong proceedings relating to PW1 to PW4's evidence, being for a different case. It is on this basis that the Respondent has applied that the Appeal should be dismissed. In resolving the issues raised in this Notice of Motion, we shall begin by first considering the issue of the Appellant serving the

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Respondent's Counsel with Heads of Argument relating to a different matter.

We wish to state that the essence of Order 11 rules 5 and 6 of the **CCR** is that the Record of Appeal shall be filed together with the Appellant's Heads of Argument. And where this is not complied with, the Respondent may apply to have the appeal dismissed or for such other order as the Respondent may require. Order 11 rule 5 of the **CCR** is couched in mandatory terms as the word "shall" is used meaning that the Record of Appeal and Heads of Argument should be filed together. We also agree with Counsel for the Respondent that Order 11 rule 9 (10) of the **CCR** provides for what should be contained in the Heads of Argument.

As regards Counsel for the Respondent's argument that this appeal should be dismissed because wrong Heads of Argument were served on him, we wish to point out that the question whether an appeal should be dismissed on account of the observed defects is discretionary. It is also settled that discretionary power must be judiciously exercised and for good and compelling reasons.

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Perusal of the record in this matter has shown that indeed, the Appellant did file the Record of Appeal together with Heads of Argument and that the Heads of Argument filed in Court relate to the Appeal before us and not to Mulobezi Constituency. We have also noted that the default complained about relates to serving the Respondent's Counsel with different Heads of Argument which do not relate to this Appeal. In conceding to this defect, Mr. Chali, Counsel for the Appellant, informed the Court that once it was realised that wrong Heads of Argument had been served on the Respondent's Counsel, correct ones were sent. In view of the above circumstances, this default cannot be said to be incurable as the defect was cured before this Motion was heard. More importantly, the Appellant did file correct Heads of Argument into Court. Therefore the Respondent's argument in this respect cannot succeed as a ground for dismissing the Appeal.

As regards Mr. Mulenga's contention that the Record of Appeal is defective because certain portions are missing between pages 316 to 348, our brief response is that we were not able to decipher the basis for this ground. This is because Counsel did not indicate where and what exactly was missing from this portion of the Record of Appeal.

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Mr. Mulenga has argued that there has been breach of Order 11 rule 9 (1) and (4) of the **CCR** at pages 316 to 348 of the Record of Appeal as the sequencing of the said pages is defective. He argued that this is fatal. It is our firm view however that this defect is not so fundamental that it can be said to be fatal to the appeal as it does not go to the root of the Appeal. The defect in question can easily be cured by a simple amendment so that the sequencing of the pages is correctly done. Thus this also fails as a ground for dismissing the appeal in this matter.

As regards Mr. Mulenga's argument that this Appeal should be dismissed on ground that the record at pages 220 to 255 contains extraneous proceedings relating to a totally different matter from the one leading to this Appeal, Mr. Chali conceded to this defect and to the fact that Order 11 rule 9 (1) and 4 (a) and (j) of the **CCR** was breached. In view of Mr. Chali's unequivocal admission of the defect, the only question that remains is whether or not the conceded default or defect in the Record of Appeal is fatal to this appeal such that it should be dismissed.

In support of his argument that the Record of Appeal should be dismissed, Mr. Mulenga argued that the Record of Appeal in its current form is incomplete and defective in material respects that are cardinal and

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fundamental for a proper and effective determination of the appeal as it breaches Order 11 rule 9 (1) and (4) (a) and (j) of the **CCR**.

On the other hand, Mr. Chali's explanation was that the default was caused by the Court Reporters who gave him wrong proceedings of the evidence of PW1 to PW4 which relate to a different matter. He also contended that when the Respondent noticed the defects, he should have filed a Supplementary Record of Appeal as provided by Order 11 rule 10 (1) of the **CCR**. He also referred us to and relied on Article 118 (2) (e) of **the Constitution** and argued that the defects were a technicality. Hence, the appeal should not be dismissed and that instead, in the interest of justice, leave should be granted to the Appellant to amend the Record of Appeal.

We have considered the above submissions. Our brief response to Mr. Chali's submission that wrong proceedings relating to a different Cause were filed because the Court Reporters gave him wrong proceedings is, to say the least, that this cannot be a reason that Counsel should in the first place be advancing to this Court. Counsel cannot indeed be allowed to shift his own ineptitude on the Court officers. It is elementary that the onus is on Counsel on record to ensure that proper and correct documents are filed

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into court. Thus, incongruous acts fall squarely on Counsel's shoulders. He only has himself to blame. We, as a Court, do not expect to encounter this kind of elementary mistake by lawyers and we censure Counsel in the strongest terms possible as his conduct shows that Counsel did not at all apply himself or read through his documents before filing them into Court. Therefore, the above excuse is not tenable. We dismiss it.

As regards Mr. Chali's argument that the Respondent should have filed a supplementary record of appeal once he realised the defects in the Appellant's Record of Appeal, our brief response is that Order 11 rule 10 (1) of the **CCR** places no such obligation on the Respondent nor is it intended to serve as a defense for an erring Appellant or his Counsel who has failed to abide by the rules of court. Counsel cannot shift his burden to ensure that the Record of Appeal is prepared in accordance with the rules of Court before it is filed. Thus the argument by Mr. Chali in this respect is not tenable and we dismiss it.

As regards Mr. Chali's submission that the defects in question were a procedural technicality which is curable and his reliance on the provision of **Article 118 (2) (e) of the Constitution** to buttress this argument, our brief response is that we had occasion to interpret Article 118 (2) (e) in

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Henry Kapoko v The People⁶. In that case, we stated that Article 118 (2) (e) of the Constitution is not intended to do away with existing principles, law and procedures, even where the same constitute technicalities. We repeat this in the current case. In **Sikalangwe Luke v Chisha Sephirine and the Electoral Commission of Zambia**⁵, we made it clear that an appellant cannot hide behind the provisions of **Article 118 (2) (e) of the Constitution** as an excuse for his failure to comply with the rules of Court in preparing and compiling the Record of Appeal. In that case, we also sounded a warning to all litigants who choose to ignore the rules of Court that they do so at their own peril and risk their appeal being dismissed.

In that same case, we cited with approval the Supreme Court decision in **July Danobo (T/A Juldán Motors) v Chimsoro Limited**⁴ where the appeal was dismissed on the ground of failure to prepare the Record of Appeal in the prescribed manner as the record of proceedings in the court below were missing from the record. It was pointed out that the failure to compile a Record of Appeal in the prescribed manner is visited by sanctions one of which is that an appeal may be dismissed.

We also wish to borrow the words of the Supreme Court in the cases of **NFC Mining PLC v Techpro Zambia Limited**⁷ and **D.E Nkhuwa v**

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Lusaka Tyres Ltd² that rules of court are intended to assist in the proper and orderly administration of justice and as such, they must be strictly followed by all the litigants and that those who choose not to comply do so at their own peril. We also wish to refer to the case of **Philip Mutantika and Mulyata Sheal S. v Kenneth Chipungu⁸**, which, as in the case at hand, concerned an appeal in a parliamentary election petition. The appeal was dismissed for among other grounds, that the Record of Appeal was not filed together with the Heads of Argument contrary to the rules of that Court.

In the appeal in casu, the Appellant filed a Record of Appeal which contains extraneous proceedings relating to a distinct Cause in respect of PW1 to PW4. In its current form the Record of Appeal therefore contains wrong evidence at pages 220 to 255. We thus order that pages 220 to 255 which contain the wrong record of proceedings be and are hereby expunged from the Record of Appeal as they offend the rules of this Court.

The question that follows is, can the appeal be heard and determined in its remaining form? We think not as there is a big gap in the record which has been created following the expunging of the evidence in question. We thus have no doubt that the Court will be denied the benefit of considering

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the evidence of all the witnesses who testified at trial of the Petition and to have it in perspective in determining the appeal in this matter. Therefore, in its current incomplete form, the appeal cannot be heard. We regard this defect to be fundamental defect which goes to the root of the entire appeal and is thus fatal to the Appeal.

In arriving at the above decision, we did take into account Mr. Chali's fervent submission and plea that leave should be granted to the Appellant to amend the Record of Appeal instead of dismissing it. However, the Record shows that the Appellant filed his Record of Appeal on 20th January, 2017. The Respondent only filed the application to dismiss this appeal on 8th February, 2017. There is also no proof that the Appellant made any attempt as argued by Mr. Chali in his submission that an application for leave to amend the Record of Appeal was made. Had this been done, the proposed application could have been exhibited in the Affidavit in Opposition of the application to Dismiss the Appeal.

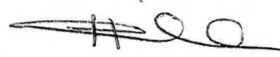
In Twampane Mining Cooperative Society Limited v E and M Storti Mining Limited³, the Supreme Court observed that the Court will not exercise its discretion in favour of an appellant that sits on his right to appeal by not abiding by the rules of court and by not acting promptly to

cure a defect. We adopt the above observation by the Supreme Court as adherence to rules is intended to ensure that matters are heard in an orderly and expeditious manner. Waiting until the Respondent applies to dismiss the appeal definitely goes against the above principle.

On this ground alone, we hold that the appeal in this matter is incompetent as it is fundamentally defective and it cannot be properly heard or determined in its current form. In **July Danobo (T/A Jaldan Motors) v Chimsoro Limited⁴**, the Supreme Court stated that if the Appellant was going to suffer any prejudice as a result of his appeal being dismissed as a result of his Counsel who did not handle his appeal properly, then he should seek recourse from his Counsel. We adopt this in the case in casu.

The sum total is that the Preliminary Issues raised by the Respondent succeed to the extent reflected above. We dismiss the Appellant's appeal in this matter.

In the circumstances of this case, we order that each party bears its own costs.



H. Chibomba
PRESIDENT
CONSTITUTIONAL COURT



M. S. Mulenga
JUDGE
CONSTITUTIONAL COURT



E. Mulembe
JUDGE
CONSTITUTIONAL COURT



P. Mulonda
JUDGE
CONSTITUTIONAL COURT



M. M. Munalula
JUDGE
CONSTITUTIONAL COURT