

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

SCZ/8/406/2018

B E T W E E N:

BENSON MABUKU SIMATAA

APPLICANT

AND

PATRICK KALALUKA

RESPONDENT



**CORAM: MAMBILIMA CJ, HAMAUNDU AND KAOMA JJS
On 6th February, 2018 and 2nd May 2018**

**For the Applicant: In Person
For the Respondent: No Appearance**

RULING

MAMBILIMA CJ delivered the judgment of the Court.

CASES REFERRED TO:

- 1. STANLEY MWAMBAZI V MORESTER FARM LIMITED (1977) ZR 108**

LEGISLATION REFERRED TO:

- a) THE SPREME COURT OF ZAMBIA ACT, CHAPTER 25 OF THE LAWS OF ZAMBIA**

This application has come before us by a way of Notice of Motion filed pursuant to Rule 48 (4) of the Supreme Court Rules (SCR), **CHAPTER 25 OF THE LAWS OF ZAMBIA^(a)**.

It is a reference from a single Judge of the Court who dismissed the Applicant's appeal for want of prosecution on 21st September, 2017. The Applicant now seeks an Order of the full Court to restore his appeal to the active Cause List.

The Motion is supported by an affidavit sworn by the Applicant. In the said affidavit, he deposed, inter alia, that his appeal was dismissed on account of failure by his 'legal assistant' to appear before the Court. That on the day of the hearing, he arrived at Court on time, but that he had no idea as to where the Judge's chambers were. That the person he found at the reception misdirected him to the High Court and when he finally managed to locate the Judge's chambers, his appeal had already been dismissed. That he regrets the inconvenience caused to the Court and is desirous of proceeding with the appeal.

The Applicant filed heads of argument in which he prays that this Court should reverse, vary or discharge the order of the single Judge dismissing his appeal. In the said arguments, the Applicant admitted that he did not attend Court on the material day but explained that his non-appearance was not a sign of disrespect to the Court but a procedural issue which according to him, is

curable. He contended that the dismissal of his appeal would cause substantial prejudice to him.

To support his application, the Applicant relied on Section 4(b) of the **SUPREME COURT OF ZAMBIA ACT**^(a), which states:-

- "4. A single Judge of the Court may exercise any power vested in the Court not involving the decision of an appeal or a final decision in the exercise of its original jurisdiction but-**
- (a)**
 - (b) in civil matters any order, direction or decision made or given in pursuance of the powers conferred by this section may be varied, discharged or reversed by the Court."**

He also relied on our decision in the case of **STANLEY MWAMBAZI V MORESTER FARMS LIMITED**¹ and in particular, our holding that:-

"It is the practice in dealing with bona fide interlocutory applications for courts to allow triable issues to come to trial despite the default of the parties; where a party is in default he may be ordered to pay costs, but it is not in the interest of justice to deny him the right to have his case heard."

At the hearing before the single Judge, the Applicant did not attend Court and neither did he file an affidavit in opposition to the application to dismiss the appeal.

We have considered the Motion before us, as well as the Applicant's submissions in support.

As stated earlier, the Applicant is seeking to have his appeal restored to the active cause list after it was dismissed for want of prosecution. The learned single Judge of the Court dealt with the Respondent's application to dismiss the appeal under Cause Number SCZ/8/406/2012. We have visited this record and it shows that the application in this matter was made under Rule 55 of the **SUPREME COURT RULES**^(a). This Rule allows a Respondent to apply for an Order to dismiss an appeal for want of prosecution if an appeal is not lodged within any extension of time granted under Rule 12. In his affidavit in support of the application to dismiss the appeal before the single Judge, the Respondent, in the relevant paragraphs, deposed as follows:-

- "4. That with leave of the High Court, the Appellant was allowed to file an appeal out of time i.e. 45 days after they attained the right to challenge the ruling of the High Court.**
- 7. That the appeal record was found to have some errors and the Respondent was allowed to make the necessary corrections but to date he has neglected to take any action....**
- 8. That his continued absence from the Court and the fact that the Respondent has been holding on to the record of appeal has dragged the case for 11(eleven) years....."**

There is an affidavit of service on record showing that the Applicant was served with the Notice of Hearing for 21st September, 2017 when the application to dismiss the appeal for want of prosecution

was heard. Before us, however, he contended that he was at the Court premises on the material day but that he did not attend the hearing because he could not find the Judge's chamber. Be that as it may, the Respondent's application was not opposed. There is no affidavit on record in which the Applicant contested the Respondent's application to dismiss the appeal for want of prosecution. The single Judge therefore only considered the Respondent's affidavit evidence that was before him as well as the submissions of Counsel. He alluded to the fact that the application was not opposed after which he dismissed the appeal for want of prosecution. Now, Rule 16(3) of the Supreme Court Rules provides that:-

"When at the time set down for the hearing of an application or appeal there is no appearance for the Appellant and no written argument has been submitted in terms of rule 34, the Court may strike out the application or appeal or may proceed to determine the application or appeal after hearing any other party or practitioner present and entitled to be heard."

In the case at hand, it is not in dispute that the Applicant was not in attendance at the hearing of the application by the Respondent to dismiss the appeal for want of prosecution and that he did not file any affidavit in opposition. The single Judge, exercised his discretion and proceeded to hear the application in the absence of

the Respondent, which he was entitled to do, under the provisions of Rule 16(3) of the Supreme Court Rules.

The Applicant has argued that he will suffer substantial prejudice if his appeal is not heard. He has relied on one of our holdings in the case of **STANLEY MWAMBAZI V MORESTER FARM LIMITED**¹ (reproduced above). What the Appellant omitted to state is our further holding in the case of **STANLEY MWAMBAZI**. This is that, "For this favourable treatment to be afforded, there must be no unreasonable delay, no mala fides and no improper conduct" on the part of the applicant.

The uncontested affidavit evidence before the single judge was that the Applicant had been dragging this case for eleven years. Having been allowed to correct errors in the record of appeal, the Applicant appears to have failed to complete the task. It is obvious that the Applicant is using the Court process to prolong litigation and to create conditions which are favourable only to himself.

It is, therefore, our considered view that the single Judge properly exercised his discretion. The Appellant cannot be afforded favourable treatment in this case because of the inordinate delay to prosecute his appeal. It can very well be said that even his current


Motion is intended to delay the matter further. For this reason, we cannot fault the single Judge for dismissing the appeal for want of prosecution. We find no merit in the Motion and it is, therefore, refused with costs to the Respondent.



I.C. Mambilima
CHIEF JUSTICE



E.M. Hamaundu
SUPREME COURT JUDGE



R.M.C. Kaoma
SUPREME COURT JUDGE