

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

CAZ/08/259/2017



BETWEEN:

FREDRICK MUNGANYA KAMAYA

APPELLANT

AND

GALAUNIA FARMS LIMITED

RESPONDENT

Before the Hon. Mrs. Justice J.Z. Mulongoti
in Chambers on the 1st day of June, 2018.

For the applicant:

Ms. O. Zulu of Mesdames Mushipe & Associates

For the respondent:

Mr. M. Ndalameta of Musa Dudhia & Co

R U L I N G

Cases cited:

1. *D.E. Nkhuwa v. Lusaka Tyre Services Limited* (1977) ZR 43
2. *Revici v. Prentice Hall Incorporated and others* (1969) 1 ALL ER 773
3. *Twampane Mining Co-operative Society Limited v. E & M Storti Mining Limited* (2011) ZR 67 Vol. 3
4. *Michael Liwanga Kaingu v. Sililo Mutaba* (CCZ Appeal No. 6 of 2017)

Legislation referred to:

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

This is a ruling for the applicant's application for further extension of time within which to file the Record of Appeal and Heads of Argument pursuant to Orders VII rule 1(1) and XIII rule 3 (4) of the Court of Appeal Rules (CAR).

Briefly, the background to this application is that the applicant filed a Notice and Memorandum of Appeal on 25th September, 2017 but failed to file the Record of Appeal within 60 days of lodging the appeal as required by the rules. On 15th December, 2017, the applicant made an application for extension of time to file the Record of Appeal and Heads of Argument which was scheduled to be heard on 15th January, 2018. On that date, the appellant did not appear before Court but the respondent's counsel was present. I gave the applicant a benefit of doubt and adjourned the matter to 5th February, 2018 on which date the hearing took off. The applicant contended that the reason they failed to file the Record of Appeal and Heads of Argument on time was because the respondent had not filed and served the Notice of Address on him. On 16th February, 2018, I rendered a ruling in the applicant's favour. I granted the applicant 30 days within which to file the Record of Appeal. The applicant failed to comply with

that order hence the current application for an order for further extension of time within which to file the Record of Appeal and Heads of Argument. The application is by Notice supported by an Affidavit sworn by Omega Zulu, an advocate in the firm of Mushipe & Associates seized with conduct of the matter on behalf of the applicant. The reasons advanced in the Notice for the delay are couched as follows:

- (i) ***“The Record of Appeal was ready for filing but could not be filed due to an error on the Registrar’s Certificate which read the Registrar of the Court of Appeal instead of the Registrar of the High Court;***
- (ii) ***when the error was rectified, the Record of Appeal could still not be accepted because the copies that were brought before the Master were short of the required 21 copies and when the remaining records were prepared and brought before the Master, they could not be accepted on the ground that it was already after 15 hours despite it being the last day;***
- (iii) ***that notwithstanding the foregoing, the Record of Appeal and Heads of Argument are ready for filing and shall be ready when this matter comes up for hearing; and***
- (iv) ***the delay in filing the Record of Appeal and Heads of Argument was therefore not inordinate or as a result of blatant disregard of the extension granted by this Honourable Court.”***

The Affidavit in Support recites the same reasons advanced in the Notice.

The respondent did not file an affidavit in opposition but contested the application on points of law.

At the hearing, both parties were represented. The applicant's counsel, Ms Zulu, relied on the affidavit in support. She highlighted, orally, that the court had initially extended time for the applicant to file the Record of Appeal but that time ran out before the documents could be filed.

The respondent's counsel, Mr. Ndalameta, opposed the application. He submitted that the record shows that in the previous application, the appellant alleged that the only reason for delay was the lack of the Notice of Address for Service. 30 days were granted and still the Record has not been filed. Counsel argued that Order XIII rule 3 (2) CAR cannot be to the effect that any application for extension of time should be allowed as long as it is made within 21 days. The unfortunate result would be that parties would be entitled to

extension as a matter of right. He referred the Court to the case of **DE. Nkhuwa v. Lusaka Tyre Services Ltd¹** to support his argument.

He argued that if the law were otherwise, a party in breach would have an unqualified right to extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. Thus, Order XIII rule 3 (2) CAR cannot be read in isolation of sub rule (1). He submitted that emphasis must be placed on the need for sufficient reason in Order XIII rule 3 (3). According to Mr. Ndalameta, no explanation has been given in the Affidavit explaining what the appellant was doing during the 29 days of the 30 days he was earlier granted. He contended that the 30 day period was sufficient. He placed reliance on the case of **Revici v. Prentice Hall Incorporated and others²** to support his argument.

I have considered the application and submissions by counsel. The application is made pursuant to Order XIII rule 3 (4) and Order VII

rule 1(1) CAR which provides for procedure of how to go about applying for extension as follows:

Order VII rule 1 (1)

“An interlocutory application under the Act shall be by notice of motion or summons in substantially Form III and Form IV, respectively, set out in the First Schedule.”

Order XII rule 3 (4)

“An application to the Court for an extension of time under this rule shall-

(a) in criminal cases, be substantially in form XXII set out in the First Schedule; and

(b) in Civil cases, be substantially in Form XXIII set out in the First Schedule.”

Apart from citing the wrong orders, the appellant also erroneously filed both a Notice and Summons.

Be that as it may, I will consider the application since the appellant has advanced reasons that caused the delay. The respondent's counsel has argued that those reasons are insufficient. Order XIII rule 3 (3) CAR which provides for sufficient reason to be considered in an application for extension of time, is couched as follows:

“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, an application for extension of time is in the discretion of the court. The Supreme Court has in numerous cases like **D.E. Nkhuwa v. Lusaka Tyre Services Ltd**, also cited by the respondent’s counsel, elucidated that-

“The principle to be applied is that whilst the granting of such extension is entirely in the discretion of the court, such discretion will not be exercised in favour of the appellant without good cause. In addition to the circumstances of the delay and the reasons therefore which provide the material on which the court may exercise its discretion, another most important factor is the length of the delay itself.”

Further, in the case of **Twampane Mining Co-operative Society Limited v. E & M Storti Mining Limited**³, the Supreme Court guided as follows:

“We cannot over emphasise the importance of adhering to rules of court as this is intended to ensure that matters are heard in an

orderly and expeditious manner. Allowing this appeal would be tantamount to us encouraging laxity and non-observance of rules by practitioners and litigants in general. We repeat what we said in Nkhuwa v. Lusaka Tyre Services Limited, that those who choose to ignore rules of court will do so at their own peril.”

The reasons advanced for the failure to file the Record of Appeal within the time that the applicant had been earlier granted by this Court are that counsel made a mistake and indicated for signature the Court of Appeal Registrar instead of the High Court Registrar and that some stamps on the documents contained in the proposed Record of Appeal were not visible such that the applicant ran out of time before he could rectify the errors. The applicant's counsel had 30 days to prepare and file the Record of Appeal and Heads of Argument following the earlier extension.

I agree with Mr. Ndalameta that the 30 days time frame was sufficient for the applicant to have complied with the earlier order to file within 30 days. As highlighted by Mr. Ndalameta, the applicant hinted in the earlier application for extension of time that the only reason the Record had not been filed is because the Notice of Address had not been filed and served on them by the respondent. I also note

that the proposed Record of Appeal of 59 pages with Heads of Argument of 8 pages exhibited in the Affidavit in Support could not have taken counsel so much time such that it can be reasonably acceptable that the 30 days earlier granted were not enough just to add the Notice of Address. It is clear that counsel waited until the 29th day to attempt to file and ran into problems and consequently ran out of time. The reasons cited for failing to file the Record of Appeal after having benefited from an earlier extension are flimsy and unacceptable. Simply put, the delay has been caused by the nonchalant manner that the applicant's counsel has handled the matter. I am guided by the decision of the Constitutional Court in **Michael Liwanga Kaingu v. Sililo Mutaba**⁴, where it was stated as follows:

"It is elementary that the onus is on counsel on record to ensure that proper and correct documents are filed 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 apply himself or read through his documents before filing them into court."

Accordingly, I find that the reasons advanced by the applicant are insufficient. The applicant has not demonstrated that there is good cause or material upon which I can exercise discretion to extend time under Order XIII rule 3(3) CAR. Therefore, the application for further extension of time is unsuccessful.

Costs to the respondent to be taxed failing agreement.

Delivered at Lusaka this 1st day of June, 2018.

A handwritten signature in dark ink, appearing to read 'J.Z. Mulongoti', is written over a horizontal line.

J.Z. Mulongoti

Court of Appeal Judge