

IN THE COURT OF APPEAL OF ZAMBIA

HOLDEN AT LUSAKA

(Civil Jurisdiction)

APPLICATIONS 57/2020,

13 AND 19 OF 2021

**IN THE MATTER OF : THE IMMIGRATION AND DEPORTATION
ACT NO. 18 OF 2021 SECTIONS 34, 35, 36,
37, 38 AND 39**

**IN THE MATTER OF : ORDER 53 OF THE RULES OF THE SUPREME
COURT (RSC) WHITE BOOK (1999 ED) VOL 1
AND VOL 2**

IN THE MATTER OF : AN APPLICATION FOR JUDICIAL REVIEW

IN THE MATTER OF : OMAR DIRIE HIRSI

AND

**IN THE MATTER OF : RESIDENCE PERMIT NO. H-0182/104-
270/03**

BETWEEN:

ATTORNEY-GENERAL

APPELLANT

AND

OMAR DIRIE HIRSI

RESPONDENT

CORAM: KONDOLO, MAKUNGU AND SIAVWAPA, JJA. No 57/2020

KONDOLO, MAJULA AND SIAVWAPA, JJA. No. 13 AND 19/2020

On 6th October, 2020, 29th April and 19th August 2021.

FOR THE APPLICANT: MR. C. MULONDA, PRINCIPAL STATE ADVOCATE

**FOR THE RESPONDENT: MR. B. GONDWE OF MESSRS BUTA GONDWE AND
ASSOCIATES**

R U L I N G

SIAVWAPA, JA delivered the Ruling of the court.

Cases referred to:

1. *D. E Nkhuwa vs Lusaka Tyre Services Limited (1977) Z.R43.*

Legislation referred to:

1. *The Court of Appeal Act No. 7 of 2016 of the Laws of Zambia*
2. *The Court of Appeal Rules Statutory Instrument No. 65 of 2016*

1.0. **INTRODUCTION**

- 1.1. This is a composite ruling on three applications namely; Application No. 57 of 2020, filed into Court on 29th September 2020, Notice of Motion No. 13 of 2021 filed into Court on 16th March 2021 and Application No. 19 of 2021 filed into court on 31st March, 2021.
- 1.2. We found it convenient to deliver a composite ruling in the three applications because the parties are the same and remedies sought are intertwined as the issues raised are all a product of our judgment of 29th April, 2020.

2.0 **BACKGROUND**

- 2.1 On 29th April, 2020, we delivered a Judgment by which we upheld the Judgment of the Hon. Mrs. Justice M. Mapani-Kawimbe of the High Court delivered on 9th October, 2017.
- 2.2 The effect of our Judgment was to restore the Respondent's Residence Permit which had been cancelled resulting in his deportation to the United States of America where his citizenship lies.
- 2.3 In terms of Section 13(1) of the Court of Appeal Act No. 7 of 2016, an appeal to the Supreme Court is with leave of the Court by application to be made within fourteen days of the Judgment as provided by sub-section (2).
- 2.4 The Applicant however, failed to apply for leave to appeal within the stipulated time prompting him to move the Court through a single Judge of the Court to grant him leave to file an application for leave to appeal out of time. The application was filed on 1st June 2020, 19 days outside the 14 days prescribed for applying for leave to appeal.
- 2.5 The learned single Judge heard the application on 25th June 2020 and on 29th September 2020, whilst awaiting the ruling on the application, the Applicant filed application No. 57 of 2020.

- 2.6 In that application we were requested to stay the execution of our Judgment of 29th April 2020 pending the ruling on the application before the single Judge for leave to file an application for leave to appeal out of time.
- 2.7 We heard the application on 6th October 2020 and in his oral submission, Mr. Mulonda, Principal State Advocate, prayed that the order of stay be granted in order to maintain the status quo pending the ruling on the application before the single Judge. He further argued that the application before the single Judge had reasonable prospects of success. It was further submitted that the order of stay be granted because the Respondent had commenced legal proceedings against the Director General of the Immigration Department.
- 2.8 After being asked to clarify the status quo he sought to be maintained with respect to the Respondent, Mr. Mulonda responded that the Respondent ought to be reverted to the status obtaining before the Judgment of the High Court implying that he ought to be deported.
- 2.9 In opposing the application, Mr. Gondwe, simply submitted that the status quo of the Respondent was that of a Resident as ordered by both the High Court and this Court. Further, it was submitted that the appeal intended had no reasonable prospects of success.

2.10 At the close of the hearing, we reserved our ruling pending the ruling by the single Judge on the application for leave to file an application for leave to appeal to the Supreme Court.

3.0 **THE RULING BY THE SINGLE JUDGE**

3.1 After nearly nine months of waiting the single Judge handed down her ruling on 3rd March, 2021 refusing to grant leave to apply for leave to appeal to the Supreme Court out of time.

3.2 In her ruling the single Judge, while acknowledging that a delay of 19 days was not inordinate, dismissed the application on the basis that the reason for failure to comply with time was not sufficient.

3.3 She also previewed the grounds for the proposed appeal and formed the view that they did not raise any issues of law or public importance not previously addressed by the Supreme Court.

4.0 **THE TWO APPLICATIONS**

4.1 The ruling by the single Judge birthed two applications namely the Notice of Motion to reverse the said ruling which is application No. 13 of 2021 and the application for an order to stay our Judgment of 29th April 2020 filed as application No. 19 of 2021.

4.2 The application for stay was countered by a Notice to raise preliminary objection on account that it was a multiplicity of actions as the same had already been heard by the Court and awaiting a ruling.

5.0 **OUR ANALYSIS AND VIEWS**

5.1 We start with the preliminary objection to the application for an order of stay of our Judgment.

5.2 We note that in the application we heard on 6th October 2020 under application No. 57 of 2020, the stay was stated to be required pending the application before the single Judge.

5.3 In the fresh application the stay is not attached to anything pending and this is because there is no appeal pending to which the stay if granted would attach.

5.4 In view of paragraph 5.3 above, it is prudent to first deal with application No. 13 of 2021 which is the motion to reverse the ruling of the single Judge that refused to grant leave to the Applicant to apply for leave to appeal out of time.

5.5 In dealing with this issue, it is important to note that the power of the Court to extend time is exercised in the Court's discretion. The discretion should however be exercised judiciously.

5.6 In that regard, Order XIII Rule 3(1)(a) of the Court of Appeal Rules provides as follows;

“The court may, for sufficient reason extend the time for-

(a)Making an application, including an application for leave to appeal.”

5.7 Clearly, the Court’s discretion in an application for extension of time is informed by sufficient reason. The Applicant must therefore, give reasons for the failure to make the application within the prescribed time.

5.8 Thereafter, it is for the Court to evaluate the reasons given and decide whether the failure by the Applicant to comply with the rule is excusable to warrant the grant of an extension of time.

5.9 In the ruling by the single Judge which the Applicant seeks to be reversed, the learned Judge refused to grant the extension because in her view, the reason advanced had failed. She further took the view that the intended appeal had no prospects of success.

5.10 In order for us to reverse the ruling of the single Judge we need to satisfy ourselves that the Judge improperly exercised her discretion.

- 5.11 We have given careful consideration to the submissions by the Applicant which largely draw from the case of *D. E Nkhuwa vs Lusaka Tyre Services Limited*⁽¹⁾. In that case the Supreme Court spoke to the rationale for the provision to extend time as provided for in the Rules as ***“If circumstances prevail which make it impossible or even extremely difficult for parties to take procedural steps within prescribed time. . .”***
- 5.12 Based on that guidance by the Supreme Court, we do not see such circumstances in this application because in the first place, the Appellant is the Principal Legal Advisor to the Government.
- 5.13 It was therefore incumbent upon the Applicant to advise the instructing Ministry (Home Affairs) whether or not an appeal would have reasonable prospects of success.
- 5.14 We do not think that the Applicant, by virtue of his office would struggle to receive instructions from a Government Department or indeed a Ministry as being portrayed by the Applicant.
- 5.15 In any event, if instructions were requested promptly after the Judgment, based on the Applicant’s view on the Judgment, he could not have failed to file a Notice and Memorandum of Appeal within the stipulated time.

5.16 We therefore, do not think that the reason advanced by the Applicant falls within the D.E. Nkhuwa case circumstances. The single Judge was not satisfied that the circumstances demanded the granting of the sought relief. Given that it is a discretionary relief, we find no reason to fault the manner in which the single Judge exercised her discretion.

6.0 **CONCLUSION**

6.1 The Applicant's motion to reverse the ruling of the single Judge cannot succeed for the reasons stated in this ruling.

6.2 This means that there remains no basis upon which we can consider the application for an order of stay of our Judgment in the absence of leave to appeal.

6.3 We also wish to comment on the argument by the learned Attorney-General that the order of stay was intended to maintain the Respondent's status of deportee prior to the High Court Judgment.

6.4 We find the argument perplexing because in essence, that order, if granted would be tantamount to reversing both our Judgment and that of the High Court.

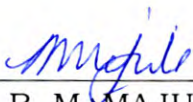
6.5 It seems to us that what has irked the Applicant is the fact that the Respondent has commenced legal proceedings against

the Director-General of the Immigration Department as submitted by Mr. Mulonda in Application No. 57 of 2020.

- 6.6 We do not think this is the right course of action to take as the law ought to be allowed to take its course.
- 6.7 Finally, we have taken a hard look at the intended grounds of appeal if the leave to apply for leave to appeal were to be granted and we find the same non-conforming to Section 13 (3) of the Court of Appeal Act No.7 of 2016.
- 6.8 We therefore find no merit in the motion which is application No. 13 of 2021. That being the case Applications No. 57 of 2020 and No. 19 of 2021 become otiose.
- 6.9 In the result, we order costs to be for the Respondent.



M. M KONDOLO
COURT OF APPEAL JUDGE



B. M. MAJULA
COURT OF APPEAL JUDGE



M. J. SIAVWAPA
COURT OF APPEAL JUDGE