

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

CAZ/08/36/2021

BETWEEN:

PAUL MANDA



Appellant

AND

JACQUELINE MUSONDA MUBANGA

Respondent

**Coram: DJP Mchenga, Majula and Sharpe-Phiri JJA
on 28th March 2022 and 8th April 2022**

For the Appellant: In person

For the Respondent: Mr. C. Sionondo of Messrs Malambo &
Company on behalf of Mr. J. Ilunga of
Messrs Ilunga & Company

RULING

Sharpe-Phiri, JA, delivered the Ruling of the Court

Legislation referred to:

1. *The Court of Appeal Act, No. 7 of 2016*
2. *Court of Appeal Rules, Statutory Instrument No. 65 of 2016R.*
3. *The High Court Rules, Chapter 27 of the Laws of Zambia*

Cases to:

1. *Guardall Security Limited v Renford Kabwe, CAZ Appeal 44/2019*
2. *Nahar Investments v Grindlays Bank Zambia Limited (1984) ZR 81*
3. *Twampane v Msorti (SCZ No. 20 of 201)*
4. *NFC Africa Mining Plc v Techro Zambia Limited, SCZ No. 22 of 2009*
5. *Nkhuwa v Lusaka Tyre Services Limited (1977) ZR 43*
6. *Stanley Mwambazi v Morester Farm Limited (1977) ZR 108*

1. INTRODUCTION

- 1.1 This is a ruling on a Motion brought by the Appellant for an order to vary or reverse a ruling of the Honourable Justice P. C. M. Ngulube delivered in chambers on 27th August 2021 sitting as a single Judge of this Court.
- 1.1 The Notice of Motion was brought pursuant to **Order VII and X Rules 2(8) and (10) of the Court of Appeal Rules** as read together **Part II Section 9(b) of the Court of Appeal Act No. 7 of 2016.**
- 1.2 The Appellant contends that the learned single Judge of this Court misdirected herself on a point of law and fact when she dismissed the Appeal without having considered the merits of the case.

2. FACTUAL BACKGROUND

- 2.1 The background of this matter is that the Respondent (Applicant in the Court below) commenced an action in the Lusaka High Court for recovery of possession of Stand No. 38974, Lusaka from the Appellant. The High Court presided over by the Honourable Mrs. Justice C. Chinyanwa Zulu, delivered a Ruling in the said action on

23rd September 2020 in which she held in favor of the Respondent.

2.2 The Ruling held as follows:

“Having found that the Respondent (Appellant herein) is occupying the land LUS/38974 without licence or consent of the Applicant (Respondent herein) as landowner, I do grant the Applicant the relief for an Order to recover possession of Stand No. 38974, Lusaka as prayed in her application. The Respondent and any other person in occupation of the said piece of land must vacate within sixty days from date of this judgment. Costs follow the event and to be taxed in default of agreement.”

2.3 Being dissatisfied with the Ruling of the said Judge, the Appellant obtained leave from the lower Court to appeal to the Court of Appeal on 9th December 2020 following an ex-parte application he made on 4th December 2020. Following grant of leave to appeal to this Court, the Appellant filed a notice and memorandum of appeal in this Court on 5th February 2021 with the following grounds of appeal:

1. The Honourable Judge in the Court below erred in law and fact when she held that the Applicant was occupying Stand Number LUS/38974 without the Applicant's/Respondent's licence or consent as landowner or that of any predecessor in title, without considering the evidence that the Applicant's/Respondent's Offer letter was cancelled by the Ministry of Lands.
2. The Honourable Judge in the Court below erred in law and fact when he granted the Applicant/Respondent the relief for an order to recover possession of Stand No. 38974, Lusaka without taking into account the material and financial expenses that the Appellant herein incurred in building the wall fence and the house amounting to over Seven Hundred Thousand (K700,000).
3. The Honourable Judge in the Court below erred in law and fact when she passed her Ruling without giving the Appellant an opportunity to be heard and/or appear before Court as he was not served with any notice of hearing.

4. The Honourable Judge in the Court below erred in law and fact when he held that the Applicant/Respondent was in order to use the summary procedure as the Appellant was occupying the land in issue without the licence or consent of the Applicant/Respondent as landowner, without taking into account the fact that the matter had several contentious issues that needed to be resolved.

5. The Honourable Judge in the Court below erred in law and fact when he held that costs were for the Applicant/Respondent, without taking into account the failure of the Applicant/Respondent to serve Notices of Hearing on the Appellant herein.

2.4 Following filing of the said notice and memorandum of Appeal on 5th February 2021, the Appellant did not take any action until 24th March 2021, when he filed an application for extension of time within which to file Record of Appeal and Heads of Arguments on the ground that he had not been able to file the Record of Appeal as he had not been availed the typed record of proceedings in the High Court under Cause No. 2020/HP/0214.

2.5 Before the Appellant's summons was heard, the Respondent brought an application before the single Judge for an Order to dismiss the appeal for irregularity.

It was made pursuant to **Order VII Rule 1(1)** as read with **Section 25 of the Court of Appeal Act** and **Order X Rule 3(5) of the Court of Appeal Rules** on the grounds that:

- 1. The Appellant did not file the notice and memorandum of appeal within the mandatory thirty-day period after the date of Judgment by the Honourable Mrs. Justice C. Chinyanwa Zulu, being 23rd September 2020.**
- 2. The ex-parte order for leave to appeal to the Court of Appeal granted on 9th December 2020 as a result of an ex-parte order application for leave to appeal made by the Respondent (now Appellant) on 4th December 2020, eighty (80) days after date of Judgement, is a nullity.**

2.6 The motion was heard and determined by a single Judge of this Court who rendered a Ruling on 27th August 2021.

2.7 The said Ruling is now the subject of determination of the Notice of Motion herein. In the said Ruling, the single Judge of this Court held that:

“In casu, the Appellant’s counsel obtained an ex-parte order for leave to appeal to this Court on 9th December 2020, well after the mandatory thirty days after the delivery of the Judgment. I am therefore of the view that the appeal is incompetently before this Court as the ex-parte order was obtained after the mandatory thirty day period within which the appeal should have been filed. I accordingly dismiss this appeal as it is incompetent. The appeal having been dismissed, costs are awarded to the Respondent, to be taxed in default of agreement.”

3. THE NOTICE OF MOTION BEFORE COURT

3.1 The Appellant’s Notice of Motion was filed into Court on 23rd November 2021 and was supported by an affidavit of even date.

3.2 In the affidavit in support, deposed to by the Appellant, he highlighted that the appeal in question was dismissed for irregularities by a single Judge of this Court and by the

application, the Appellant sought the Court's indulgence to vary, reverse or dismiss the Ruling of a single Judge.

- 3.3 The reasons advanced for the request being that the appeal has merit as the matter was prematurely dismissed on a curable technicality.
- 3.4 The Appellant contended that the single Judge ought to have directed him to follow the correct procedure and that the appeal ought to have been heard on its merits by the full bench.
- 3.5 The Appellant further deposed that following the ruling, the Respondent had advertised the subject property as indicated in the application for injunction filed before the single Judge which was refused on the ground that she had by that time dismissed the matter.
- 3.6 The Appellant contended that the appeal had strong prospects of success.

4. ARGUMENTS IN SUPPORT OF MOTION

- 4.1 The Appellant's motion was supported by Skeleton Arguments filed on 15th February 2022 in which the Appellant argued that in line with **Order VII and X Rules 2(8) and (10) of the Court of Appeal Rules** as read

together with **Part II Section 9 of the Court of Appeal Act, No. 7 of the 2016** this Court has power to vary or reverse the decision of the single Judge.

- 4.2 The Appellant urged the Court to look at the merits of the appeal. He referred to the case of **Nkuwa vs Lusaka Tyre Services Limited** where it was held that:

“The granting of an extension of time within which to appeal is entirely in the discretion of the Court, but such discretion will not be exercised without good cause.”

- 4.3 The Appellant made further reference to the case of **Twampane Mining Co-operative Society vs E and M Stori Mining Limited** where the Supreme Court held that:

“An appellate Court is entitled to look into the merits of the appeal when considering an application for extension of time.”

- 4.4 The Appellant further argued that it would be in the interest of justice that the appeal is heard and determined on its merits as he had shown good cause at the time of filing the application for extension of time within which to file the Record of Appeal and on opposing the preliminary issue for dismissal of appeal.

4.5 The Appellant urged this Court to forego his technical defaults and determine the appeal on its merits citing the case of **Stanely Mwambazi vs Morester Farm Limited** where it was held that:

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

5. ARGUMENTS OPPOSING THE MOTION

5.1 The Respondent opposed the Motion and filed Skeleton Arguments on 4th March 2022. In the said Arguments, the Respondent highlighted that the Appellant had lodged the Notice of Motion on 23rd November 2021 which was 83 days from the date of the decision of the single Judge delivered on 27th August 2021.

5.2 The Respondent submitted that this was contrary to the provisions of **Order X Rule 2(1) and (9) of the Rules of the Court of Appeal** which provides that:

“(1) An application to a single Judge shall be made by notice of motion or summons within fourteen days from the date of the decision complained.

(9) An application involving the decision of an appeal shall be made to the Court in the manner specified in sub-rule (1).”

5.3 It was also argued that **Order VII Rule 2(11)** provides that:

“If the appellant has not lodged any notice within the prescribed time, the refusal of the application by the single Judge shall be final.”

5.4 It was further argued by the Respondent that the motion before the Court was fatally irregular as the decision of the single Judge had been rendered final after the expiration of the mandatory fourteen (14) day period within which the Appellant was required to appeal to the Court.

5.5 The Respondent urged this Court to have recourse to its decision in the case of **Guardall Security Group Limited vs Reinford Kabwe** where we held that:

“The effect of a limitation provision in an Act of Parliament is to limit the jurisdiction of the Court as

to the matter before it to within that stipulated period. Failure to act within the set time limit robs the Court of jurisdiction to take any further action in that matter. Whether or not the non-compliance has been caused by the Court or other players is immaterial as the cesser of jurisdiction is by act of law.”

- 5.6 The Respondent also relied on the case of **Twampane vs Msorti** where the Supreme Court held that:

“It is important to adhere to the Rules of Court in order to ensure that matters are heard in an orderly and expeditious manner... those who choose to ignore Rules of Court do so at their own peril.”

- 5.7 The Respondent further submitted that if allowed, the appeal will to a greater extent be prejudicial to her in the manner envisaged in the case of **Nahar Investments vs Grindlays Bank International Zambia Limited** where the Court held that:

“We wish to remind Appellants that it is their duty to lodge records of appeal within the period allowed, including any extended period. If difficulties are encountered which are beyond their means of control

(such as the non-availability of the notes of proceedings which is the responsibility of the High Court to furnish), Appellants have a duty to make prompt application to the Court for enlargement of time. Litigation must come to an end and it is highly undesirable that Respondents should be kept in suspense because of dilatory conduct on the part of the Appellants. Indeed, as a general rule, Appellants who sit back until there is an application to dismiss their appeal, before making their own frantic application for an extension, do so at their own peril. If the delay has been inordinate or if in the circumstances of an individual case, it appears that the delayed appeal has resulted in the Respondent being unfairly prejudiced in the enjoyment of any Judgment in his favour, or in any other manner, the dilatory Appellant can expect the appeal to be dismissed for want of prosecution, notwithstanding that he has a valid and otherwise perfectly acceptable explanation.”

- 5.8 Furthermore, it was submitted that the Supreme Court in the case of **NFC Africa Mining Plc vs Techro Zambia Limited** held that:

“The Rules of Court are intended to assist in the proper and orderly administration of justice and as such, they must be strictly followed.”

- 5.9 The Respondent concluded by referring to the case of ***Nkhuwa vs Lusaka Tyre Services Limited*** where the Court held that:

“The Rules of Court must prima facie be obeyed and in order to justify a Court in extending the time during which some step in procedure requires to be taken there must be some material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time-table for the conduct of litigation.”

6. ARGUMENTS IN REPLY TO OPPOSITION

- 6.1 In his rebuttal, the Appellant filed arguments in reply dated 7th March 2022, in which the Appellant argued that the decision complained of in this case is one made by the lower Court Judge of the decision of the quasi-judicial body, while **Order X Rule 2(1)** relied on by the Respondent

refers to the way an application must be made to a single Judge of this Court.

- 6.2 The Appellant argued that the application herein relates to the application he made to the full bench of this Court following the decision of the single Judge. He further argued that **Sub-rule (9) of the said Order X Rule 2 of the Court of Appeal Rules** does not apply in this case because it refers to an appeal to the Court and an application to vary, discharge or reverse a Ruling of the single Judge. He insisted that the application before Court has been made pursuant to **Order X sub-rule 8 under Section 9(b) of the Court of Appeal Act**, adding that the said provision does not give a time frame within which an application may be made.

7. DECISION OF THIS COURT

- 7.1 The motion was heard on 7th March 2022. The Appellant appeared in person and the Respondent was represented by counsel. The parties relied on their respective Heads of Arguments which have already been highlighted in the earlier part of this Judgment.
- 7.2 This motion arises from the decision of the single Judge of this Court on an application brought by the Respondent

to dismiss the Appellant's appeal under cause number CAZ/08/36/2021 for irregularity.

- 7.3 The irregularity being that the said appeal offended the provisions of **Section 25 of the Court of Appeal Act** as well as **Order X Rule 3(5) of the Court of Appeal Rules** which require that appeals are lodged within 30 days from the date the decision complained of before a lower Court.
- 7.3 The facts in this case reveal that the lower Court rendered its judgment in favour of the Respondent on 23rd September 2020. The Appellant being aggrieved with the said decision filed an ex-parte application for leave to appeal the said decision on 4th December 2020. An ex-parte order granting leave to appeal was issued by the lower Court on 9th December 2020.
- 7.4 The said application for leave to appeal was brought 73 days after the said decision of the lower Court and leave was granted 80 days after the decision complained of.
- 7.5 Following grant of leave to appeal, the Appellant went on to file Notice of Appeal and Memorandum of Appeal on 5th February 2021. The Applicant subsequently filed an application for extension of time within which to file Record of Appeal and Heads of Arguments on 24th March

2021 on account of having failed to obtain a typed record of proceedings from the lower Court in good time.

7.6 Given the said turn of events, the Respondent moved a motion to dismiss the appeal on account of irregularity, particularly that it had been filed out of time which motion led to the decision of the single Judge which the Appellant seeks to impugn by this motion before us.

7.7 The primary argument by the Appellant is that the single Judge dismissed the appeal and upheld the Respondent's motion without looking into the merits of the appeal before it. His contention is that a decision of a single Judge of this Court may be varied, discharged, or reversed by the full bench in accordance with **Section 9(b) of the Court of Appeal Act.**

7.8 The said Section 9(a) of the Act provides that:

“A single Judge of this Court may exercise a power vested in the Court not involving the decision of an appeal, except that...

(b) in civil matters, an 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.”

7.9 It is palpably clear that this Court has the power to vary, discharge or reverse a decision of a single Judge where just cause is shown to do so. The issue for consideration is whether the decision of the single Judge of the Court herein should be varied or reversed.

7.10 In making this determination, we will review the application before the single Judge, which was for an order to dismiss the action for irregularities. Having heard the parties, the single Judge found that the appeal was competently before the Court and dismissed it accordingly.

7.11 The Judge found that the decision complained of was made on 23rd September 2020, and that the Appellant only applied for leave to appeal on 4th December 2020, that is 73 days after the decision complained of.

7.12 Evidently, the Appellant did not comply with the provisions of **Section 25 of the Court of Appeal Act** which provides that:

“Subject to Section twenty-three, a person who intends to appeal to the Court from a Judgment shall do so within thirty days of the Judgement.”

7.13 The aforesaid provision is supplemented by the **Order X Rule 3(5) of the Court of Appeal Rules** which provides that:

“A person desiring to appeal to the Court shall give notice of appeal in accordance with this rule. The notice and memorandum of appeal shall be entitled in the proceedings from which it is intended to appeal and shall be filed with the Registrar within thirty-days after the Judgment appealed against.”

7.14 Given the aforesaid provisions, we re-iterate that the practice and procedure to be followed in conduct of business of this Court is as provided for in the **Court of Appeal Act and the Rules** of this Court, recourse may only be had to other provisions where there is a lacuna in the said provisions.

7.15 As regards the provisions for time within which appeals are to be brought, this Court has repeated that the ends of justice can only be met by strict adherence to rules of Court which by their very nature are intended to achieve

the proper and orderly administration of justice. Failure of parties or Court to follow the practice and procedure as promulgated in the rules is injustice.

7.16 In the case of **Guardall Security Limited vs Renford Kabwe**, this Court held that:

'Failure to act within the set time limit robs the Court of jurisdiction to take any further action in that matter. Whether or not the non-compliance has been caused by the Court or the other players is immaterial as the cesser of jurisdiction is by act of law.'

7.17 In the above case, we guided that the failure to act within the time limits set, strips the Court of jurisdiction to take further action in the matter.

7.18 In the present case, the Appellant being dissatisfied with the decision of the lower Court delivered on 23rd September 2020, ought to have filed the appeal within the time set by law, i.e., no than later than 22nd October 2020.

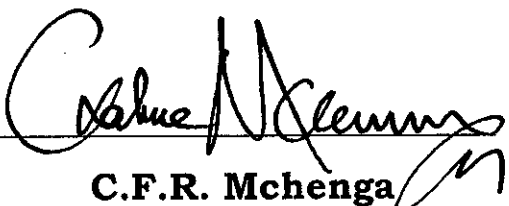
7.19 The provisions above prescribe 30 days as the time within which the Appellant ought to have filed the Notice of Appeal. The Appellant did not seek leave to appeal until 4th

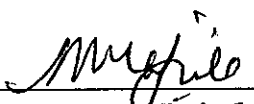
December 2020, a period of 73 days after the decision complained off. This was distinctly out of time.

7.20 For the said reasons and authorities cited, we find no reason to vary, discharge or reverse the decision of the single Judge as sought by the motion herein. The learned single Judge was on firm ground in holding as she did. This Court has no jurisdiction to adjudicate or consider merits of an action which is time barred by provisions of the law.

8. CONCLUSION

The Appellants Notice of Motion is accordingly dismissed with costs to the Respondent.


C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL


B.M. Majula
COURT OF APPEAL JUDGE


N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE