

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

SCZ/8/30/2021

BETWEEN:

STEPHEN MWEWA

AND

ATTORNEY GENERAL



APPLICANT

RESPONDENT

**Coram: Kajimanga, JS in Chambers on 9th February 2022 and
12th April 2022**

FOR THE APPLICANT : Mr. K. Mwale of Messrs K. Mwale and
Company

FOR THE RESPONDENTS: Mrs. D. Mwewa-Sallah, Principal
State Advocate of the Attorney
General's Chambers

RULING

Case referred to:

1. **D.E. Nkhuwa v Lusaka Tyre Services Ltd (1977) Z.R. 43**
2. **Workers Compensation Fund Control Board v Regina Kapwele and Another - SCZ/8/33/2019**
3. **Edward Chilufya Mwansa & 194 Others v Konkola Coppermine Plc - Appeal No. 99 of 2015**

Legislation referred to:

1. **Supreme Court Act, Chapter 25 of the Laws of Zambia: Order 12 rule 1.**
2. **Defence Act, Chapter 106 of the Laws of Zambia; Sections 124(1), 125, 137 (1) & (3)**

Introduction

[1] This is a ruling on an application for an order for leave to appeal to the Supreme Court out of time pursuant to Order 12 rule 1 of the Supreme Court Rules, Chapter 25 of the Laws of Zambia.

Affidavit evidence and arguments

[2] The application is supported by an affidavit sworn by Stephen Mwewa, the applicant herein. He deposed that he was an army officer in the Zambia Army occupying the rank of warrant officer class one and that he was allegedly charged for absenteeism by the respondent under the Defence Act, Chapter 106 of the Laws of Zambia. Subsequently, a Board of Inquiry was set up to investigate and determine the matter. The Board of Inquiry went on to convict him for absenteeism without giving him an opportunity to be heard on the allegations levelled against him and made a decision to discharge him from the regular force, which decision was not availed to him.

[3] Following this decision, which has the same effect as that of a Court Martial, he was discharged from the regular force of the Zambia Army on 16th September 2016. Thereafter, he had been

writing to his superiors for the matter to be resolved administratively and to have lenience on him with regard to his discharge from the regular force as per exhibit "SM1". However, his superiors' response to his request yielded no positive outcome as they upheld the decision of the Board of Inquiry as per exhibit "SM2". As a result of taking the administrative route, the time within which to make an appeal against the decision of the Board of Inquiry to the Supreme Court expired as provided for in the Defence Act.

- [4] The application was opposed by way of an affidavit in opposition sworn by Brigadier General Francis Muketa Kangwenda, the director general of the Zambia Army legal services branch. His affidavit evidence disclosed that the applicant was absent from duty without official leave for twenty-two days, from 12th September 2016 to 3rd October 2016. Following his illegal absence, a Board of Inquiry was convened in line with section 124(1) of the Defence Act as evidenced by exhibit "FMK1". According to the deponent, the applicant was illegally absent from duty and was nowhere to be seen or found and thus cannot claim that he was not subjected to the rules of natural justice.

[5] He deposed that the Board of Inquiry recommended for the applicant's discharge from the Zambia Army. As a consequence, the applicant was discharged for illegal absenteeism in line with the provisions of section 125 of the Defence Act, with effect from 12th September 2016 as per exhibit "FMK2". The applicant was informed of his discharge, and he responded seeking leniency in a letter dated 21st March 2019 as per exhibit "FMK3". In a letter dated June 2019, the applicant's appeal for leniency was denied and the Zambia Army advised the applicant to seek leave of the Supreme Court if he wished to appeal their decision. The applicant only filed his application for leave to appeal to this court out of time more than 2 years later on 9th December 2019. However, the applicant has not provided any sufficient reasons for the delay in making his application for leave to appeal out of time.

[6] The applicant filed an affidavit in reply in which he deposed that the respondent knew where the applicant was residing and that the respondent even sent some army personnel to search the house of the applicant during the period the Board of Inquiry was constituted as indicated in exhibit "SM1". He also stated

that the Board of Inquiry's recommendation for his discharge from the Army was void as the AWOL procedure which stipulates a period of 28 days was not followed when constituting the Board. As a result, the applicant did not even appear before the said Board of Inquiry and was further not availed the decision of the Board of Inquiry, resulting in a breach of the rules of natural justice.

[7] The applicant's affidavit evidence further disclosed that the applicant wrote a letter seeking leniency following the advice that was given by the Army Legal Director but that the first letter which the applicant wrote after the discharge was seeking audience with the Army Commander as per exhibit "SM2". The applicant concluded that the delay in appealing was caused in part by the respondent's refusal to release the decision of the Board of Inquiry and the applicant's own attempt to resolve the dispute administratively. Thus, the applicant has provided sufficient reason to appeal out of time.

[8] In his skeleton arguments, Mr. Mwale submitted on behalf of the applicant that this court has power to exercise its discretion in granting leave to appeal out of time provided the applicant

has a good cause leading to the delay in appealing. According to counsel, the applicant's failure to appeal against the decision of the Board of Inquiry to the Supreme Court within the stipulated time as provided for by law was due to the administrative route that was taken by the applicant to amicably resolve the issue and request for leniency from his superiors. Thus, the applicant has a good cause as to why he delayed in appealing to this court as he wanted to exhaust all administrative channels. He therefore prayed that this court exercises its discretion to grant him leave to appeal out of time.

- [9] For the state, Mrs. Sallah submitted that in June 2019, the applicant made an appeal for leniency against his discharge and the Zambia Army advised him to seek leave of the Supreme Court if he wished to appeal their decision but he sat on his rights from June 2019 to December 2021. She also contended that section 137(1) of the Defence Act is clear as to the time for seeking leave to appeal for any conviction of the court-martial, that such appeals must be lodged forty days of the promulgation of the finding thereof. However, the applicant only filed the

application before this court on 9th December 2021, over two years after the decision of the Zambia Army.

[10] Relying on the cases of *D.E. Nkhuwa v Lusaka Tyre Services Limited*¹ and *Workers Compensation Fund Control Board v Regina Kapwele and Another*² and the provisions of section 137(3) of the Defence Act, Mrs. Sallah argued that this court has discretion for sufficient reason, to extend time within which an application for leave to appeal can be made. However, the reasons advanced in the applicant's affidavit in support fall short of the legal requirements.

[11] Counsel also submitted that the reason advanced by the applicant of him pursuing administrative channels to resolve the matter were 'post facto' and this did not stop time from running. In support of this argument, the court was referred to the case of *Edward Chilufya Mwansa & 194 Others v Konkola Coppermines Plc*³ where it was held that:

“The evidence in the record of appeal discloses that seven years had gone by from the time the cause of action arose without the appellants commencing legal proceedings against their employer. They sought to exhaust administrative and political channels instead. The respondent in a letter dated 17th December 2012,

advised the appellants that the administrative procedures were closed. Yet, the appellants only applied to file the complaint out of time on 9th January 2015 - over three years later.

Any appellant, whether represented or not, has a duty to be vigilant. Law, like equity, favours the vigilant. Section 19(3) of the Industrial and Labour Relations (Amendment) Act has to be construed within the maxim *vigilantibus et non dormientibus jura subveniunt* (the law helps the vigilant, not those who slumber) – see paragraph 1437 Halsbury's Laws of England, Vol.44(1) 4th Ed. P.867.

In *D. E. Nkhuwa v Lusaka Tyre Services Ltd*, we held that the granting of an extension of time lies entirely in the discretion of the court but such discretion will not be exercised without good cause. We also stated in the same case that rules prescribing time limits within which steps must be taken ought to be adhered to strictly and parties who ignore them do so at their own peril.

Pursuing an ex-curia settlement does not arrest the statutory time form running. In this case, the appellants could well have commenced their action in the Industrial Relations Court while they pursued a settlement on a clear understanding that such action would be discontinued if and when a settlement were reached. Our view, therefore, is that the lower court cannot be faulted in finding as it did.”

- [12] Mrs. Sallah, accordingly, contended that there has been delay on the part of the applicant in making his application for leave to appeal as it was made 2 years after the prescribed time period. Further, that he has not provided sufficient reasons for

the said delay. As such, he is not entitled to the relief he is seeking under Order 12 rule 1 of the Supreme Court Rules and his application should therefore be dismissed with costs.

[13] No oral hearing was held in this matter as the parties agreed that it be dispensed with and that the court renders a ruling based on the material filed by the parties.

Decision of the Court

[14] I have considered the affidavit evidence and written submissions of both parties. The application before this court is predicated on rule 12(1) of the Rules of the Supreme Court which states that:

“The Court shall have the power for sufficient reason to extend time for making any application, including an application for leave to appeal, or for bringing any appeal, or for taking any step in or in connection with any appeal, notwithstanding that the time limited therefor may have expired, and whether the time limited for such purpose was so limited by the order of the Court or by these Rules, or by any written law.” [Emphasis added].

[15] In this application, the applicant is seeking leave to appeal to this Court out of time against the decision of a Board of Inquiry, discharging him from the regular force of the Zambia Army in

accordance with the Defence Act. It is trite that leave is granted at the discretion of the court. The grant or refusal to grant an application for leave would depend on the circumstances of each case. In so far as the provisions of rule 12 of the Supreme Court Rules are concerned, an applicant seeking leave to appeal out of time can only benefit from the court's discretionary power if sufficient reasons are advanced for extension of time.

[16] This is consistent with section 137 of the Defence Act which provides that:

“(1) Leave to appeal to the supreme court shall not be given except in pursuance of an application in that behalf made by or on behalf of the appellant, and lodged within forty days of the date of promulgation of the finding of the court-martial in respect of which the appeal is brought, with the registrar of the court of appeal, being an application in the prescribed form and specifying the grounds on which leave to appeal is sought and such other particulars, if any, as may be prescribed.

(2) ...

(3) The Supreme Court may extend the period within which an application for leave to appeal is required by subsection (1) to be lodged, whether that period has expired or not and may similarly extend the period for lodging the appeal provided by subsection (2), if, owing to the fact the appellant is outside Zambia or otherwise,

he has not had a reasonable opportunity of lodging his appeal within fourteen days..."

[17] The contention of the applicant in the present case is that he was unable to appeal against the decision of the Board of Inquiry within the statutory period because he was pursuing administrative channels to amicably resolve the matter and seeking leniency from his superiors for his discharge from employment. The respondent, on the other hand, contends that there has been inordinate delay on the part of the applicant in making the application for leave to appeal out time and that the applicant has not provided sufficient reasons for the said delay.

[18] From my reading of the affidavit evidence on record, the applicant was discharged from employment by a memo dated 2nd February 2017. Following his discharge, the applicant had exchanged correspondence with his superiors as evidenced by the letters dated 6th February 2017 and 21st March 2019. However, the last communication between the parties was in June 2019 when the applicant's superiors wrote to him rejecting his request for leniency and advised him to seek leave

of the Supreme Court if he wished to appeal against his discharge. Subsequently, on 9th December 2021, the applicant filed before this court his application for leave to appeal out of time.

[19] The question for my determination is whether, on these facts, I should exercise my discretion to grant the applicant leave to appeal to this court out of time. As I see it, the applicant exhausted the administrative channels available to him at the point when his superiors advised him to appeal to the Supreme Court. This was in June 2019. At that juncture, he should have filed his application for leave to appeal out of time before this court. Instead, he waited until December 2021 to take such steps - two and a half years after the administrative procedures closed. The lapse of two and a half years in this case cannot be said to be reasonable.

[20] Worse still, the applicant has not given any explanation to this court for this delay so as to satisfy the 'sufficient reasons' requirement envisaged in rule 12. In my view, the failure by the applicant to do so is fatal to this application. Stated differently, the applicant has not furnished or shown sufficient reasons to

compel me to exercise my discretion in favour of granting him leave to appeal out of time.

Conclusion

[21] For the reasons stated above, I have come to the ineluctable conclusion that this application lacks merit. It is accordingly dismissed. This conclusion notwithstanding, it is ordered that each party shall bear their own costs.



C. KAJIMANGA
SUPREME COURT JUDGE