IN THE CONSTITUTIONAL COURT OF ZAMBIA 2021/CCZ/A0027

HOLDEN AT LUSAKA

(Appellate Jurisdiction)

IN THE MATTER OF: ARTICLE 49(2), 51, 54, 72(2) (c), 73(1) OF THE CONSTITUTION OF ZAMBIA CHAPTER 1 OF THE LAWS OF ZAMBIA

REPUBLIC OF ZAMBIA
CONSTITUTIONAL COURT OF ZAMBIA
16 MAY 2022
REGISTRY 5
P O BOX 50067, LUSAKA

IN THE MATTER OF: SECTION 81, 89, 97 (1), 98 (c), 99 AND 100 (2) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016

IN THE MATTER OF: CODE OF CONDUCT RULES 12 AND 15(a) (h) and (k)

IN THE MATTER OF: MKUSHI SOUTH CONSTITUENCY ELECTION HELD IN ZAMBIA ON 12TH AUGUST, 2021

IN THE MATTER OF: AN ELECTION PETITION BY SYDNEY CHISANGA

BETWEEN:

SYDNEY CHISANGA APPELLANT

AND

DAVIES CHISOPA 1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA 2ND RESPONDENT

CORAM: Sitali, Munalula, Musaluke, Chisunka and Mulongoti JJC. On 22nd April, 2022 and 16th May, 2022.

For the Appellant: Mr. A. Kasolo of Messrs. Mulilansolo Chambers and Mr. D. Musonda of Messrs. Maybin Mulenga & Partners.

For the 1st Respondent:	**Mr. K. Kaunda and Mr. A. Mwila of Messrs. Kaunda Kaunda and Mwila Legal Practitioners**
For the 2nd Respondent:	**Mr. B.M. Musenga and Mr. M. Bwalya (In- House Counsel)**

RULING

Musaluke, JC delivered the Ruling of the Court.

Cases referred to:

1. Barclays Bank Plc. v Jeremiah Njovu and 41 Others SCZ No. 140 of 2015.
2. Road Transport and Safety Agency v First National Bank Zambia Limited and Joseph Milambo SCZ Appeal No. 12 of 2016.
3. Twampane Mining Co-operative Society Limited v E & M Storti Mining Limited SCZ Appeal No. 20 of 2011.
4. Henry Kapoko v The People CCZ Selected Judgment No. 43 of 2017.
5. Margaret Mwanakatwe v Charlotte Scott and The Attorney General CCZ Selected Ruling No. 11 of 2018.
6. Mwiya Mutapwe v Shomeno Dominic CCZ Appeal No. 8 of 2016.

Legislation referred to:

1. The Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016.
2. The Electoral Process Act No. 35 of 2016.

3. The Constitutional Court Rules, Statutory Instrument No. 37 of 2016.

1.0 BACKGROUND

1.1 This is a Ruling regarding the 1st Respondent's motion to raise preliminary issues.

1.2 The background to this motion is that the Appellant and the 1st Respondent stood for election as Member of Parliament for Mkushi South Constituency. The Appellant stood under the United Party for National Development (UPND) party ticket whilst the 1st Respondent stood on the Patriotic Front (PF) party ticket.

1.3 The 1st Respondent emerged victorious and was declared duly elected Member of Parliament for Mkushi South Constituency.

1.4 Displeased with the outcome of the election, the Appellant filed a petition before the High Court seeking among other things that the Appellant's election as Member of Parliament for Mkushi South Constituency, be declared null and void.

1.5 After hearing evidence at trial, the learned trial judge upheld the election of the 1st Respondent and declared him as duly elected Member of Parliament for Mkushi South Constituency.

1.6 Dissatisfied with the decision of the High Court, the Appellant, on 6th December, 2021 lodged an appeal in this Court by filing a Notice of Appeal and Memorandum of Appeal.

2.0 1ST RESPONDENT'S MOTION AND ARGUMENTS IN SUPPORT

2.1 On 16th March, 2022, the 1st Respondent filed a motion to raise preliminary issues pursuant to Order XI rules 5, 6 and 9 of the Constitutional Court Rules SI No. 37 of 2016 (CCR). The 1st Respondent seeks determination of the following issues:

i. **Whether this Honourable Court has jurisdiction to hear and determine this cause or "appeal" in view of the fact that the Record of Appeal was filed out of time and without the Appellant obtaining leave of the Court to file the same and thus irregular.**

ii. **Whether there is an appeal before this Court in view of the fact that the Record of Appeal was filed out of time, and without the Appellant obtaining leave of the Court to file the same.**

iii. **Whether the Court can determine this cause in view of the fact that the material or necessary documents to properly determine an Election Petition appeal have been omitted from the Record whilst certain documents in the Record of Appeal are illegible, as stated in the supporting affidavit hereto.**

2.2 The 1st Respondent's motion was accompanied by an affidavit in support, list of authorities and skeleton arguments.

2.3 The affidavit sworn by the 1st Respondent states that the Appellant's Record of Appeal had been filed out of time.

2.4 It was averred that the Notice of Appeal and the Memorandum of Appeal were filed on the 6th December, 2021 whilst the Record of Appeal was filed on 6th January, 2022 outside the thirty (30) day mandatory period, which lapsed on 5th January, 2022.

2.5 It was averred further, that on 9th March, 2022 the 1st Respondent's advocates conducted a search on the court record to ascertain if the Appellant had obtained leave of Court to file the said Record of Appeal out of time, that the search revealed that no such leave was obtained by the Appellant.

2.6 It was averred that the Record of Appeal filed out of time also omitted the following critical documents that were filed in the High Court which included:

i. 1st Respondent's Answer
ii. 1st Respondent's affidavit verifying Answer
iii. 2nd Respondent's Answer
iv. 2nd Respondent's affidavit verifying Answer
v. Petitioner's (Appellant's) Bundle of Documents
vi. 1st Respondent's Bundle of Documents
vii. 2nd Respondent's Bundle of Documents

2.7 That a further perusal of volume II of the Record of Appeal reveals that the documents therein are illegible. That therefore, apart from the Record of Appeal having been irregularly filed, it is difficult for the Court to properly determine the Appeal and Cross Appeal herein.

2.8 In the skeleton arguments filed in support of the motion, the 1st Respondent argued the three issues raised.

2.9 The first issue is whether or not this Court has jurisdiction to hear and determine the appeal in view of the fact that the Record of Appeal was filed out of time and without the Appellant obtaining leave of Court to file the same and thus irregular.

2.10 It was argued that Order 11 rule 5 of the CCR mandates an Appellant to file a Record of Appeal together with heads of argument within thirty (30) days of filing the Notice of Appeal. Further, that Order 11 rule 6 provides for sanctions for failure to comply with Order 11 rule 5, which is that the appeal ought to be dismissed.

2.11 That in *casu*, the Appellant in breach of the said rules, filed his Record of Appeal beyond the mandatory 30 day period allowed by the CCR. That the period between the 6th December, 2021 when the Notice and Memorandum of Appeal were filed and 6th January, 2022 when the Record of Appeal was filed is 31 days. That neither an order extending

the time in which to file the Record of Appeal was granted nor was leave sought to file the Record of Appeal out of time. Our attention was drawn to the case of **Barclays Bank Plc. v Jeremiah Njovu and 41 Others**[1] in which the Supreme Court held that the absence of leave to appeal goes to the very core of the Appellate court to deal with the appeal.

2.12 The 1st Respondent contends that this Court lacks jurisdiction to entertain an appeal whose record was filed outside the prescribed period without leave of Court. The case of **Road Transport and Safety Agency v First National Bank Zambia Limited & Joseph Milambo**[2] was cited in support of this argument.

2.13 Regarding the second preliminary issue which is whether or not there is in fact an appeal before this Court in view of the fact that the Record of Appeal was filed out of time, and without the Appellant obtaining leave of the Court to file the same, reliance was again placed on Order 11 rule 5 of the CCR.

2.14 It was submitted that an appeal is lodged when the Record of Appeal and heads of arguments are filed. That the Record of Appeal having been filed out of time, and without leave of court, there is no appeal for consideration before Court.

2.15 The third preliminary issue is whether or not the Court can determine the Appellant's appeal in view of the fact that material or necessary documents to properly determine an election petition appeal have been omitted from the Record of Appeal whilst certain documents in the Record of Appeal are illegible. For this issue, reliance was placed on Order 11 rule 9 (4) of the CCR which prescribes the documents to be contained in the Record of Appeal.

2.16 When this matter came up for hearing on 22nd April, 2022 Mr. Kaunda, Counsel for the 1st Respondent augmented his written submissions with brief oral arguments.

2.17 Counsel submitted that the Appellant herein ignored the rules of Court by filing a Record of Appeal outside the prescribed 30 day period without obtaining leave of this Court to file out of time. Counsel drew our attention to the case of **Twampane Mining Co-operative Society Limited v E & M Storti Mining Limited**[3] in which it was held that those who choose to ignore rules of court, do so at their own peril.

2.18 Counsel therefore urged us to dismiss the Appellant's appeal herein with costs.

3.0 APPELLANT'S RESPONSE TO THE 1ST RESPONDENT'S MOTION

3.1 The Appellant did not file any written arguments in opposition to the 1st Respondent motion to raise preliminary issues but upon application, he was allowed to respond verbally to the motion at the hearing.

3.2 Mr. Musonda, Counsel for the Appellant submitted that this Court should exercise its inherent jurisdiction to ensure just determination of matters and must not give undue regard to procedural technicalities. In support of this preposition, the Court's attention was drawn to the provisions of Article 118(2)(e) of the Constitution of Zambia as amended by Act No. 2 of 2016 (the Constitution). The case of **Henry Kapoko v The People**[4] was also cited to support this argument.

3.3 Counsel further cited the case of **Margaret Mwanakatwe v Charlotte Scott & The Attorney General**[5] where we stated *inter alia* that:

> **"Although the rules of the Constitutional Court under Order 9 prescribes what the record of appeal should contain, they do not stipulate sanctions that follow the filing of a defective record."**

3.4 Counsel contended that this Court is clothed with the jurisdiction and discretion to make just and appropriate orders pursuant to Order 15 rule 1(g) of the CCR which empowers this Court to grant any other remedy that the Court may consider just.

3.5 Counsel therefore, beseeched this Court not to give undue consideration to the procedural technicalities in this matter but that it should invoke its inherent jurisdiction to allow the Appellant to withdraw the defective Record of Appeal and amend the same as well as to grant the Appellant leave to file the Record of Appeal out of time.

3.6 Mr. Kasolo, co-counsel for the Appellant, urged the Court to take judicial Notice of the death of Mr. Maybin Mulenga, the managing Partner of Maybin and Partners, who died during the process of the appeal.

4.0 ARGUMENTS IN REPLY BY THE 1ST RESPONDENT

4.1 In reply, Mr. Kaunda submitted that Article 118(2)(e) of the Constitution relied upon by the Appellant's Counsel is not intended to do away with existing principles, laws and procedures even where the same may constitute technicalities. That a party is obliged to comply with court procedures more so in a case where rules are mandatory as is the case with Order 11 rule 5 of the CCR.

4.2 As regards the submission that this Court must exercise its inherent jurisdiction to ensure just determination of matters and must not give undue regard to procedural technicalities, it was Counsel's submission

that the exercise of the Court's inherent jurisdiction is not meant to contradict the express provisions of the law.

4.3 On the Appellant's oral application to withdraw the Record of Appeal, it was counsel's submission that there was no formal application to withdraw the Record of Appeal as prescribed by the rules. Furthermore, that the attempted application had come three months after the defective Record of Appeal was filed.

4.4 On the submission to take judicial notice of the death of the late Mr. Maybin Mulenga, it was contended that said Mr. Mulenga died on or about 6th January, 2022, the same day the Record of Appeal was filed and that the record shows that the same was filed by Mulilansolo Chambers and not Maybin and Partners and that as at the date when the Record of Appeal was filed, the case was in fact being handled by Mulilansolo Chambers.

4.5 Mr. Mwila co-counsel for the 1st Respondent, submitted that the 1st Respondent is cognizant of the fact that this is a Court that determines election matters to its finality, as such, a precedent that this Court sets is critical to the administration of justice. That therefore, if this Court was to allow a litigant to file a Record of Appeal out of time without leave of Court, be it by a day, nothing will stop the next litigant from

filing a Record of Appeal after six months without leave of Court and this will set a bad precedent.

4.6 The 1st Respondent prays that the preliminary issues raised be sustained and the Appellant's appeal dismissed.

5.0 2ND RESPONDENT'S POSITION ON THE MOTION

5.1 The 2nd Respondent did not take a position on the 1st Respondent's motion and opted to leave the matter to the Court's determination.

6.0 ANALYSIS AND DETERMINATION OF THE 1ST RESPONDENT'S MOTION

6.1 We have considered the 1st Respondent's motion to raise preliminary issues, the affidavit in support as well as the skeleton arguments filed in support of the motion. We have also taken into account oral submissions made by the Appellant's counsel opposing the motion.

6.2 The first issue for determination is whether or not this Court has jurisdiction to hear and determine an appeal where the Record of Appeal is allegedly filed out of time and without the Appellant obtaining leave of Court.

6.3 Order 11 rule 3 of the CCR provides for the procedure for commencing an appeal before this Court and provides as follows:

(1) A person desiring to appeal to the Court shall give Notice of Appeal in accordance with this rule.

(2) An appellant may appeal against the whole or a part of a judgment.

(3) The notice of appeal shall state whether the whole or part only, and what part, of the judgment is appealed against.

(4) The names and addresses of all persons intended to be served with a notice of appeal shall be stated in the notice of appeal.

(5) The notice of appeal 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.

6.4 Order 11 rule 5 of the CCR further provides for the lodging of an appeal and states that:

> **Subject to rule 4 and any extension of time, the appellant shall, within thirty days after filing a notice of appeal, lodge the appeal by filing in the Registry, twenty hard copies of the record of appeal together with heads of argument and an electronic copy of the record of appeal. –**

6.5 It is clear that Order 11 rule 5 of the CCR is couched in mandatory terms and requires that the appellant must file the Record of Appeal and supporting heads of argument, within thirty (30) days of filing the notice of appeal unless the appellant is granted an order for extension or granted leave to file out of time by the Court.

6.6 In *casu,* the record shows that the Appellant herein filed his Notice and Memorandum of Appeal on 6th December, 2021. The record also

reveals that on 6th January, 2022 the Appellant filed into Court the Record of Appeal and heads of argument. This was outside the 30 days period provided for by Order 11 rule 5 of the CCR to file the Record of Appeal and heads of argument. We note that no order was sought and obtained to extend the time in which to file the Record of Appeal and heads of argument. Further, there was no attempt by the Appellant to seek leave to file the Record of Appeal and heads of argument out of time.

6.7 The issue that falls for determination is therefore, whether or not in the absence of an order extending time within which to file the Record of Appeal or an order for leave to file the Record of Appeal out of time this Court can hear and determine the Appellant's Appeal in its state.

6.8 The answer is found in Order 11 Rule 6 of the CCR which provides as follows:

> **If an appeal is not lodged as provided in rule 5, the respondent may make an application to the Court for an order dismissing the appeal for want of prosecution, or alternatively, for such other order with regard to the appeal as the respondent may require.**

6.9 Clearly, in terms of Order 11 rule 6 of the CCR, an appellant who fails to lodge the Record of Appeal in accordance with Order 11 rule 5 of

the CCR risks having the appeal dismissed for want of prosecution upon an application by the respondent.

6.10 In the case of **Mwiya Mutapwe v Shomeno Dominic**[6] we explained the import of Order 11 rule 5 and held as follows:

> **"The reason for restricting the time within which the record of appeal must be filed is that it ensures the expeditious setting down of the appeal for hearing. The requirement for the Appellant to file Heads of Argument at the same time that he or she files the Record of Appeal, is intended to enable the Respondent and the Court to know what objection the Appellant has to the Judgment and essentially what the Appeal is based on. It enables the Respondent to frame his or her own heads of argument in response to the Appellant's heads of argument in an informed manner before the appeal is heard."**

6.11 In the **Mutapwe**[6] case, we declined to entertain counsel's contention that failure to comply with the provisions of Order 11 rule 5 of the CCR is a procedural technicality which cannot result in the dismissal of the appeal.

6.12 We therefore, upon an application by the 1st Respondent pursuant to Order 11 rule 6 of the CCR, find that the failure by the Appellant herein to obtain leave to file the Record of Appeal out of time, goes to the very core of the appeal before us and it is not a mere procedural technicality. The Appellant, having been out of time, ought to have made an

application for leave to file the Record of Appeal out of time. There being no such application, we find that the appeal herein is incompetently before us as the Record of Appeal and heads of argument filed before Court on 6th January, 2022 are improperly before us.

6.13 The second issue raised by the 1st Respondent is whether or not there is an appeal before this Court in view of the fact that the Record of Appeal was filed out of time and without the Appellant obtaining leave of the Court.

6.14 The net effect of the Appellant's failure to obtain leave of Court to file the Record of Appeal when he was out of time is that the Appeal is incompetently before this Court and therefore, there is no appeal to consider.

6.15 The third issue raised by the 1st Respondent is whether or not the Court can determine this cause in view of the fact that material or necessary documents to properly determine an election petition appeal have been omitted from the Record of Appeal whilst certain documents therein are illegible.

6.16 The short answer to the third issue is that as the Record of Appeal is improperly before Court, its contents cannot therefore, be examined as

to whether or not some documents have been omitted or are illegible or not.

6.17 We accordingly, uphold the 1st Respondent's preliminary issues raised and dismiss the Appellant's appeal for it is incompetently before this Court.

6.18 We order each party to bear own costs.

A.M. Sitali
Constitutional Court Judge

M. M. Munalula (J.S.D)
Constitutional Court Judge

M. Musaluke
Constitutional Court Judge

M. K. Chisunka
Constitutional Court Judge

J. Z. Mulongoti
Constitutional Court Judge