

IN THE CONSTITUTIONAL COURT
HOLDEN AT LUSAKA
(Appellate Jurisdiction)

2021/CCZ/A007

**IN THE MATTER OF: A LOCAL GOVERNMENT ELECTION
PETITION FOR MKUSHI NORTH
COUNCIL CHAIRPERSON HELD ON
12TH AUGUST, 2021**

EVANS BWALYA



APPELLANT

AND

CHILEMU K. NELSON

1st RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2nd RESPONDENT

***CORAM: Mulenga, Mulonda Musaluke, Chisunka and
Mulongoti, JJC on 29th July, 2022 and 9th September
2022.***

APPEARANCES:

For the Appellant:

**Mr. T. S. Ngulube – Messrs. Tutwa S.
Ngulube and Company**

**For the 1st Respondent: Ms. M. Mushipe – Mesdames. Mushipe
and Associates**

For the 2nd Respondent: Mr. M. Bwalya – In-house Counsel

R U L I N G

Chisunka, JC, delivered the Ruling of the Court.

Cases referred to:

1. **D.E. Nkhuwa v Lusaka Tyre Services Limited (1977) Z.R. 43 (S.C.)**
2. **Nahar Investment Limited v Grindlays Bank International (Zambia) Limited (1984) Z.R. 81 (S.C.)**
3. **Zambia Revenue Authority v Jayesh Shah (2001) Z.R. 23**
4. **Barclays Bank PLC v Njobvu and 41 Others (SCZ/9/21/2019)**
5. **Dar Farms Transport Limited v Moses Nundwe SCZ Appeal No. 46/2014**
6. **Twampamane Mining Co-operative Society Limited v E and M Storti Limited (2011) 3 Z.R. 67**
7. **Mcarthur Mudenda and Another v Ericsson AB Zambia SCZ Selected Judgment No. 48 of 2017**
8. **Hakaide Hichilema and Geoffrey Bwalya Mwamba v Edgar Chagwa Lungu and Attorney General, 2016/CC/0033, CCZ Selected Ruling No. 29 of 2018**
9. **Hakaide Hichilema and Geoffrey Bwalya Mwamba v Edgar Chagwa Lungu and Attorney General, 2016/CC/0034**
10. **Inonge Mubika v Mukelebai Pelekelo, CCZ Selected Judgment No. 32 of 2017**
11. **July Danobo T/A Juldan Motors v Chimsoro Farms Ltd SCZ Judgment No. 15 of 2009**

Legislation referred to:

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

Works referred to:

1. **The Rules of the Supreme Court of England, 1965 (1999 Edition)**

Introduction

1. This ruling decides the Appellant's notice of motion for a renewed application for leave to extend time within which to appeal to the full bench pursuant to order XV rule 7 as read with order I rule 1 (1) and (2) of the Constitutional Court Rules, Statutory Instrument No. 37 of 2016 (the "**CCR**").
2. The Appellant's renewed application, filed on 28th March 2022, is anchored on the following terms:
 - 2.1. **That the matter has not been determined on its merits, as the applicant has the right to be heard by an appellate court;**
 - 2.2. **That the delay is not inordinate and shall not cause any prejudice or damage to the proposed Respondents;**
 - 2.3. **That the matter herein being an election petition ought to be determined on the merits as it is a matter of public interest;**
 - 2.4. **That matters should be determined on merit and should not be disposed of based on breach of procedural and regulatory rules and regulations; and that**
 - 2.5. **The Applicant shall suffer unfathomable loss and damage if his right to appeal is not exercised based on a breach that has not greatly prejudiced the proposed Respondents.**

Background

3. The background giving rise to the Appellant's renewed application is that on 18th September, 2021, the Local Government Elections Tribunal at Mkushi delivered a judgment declaring that the Appellant was not duly elected as Council Chairperson for Mkushi District Council and that his election was null and void.

4. On 29th September, 2021, the Appellant filed a notice of appeal and a memorandum of appeal intending to appeal the judgment of the Local Government Elections Tribunal.
5. On 3rd November, 2021, the Appellant filed an application before a single Judge of this Court, for leave to serve the notice of appeal and memorandum of appeal by way of substituted service pursuant to order IX rule 5 of the CCR.
6. On 4th November, 2021, the date of hearing for the aforementioned application, Counsel for the Appellant did not appear before Court and there was no reason advanced for the non-appearance. The single Judge dismissed the matter in the following terms:

“May the record show that there is no appearance on the part of the Appellant’s Counsel. For a matter which was scheduled to be heard at 14:30 hours and there is no intimation as to whether counsel is delayed. The matter is therefore, dismissed for want of prosecution.”

7. Following the above mentioned order by the single Judge, the Appellant filed a notice of motion to review the decision of the single Judge on 25th November, 2021, pursuant to order I rules 1 and 2 of the CCR.
8. On 9th December, 2021, the Appellant withdrew the notice of motion to review the decision of the single Judge citing that the motion was wrongly before the Court.
9. On 22nd December, 2021, the Appellant filed an application for leave to extend time within which to appeal to the full

bench pursuant to order XV rule 7 and order 1 rule 1 (1) and (2) of the CCR. The 1st Respondent opposed this application by filing an affidavit in opposition on 31st January, 2022.

10. The single Judge heard the application on 17th February, 2022, and delivered a ruling on 21st March, 2022. In the ruling, the single Judge found that the Appellant's delay in making the application was inordinate and advanced no good reason for the delay.
11. Consequently, the single Judge found that this was not a suitable matter in which to exercise her discretion to grant the application to extend time within which to appeal to the full bench. The single Judge therefore, dismissed the said application.
12. Subsequently, the Appellant filed a renewed application for leave to extend time within which to appeal to the full bench which application is now before us.

The Appellant's Affidavit Evidence and Arguments in Support of Renewed Application

13. The Appellant's renewed application was accompanied by an affidavit in support and skeleton arguments. The affidavit in support was sworn by the Appellant. He deposed that:
 - 13.1. He filed an application to serve court process by way of substituted service and the date of hearing was scheduled for 3rd November, 2021. He was, however, unable to attend the hearing as he was only informed of the date of hearing on 4th November, 2021.

This prompted the single Judge to dismiss the application for substituted service and his appeal for want of prosecution.

- 13.2. He was dissatisfied with the decision of the single Judge that dismissed his appeal and was desirous of having the application for leave to extend time to be re-heard and determined by the full bench.
 - 13.3. His intended appeal raises a meritorious case and it ought to be adjudicated upon as a failure to do so would prejudice him and occasion him unfathomable loss.
 - 13.4. He was unable to lodge this appeal in time and thus, unable to appeal the single Judge's decision without extending time within which to appeal.
 - 13.5. Parties have the right to have their matters heard on appeal and mere breaches of procedural rules and regulations should not operate as a hurdle to circumvent justice where a party has a clear question that ought to be determined by the appellate court.
 - 13.6. This matter borders on a matter of public interest and it ought to be determined in the interest of justice so as to achieve the ends of justice.
14. In the written skeleton arguments filed in support of the renewed application, the Appellant:
- 14.1. Relied on the case of ***D.E. Nkhuwa v Lusaka Tyre Services Limited***¹, and submitted that considering

that the matter in question is an election petition that is of great public interest, the single Judge ought to have been aware of the Appellant's difficulties in effecting service as explained and should not have dismissed the matter for want of prosecution.

- 14.2. Cited the case of ***Nahar Investment Limited v Grindlays Bank International (Zambia) Limited***², and argued that the delay caused by the Appellant was not the fault of the Appellant neither was it inordinate considering that the Appellant was attempting to serve the 1st Respondent by way of substituted service after personal service proved futile.
- 14.3. Relied on the case of ***Zambia Revenue Authority v Jayesh Shah***,³ and submitted that all matters must be determined on their merits regardless of the default or procedural technicalities.
15. At the hearing of the renewed application, Counsel for the Appellant submitted that:
 - 15.1. This matter should be heard on its merits as it is an election petition. An aggrieved party should be accorded an opportunity to appeal against a decision of a single Judge of this Court. The single Judge was therefore, wrong to dismiss the entire appeal as opposed to striking out the application for substituted service.

15.2. This Court has jurisdiction to grant leave to the Appellant and enable him present his appeal and have it determined on its merits.

15.3. It is undisputed that there was a slight delay in bringing this application, however, in the interest of justice the delay is excusable and this Court should exercise its discretion to grant the leave sought.

The 1st Respondent's Affidavit Evidence and Arguments in Opposition

16. The 1st Respondent filed an affidavit in opposition and a further affidavit in opposition on 14th April, 2022 and 27th June, 2022, respectively. Both affidavits were sworn by the 1st Respondent. He deposed that:

16.1. The Appellant failed to follow the procedure laid down by this Court in instances where an appeal has been dismissed.

16.2. This application is procedurally defective, frivolous and vexatious and is calculated to prejudice the 1st Respondent thus, this Court should not entertain it.

16.3. The procedure employed by the Appellant is non-existent and amounts to forum shopping and an abuse of court process.

16.4. The Appellant cannot appeal the single Judge's decision to the full bench, he can only renew his application before the full bench.

- 16.5. The breach of the procedural rules by the Appellant is not a mere breach but goes to the root of the application.
- 16.6. The Appellant's failure or neglect to prosecute his appeal within the rules of court was extremely inordinate and inexcusable and prejudices the 1st Respondent.
- 16.7. The appeal in respect of this matter was dismissed and that without the order dismissing it being set aside, this Court is *functus officio*.
- 16.8. This is not a proper case in which this Court should entertain the Appellant's renewed application to extend time within which to appeal to the full bench.
17. The 1st Respondent filed written skeleton arguments and further list of authorities and skeleton arguments on 14th April, 2022 and 27th June, 2022, respectively. The 1st Respondent:
- 17.1. Relied on the cases of ***Barclays Bank PLC v Njobvu and 41 Others***⁴, and ***Dar Farms Transport Limited v Moses Nundwe***⁵, and argued that upon the single Judge's dismissal of the appeal, the Court became *functus officio* and has no jurisdiction to hear this application.
- 17.2. Submitted that the CCR do not provide for an appeal of a single Judge's decision to the full bench. The correct step was for the Appellant to move this Court

pursuant to order 11 rule 14(2) and (3) and order 15 rule 7 of the CCR.

- 17.3. Argued that the Appellant did not adhere to the rules of court and on the strength of the case of ***Twampane Mining Cooperative Society Limited v E and M Storti Limited***⁶, this Court should not entertain this application on that basis.
18. At the hearing of the motion, Counsel for the 1st Respondent augmented the written skeleton arguments with the following oral submissions:
 - 18.1. Once the single Judge dismissed the Appellant's appeal, this Court became *functus officio* as there was no longer an appeal before this Court.
 - 18.2. The Appellant's renewed application is marred with irregularities and procedural improprieties. In particular, the Appellant did not comply with order 11 rule 14(1) and (2) of the CCR.
 - 18.3. As per the case of ***Mcarthur Mudenda and Another v Ericsson AB Zambia***⁷, the fate of the Appellant's appeal is that it remains dismissed. As such, this renewed application is frivolous and vexatious.

The Appellant's Reply

19. In reply to the 1st Respondent's opposition, the Appellant filed an affidavit in reply and an affidavit in reply to further

affidavit in opposition on 4th May, 2022 and 1st July, 2022, respectively. The affidavits were sworn by the Appellant and disclosed that breach of a procedural rule does not determine a matter on the merits and the matter herein ought to be determined on its merits. It is an election petition that is of great public interest as the will of the people may be affected.

20. In his oral submissions in reply, Counsel for the Appellant submitted that the decision of the single Judge was not on the merits, it was on a technicality and that this Court is empowered to extend time under order 15 rule 7 of the CCR
21. The Appellant also filed a list of authorities and skeleton arguments in reply on 1st July, 2022. We, however, will not replicate the contents of the written skeleton arguments in reply as they repeated the skeleton arguments in support of the renewed application.

Issue for Determination

22. We have considered the notice of motion for a renewed application for leave to extend time within which to appeal to the full bench together with the affidavit evidence, list of authorities and the skeleton arguments filed by the parties and the oral submissions made by counsel.
23. The central issue that falls for determination is whether or not, in the circumstances, this Court should grant the renewed application for leave to extend time within which to appeal to the full bench.

24. The Appellant has urged this Court to extend the time within which he may appeal the decision of the single Judge of this Court so as to allow his appeal to be heard on its merits.
25. The 1st Respondent, on the other hand, contends that the Appellant's appeal was dismissed and this Court is *functus officio*. He also contends that the Appellant cannot appeal the single Judge's decision to the full bench and that he can only renew his application before the full bench.

Evaluation and Decision

26. We will begin with the 1st Respondent's contention that the Appellant cannot appeal the single Judge's decision to the full bench but that he can only renew his application before the full bench.
27. In the cases of ***Hakainde Hichilema and Geoffrey Bwalya Mwamba v Edgar Chagwa Lungu and Attorney General***⁸, and ***Hakainde Hichilema and Geoffrey Bwalya Mwamba v Edgar Chagwa Lungu and Attorney General***⁹, this Court considered the manner in which a party should challenge a decision of a single Judge and outlined the following principles:
 - 27.1. An appeal against a decision of the single Judge of this Court lies to the full bench pursuant to order 1 rule 1 (1) and (2) of the CCR as read together with order 59 rule 14 of the Rules of the Supreme Court of England, 1965 (1999 Edition) (the "**White Book**").

- 27.2. The appeal must be made as a renewed application before the full bench by summons within ten (10) days of the decision of the single Judge appealed against.
- 27.3. Where the ten (10) day period has lapsed, a party intending to appeal may apply for leave to appeal out of time giving reasons why the appeal could not be lodged within the prescribed period.
- 27.4. Where a party fails to renew the application within the stipulated ten (10) day period and fails to give sufficient reasons as to the delay in lodging within the prescribed period, the Court shall set aside the summons on appeal for want of jurisdiction.
28. In this case, the renewed application satisfies the above legal principles as it is an appeal of a single Judge's decision by way of a renewed application before the full bench from an earlier application for leave to extend time within which to appeal to the full bench that was dismissed by a single Judge.
29. Coming to the renewed application for extension of time, in the case of ***Inonge Mubika v Mukelebai Pelekelo***¹⁰, we said that this Court had discretion to extend time and stated as follows *vis-à-vis* applications for extension of time:

Primarily, there must be no inordinate delay and there should be good reason for the failure to meet the deadline.

30. In view of the foregoing, this Court has discretion to extend time where the delay is not inordinate and there is a good reason for the delay.
31. It is undisputed that the decision being appealed against by way of renewal was handed down on 4th November, 2021, and the prescribed time period of ten (10) days had already elapsed at the time the Appellant made the application to extend time within which to appeal to the full bench on 22nd December, 2021.
32. The record of proceedings reveals that the Appellant did not attempt to take any steps to challenge the single Judge's decision until after some twenty-one (21) days had elapsed from the date of the single Judge's decision.
33. The Appellant, however, only filed the application for leave to extend time within which to appeal to the full bench on 22nd December, 2021. Thus, there was a delay of forty-eight (48) days. As already stated the law states that an appeal of a decision of a single Judge must be made within a ten (10) day period. Our considered view is that the forty-eight (48) day delay is inordinate.
34. As regards, the reason for the delay, the Appellant in his affidavit in reply at page 18 of the supplementary record of notice of motion deposed that that the application was filed out of time because the date of hearing of 4th November, 2021 was not communicated to him or his advocates.

35. When prodded by the Court as to why the time limit within which to appeal the decision of the single Judge was not adhered to, Counsel for the Appellant's response was that there was miscommunication between the Appellant's previous advocates and the court marshal.
36. It is clear to us that the reason advanced for the Appellant's delay is being attributed to the Appellant's previous advocate's failure to promptly secure the date of hearing before the single Judge and appear on that date.
37. In matters where a default is caused by a party's advocates, our views align with those enunciated in the case of ***July Danobo T/A Juldan Motors v. Chimsoro Farms Ltd¹¹***, where the Supreme Court enunciated that:

If at all the appellants will be disadvantaged or prejudiced in any way by the stand we have taken in dismissing this appeal, then they must seek recourse from their counsel who did not handle their appeal properly.

38. Our position is that the Appellant cannot use his previous Counsel's omission, failure, and or negligence as a ground upon which to seek an extension of time. The result is that the Appellant has not advanced any good reason for us to exercise our discretion in his favour.
39. The Appellant has, therefore, not satisfied the two essential elements necessary for the grant of an extension of time, namely the length of delay and the reason for delay.

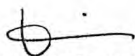
Conclusion


40. Taking the above into account this is not a proper case in which this Court would exercise its discretion to grant leave to extend time within which to appeal to the full bench.

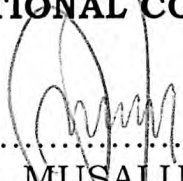
Orders

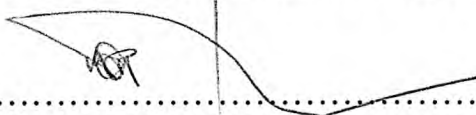
41. The Appellant’s notice of motion for a renewed application for leave to extend time within which to appeal to the full bench fails and is accordingly dismissed.

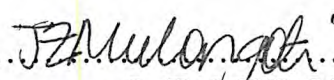
42. Each party to bear their own costs.

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M. S. MULENGA
CONSTITUTIONAL COURT JUDGE

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P. MULONDA
CONSTITUTIONAL COURT JUDGE

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M. MUSALUKE
CONSTITUTIONAL COURT JUDGE

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M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE

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J. Z. MULONGOTI
CONSTITUTIONAL COURT JUDGE