

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

APPLICATION NO. 17/2022

BETWEEN:

CHISHIMBA KAMBWILI
SABOI IMBOELA
DR. PAUL MBULO
ACKSON KAONGA



1ST APPELLANT
2ND APPELLANT
3RD APPELLANT
4TH APPELLANT

AND

BRIDGET ATANGA

RESPONDENT

*(suing in her capacity as the Secretary General
of National Democratic Party)*

Coram: Makungu, Sichinga and Sharpe-Phiri J.J.A

On the 11th day of August and 26th October, 2022

For the appellants: Mr. J. Zulu of Japhet Zulu Advocates

For the respondents: Mr. K. Mambwe of Messrs Ferd Jere & Company

RULING

Makungu, JA delivered the Ruling of the Court.

Cases referred to:

1. *July Danobo T/A Juldan Motors v. Chimsoro Farms Limited* (2009) Z.R 148
2. *Col Kashekele Chrispin Kayombo and Others v. The Committee on the Sale of Government Pool Houses, The Commander Zambia Airforce, The Attorney General* SCZ Appeal No. 157/2013
3. *Access Bank (Zambia) Limited v. Group five/Zcon Buiness Park Joint Venture (suing as a firm)* SCZ 8/52/ 2014
4. *Jonathan Van Blerk v. The Attorney General and Others* Appeal No.7 of 2020
5. *Kapoko v. The People* CCZ No.43 of 2016
6. *Jamas Milling Company Limited v. Imex International Limited* (2002) ZR 79

7. *Dar Farms Transport Limited v. Nundwe & 3 Others SCZ Appeal No.46 of 2014*

8. *Zambia Revenue Authority v. Charles Waiumweya Muhau Masiye SCZ Appeal No. 56 of 2011*

Legislation referred to:

The Court of Appeal Rules, S.I No. 65 of 2016

This motion was filed by the Respondent in the appeal whom we shall hereinafter refer to as the applicant. The motion raises a preliminary issue whether the appeal should be dismissed for incompetence for non – compliance with the mandatory provisions of **Order X rule 9 (5) (c),(d),(f),(g),(h) and (I) of the Court of Appeal Rules, 2016**. The applicant has pointed out in the motion and affidavit in support thereof that the record of appeal does not contain the following documents:

1. A copy of the order granting leave to appeal in violation of **Order X rule 9 (5) (c) of the Court of Appeal Rules**.
2. The memorandum of appeal in violation of **Order X rule 9 (5) (d) of the Court of Appeal Rules**.
3. The respondent's application made in the court below for leave to commence committal proceedings against the appellants in violation of **Order X rule 9(5) I of the Court of Appeal Rules**.

4. Copies of the affidavit and documents put in evidence in the lower court in support of the application for leave to commence committal proceedings against the appellants in violation of **Order X rule 9 (5) h of the Court of Appeal Rules.**

Further, that the Certificate of Record by the Registrar appearing on pages 1 and 2 of the Record of Appeal was not signed by the Registrar of the Ndola High Court as custodian of the record of proceedings of the Court where the appeal originated. It was instead signed by the Registrar of the Lusaka High Court who is incompetent to certify the correctness of the record as he has not had custody of the court file: this is in violation of **Order X rule 9 (5) b of the Court of Appeal Rules.**

In the affidavit in opposition sworn by Kennedy Mambwe, Counsel for the appellants (hereinafter referred to as respondents) conceded that the said documents were omitted from the record of appeal. The affiant states that the defects can be cured if the court allows either the withdrawal of the record of appeal so that a corrected record may be filed later or if the court grants leave to file a supplementary record of appeal.

The applicant filed in skeleton arguments dated 14th April, 2022 highlighting some of the breaches. As regards the omission of the order granting leave to appeal contrary to Order X rule 9 (5) (c) of the Court of Appeal rules, counsel submitted that since the present appeal is one that requires leave of court to appeal, it is mandatory to include a copy of the order granting leave to appeal in the record of appeal.

Counsel stated that the record of appeal does not contain the memorandum of appeal in breach of order X rule 9 (5) (d) of the Court of Appeal Rules which is also an important document.

That the present appeal is against the High Court's order granting leave to the applicant to commence committal proceedings against the respondents. The application comprises the ex-parte summons for leave to commence committal proceedings, the affidavit in support of the ex-parte summons, the statement in support of the application, the certificate of urgency and skeleton arguments in support of the application are all relevant to the present appeal.

That the reasons why the application for leave to commence committal proceedings is directly relevant to the present appeal are as follows:

(a) the lower court's decision on the said application is what the appellants have appealed against.

(b) the application for leave to commence committal proceedings made in the court below would have assisted this court to appreciate the evidence and arguments relied upon in the court below on which the lower court's decision appealed against was based.

Counsel went on to submit as regards the omission of affidavits and documents put in evidence in the lower court in support of the application for leave to commence committal proceedings. He submitted that the affidavit in support of the ex-parte summons for leave to commence committal proceedings together with all the exhibits to the said affidavits are material to the present appeal as they constitute the facts upon which the court below made the decision to grant leave to commence committal proceedings.

On the issue of the Certificate of Record signed by the Registrar, it was submitted that the Registrar of the registry from which the appeal originated is expected to verify the accuracy of the copies of the documents from the court below and the notes of the proceedings of the court below included in the record of appeal. Counsel stated

that the present appeal arose from the decision of Judge M. Mulanda under cause number 2021/HN/070 (Ndola District Registry). As such, it is the Registrar of the Ndola High Court who is competent to certify the present record of appeal and not the Registrar of the Lusaka Principal Registry. That the Registrar of the Lusaka Principal Registry is not competent to certify as correct, a record of the Ndola District Registry as it is not under his jurisdiction.

Counsel went on to submit that **Order X rule 9 (5) of the Court of Appeal Rules** uses the word 'shall' which means it is couched in mandatory terms and failure by the respondent to comply with the mandatory provisions renders the present appeal incompetent.

Counsel went on to cite a number of cases where the Supreme Court dismissed appeals due to incompetence of the records of appeal. These cases include: **July Danobo T/A Juldun Motors v. Chimsoro Farms Limited**,¹ **Col Kashekele Chrispin Kayombo and Others v. The Committee on the Sale of Government Pool Houses, The Commander Zambia Airforce, The Attorney General**;² **Access Bank (Zambia) Limited v. Group five/Zcon Business Park Joint Venture (Suing as a firm)**.³

It was submitted that from the above authorities, it is clear that a record of appeal that is not prepared in compliance with the mandatory requirements is incompetent and must be dismissed. Counsel therefore urged us to dismiss the appeal with costs to the applicant.

The respondents filed skeleton arguments dated 5th April, 2022 wherein counsel conceded that the preliminary objections raised by the applicant are valid. However, he submitted that the defects complained of are curable and prayed that the respondents be allowed to withdraw the record of appeal and amend the offending defects before refiling so that the appeal could be heard on the merits as the same raises matters of public importance. That the applicant would not be prejudiced by the withdrawal of the record as the missing proceedings are not material to the determination of the appeal. The case of **Jonathan Van Blerk v. The Attorney General and Others**⁴ was cited in support of this submission.

Counsel further submitted that, dismissing the appeal would be in violation of article 118 (2) (e) of the Constitution of Zambia which provide that court's should not pay undue regard to procedural technicalities. The case of **Kapoko v. The People**⁵ was also cited in support of the submission that article 118 (2) (e) exists to safeguard

the interest of justice in the face of unavoidable procedural technicalities.

We have perused the record of appeal and considered the arguments made by learned counsel on both sides. It is common ground that the record of appeal is defective. However, counsel for the respondent argued that the defects can be cured by filing a supplementary record of appeal or withdrawing the record of appeal in order to amend it.

According to **Order 10 rule (4) of the Court of Appeal Rules,**

“Where a document referred to in a record of appeal in accordance with rule 9, is omitted from the record of appeal the appellant may, with leave of court, within fourteen days of lodging the record of appeal, file a supplementary record.”

This means that an appellant who discovers that a document which is supposed to be in the record of appeal in accordance with rule 9, was left out, should within fourteen (14) days of filing the record of appeal, apply for leave to file a supplementary record of appeal and may only file the same upon obtaining leave of court. It is our firm view that a formal application is required.

In the present case, an informal application was made to the Court which was also out of time and it is therefore rejected.

Order 10 rule (14) provides that:

“A copy of the record shall be certified by the appellant or the appellant’s practitioner, or if prepared by the Registrar, by the Registrar.”

Rule 10 (15) provides that:

“For the purposes of sub rules (12) (13) and (14), “Registrar” includes an officer of the court below, who may be appointed by the Registrar for the purposes of the preparation of the record.”

The said Rule (14) entails that the person who prepares the record; the appellant or the appellant’s practitioner or the registrar, is required to certify the record.

The said Rule (15) entails that the Registrar may appoint an officer of the court below where the proceedings took place who may prepare the record and certify it.

In the present case, the record was obviously certified by a person without authority as he is a Registrar not assigned to the court where the proceedings took place.

The Supreme Court has on a number of occasions cautioned parties and their advocates about the need to lodge complete records of appeal and the consequences of not doing so. In the case of **July Danobo (T/A Juldan Motors v. Chimsoro Farms Limited)**,¹ the Supreme Court invoked rule 68(2) of the Rules of the Supreme Court and dismissed the appeal as the record of appeal did not contain the record of proceedings in the court below and was for this reason found to be incompetent.

Similarly, in the case of **Dar Farms Transport Limited v. Nundwe & 3 Others**,⁷ the appeal was dismissed because the order granting leave to appeal was missing from the record of appeal.

In the case of **Access Bank (Zambia) Limited v. Group five/Zcon Buiness Park Joint Venture (suing as a firm)**,³ counsel for the respondent took objection to the record of appeal not having been prepared in line with rule 10(1) and (5) and rule 58 (1) and (4) of the Supreme Court Rules Chapter 28 of the Laws of Zambia. He pointed out that some specified pages in the record were illegible, some portions of the evidence tendered in the court below were omitted and there were some pagination mistakes evident on the face of the record.

The Supreme Court took the view that the record of appeal was incompetent and that the breaches in question were fatal and went to the very root of the appeal process.

The Supreme Court further stated that:

“Matters should as much possible be determined on their merits rather than be disposed of on technical or procedural points. This in our opinion, is what the ends of justice demand. Yet justice also requires that this court, indeed all courts, must never provide succor to litigants and their counsel who exhibit scant respect for rules of procedure. Rules of procedure and time lines serve to make the process of adjudication fair, just, certain and even handed. Under the guise of doing justice through hearing matters on their merits, courts cannot aid in the bending or circumventing of these rules and shifting goal posts, for while laxity in application of these rules may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.”

In the case of **Jamas Milling Company Limited v. Imex International Limited**,⁷ the Supreme Court enunciated that rules of

procedure are meant to facilitate proper administration of justice but emphasized inter- alia that:

“It is not in the interest of justice that parties by their shortcomings should delay the quick disposal of cases and cause prejudice and inconvenience to other parties.”


The Supreme Court dismissed the appeal in the case of **Zambia Revenue Authority v. Charles Waiumweya Muhau Masiye**⁸ as the irregularities on the record went to the root of the appeal.

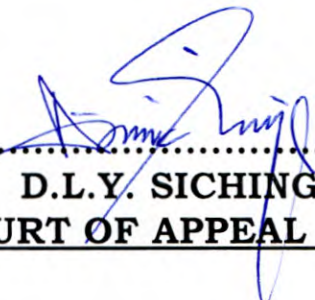
We adopt the reasoning of the Supreme Court in the aforementioned authorities. Our firm view is that the defects in this case are so material so that they go to the root of the appeal process. According to **Order 10 rule 17 (2) of the Court of Appeal Rules, 2016** *“If the record of appeal is not prepared in the prescribed manner, the appeal may be dismissed.”* [Emphasis ours]

This entails that we have the discretion to either allow an incompetent record or grant leave to amend it or dismiss such an appeal for incompetence.

In this matter, the respondents have exhibited disrespect for the rules of court and this cannot be condoned. They were only prompted

to apply to amend the defective record of appeal by the applicant's motion to dismiss the appeal. Under the circumstances, the applicant may be prejudiced should we allow the respondents to withdraw the record and amend it as justice delayed is justice denied. For the foregoing reasons, the appeal is dismissed for incompetence with costs to the applicant, which may be taxed in default of agreement.


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C.K. MAKUNGU
COURT OF APPEAL JUDGE


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D.L.Y. SICHINGA, SC
COURT OF APPEAL JUDGE


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N.A. SHARPE- PHIRI
COURT OF APPEAL JUDGE