**IN THE SUPREME COURT FOR ZAMBIA Appeal No. 182/2008**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)

**BETWEEN**

**S.P. MULENGA ASSOCIATES INTERNATIONAL 1ST APPELLANT**

**CHAINAMA HOTEL LIMITED 2ND APPELLANT**

**AND**

**FIRST ALLIANCE BANK (Z) LIMITED RESPONDENT**

***Coram:*  CHIRWA AG/DCJ, MUYOVWE and MUSONDA, JJS**

**On the 19th January, 2012 and 17th May, 2012**

For the Appellant: Mr. P. Katupisha, Messrs Milner Katolo and

Associates

For the Respondent: Mr. P. Chibundi, Messrs Chibundi and

Company

**R U L I N G**

**MUYOVWE, JS, delivered the Judgment of the Court.**

**Cases referred to:**

1. **Zambia Revenue Authority vs. T. and G. Transport Appeal (2007) Z.R. 13**
2. **Zambia Revenue Authority vs. Jayesh Shah (2001) Z.R. 60**

When we heard this Motion, Mr. Justice Musonda sat with us. He has since been suspended. This Ruling is, therefore, by the majority.

By Notice of Motion, the Respondent applies to the full Court for an Order that the Appeal (No. 182 of 2008) be dismissed for incompetence on account of lack of leave to appeal out of time. The Notice of Motion is filed pursuant to **Rule 55 of the Supreme Court Rules under Cap 25 of the Laws of Zambia** and is supported by an affidavit.

The Affidavit in support sworn by Thula Nyasulu is to the effect that the Appeal is wrongly before Court as leave to appeal out of time was not obtained against the Judgment of Hon. Madam Justice Chibomba delivered on 31st March, 2006 and which Judgment is referred to in the Notice of Appeal filed on 21st August, 2008. That it appears that the Notice of Appeal was accepted by the Supreme Court Registry Staff on the strength of an Order for leave to Lodge Appeal out of time granted on 15th August, 2008. That the said leave related to the Ruling dated 9th May, 2008 in which the lower Court refused the Appellants’ application for Special Leave to Apply for review Out of Time. That the Appeal against the Judgment of 31st March, 2006 was filed after two years from the date of Judgment without leave and is therefore, incompetent and irregular. That in fact the Notice of Appeal refers to a Judgment of 31st March, 2008 which is not produced in the Record of Appeal. That the Appeal should be dismissed.

In the Affidavit in Opposition sworn by Sonny Paul Mulenga, he deposed that after Judgment was delivered on 31st March, 2006 he came across fresh facts which merited a review of the Judgment. That he applied for a Review on 31st March, 2006 and the same was refused in a Ruling dated 9th May, 2008. However, in the same Ruling the High Court granted the Appellants leave to appeal. That due to circumstances beyond his control he could not file the appeal within the stipulated time. That the Appellants applied for Leave to lodge Appeal Out of Time and was granted same on 15th August, 2008. That contrary to the Respondents’ allegation the Appeal is against the Judgment of 31st March, 2006 and not the Ruling of 9th May, 2008 and he reasonably believed that the Order for Leave to Appeal Out of Time was in respect of the Judgment of 31st March, 2006.

On behalf of the Respondent, Mr. Chibundi submitted, inter alia, that the Order marked “SPM2” cannot be relied on against the Judgment of 31st March, 2006. Counsel submitted that this appeal is incompetent and relied on **Zambia Revenue Authority vs. T. and G. Transport¹**

In response, Mr. Katupisha submitted that they opposed the application. He submitted that it is not in dispute that at page 144 of the Record of Appeal there is an Order for leave to lodge an appeal Out of Time and that the Notice of Appeal against the Judgment of the trial Judge was duly filed. According to Mr. Katupisha, this shows that the Appellants were aggrieved with the Judgment. Mr. Katupisha conceded that as the Record of Appeal stands, there seems not to be an Order granting leave. He submitted that one cannot appeal against a Review. Counsel relied on **Zambia Revenue Authority vs. Jayesh Shah²** where it was held that cases should be decided on merit and that any breach will not always be fatal, if the rule is merely regulatory or directory. Counsel contended that, in view of this decision and taking into consideration that the Appellants were aggrieved against the Judgment and applied for review but they were mistaken in their belief, this Court should consider the meritorious nature of the appeal rather than the breach.

In reply, Mr. Chibundi submitted that failure to obtain leave is fatal. He argued that the Record of Appeal shows that it was the Ruling of 9th May, 2008 for which leave to appeal was granted and not the Judgment of 31st March, 2006 which required leave to be applied for Out of Time in order for the Appeal to be competent.

We have considered the Motion together with the affidavits filed in support and in opposition. We have also considered the submissions by learned Counsel for the parties.

It is not in dispute that the Judgment of the lower Court was delivered on the 31st March, 2006 and that the Notice of Appeal was filed on the 21st August, 2008. We agree with Mr. Katupisha that the Appellants were aggrieved with the decision of the Court below hence their application for review which the lower Court refused on 9th May, 2008. Mr. Katupisha submitted that one cannot appeal against a review. This is not correct. **Order 39 of the High Court Rules** provides that a judge can review his/her judgment except where either party shall have obtained leave to appeal and such appeal is not withdrawn. This means that if there is an appeal the Judge will not review his/her decision. The fundamental question is whether the Appellants obtained leave to appeal out of time? Notably, paragraph 8 of the affidavit in opposition reads as follows:

“**That due to circumstances beyond my control I could not file the appeal within the stipulated time**”**.**

The above confirms that the Appellants concede that they did not file the Appeal within the stipulated time and this also goes to show that they were aware that they were out of time and that, therefore, they should have applied for Leave to file the Notice of Appeal out of time instead of proceeding to file the Notice of Appeal without leave of Court.

In their affidavit in opposition, the Appellants made a futile attempt to show that they had actually obtained leave to appeal Out of Time. The record shows and Mr. Katupisha has rightly conceded that there was no leave obtained by his learned brothers who handled this matter before him. The leave that was granted by the Court below was leave following the refusal of the application for Special Leave to apply for Review Out of Time. This leave was granted on the 9th May, 2008. And definitely as Mr. Chibundi has argued, the leave obtained on the 9th May, 2008 cannot be applicable to the Judgment that was delivered by the lower Court on the 31st March, 2006. Clearly, the authorities cited by Mr. Katupisha are not applicable and cannot help the Appellants in this matter. The Appellants sat on their rights by failing to obtain leave to appeal out of time against the Judgment of 31st March, 2006 and they cannot blame anyone for the predicament that they find themselves in. We have said time and again that Rules of Court are there to be observed and litigants who choose not to abide by the said rules do so at their own peril.

In this case, there is evidence of inordinate delay on the part of the Appellants and certainly there is a clear display of lack of seriousness on their part.

We find that the Motion has merit. In the circumstances, we dismiss the appeal with costs to the Respondent to be agreed and in default thereof to be taxed.

**……………………………..**

**D.K. CHIRWA**

**ACTING DEPUTY CHIEF JUSTICE**

**…………………………….. ………………………….**

**E.N.C. MUYOVWE P. MUSONDA**

**SUPREME COURT JUDGE SUPREME COURT JUDGE**