**IN THE SUPREME COURT OF ZAMBIA SCZ/8/148/2009**

**HOLDEN AT LUSAKA/NDOLA**

**(Civil Jurisdiction)**

**B E T W E E N:**

**FRANCIS CHAPOTA 1ST APPELLANT**

**MOBITEL ZAMBIA LIMITED 2ND APPELLANT**

**AND**

**CASAT TECHNOLOGIES RESPONDENT**

***Coram: Chibesakunda, Mwanamwambwa and Chibomba JJS.***

 ***On 16th February, 2011 and 13th April, 2012.***

*For the Appellants: Mr. M. Haimbe of Sinkamba Legal Practitioners.*

*For the Respondent: Mr. K. I. Mulenga of Kumasonde Chambers.*

**J U D G M E N T**

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

**Cases and other materials referred to:-**

1. Black’s Law Dictionary, 8th Edition

2. Zambia Revenue Authority vs. Jayesh Shah (2001) Z. R. 60

3. University of Zambia Council vs. Jean Mary Calder (1998) Z. R. 48

4. Blair Freight International Limited vs. Credit Bank Limited SCZ Appeal No. 209 of 1997

5. Nahar Investment Limited vs. Gindlays Bank International (Z) Limited (1984) Z. R. 81

6. R. B. Policies at Llyod’s vs. Butler (1950) 1. K. B 76

7. Development Bank of Zambia and Mary Ncube (Receiver) vs. Christopher Mwanza and 63 Others SCZ/8/103/08

**Legislation referred to:-**

1. The Supreme Court Act, Chapter 25 of the Laws of Zambia

 By Notice of Motion, the appellant applies to the full Court for an order to reverse or vary the order by the Single Judge of this Court delivered on 23rd November, 2009 in which the Single Judge dismissed the appeal for want of prosecution. The Notice of Motion was filed pursuant to Section 14 of the **Supreme Court Act** and is supported by an Affidavit in Support. The ground given is that the delay in filing the Record of Appeal was not inordinate; the reasons for the delay were bonafide; the appeal has merit and that the appellants would suffer injustice and financial hardships if the appeal is not determined on the merits.

The gist of the Affidavit in Support is that the appellants, being dissatisfied with the Ruling of the learned Judge in the Court below, filed a Notice of Appeal on 3rd July, 2009. In that Ruling, the Court below awarded costs to the respondent on a matter which the appellant claimed, had abated due to the demise of the 1st Defendant (the 1st appellant).

On 1st October 2009, the respondent filed an application to dismiss the appeal for want of prosecution which the appellant opposed in its Affidavit in Opposition. The learned Counsel for the appellant explained that the delay was not inordinate nor deliberate as he had accompanied his wife to South Africa for medical treatment and that on his return on 24th July 2009, he had to attend to the wife and that he then also fell ill. That, however, the Single Judge dismissed the appeal on ground that no proof was attached to verify that he was indisposed as alleged. That, however, the reason tendered was not only plausible but genuine and hence, the appeal should be determined on its merit as the Ruling by learned Judge in the Court below is unsatisfactory and the appellants would suffer grave injustice if the Ruling is allowed to stand.

In opposing this application, the learned Counsel for the respondent, Mr. Mulenga, relied on the respondent’s Heads of Argument. The gist of the respondent’s Heads of Argument is that the appellants’ Notice of Motion was filed on 22nd March, 2010, while the Order sought to be appealed against was made on 23rd November, 2009. That the Notice of Motion was filed 49 days after it ought to have been filed as it should have been filed by 23rd January, 2010. That however, leave was not obtained to file the Notice of Motion Out of Time. Reference was made to Rule 49(2) and (5) which state that:-

“**49(2) The Notice of Appeal shall be instituted in the proceedings from which it intended to appeal and shall be filed therewith in duplicate with the Registrar of the High Court, and shall be so filed within thirty days after the Judgment complained of.”**

**49(5) The notice of appeal shall be served within the period of thirty days on all parties directly affected by the appeal or their practitioners respectively.”**

It was submitted that the word “**shall”** used in the above quoted sub-rules denote mandatory duty. And that **Black’s Law Dictionary1,** defines “**shall**” as:

**“Has duty to; more broadly, is required to. This is the mandatory sense that the drafter typically upholds and that the Courts typically upholds**.”

 The case of **Zambia Revenue Authority vs. Jayesh Shah2**, was cited in which we held that “**Cases should be decided on their substance and merit. The rules must be followed, but the effect of a breach will always be fatal if the rule is merely regulatory or directory.”**

And that in **University of Zambia Council vs. Jean Mary Calder3**, this Court held that:-

“**When the order, direction, or decision made by a Single Judge has taken effect, nothing remains on the record that can be varied, discharged or reversed by the full Court. A party aggrieved by any decision varied, discharged or reversed by the Court should do so before the expiration of the time set by a Single Judge.”**

It was submitted that the appellants in this case did not comply with the provisions of Rules 49(2) and (5) as their Notice of Motion was not filed within the stipulated 30 days period. That this Court emphasized adherence to the Rules of the Court in **Blair Freight International Limited vs. Credit Bank Limited4**, where this Court stated that:-

“**The appeal on the ground of failure to comply with the rule was in our view properly dismissed. The Rules of the Court are for the smooth administration of justice. They ought to be obeyed.**”

Further that in **Nahar Investment Limited vs. Gindlays Bank International (Z) Limited5**, this Court stated that:-

“**Appellants who sit back until there is an application to dismiss their appeal before making their own application for extension of time, do so at their own peril and that in the event of inordinate delay or unfair prejudice to a respondent, the appellant can expect the appeal to be dismissed**.”

And that Streatfield J, stated in **R. B. Policies at Llyod’s vs. Butler6**, that:-

“**It is a policy of the Limitation Acts that those who go to sleep upon their claims should not be assisted by the Courts recovering their property, but another, and, I think, equal policy behind these Acts is that there should be an end to litigation…”**

 And that in **Development Bank of Zambia and Mary Ncube (Receiver) vs. Christopher Mwanza and 63 Others7**, Mambilima, Deputy Chief Justice, observed that:-

“**There must be finality to litigation and a party who is clearly in default should reap the consequences of its inertia and cannot be allowed to roam the Courts like a headless chicken keeping the other party in suspense more so that the party was represented by Counsel**.”

Counsel concluded by arguing that the rules of the Court must be complied with because if every litigant was left to do as one wanted, there would be total disorder in the Courts and this situation could only be avoided by the Courts ensuring that rules are followed and complied with. On this basis, Counsel submitted, this appeal is misconceived and improperly before the Court.

We have seriously considered the Notice of Motion together with the Affidavits filed in support and in Opposition. We have also considered the submissions by the learned Counsel for the parties. This Notice of Motion raises the question whether the Order of the Single Judge of this Court dismissing the appellants’ appeal for want of prosecution should be reversed or varied.

As can be seen from the Affidavit in Support, the appellants’ main argument is that the Record of Appeal could not be filed on time because firstly, the wife to the learned Counsel for the appellants fell ill and the learned Counsel had to accompany her to South Africa for medical treatment. Secondly, that upon his return from South Africa, Counsel had to attend to the sick wife at home and that in the process, he also fell ill. That in view of this explanation, the Single Judge of this Court should have given Counsel the benefit of doubt and that the appeal should not have been dismissed for want of prosecution even though no proof was produced to verify that Counsel was indisposed.

It is not in dispute that the Ruling sought to be appealed against was delivered on 11th June, 2009 and that the Notice of Appeal was filed on 3rd July 2009. The Record of Appeal was not filed within the 60 days period allowed by the rules of the Court. On 1st October 2009, the respondent filed an application to dismiss the appeal for want of prosecution which the Single Judge allowed on 23rd November, 2009.

It is, however, our firm view that since the appellants’ Counsel did not attach the proposed Record of Appeal, it is not possible for us to determine whether the proposed appeal discloses any merits or not. The learned Counsel did not also attach any travel or medical documents to verify his claim that indeed, he was indisposed in the manner suggested. It is his word only. We can only repeat what we stated in **Blair Freight International Limited vs. Credit Bank Limited4**, and in **Nahar Investment Limited vs. Gindlays Bank International (Z) Limited5**. This is that rules of the Court ought to be obeyed and that appellants who sit back until an application to dismiss their appeal is filed without applying for an extension of time and/or leave to file their Record of Appeal out of time, do so at their own peril.

In this case, we are satisfied that the appellants did not substantiate the failure to file the Record of Appeal on time. Neither did the appellants make any effort to obtain an extension of time nor leave to file the Record of Appeal out of time. The appellants sat back until the respondent applied to dismiss the appeal for want of prosecution. This demonstrates lack of seriousness on the part of the appellants. Therefore, on the authorities cited above, it is our considered view that the Notice of Motion has no merit. The same is dismissed with costs to the respondent to be agreed and in default thereof, to be taxed.

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L. P. CHIBESAKUNDA

**SUPREME COURT JUDGE**

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M. S. MWANAMWAMBWA

**SUPREME COURT JUDGE**

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H. CHIBOMBA

**SUPREME COURT JUDGE**