**IN THE SUPREME COURT OF ZAMBIA APPEAL NO./24/2009**

**HOLDEN AT LUSAKA**

**(Criminal Jurisdiction)**

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

**PATRICK NCHIMUNYA APPELLANT**

**VS**

**SIMON SIMUCHELA 1ST RESPONDENT**

**JOSIAH HAMALAMBO 2ND RESPONDENT**

***Coram: Chirwa, Ag. D.C.J., Chibomba and Musonda, J.J.S.,***

***On 9th August 2011 and on 2nd February 2012***

*For the Appellant: Mr. H. Silweya of Silweya & Company*

*For the Respondent: Mr. H.H. Ndholvu of H.H. Ndhlovu & Company*

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

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

***Cases Referred To:-***

1. ***Jamas Milling Company Vs Imex International (PTY) Limited (2002) ZR 79.***
2. ***ZCCM Limited Vs Elvis Katyamba & 46 Others (2006) ZR 1.***
3. ***Sipalo Vs Mundia (1996) ZR 105.***

This was an appeal by the appellant who was the plaintiff in the Subordinate Court and Respondent in High Court. The appeal is against the decision of the High Court to review its order of stay of execution of the Subordinate Court Judgment pursuant to Order 39 of the High Court Rules.

The Judge had initially granted an exparte order to stay execution, which was discharged after an inter parte hearing on 20th August 2008. After review, the learned Judge allowed the Respondents in this Court who were defendants in the Subordinate Court and appellants in the High Court to appeal to the High Court and condemned them in costs. In the ruling of 24th January 2008, the Subordinate Court had rejected an application to stay the execution of judgment as the only notice of appeal on record was that filed at the High Court Principal Registry, contrary to Order 44 Rules 2 and 3 of Chapter 28. The learned Judge was of the view that the notice of appeal had not been entered in the Subordinate Court, as there was no certificate signed to show that the appeal had been entered. The learned Judge went on to state that there was lapse either by the Clerk of Court or the appellants. She decided to review the decision upon learning that the Subordinate Court had transmitted the record to the High Court.

At the hearing of the appeal on 9th August 2011, Mr. Silweya objected to Mr. Ndhlovu filing the Record of Appeal. We allowed Mr. Silweya’s objection as the documents were not part of the proceeding appealed against. The proceedings took place on 4th November 2008 and the documents were filed on 14th May 2009. We, therefore, ordered that they be expunged from the record.

Mr. Silweya filed three grounds of Appeal. In ground one, Mr. Silweya argued that there was no fresh evidence or facts before the court which must have existed at the time of the decision, which had not been discovered before or could not be discovered with due diligence. The Respondents had not filed the notice of appeal against the judgment of the Subordinate Court as required by our decision in ***Jamas Milling Company Vs Imex International (PTY) Limited***.(1)

In ground two, Mr. Silweya argued that the Respondents lost time by deliberate disregard of the court and the Clerk of Court at Monze, by not filing the Notice of Appeal before the expiration of 30 days. No special leave was applied for as required by Order 44 Rule 3 of Chapter 28 to file the appeal out of time.

The High Court had no inherent jurisdiction to entertain an appeal from the Subordinate Court at Monze, when there is no Notice of Appeal entered at Monze. The notice of appeal was filed in a wrong Court in the High Court.

Mr. Silweya cited Section 31 of Chapter 28, which is couched in these terms:

***“Subject to the provisions of the next succeeding section, the High Court shall not entertain an appeal, unless the appellant has fulfilled all the conditions of appeal imposed by the Subordinate Court or by the High Court, as prescribed by rules of the Court***

***(32) Notwithstanding anything herein before contained, the High Court may entertain any appeal from a Subordinate Court, on any terms which it thinks just”***

Mr. Silweya argued that administrative discretion cannot override a statutory provision and referred us to the cases of ***ZCCM Limited Vs Elvis Katyamba and 46 Others***(2) and ***Sipalo Vs Mundia***(3) in which case the High Court held that:

***“Where the court has discretion to enlarge time for a procedural step, it will not exercise that discretion in favour of the appellant unless there is some material on which the discretion can be exercised”***

In ground three Mr. Silweya argued that the court below misdirected itself by allowing the appeal to proceed after going through the process of hearing parties.

Mr. Ndhlovu, in responding to the first ground, submitted that the learned Judge discharged the exparte Order to Stay execution as there was nothing to show that the Respondents had filed a notice of their intention to appeal to the High Court through the Clerk of Court at Monze Subordinate Court. The Respondents appealed for review upon learning that the record had been transmitted to the High Court.

Responding to the second ground, Mr. Ndhlovu argued that at the time of the stay, the learned Judge was not in possession of the record of appeal from Monze Subordinate Court, but at the time of review, the record had been transmitted to the High Court. The learned Judge therefore did not err at law.

On the third ground Mr. Ndhlovu submitted that, the learned Judge was on firm ground when she decided that the Respondents proceed with the appeal in the High Court, as the record of Appeal from Monze Subordinate Court was before her.

We have considered submissions from both counsel. It is patently clear that the Respondents in this court did not file the notice of appeal in accordance with Order 44 of Chapter 28 and Order 47 of Chapter 27.

Order 44 Rule 3 (1) reads:

***“Every appellant shall, within thirty days of the date of any final judgment or decision against which he intends to appeal, or in the case of any interlocutory decision against which he intends to appeal, within fourteen days of the same:-***

1. ***File with the Clerk of Court and serve upon the other party or parties to the suit notice of his intention to appeal;***
2. ***Pay the Clerk of Court the amount of the expense of making up and transmission to the appellate court of the record of appeal (which amount shall be refunded to him if the record of appeal be not made up and transmitted;***
3. ***Give security to the satisfaction of the magistrate either by deposit, or by bond with or without sureties in the prescribed form, for payment of all such costs or the appellant may be adjudged to pay to any party by the appellate court”***

Order 47 Rule 1 reads:

***“Every appellant shall give security to the satisfaction of the Subordinate Court (hereinafter called the Court below), either by deposit or by bond in form 48 in the first schedule, for payment of all such costs as may be awarded to any respondent by the Court. He shall also pay into the Court below the amount of the expense of making up and transmission to the court of the record of appeal. He shall also give notice of the appeal to all parties directly affected by the appeal and to such others, as respondents, as the court below thinks fit to direct. If security, payment and notice are so given and made within one month after the application for conditional leave to appeal, and if the application for final leave to appeal filed in the court below not later than seven days after the expiration of such month, then and not otherwise the court below shall give final leave of appeal”***

These are procedural rules which must be complied with by anyone intending to appeal from a decision of the Subordinate Court to the High Court. The Subordinate Court or the High Court has no discretion to dispense with these rules as was the case. For the High Court to be clothed with Jurisdiction to entertain interlocutory applications and the main appeal, the Notice of Appeal should have been entered, which should be served on the other party, expenses of making up and transmitting the record to the High Court ought to have been paid, this should be done within 30 days. The court below fell into error by treating the mere transmission of the record to the High Court, as amounting to the filing of the notice of appeal.

The appellants in the court below, who are Respondents in this court, having failed to comply with the laid down procedure, the High Court had no Jurisdiction to entertain any application. The proceedings before the High Court were a nullity. We order that the Respondents go and apply for leave to appeal out of time before the Subordinate Court. We allow the appeal.

The Appellants will get their costs in the court below and in this court to be taxed in default of agreement.

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**D.K. CHIRWA**

**DEPUTY CHIEF JUSTICE**

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**H. CHIBOMBA**

**SUPREME COURT JUDGE**

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**P. MUSONDA**

**SUPREME COURT JUDGE**