IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 157/2013**
HOLDEN AT NDOLA
(Civil Jurisdiction)

IN THE MATTER OF: ORDER 53 OF THE SUPREME COURT RULES

AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW FOR AN ORDER FOR MANDAMUS, CERTIORARI AND PROHIBITION TO COMPEL THE RESPONDENTS TO COMPLY WITH THE PROVISIONS OF CLAUSE 1.3 (B) OF THE GOVERNMENT DOCUMENTS TITLE "HAND BOOK" ON THE CIVIL SERVICE HOUSE OWNERSHIP ISSUED BY CABINET IN JULY, 1996 WHICH ENTITLED APPLICANTS TO PURCHASE THE SAID HOUSE.

BETWEEN:

COL. KASHEKELE CHRISPIN KAYOMBO & OTHERS **APPELLANTS**

AND

THE COMMITTEE ON THE SALE OF GOVERNMENT POOL HOUSES **1ST RESPONDENT**

THE COMMANDER ZAMBIA AIR FORCE **2ND RESPONDENT**

THE ATTORNEY GENERAL **3RD RESPODNENT**

Coram: Phiri, Muyovwe and Wood, JJS
On the 1st December, 2015 and 15th January, 2016

For the Appellants: Mr. E. Eyaa, Messrs KBF and Partners

For the Respondents: Ms. C. Mulenga, Principal State Advocate

JUDGMENT

MUYOVWE, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Major Lubinda Sawekema vs. The Committee on the Sale of Government Pool Houses and Others 2004/HP/0166**
2. **Stanley Mwambazi vs. Morester Farms (1977) Z.R. 144**
3. **Zambia Revenue Authority vs. Armcor Security Limited SCZ No. 56 of 2014**

Other works referred to:

1. **Handbook on Civil Service Home Ownership**
2. **Order 53 of the Rules of the Supreme Court, White Book**
3. **Rules 58 and 68 of the Supreme Court Rules, Cap 25 of the Laws of Zambia**

There are three appeals in this matter:

1. The appeal against the main judgment dated 19th March 2013 in which the Lusaka High Court dismissed the appellants' application for judicial review.
2. The appeal against the Ruling dated 8th May 2013 on a preliminary issue raised by the appellant as to whether the court below had jurisdiction to review the order of stay of execution of judgment following upon the appellant's appeal to the Supreme Court against the main judgment.

3. The appeal against the Ruling dated 15th July, 2013 in which the lower court reviewed its order of stay of execution of judgment.

We intend to first of all deal with the main appeal related to the judgment of 19th March, 2013.

The brief background to this matter is that the appellants who were employed by Zambia Air Force applied to the 1st respondent to purchase the houses they were occupying by virtue of their employment in ZAF. The houses in issue are situated within the Avondale Housing Area in Lusaka. According to the appellants, one Major Lubinda Sawekema challenged the committee's refusal to sell him the house he occupied and obtained a High Court judgment in his favour, on 26th October, 2005.

The record of appeal shows that in the case of **Major Lubinda Sawekema,**[1] the State failed to file a record of appeal as provided by the Rules of the Supreme Court. In the **Sawekema**[1] case, a single judge of the Supreme Court dismissed the appeal on 23rd September, 2008 on the ground that the State had failed

to file a record of appeal within the prescribed period and that the delay was inordinate.

According to the appellants, in the case in *casu*, the ZAF administration did not comply with the judgment of the lower court, even after the matter was dismissed by a single judge of the Supreme Court.

The appellants claimed that the respondents' refusal to sell the houses to them was against public policy, discriminatory and unreasonable. The appellants also claimed that the failure by government to sell the houses to them, caused humiliation especially that they were eligible to purchase the houses as sitting tenants.

The appellants applied for judicial review of the decision of the 1st respondent which refused to sell government pool houses to them as sitting tenants. The appellants sought the following reliefs:

(a) A declaration that the houses on the list of officers situate at Avondale Lusaka are Government Pool Houses purchased using government funds and are not ancillary to the operations of the Zambia Air Force (ZAF) and as per government policy the

applicants as sitting tenants were or are entitled to purchase them;

(b) An Order of Certiorari, to move into the court, the decision in question for the purpose of quashing it;

(c) An Order of Mandamus to Order the 1st and 2nd respondents to sell the houses to the applicants who were or are sitting tenants or to administrators of estates of Zambia Air Force (ZAF) Officers who have passed on; and

(d) Damages for discrimination humiliation and loss.

The respondents' position was that the said houses were institutional houses and not for sale.

The State raised the argument that the appellants were late in challenging the decision of the Committee to sell to them the institutional houses.

The State also argued that the appellants had taken more than 4 years after the judgment in the **Sawekema**[1] case to apply for leave for judicial review and that on this premise the matter should be dismissed.

In his judgment, the learned judge in the court below examined the sequence of correspondence in this matter starting with the preamble to the Handbook on Civil Service Home Ownership which reads:

"In the spirit of empowering Zambians to acquire their own houses, the government has decided to sell some of its pool houses to sitting tenants who are civil servants. This section contains guidelines for the sale of government pool houses. These guidelines include information on the categories of houses, eligibility/ineligibility criteria of sitting tenants, subject to review as and when need arises.

Further information regarding the sale of government pool houses may be obtained from the Permanent Secretary (Administration), Cabinet Office, who is chairman of the Ad Hoc Supervisory and Monitoring Committee."

The learned judge then addressed his mind to President Chiluba's letter where he instructed that houses and flats bought on the open market should be retained by the Ministry of Defence as the need for institutional houses existed. Later, the learned judge dwelt on the correspondence which specifically referred to the houses which are the subject of this appeal and the decision to withdraw the offers to the appellants.

The learned judge found that although the **Sawekema**[1] judgment was delivered on 26th October, 2005, the decision sought to be reviewed was not the **Sawekema**[1] judgment but the decision not to sell the houses to the appellants which decision was made in 2001. He found that the appellants failed to comply

with Order 53 as their application was not made promptly. He found the appellants guilty of inordinate delay. In fact, he found that the grounds for the relief sought were not stated. According to the learned judge he would have dismissed the application on these preliminary points.

However, he proceeded to consider the case on the merits and found that the government had no obligation to sell the houses and the appellants could not claim that they had a legitimate expectation to purchase the houses as sitting tenants. He found that there was no illegality in the government decision not to sell the houses to the appellants. The learned judge found that the decision not to sell was not irrational or unreasonable and that there was no procedural impropriety.

The learned judge concluded that the government could not sell the houses to all civil servants and that it was a privilege not an entitlement to purchase a government house. He dismissed the appellants' claim with costs to the respondents.

On appeal, the appellants have advanced the following grounds in this court:

1. **The trial judge erred in law and in fact when he held that there was no illegality in the government decision NOT to sell the disputed houses to the appellants.**

2. **The trial judge erred in law and misdirected himself in fact in finding that the decision by the Respondents not to sell to the appellants was not unreasonable, that it is on the verge of absurdity.**

3. **That the trial judge misdirected himself in law and in fact in not determining whether there was procedural impropriety by respondents conduct of cancelling the offer letter to the appellants and refusing to sell the said houses to the appellants.**

At the hearing of the appeal, Ms. Mulenga Counsel for the State raised preliminary objections in accordance with a notice filed on 5th February, 2015.

In her elaborate heads of argument filed herein, she emphasised that the learned judge in the court below dismissed the application for judicial review principally for inordinate delay in bringing the application and failure to state the grounds on which judicial review was being sought. It was strongly submitted that the appellants have based their appeal on the *obiter dicta* of the trial judge. Counsel referred us to a passage in the judgment where the learned judge stated that:

"I, therefore, accept submissions by the Respondent's Counsel that at the time the application for judicial review was filed on 29th May 2009, the said application was stale as there was inordinate delay in seeking the relief sought, and I would dismiss the application on these preliminary points."

She argued that the *obiter dicta* was in the following terms: **"However, I have considered the merits of the application had judicial review been sought within the stipulated period."** She submitted that the appellants have anchored the appeal on three grounds which are clearly targeted at the *obiter dicta* of the trial judge as opposed to the *ratio decidendi.* Counsel submitted that the appeal was misconceived and should be dismissed on this account.

Counsel then addressed her mind to what she termed as the two main principles upon which the trial court dismissed the appellants' application for judicial review. She submitted that Order 53 of the Rules of the Supreme Court is quite explicit as regards delay in applying for relief. Under Order 53/4 Sub Rule (1) it states that:

"An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good

reason for extending the period within which the application shall be made."

She pointed out that the appellants commenced their application for judicial review in May 2009 and the ex parte order for leave was granted on 11th June, 2009. That in their application, the appellants sought judicial review of the decision of the Committee on the Sale of Government Pool Houses not to sell institutional houses and flats bought on the open market by the Defence Force Services, in particular the Zambia Air Force houses located in Avondale. This decision was made sometime in 2001 but the appellants only made their application for judicial review 8 years later in 2009. It was submitted that the reason given for the delay was that the appellants were unable to make the application within three months because they were waiting for the outcome of the **Sawekema**[1] case. It was submitted that the decision for which the appellants sought judicial review was the decision of the Committee on the Sale of Government Pool Houses and not the order of a single judge of this court.

Regarding the issue of the appellants' failure to state the ground(s) for seeking judicial review, we were referred to the notice of application for leave to apply for judicial review filed by

the appellants in the court below. Counsel pointed out that the notice filed into court on 29th May, 2009 does not state the ground(s) upon which relief was sought contrary to Order 53 Rule 3 Sub Rule (2) (ii) of the White Book. Counsel submitted that failure by the appellants to state the ground(s) upon which they sought relief was fatal and that the court below was on *terra firma* in dismissing the appellants' application on this preliminary point and that we should uphold the lower court.

Further, it was submitted that the appellants' application for judicial review lacked full and frank disclosure as to why they delayed in making the application. Other defects that were raised were that: the appellants' notice filed into court on 29th May, 2009 did not conform to the prescribed form and was irregular; the mode of applying for judicial review was flawed; the record of appeal does not contain an originating summons or originating notice of motion as neither of the said documents was filed in the proceedings in the court below; it does not contain a copy of the notes of the hearing in the court below which is contrary to Rule 58 (4) (j) of the Supreme Court Rules; she also referred us to Rule 68 (2) of the Supreme Court Rules which provides that if the record of appeal is not drawn up in the

prescribed manner, the appeal may be dismissed. She urged us to emphasise the importance of court rules to ensure adherence by dismissing this appeal for failure to observe the attendant court rules.

In his arguments in reply to the submissions by the State on the preliminary issues, Mr. Eyaa vehemently argued that the appeal is not based on the *obiter dicta* by the learned judge. Learned Counsel's argument is that although the learned judge agreed with the respondents on the preliminary issue, in the end he determined the whole case on the merits. Counsel pointed out that leave was obtained before Chawatama J. According to Mr. Eyaa, the respondents had the liberty to apply to discharge the ex-parte Order granting leave under Order 53/14/62 read with Order 53/14/4. He emphasised that the learned trial judge exercised his discretion to hear the case on the merits despite noting the default. He relied on **Stanley Mwambazi vs. Morester Farms**[2] which states that matters must be disposed of on the merits.

On the irregularities pointed out by the State and on which basis we are being called upon to dismiss the appeal, it was

submitted that these objections lack merit as well. It was argued that it is not correct that the rules prescribe that the memorandum of appeal should be excluded from the record of appeal. It was submitted that the Notice of Appeal and the Memorandum of Appeal were amended after the appellants were granted leave by a single judge of this court on 18th December, 2014.

On the issue of the absence of the notes of the hearing in the court below, it was submitted that the matter proceeded on affidavits and submissions and this explained the absence of the notes by the trial court because there were none.

We were urged to dismiss the preliminary issues raised.

We have considered the arguments by learned Counsel for the parties on the preliminary issues raised by the respondents.

It is worth noting that the preliminary issues raised in this court were raised before the trial court as well. However, we wish to state that we do not agree with Ms. Mulenga that the memorandum of appeal should be excluded from the record of appeal. Rule 49(5) of the Supreme Court Rules provides that the

notice of appeal should be filed together with the memorandum of appeal. See **ZRA vs. Armcor Security Limited**[3] at p. 2170. The memorandum of appeal is part of the backbone of the appeal and forms part of the record of appeal. In any case, if there were any anomalies with regard to the notice of appeal and the memorandum of appeal, the same were cured by the order of amendment granted to the appellants by the learned Deputy Chief Justice on 4th December, 2014. The objection by the State is misconceived and cannot be sustained.

Coming now to the main arguments raised by the State in the preliminary issues, in sum the argument is that the appeal is based on the obiter dicta pronounced by the learned judge; that the application for judicial review had come too late as the decision being questioned was made in April 2001 and that the grounds for relief sought were not specified in the Notice for application for leave. On the other hand, the appellants maintained that the decision in the court below was based on the merits and that leave was granted and the respondent did not appeal against that Order. Mr. Eyaa conceded, and rightly so, that the learned judge in the court below upheld the preliminary objections raised by the State but he insisted that the learned

judge was on *terra firma* when he decided the case on the merits. The question, as we see it, is whether the learned judge was in order to proceed to decide the matter on the merits.

An excerpt from the learned judge's judgment reads as follows:

> **"The application for leave therefore ought to have been made at sometime in 2001 within three months from the date when grounds for Judicial Review first arose. Thereafter, the Applicants would have been perfectly entitled to move the court to extend time for applying to move Judicial Review. In the instant case, I find that the application was not made promptly and in any event within the three months period in compliance of Order 53."**
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> **Further from the Notice of Application for leave and the affidavit in support of leave the grounds upon which relief is sought are not stated in the prescribed format. I therefore accept submissions by the Respondent's counsel that at the time the application for judicial review was filed on 29th May 2009, the said application was stale as there was inordinate delay in seeking the relief sought, and I would dismiss the application on these preliminary points."**
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> **However, I have considered the merits of the application had judicial review been sought within the stipulated period....."**

It is not in dispute that this whole case is anchored on the decision by the Committee on the sale of Government Pool Houses' refusal to sell the houses to the appellants who were sitting tenants. That this decision was made in April 2001 is common cause. According to the appellants, their failure to come to court within three months as required under Order 53 was due to the fact that they were waiting for the outcome of the case of **Major Lubinda Sawekema vs. The Committee on the Sale of Government Pool Houses and Others**[1] which judgment was delivered on 26th October, 2005. As the learned trial judge observed, the decision which the appellants sought to have reviewed was not the judgment of 26th October, 2005 but that of the Committee not to sell them the houses which decision was made in 2001. Clearly, looking at the time period, the appellants were guilty of inordinate delay even as they commenced proceedings in 2009. While, we cannot ignore that leave had been granted to the appellants and there was no appeal lodged in this court against this decision, we take the view that the learned trial judge could not be expected to overlook the defects in the application before him. Therefore, having noted and agreed with the State on the preliminary issues raised before him, it was

unnecessary for the learned judge to retreat his steps by delving into the merits of the case.

His own words actually were to the effect that the application was dismissed. It was erroneous for him to proceed any further. On this ground alone, this appeal cannot succeed.

On the issue of the apparent omission to include the notes of the proceedings in the court below, Mr. Eyaa argued that the absence of the notes of the lower court was not an issue as the matter was heard by affidavit evidence and submission. We do not agree with him. In their submissions in the court below, the State submitted as follows:

> **"(c) Thirdly, my Lord, at the hearing of the oral arguments on 07 August 2012, both parties agreed to rely on the affidavit evidence that was already before court and to file written submissions. The court directed the applicants to file in their submissions within fourteen (14) days but not later than 27 August 2012 and that the respondents should equally do the same before 14 September 2012..."**

From this submission, we discern that certainly there was a hearing on the 7th August, 2012 contrary to the submission by Counsel for the appellants. The notes of the hearing should have been included in the record of appeal even if a decision was to be based on affidavit evidence and submissions. And so, the

truth emerges that the record of appeal does not contain the proceedings of the court below. In this regard, Rule 58 states the contents of a record of appeal and this includes as stated in sub-rule (4) (j) a copy of the notes of the hearing at first instance.

As indicated at the outset, this appeal comprises of three appeals: the appeal against the judgment dated 19th March 2013; the Ruling dated 8th May 2013 and 15th July 2013. Proceedings relating to the three appeals are not on the record of appeal contrary to Rule 58(4)(j).

We must hasten to add that we also agree that this appeal was full of irregularities going by the condition of the record of appeal. Our own observations are as follows:

1. The record of appeal at Page 16 shows the affidavit in support which appears not to have been filed as it is not stamped or sworn.
2. The copy of the Civil Service Hand Book marked "GML3" mentioned in the unfiled unsworn affidavit in support is not legible. It is faded.

3. The affidavit in reply to the affidavit in opposition to the application for judicial review appears not to have been filed or sworn.

All these irregularities show that this appeal is incompetent. Rule 58 (4) of the Rules of the Supreme Court is instructive on this point.

We have enumerated a number of irregularities confirming the State's assertion that this appeal is incompetent and should be dismissed in terms of Rule 68 (2) which provides that if the record of appeal is not drawn up in the prescribed manner, the appeal may be dismissed. Quite obviously, this appeal cannot survive.

And so, coming back to the State's objections on the substantive judicial review application, we note that the application was not in the prescribed form. The notice for leave did not include the grounds for relief. The affidavit verifying facts lacks detail and we take the view that the learned judge who granted leave should have scrutinised the application to ensure that it met the required standard.

In sum, we find that the preliminary objections raised by the State are valid and must be upheld. We have, of course, brought out our own observations regarding the state of the record of appeal. In light of our findings, there can be no escape route for the appellants. This appeal is accordingly dismissed with costs to the respondents to be taxed in default of agreement.

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G.S. PHIRI
SUPREME COURT JUDGE

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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A.M. WOOD
SUPREME COURT JUDGE