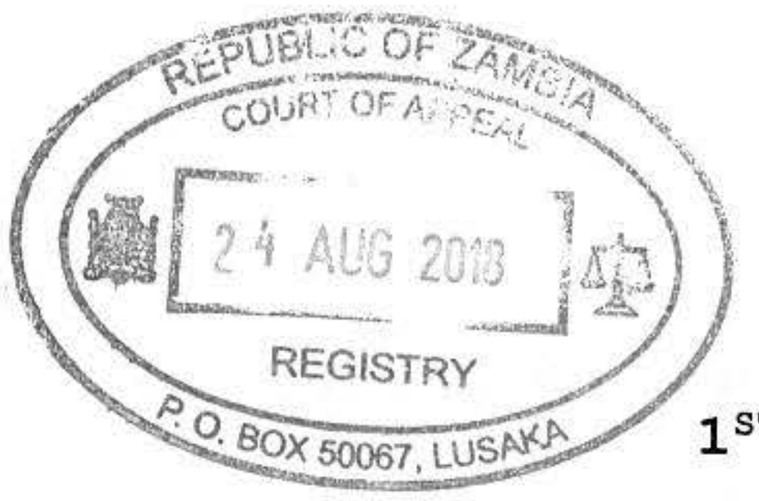
IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 47/2017
HOLDEN AT LUSAKA/NDOLA
(Civil Jurisdiction)

BETWEEN:



MUCHINKA FARM LIMITED	APPELLANT
AND	
THE ATTORNEY GENERAL	1ST RESPONDENT
A.T. PHIRI	2ND RESPONDENT
EVA PHIRI	3RD RESPONDENT

Coram: Mchenga, DJP, Chishimba and Kondolo, JJA

On 4th October 2017, 15th November 2017 and 24th August 2018

For the Appellant: E. Chulu, Enias Chulu Legal Practitioners
For the 1st Respondent: F. Chidakwa, Assistant Senior State Advocate, Attorney Generals Chambers Advocate Ministry of Justice
For the 2nd and 3rd Respondents: E.I. Banda Senior Legal Aid Counsel, Legal Aid Board

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J U D G M E N T

Mchenga, DJP, delivered the judgment of the court.

Cases referred to:

1. **Stanley Mwambazi v Morester Farms [1977] Z.R. 108**
2. **Nahar Investment Limited v. Grindlays Bank International (Z) Limited [1984] Z.R. 8**

3. John Sangwa and Simeza, Sangwa & Associates v Hotellier Limited and Ody's Works Limited SCZ/8/402/2012
4. Access Bank (Zambia) Limited v Group Five/Zcon Business Park Joint Venture (Suing as a Firm), Supreme Court Appeal No. 76 of 2014
5. Henry Kapoko v The People 2016/CC/23

Legislation referred to:

1. The Constitution of Zambia, Chapter 1 of the Laws of Zambia
2. The High Court Act, Chapter 27 of the Laws of Zambia
3. The Court of Appeal Act, No. 7 of 2016
4. The Court of Appeal Rules, Statutory Instrument No. 65 of 2016

This is an appeal against the High Court's decision declining to grant the appellant leave to file a notice of appeal to the Court of Appeal, out of time.

The circumstances surrounding the appeal are that on 28th July 2005, the appellant took out a writ, seeking, *inter alia*, declarations that Commissioner of Lands' re-entry of Lot No. 3690/M Ndola and the subsequent issue of title to that property, to the 2nd and 3rd respondents, was null

and void. On 8th May 2008, the 2nd and 3rd respondent's advocates filed into court, a request to set the action down for trial.

The trial judge set 13th January 2014, as the trial date. On that day, neither the appellant's representatives nor their advocates, turned up. The respondents and their advocates attended and the trial judge dismissed the action for want of prosecution, following an application by one of the respondent's advocate. He noted that most adjournments previously, were due to the non-attendance of the appellant's representatives and their advocates.

The appellant applied for the review of the order dismissing the action for want of prosecution and on 20th March 2015, the trial judge delivered his ruling. He declined to review his decision. The ruling was delivered in the presence of the appellant's counsel.

A year and seven months later, on 11th May 2016, the appellant's new advocates, applied for leave to file a

notice appealing against the dismissal of the case for want of prosecution, out of time. The application was heard and the trial judge declined to grant the leave. While accepting that matters should be determined on their merits, he declined to enlarge time for filing the notice of appeal after finding that sufficient reason had not been advanced for the delay, given that the ruling declining to review his decision, was delivered in the presence of the appellant's advocates, at the time.

Two grounds have been advanced in support of the appeal. They can be summarized as follows; in the absence of improper conduct on the part of the advocates retained by the appellant, the failure to file the notice of appeal on time, cannot be taken to be an indication that they had slept on their rights. In addition, given the nature of the appellant's claim, the case should have been determined on its merits and not dismissed on a technicality.

Submitting on behalf of appellant, Mr. Chulu referred to the case of **Stanley Mwambazi v Morester Farms**[1] and argued that since the delay in applying for leave to appeal out of time was not unreasonable and there was no improper conduct on the part of the appellant, the application should have been allowed. He also submitted that the case of **Nahar Investment Limited v. Grindlays Bank International (Z) Limited**[2], which the trial judge relied on to dismiss the application, is not applicable to this case because the circumstances are different. In that case, the application was only filed after the respondent had applied to have the matter dismissed, no application to dismiss the matter was filed in this case before the application was made.

He ended his submission on the point, by urging us to take the approach taken by the Supreme Court in the case of **John Sangwa and Simeza, Sangwa & Associates v Hotellier Limited and Ody's Works Limited**[3]. Mr. Chulu submitted that the appellant should have been allowed to file his notice and ordered to pay costs.

Mr. Chulu also referred to **Article 118(2)(a) of the Constitution** and submitted that the delay in filing the notice was a procedural technicality that should not encumber the appellant because the respondents were not in any way prejudiced by the delay. The appellant should have been allowed to file the notice to enable their grievance to be determined on its merits.

In response, Major Chidakwa submitted that the trial judge arrived at the correct decision, having recognised the need to have cases determined on the merits and at the same time ensure that litigation comes to an end, timely. In response to Mr. Chulu's submission on **Article 118(2)(e) of the Constitution**, Major Chidakwa referred to the case of **Access Bank (Zambia) Limited v Group Five/Zcon Business Park Joint Venture (Suing as a Firm)**[4] and submitted that litigants must comply with rules of procedure when they appear before courts. In this case, the appellant failed to do so.

Responding, on behalf of the 2nd and 3rd respondents, Ms. Banda submitted that the trial judge was on firm ground when he found that a delay of 1 year and 7 months was inordinate. In response to Mr. Chulu's submission on **Article 118(2)(e) of the Constitution**, Ms. Banda referred to the case of **Henry Kapoko v The People**[5] and submitted that the provision was not intended to do away with rules of procedure.

In reply, Mr. Chulu argued that the case of **Henry Kapoko v The People**[5] enjoins the court not to pay undue regard to technicalities that obstruct the course of justice. He submitted that although there was a delay in filing the application for leave to appeal out of time, the respondents have not demonstrated that they will be prejudiced if leave is granted to file it.

We will deal with the arguments in support of both grounds of appeal together as they are inter-related. The first issue we will deal with is Mr. Chulu's submissions on the import of **Article 118(2)(e) of the Constitution.**

In the case of **Henry Kapoko v The People**[5], a case in which the import of **Article 118(2)(e) of the Constitution** was considered, Munalula JC, delivering the judgment of the Constitutional Court, said the following at page J30:

> **"The Article's beneficial value is achieved well if it is applied in an eclectic fashion depending on the nature of the rule before it. Each court will need to determine whether in the peculiar circumstances of the particular case, what is in issue is a technicality and if so whether compliance with it will hinder the determination of a matter in a just manner"**

At page J33 of the same judgment, she went on to say the following:

> **"while the facts and law in each case will vary the principle laid out by this Court on the meaning and application of Article 118(2)(e) remains constant. The courts word is clear. Article 118(2) (e) is not intended to do away with existing principles, laws and procedures, even where the same constitute technicalities. It is intended to avoid a situation where manifest injustice would be done pay paying unjustifiable regard to a technicality"**

From these extracts, it is clear that the provision was not intended to do away with existing principles, laws or rules of procedure. Depending on the circumstances,

courts are urged to be flexible in cases where strict compliance with rules of procedure may lead to injustice. This was the case in **John Sangwa and Simeza, Sangwa & Associates v Hotellier Limited and Ody's Works Limited**[3], where the application was made a few days out of time. In this case, the application was made 1 year 7 months late, but we will get back to this in a moment.

Coming to Mr. Chulu's submission that the case of **Nahar Investment Limited v Grindlays Bank International (Zambia) Limited**[2] was not applicable to this case, while we agree that the facts of that case are not on all fours with this case, we find that that is of no consequence. This is because what the trial judge drew from the case, was the Supreme Court's pronouncement on inordinate delays. In that case, page 82, Ngulube CJ, delivering the judgment of the court, had the following to say:

> **"Indeed, as a general rule, appellants who sit back until there is an application to dismiss their appeal, before making their own frantic application for an extension, do so at their own peril. If the delay has been inordinate or if in the circumstances of and individual case, it appears that the delay appeal has resulted in the respondent being unfairly prejudiced in the**

> **enjoyment of any judgment in his favour, or in any other manner, the dilatory appellant can expect the appeal to be dismissed for want of prosecution, notwithstanding that he has a valid and otherwise perfectly acceptable explanation."**

It was the Supreme Courts position that where there has been inordinate delay that may have caused prejudice to other parties, an application for extension of time may be declined. As we have just stated, the trial judge was entitled to take this principle into account.

Mr. Chulu also referred to the case of **Stanley Mwambazi v Morester Farms Limited**[1]. In that case, Gardner JS, at page 109, observed as follows:

> **"Where a party is in default he may be ordered to pay costs, but it is not in the interests of justice to deny him the right to have his case heard. I would emphasise that for this favourable treatment to be afforded to the applicant there must be no unreasonable delay, no malafides and no improper conduct of the action on the part of the applicant. No such considerations apply in this case."**

Our understanding of this case is that a party in default, can be allowed to pay costs, where there is default but no malafides or unreasonable delay. However, where there

are no malafides but there is unreasonable delay, reliance cannot be placed on the principle set out in this case.

As we see it, the issue is whether the 1 year 7 months delay to file the application for leave to appeal out of time was inordinate. The issue must be understood in context. The writ in this case was taken out in 2005 and by 2013, which is 8 years later, trial had not commenced. The delay in the trial commencing was due to adjournments, mostly at the instance of the appellant. Further, the dismissal of the application to review, which should have triggered the application for leave to appeal out of time, was made in the presence of the appellant's advocates.

First of all, the fact that the appellant's advocate at the time were different, is in our view immaterial. Even if they had retained counsel, it was their duty to follow up on progress on the case. No plausible explanation has been rendered as to why it took such a long period of time before any action was taken. Their failure to react until

after a year and 7 months is indicative that they had gone to sleep.

We find that the trial judge cannot be faulted for finding that the wait of 1 year and 7 months was inordinate. It is also our view that when considering the interests of justice, one must not only look at giving adequate opportunity to the claimant to present his/her case; the defendant's interests must also be considered because the defendant is equally entitled to having any claims against them made in good time. In this case, the 2nd and 3rd respondents have been waiting since 2005 for the appellant to present the case against them.

We find that the trial judge did not pay undue regard to technicalities, when in the absence of any plausible explanation he declined an attempt to revive a case after a period of 1 year and 7 months. The decision cannot be described as being a "technicality" in breach of **Article 118(2)(e) of the Constitution.**

In the face of the delay, that was rightly found to be inordinate, we find that the trial judge rightly declined to grant the appellant leave to file their notice of appeal out of time. We find no merit in the appeal and we dismiss it with costs.

C.F.R Mchenga
DEPUTY JUDGE PRESIDENT

F.M. Chishimba
COURT OF APPEAL JUDGE

M.M. Kondolo SC
COURT OF APPEAL JUDGE