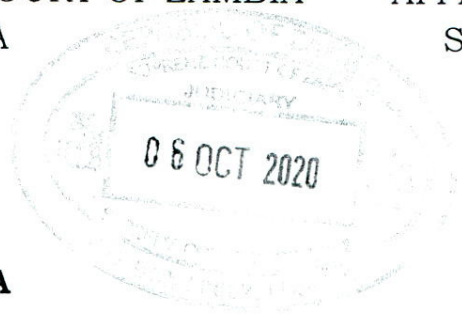


IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

APPEAL NO. 125/2016  
SCZ/8/273/2015



BETWEEN:

**LENARD KANYANDA**

**APPELLANT**

**AND**

**ITAL TERRAZO LIMITED (IN RECEIVERSHIP)**

**RESPONDENT**

Coram: Musonda, DCJ, Kaoma and Kajimanga, JJS on 6<sup>th</sup> October,  
2020

For the Appellant: In Person

For the Respondent: Mr. C.M. Sianondo – Malambo and Company

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

Kaoma, JS, delivered the Judgment of the Court.

**Legislation referred to:**

- 1. Supreme Court Rules, Cap 25, Rules 12(1) and (2), 48(1) and (4), 54, and 58(5)
- 2. The Supreme Court (Amendment) Rules, 2012 (Statutory Instrument No. 26 of 2012)

**1. Background Facts**

- 1.1 On 7<sup>th</sup> May, 2019 when the appellant’s appeal was called for hearing, the appellant informed the Court that he was appearing in person because his counsel had just abandoned him although they had not filed an order or a notice of withdrawal of advocates. However, he indicated that he was ready to proceed in person.
- 1.2 Before we could hear the appeal, we had to deal with a preliminary issue raised by counsel for the respondent that the appellant had

filed the record of appeal outside the 60 days stipulated by **Rule 54** of the **Supreme Court Rules, Cap 25** without leave of the court.

- 1.3 The appellant had conceded that there was no leave obtained to file the record of appeal out of time but he alleged that he was not aware and that he was hearing it in court. Counsel for the respondent then invited the court to dismiss the appeal, for the reason that it was incompetent.
- 1.4 However, given the claim by the appellant that his counsel had just abandoned him, the court allowed him to withdraw the record of appeal with a view to apply for leave before a single Judge, within a period of 30 days to file the record of appeal out of time. The court awarded the costs to the respondent.

## **2. Application before the Single Judge and Decision**

- 2.1 On 20<sup>th</sup> May, 2019 the appellant applied before a single judge of this Court for leave to file his record of appeal out of time. The single judge heard the application on 24<sup>th</sup> May, 2019 and delivered an extempore ruling dismissing the application, with costs.
- 2.2 The single Judge gave two reasons, first, that there was inordinate delay by the appellant to file his application for leave; and secondly that he sat on his rights and the issue of his lawyers was not a reason for her to exercise her discretion in his favour.

### **3. This Motion and arguments by the parties**

- 3.1 On 10<sup>th</sup> June, 2019, the appellant filed this motion seeking to set aside the ruling of the single Judge and for the Court to grant him leave to file the record of appeal out time. In the affidavit in support of notice of motion, he explained the circumstances that prompted him to apply for leave to file the record of appeal out of time.
- 3.2 The appellant's main argument in support of the motion was that he applied for leave to file the record of appeal out of time based on our decision of 7<sup>th</sup> May, 2019 and that he based his application on **Rule 12(1)** of the **Supreme Court Rules**.
- 3.3 The respondent filed an affidavit and arguments in opposition on 3<sup>rd</sup> February, 2020. The main contention was that since the appellant failed to file the record of appeal within the requisite 60 days, he was required, in terms of **Rule 12(2)** of the **Supreme Court Rules**, to apply for extension of time within 21 days after the end of the 60 days, before filing his application before the single Judge.
- 3.4 Alternatively, the appellant ought to have applied for leave of this Court before filing an application to extend the time within which to file the record of appeal after the Court allowed him to withdraw the appeal on 7<sup>th</sup> May, 2019.

### **4 Preliminary objection by the respondent**

- 4.1 On 10<sup>th</sup> September, 2020, the respondent filed a notice to raise a preliminary objection to the hearing of the motion on the ground



that the motion was improperly before this Court as there was no leave obtained before filing the same as the application was outside the time stipulated by **Rule 12** of the **Supreme Court Rules**. The respondent relied on the affidavit in opposition to the motion.

4.2 In his oral submissions before us, counsel for the respondent further contended that the motion was incompetent in light of **Rule 48(4)** of the **Supreme Court Rules** as the appellant filed the motion outside the 14 days period stipulated in **Rule 48(1)**.

4.3 On 29<sup>th</sup> September, 2020, the appellant filed skeleton arguments in opposition of notice to raise preliminary objection to the hearing of the motion. He contended largely that the objection mounted by the respondent based on **Rule 12(2)** of the **Supreme Court Rules** was misconceived as the Court on 7<sup>th</sup> May 2019 granted him 30 days within which to file the application for leave.

4.4 In his oral reply to the arguments by counsel for the respondent around **Rule 48(4)** of the **Supreme Court Rules**, the appellant acknowledged that he ought to have filed the motion within 14 days of the decision of the single Judge and that he was out of time.

## 5 **Our decision on the preliminary objection**

5.1 The issue we have to decide is whether this motion is improperly before us as argued by the respondent. We agree with the appellant that given the order we made on 7<sup>th</sup> May, 2019 granting him 30 days within which to apply for leave before a single judge to file the

record of appeal out of time, there was no need for him to move the single Judge under **Rule 12(2)** before filing the application.

5.2 As we said above, the appellant applied before the single Judge for leave to file his record of appeal out of time on 20<sup>th</sup> May, 2019, which was within the permissible 30 days. In any case, counsel for the respondent had made the same argument before the single judge but she did not consider it a bar to the appellant's application, which she considered on merit.

5.3 However, the issue does not end there. In terms of **Rule 48(4)** of the Supreme Court Rules, the motion ought to have been filed within fourteen (14) days of the decision of the single Judge declining leave. **The Supreme Court (Amendment) Rules, 2012 (Statutory Instrument No. 26 of 2012)** amended **Rule 48(1)** of the Supreme Court Rules to insert a fourteen days time limit. It provides in part:

**(1) Applications to a single judge shall be made by motion or summons, within fourteen days of the decision complained of which shall state the grounds of the application, and shall if necessary be supported by affidavits ... (Underlining ours for emphasis only)**

5.4 **Rule 48(4)**, which was not amended provides in part:

**(4) Any person aggrieved by any decision of a single judge who desires to have such decision varied, discharged or reversed by the Court under paragraph (b) of section four of the Act, shall in like manner file before the hearing by the Court three extra copies of the proceedings, ... (Emphasis again ours)**

- 5.5 **Rule 48(1)**, which we have set out in paragraph 5.3, is couched in mandatory terms in relation to the period within which to make an application to a single Judge, that is, within fourteen days of the decision complained of. It is no longer open ended as it was before the amendment of 2012.
- 5.6 Furthermore, because of the use of the phrase ‘**shall in like manner**’ in **Sub-rule (4)**, any application made under that sub-rule, challenging the decision of a single Judge should be made within fourteen days as provided in **sub-rule (1)**. The same applies to an application involving the decision of an appeal under **Rule 48(5)**.
- 5.7 Coming back to this matter, the appellant filed this motion on 10<sup>th</sup> June, 2019, seventeen days following the decision of the single Judge complained of. Plainly, this was outside the stipulated period.
- 5.8 We are alive to the fact that the date stamp on the notes of proceedings at page 19 of the motion record carries the date of 29<sup>th</sup> May, 2019 but the relevant date, for our purposes, is 24<sup>th</sup> May when the extempore ruling was delivered by the single judge. The appellant accepted that he did not obtain leave to file the motion out of time. Yet again, the appellant is caught up in the rules of court.

## **6 CONCLUSION**

- 6.1 For the foregoing reasons, we find and hold that the motion is improperly and incompetently before us and we dismiss it. In any case, the motion would have failed on the merits.



6.2 In the event, the appeal that has survived this far, only on the notice of appeal, is also dismissed.

6.3 We would have awarded costs to the respondent. However, learned counsel for the respondent courageously informed us that the appellant is not in a position to pay awarded costs, which counsel has readily given up, and so, we should not burden him with another order for costs. We commend counsel for this brevity, which is very rare at the Bar. Therefore, we make no order as to costs.



**M.MUSONDA**  
**DEPUTY CHIEF JUSTICE**



**R.M.C. KAOMA**  
**SUPREME COURT JUDGE**



**C. KAJIMANGA**  
**SUPREME COURT JUDGE**