IN THE SUPREME COURT OF ZAMBIA **Appeal No. 46/2014**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

DAR FARMS TRANSPORT LIMITED **APPELLANT**

AND

MOSES NUNDWE **1ST RESPONDENT**

LIMA BANK LIMITED (IN LIQUIDATION) **2ND RESPONDENT**

LUKANGA INVESTMENT DEV. LIMITED **3RD RESPONDENT**

MPONGWE FARMS LIMITED **4TH RESPONDENT**

CORAM: Kajimanga, Kabuka and Mutuna JJS
On 3rd November 2020 and 19th November 2020

For the Appellant : Mr. C. M. Sianondo, Messrs Malambo & Co.

For the 1st Respondent: Mrs. K. M. Kabalata, Messrs Chalwe Kabalata Legal Practitioners

For the 2nd Respondent: N/A

For the 3rd Respondent: N/A

For the 4th Respondent: N/A

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

1. *Savenda Management Services Limited v Stanbic Bank Zambia Limited and Gregory Chifire - Selected Judgment No. 47 of 2018*
2. *Finsbury Investments Limited & Others v Ventriglia & Others (2013) Z.R. Vol 2 412*
3. *Zambia Revenue Authority v Jayesh Shah (2001) Z.R. 60*

4. *Maseka v The People (1974) Z.R. 9*
5. *Development Bank of Zambia & Others v Christopher Mwanza & Others – SCZ/8/103/08*
6. *Philip Matanyika, Sheal Mulyata v Kenneth Chipungu (2014) Z.R. Vol 1 352*
7. *July Danobo T/A Juldan Motors v Chimsoro Farms Limited (2009) Z.R. 148*

Legislation referred to:

1. *Supreme Court Rules, Supreme Court Act Chapter 25 of the Laws of Zambia, Rules 48(5) and 50(2)*

Introduction

[1] This motion is twofold. First, the appellant seeks the setting aside of the order of this court dismissing the appeal so that it can be restored for hearing on the basis that leave to appeal existed at the time the matter came up for hearing as it was obtained from the court below. Second, that we should consider this hearing of the motion as the hearing of the appeal.

Evidence

[2] The affidavit in support of the motion discloses that the appellant caused to be filed a record of appeal and heads of argument on 20th March 2014 and served the same on the respondents. The matter came up for hearing on 4th February 2020 when this court raised an issue of lack of leave [to appeal]. As there was no leave which was seen on the record of appeal,

this court proceeded to dismiss the appeal on the understanding that there was no leave. The issue having been raised by the court at the hearing, there was no opportunity to review the many volumes which had not been carried to court for the hearing. Upon a search on the files, it was discovered that despite the leave having not been in the record of appeal, it had in fact been obtained from the court below and thus the appeal was competently before court. It was in this regard that permission was being sought to restore the matter for hearing so that it can be determined on the merits as the decision of the court had been made on an understanding that leave did not exist when it did.

[3] The motion was opposed by the first respondent. His brief opposing affidavit sworn by counsel discloses that the appeal which was dismissed related to the judgment delivered by the High Court on 7th October 1999. Due to the passage of time, the second and third respondents have been liquidated. The deponent spoke to the first respondent on 9th October 2020 who stated that the passage of time will make it more complicated, if not impossible, to satisfy all components of the judgment. The

first respondent believes that any delay in executing the judgment will cause him grave harm and that the restoration of the appeal will delay the matter further.

Arguments

[4] The appellant and first respondent filed written arguments which they briefly augmented at the hearing. In the appellant's written arguments in support of the motion, Mr. Sianondo submitted that this motion has been brought pursuant to rule 48(5) of the Rules of the Supreme Court, Supreme Court Act Chapter 25 of the Laws of Zambia as the order dismissing the appeal involves the decision of this court. Further, that the motion has also been brought on the basis of this court's inherent jurisdiction.

[5] On the exercise of this court's inherent jurisdiction, learned counsel referred us to our decision in *Savenda Management Services Limited v Stanbic Bank Zambia Limited and Gregory Chifire*[1] where we stated that:

> *"The other source of our jurisdiction is what is known as the inherent jurisdiction of the court. Black's Law Dictionary does not define the phrase but refers to "inherent power" which it defines as "a power that necessarily derives from an office, position or status."*

[6] Learned counsel submitted that this court has inherent jurisdiction which extends to the general administration of justice and that in addition, it has jurisdiction to reconsider the order earlier made in order to avoid real injustice and more so, where the circumstances are exceptional. In this regard, he drew our attention to the case of *Finsbury Investments Limited & Others v Ventriglia & Others*[2] where we stated at page 433 as follows:

> *"Clearly, as the foregoing authorities establish, this court has unfettered inherent jurisdiction and in appropriate cases, it can reopen its final decisions and rescind or vary such decisions. This court will not, however, reopen its decision merely on the ground that a party to this decision is dissatisfied with it and wants a more favourable decision. In our considered view, the power of this court to reopen its decision can only be invoked in exceptional circumstances where the interest of justice demands that to be done. In Re Uddin (a Child)*[4]*, Dame Elizabeth Butler-Loss P, summarized the circumstances in which an appellate court can reopen its final decision as follows:*
>
> *"The Court of Appeal or the High Court will not reopen a final determination of any appeal unless – (a) it is necessary to do so in order to avoid real injustice; (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and (c) there is no alternative effective remedy.*
>
> *In our view, this is a proper case where this court can reopen its decision. This inherent unfettered jurisdiction must be weighed*

against an equally important principle of the finality of this court's decisions and the principle of functus officio. This court can only invoke its unfettered inherent jurisdiction where the interest of justice demands that to be done; where the interests of justice outweigh the equally essential principles of finality and functus officio."

[7] According to learned counsel, the present case falls within the categories where real injustice would be occasioned to the appellant as leave was obtained from the court below. There is no other alternative remedy for the appellant but to approach this court – the only court which can look at its decision and reconsider it. Reliance was placed on *Zambia Revenue Authority v Jayesh Shah*[3] where, counsel argued, a similar situation arose. We were specifically referred to the following passage at page 61:

"When we heard this appeal on 7th March, 2001, Mr. Banda raised a preliminary objection to the appeal on the ground that the notice of appeal was filed out of time and there was no order granting leave to appeal out of time on the record. The order granting leave is in fact there on the records of the court except that a copy was not included in the record of appeal filed by the appellants. Learned counsel suggested that the record of appeal ought not to have been accepted in the absence of the order granting leave and that even if the order exists, its absence from the record of appeal rendered the appeal invalid. We said then that our ruling would be reserved to the main judgment. We rule that the objection was not well taken. Cases should be decided on their substance and merit where there has been only a very technical omission or oversight not affecting the validity of

process. This is not to suggest that the rules of court can be ignored when they specify what should be included in the record of appeal; the rules must be followed but the effect of a breach will not always be fatal if the rule is merely regulatory or directory. Here, the order exists in fact and the failure to include it in the record cannot be fatal; it is not as if no leave had been obtained altogether when the appeal might have been incompetent. The objection is overruled."

[8] It was contended that although leave was not part of the record, it was obtained and the order to that effect does exist. It is in this regard that the appellant seeks this court's indulgence to revisit the order dismissing the appeal for lack of leave and restore the matter to the active cause list.

[9] Learned counsel further submitted that in its motion, the appellant also seeks that the court should consider this hearing as the hearing of the appeal itself. That although this procedure is mainly utilized in criminal cases, it can also be of great help in civil matters and the case of *Maseka v The People*[4] was cited in aid. It was also argued that this court had an opportunity to consider this approach in the case of *Development Bank of Zambia & Others v Christopher Mwanza & Others*[5] where it

stated that:

"It would have to be in a very exceptional case that such a procedure could be adopted in civil matters."

[10] He finally submitted that unlike the *Development Bank of Zambia*[5] case where this court declined to utilize this procedure, the present case carries with it exceptional elements necessitating the adoption of this procedure in that the record of appeal was filed with all the arguments by the respective parties except for [the order granting leave] which was not in the record of appeal.

[11] In the first respondent's arguments filed in opposition to the motion, Mrs. Kabalata submitted that there is no appeal pending before this court as the appeal under this cause was dismissed on 4th February 2020. The matter having been dismissed, counsel contended, this court is *functus officio* and cannot rehear the matter. Further, that there is in fact no provision for the application the appellant's counsel has made before this court.

[12] Regarding the appellant's argument that for good and sufficient reasons an appeal may be restored under certain circumstances, learned counsel referred us to the case of *Philip*

Matanyika, Sheal Mulyata v Kenneth Chipungu[6] where this court declined to restore an appeal on account of the fact that rules of the court had not been complied with. In the case at hand, counsel contended, the matter was dismissed because the order granting leave to appeal was not included in the record of appeal. That Rule 50(2) of the Supreme Court Rules, Supreme Court Act Chapter 25 of the Laws of Zambia makes it mandatory for the order granting leave to appeal to be included in the record of appeal.

[13] Learned counsel also cited the case of *July Danobo T/A Juldan Motors v Chimsoro Farms Limited*[7] where this court dismissed the appeal for having failed to comply with the rules of the court regarding composition of the record of appeal. She argued that this matter should not be treated differently. The appellant having failed to include the order granting leave to appeal, it should have its matter dismissed for failure to prepare the record of appeal in accordance with Rule 50(2) of the Supreme Court rules.

[14] Learned counsel further submitted that in restoring the appeal

this court will be indirectly staying a judgment which was twenty years ago in 1999. We were accordingly urged to dismiss this motion with costs.

Consideration of the motion by this court and decision

[15] We have considered the affidavit evidence and the arguments advanced by both learned counsel. The main question for our determination in this motion is whether this court has power to restore and hear an appeal which had been dismissed for failure to comply with its mandatory rules.

[16] As the affidavit evidence reveals, the appeal in this matter came up for hearing on 4th February, 2020. We dismissed it for being incompetent as the record of appeal did not contain an order of the lower court granting leave to appeal, the ruling appealed against having emanated from a chamber application. The thrust of the appellant's contention is that in the exercise of our inherent jurisdiction, we have power to restore and hear the dismissed appeal. The argument being that this will avoid injustice and the circumstances of the case are exceptional. The case for the first appellant is that the appeal having been dismissed, this court is *functus officio* and the appellant's

application is not based on any legal provision.

[17] Rule 50(2) of the Supreme Court Rules enacts in part as follows:

> *"In all other cases, application to the High Court for leave to appeal to the Court shall be by motion or summons, which shall state the grounds of the application, and shall, if necessary, be supported by affidavit. Such application shall be intituled and filed in the proceedings from which it is intended to appeal, and all necessary parties shall be served. If leave is granted, the order giving leave shall be included in the record of appeal..."* [Emphasis added]

[18] We observed earlier in this judgment that the appeal was dismissed because the order granting leave to appeal was not included in the record of appeal. Needless to state, the appeal was incompetent and properly dismissed because it offended the mandatory requirement of Rule 50(2) of the Supreme Court Rules. In our view an appeal dismissed under these circumstances cannot see the light of day again. Stated differently, such an appeal cannot be restored to the active cause list and heard. As aptly argued by Mrs. Kabalata, this court became *functus officio* after the appeal was dismissed.

[19] Regarding Mr. Sianondo's contention that this court has inherent jurisdiction to reconsider the order it made earlier to avoid real injustice especially where the circumstances are

exceptional, we posit that the exercise of such jurisdiction is not to be done willy nilly but must be within the law. Our inherent jurisdiction will never be exercised where the default arises from counsel's ineptitude as was the case in this matter where counsel neglected to include the order granting leave in the record of appeal in violation of the mandatory requirement of Rule 50(2) of the Supreme Court Rules. The assertion by Mr. Sianondo that the circumstances of this case are exceptional does not find favour with us because we see none. The circumstances merely reveal a cavalier attitude on the part of counsel which this court cannot condone.

[20] We must also be emphatic in stating that the *Zambia Revenue Authority*[3] case relied on by the appellant is clearly distinguishable from the circumstances of this case as demonstrated below. In that case, a preliminary objection to the appeal was raised during the hearing on the ground that there was no order granting leave to appeal out of time on the record. The court stated that the order granting leave was in fact there on the records of the court except that a copy was not included in the record of appeal filed by the appellants. It was

for this reason that the court stated that the order existed and the failure to include it in the record could not be fatal. In the present case however, the record of proceedings for the hearing on 4th February 2020 reveals in part as follows:

> *"Court: So if leave was granted we would have found it here, so nothing was applied for?*
>
> *Mr. Sianondo: From the proceedings which we have here, there is no leave.*
>
> *Court: ...this record does not show that there was ever a record for leave to appeal, no application, no transcript of proceedings, nothing.*
>
> *Mr Sinando: I agree my Lady.*
>
> *Court: ... what happens to this appeal first before you come to the issue of costs?*
>
> *Mr. Sianondo: ... I have already stated my Lady that in view of no leave, the appeal can't proceed.*
>
> *Court: It's incompetent and ought to be dismissed?*
>
> *Mr. Sianondo: It's incompetent.*
>
> *Court: It's an appeal, it is incompetent [and] its not supposed to be here.*
>
> *Mr. Sianondo: True my Lady."*

[21] It was because of the foregoing that we dismissed the appeal on the basis that it was incompetent as there was no order granting leave in the record of appeal.

Conclusion

[22] For the reasons we have stated above, our ineluctable conclusion is that there is no merit in this motion. It is accordingly dismissed. In view of this conclusion, it follows that the second limb of the application is doomed to fail as it has no leg to stand on. We award costs to the first appellant, to be taxed in default of agreement.

C. KAJIMANGA
SUPREME COURT JUDGE

J. K. KABUKA
SUPRME COURT JUDGE

N. K. MUTUNA
SUPREME COURT JUDGE