IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 001/2020**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

DAVID NGWENYAMA **APPELLANT**

AND

ATTORNEY GENERAL **1ST RESPONDENT**
MWEMBESHI RESOURCES LIMITED **2ND RESPONDENT**

CORAM: ***CHASHI, LENGALENGA, NGULUBE, JJA.***
On 18th February, 2021 and 25th February, 2021.

For the Appellant:	*C. Sianondo and M. Siansumo, Messrs Malambo and Company*
For the 1st Respondent:	*L. S. Chibowa, Principal State Advocate and M. J. Mazulanyika, Senior State Advocate, Attorney General's Chambers*
For the 2nd Respondent:	*L. Chanda and K. Chulu, Messrs P.H. Yangailo and Company*

J U D G M E N T

NGULUBE, JA, delivered the Judgment of the Court

Cases referred to:

1. *Birkett vs James (1977) 2 All ER 801*
2. *Nahar Investments Limited vs Grindlays Bank International (Zambia) Limited (1984) Z.R.81*

3. *Mandona vs Total Aviation and Export Limited and others, SCZ Appeal Number 82/2009 (2019)*
4. *Zambia Revenue Authority vs Shah (2001) Z.R.60*
5. *Michael Liwanga Kaingu vs Sililo Mutaba, Constitutional Court, Selected Ruling Number 9 of 2018*
6. *Rachael Lungu Saka vs Hilda Bwalya Chomba (sued as administratrix of the Estate of the Late Jean M. Chomba) and Attorney -General CAZ Appeal Number 08/059/2017*
7. *Hichilema vs Lungu vs Another, 2016/CC/0031*
8. *Mususu Kalenga Building Limited and Winnie Kalenga vs Richmans Money Lending Enterprise, SCZ Judgment Number 4 of 1999*
9. *Henry Kapoko vs The People 2016/CC/0023*
10. *Chisanga Mushili Mulenga vs ZESCO Limited Appeal Number SCZ/8/49/2013*

Legislation referred to:

1. *Environmental Management Act, 2011*
2. *High Court (Appeals) (General) Rules, Statutory Instrument Number 6 of 1984*
3. *The Constitution of Zambia, Act Number 1 of 2016*

INTRODUCTION

1. This is an appeal against a Ruling of the High Court delivered by Hon. Justice C. Chanda, on 17th October, 2019, in which the court found that the appeal before it was incompetent and decided it would not determine the merits of the appeal as there was no record of appeal filed by the appellants.

2. The court further found that the period from 2014 when the appeal was lodged to 2019 when the application for adjournment was sought by the appellants for purposes of filing the record of appeal amounted to inordinate delay. The court dismissed the matter for want of prosecution and awarded costs to the second respondent, to be taxed in default of agreement.

BACKGROUND

3. The background to the matter to the extent that is important for the determination of this appeal is straight forward. The second respondent had applied to relevant authorities to commence mining in the lower Zambezi National Park and the Minister of Lands, Natural Resources and Environmental Protection granted it permission to commence large scale mining activities in the national park.

4. Following the Minister's approval, the appellant filed a notice of appeal pursuant to the ***Environmental Management Act, 2011***[1] because he was of the view that the Minister made a wrong decision as he ignored the findings and recommendation of the Zambia Environmental Management Agency. The appellant was further of the view that the said decision would undermine the environmental laws. He also contended that the Minister's decision was wrong as

the second respondent's mining licence was issued before an environmental impact assessment was conducted and as such, it could not carry out mining activities in the lower Zambezi National Park.

5. The appellant's appeal was filed with an application for stay of execution of the Minister's decision. The respondents objected to the mode of commencement of the matter before the High Court. Upon considering the objection, the learned High Court Judge who was adjudicating upon the matter then ordered that it proceeds as an appeal and not by way of originating process. Mr. Justice I.C.T. Chali subsequently decided that he would not proceed to hear viva voce evidence but would receive arguments from the parties and then render a Judgment.

6. The second respondent submitted that the notice of appeal and the grounds of appeal from the Minister's decision lacked merit as they were founded on an erroneous view of the law. It further submitted that the notice of appeal was incompetently before the High Court as it was not compliant with the ***High Court (Appeals) (General) Rules, Statutory Instrument Number 6 of 1984***[2] which governs the procedure on appealing against decisions of a tribunal.

The second respondent submitted that rule 3 of the said Rules provides that:

> ***"3(1) Any person desiring to appeal to the High Court from a decision of the tribunal shall, within thirty days of the date of the issue of the order containing such decision give notice of appeal as hereinafter provided."***

The second respondent prayed that the appeal be dismissed for want of prosecution as the appellant had not filed a record of appeal from the time the matter commenced on 4th February, 2014.

7. The second respondent highlighted rule 5 which provides that:

> ***"5. (1) The appellant shall prepare the record of appeal which shall be bound in book form with an outer cover of stout paper and may, if extensive, be in more than one volume.***
>
> ***(2) The tribunal shall make available to the appellant copies of all relevant documents which are necessary for the purpose of preparing the record of appeal and which are in the exclusive possession of the tribunal."***

8. Specifically, the second respondent submitted that rule (5) provides that:

> ***"(5) The appellant shall forward to the tribunal the record of appeal and such number of copies thereof as the registrar may determine, and the tribunal shall, if***

satisfied in that behalf, certify as correct the record of appeal and each copy thereof forwarded to it."

The second respondent prayed that the appeal be dismissed due to the failure by the appellant to file a record of appeal.

9. The parties expected a Ruling from Chali, J, based on the submissions that they filed but it was not rendered until he passed on. The matter was them allocated to Chanda, J. who heard an application by the appellant (who was the sixth appellant in the lower court) to file the record of appeal. The appellant's counsel then sought an adjournment to regularize the record but the application was opposed by the second respondent because it was of the view that the appellant had sufficient time to prosecute the appeal and neglected to do so. It reiterated its earlier submission that the appeal was incompetent as there was no record of appeal. The court refused to grant the application for adjournment and found that the appeal before it was incompetent. It dismissed the appeal for want of prosecution as there was no record of appeal.

THE GROUNDS OF APPEAL

10. Dissatisfied with the Ruling of the court, the appellant lodged this appeal, advancing the following grounds-

1. **The learned Judge misdirected himself and therefore fell into grave error when he dismissed the appeal without considering the documents that needed to form part of the record of appeal were in the custody of the first respondent who needed to furnish them.**
2. **The learned Judge misdirected himself and therefore fell into grave error when he dismissed the Appeal for want of prosecution when the inactivity of the matter between 2015 and 2019 was not attributable to the appellant.**
3. **The learned Judge misdirected himself when he dismissed the matter for want of prosecution and failed to take into account the public interest of the matter to have the Appeal determined on its merits.**

THE APPELLANT'S ARGUMENTS

11. When the matter came up for hearing on 18th February, counsel for the parties relied on the heads of arguments filed. In arguing ground one, it is submitted that the law relating to the preparation of the record of appeal from the decision of the Minister is that the tribunal that rendered the decision being appealed against should furnish the appellant with all the documentation that was relied on by the tribunal in arriving at the decision it made. Counsel referred to ***Rule 5(4) of the High Court (Appeals) (General) Rules[2],*** which provides that:

(4) The record of appeal shall contain-
(a) a list of its contents;
(b) the notice of appeal;
(c) the notice of cross appeal;
(d) any affidavits filed before the tribunal;
(e) the record of proceedings before the tribunal;
(f) all documents tendered in evidence before the tribunal whether admitted in evidence or not;
(g) the order setting forth the decision of the tribunal; and
(h) any other affidavits, exhibits, documents or other relevant material.

12. It is submitted that the lower court erred in law and fact when it dismissed the appeal for want of prosecution as the appellant could only have been in a position to file the record of appeal if the relevant documentation was availed by the first respondent. According to counsel, there was basis for the appellant to make the application for leave to file an application for an order to compel the first respondent to furnish the necessary documents required for the preparation of the record of appeal and the court should have granted the appellant leave. It is argued that, the appellant was not out of time to file the record of appeal as the time within which to file the record of appeal only starts running when the appellant receives certified copies of the record of appeal from the tribunal. It is Counsel's contention that the record of appeal could only be

prepared once the tribunal availed the appellants all the documents needed for the record of appeal and only after receiving certified copies of the record of appeal from the tribunal could the appellant be in a position to file the record of appeal.

13. In arguing ground two, it is submitted that the matter was reserved for Judgment before Judge I.C.T Chali but this was not rendered until he passed on. It is contended that the lower court misdirected itself when it held that the period from 2014 when the appeal was lodged to 2019 amounted to inordinate and inexcusable delay for the failure to lodge a record of appeal.

14. Counsel refers to the case of **Birkett vs James**[1] where Lord Diplock held that-

> ***"The power to strike out for want of prosecution should be exercised only when the court is satisfied either-***
> ***(1) The default has been intentional and contumelious or***
> ***(2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and***
> ***(b) that such delay will give rise to substantial risk that it is not possible to have a fair trial of the issues in the action or is such is likely to cause or have caused serious prejudices to the Defendants."***

15. Counsel contends that by dismissing the appeal for want of prosecution, the court left the appellant without any effective remedy and he was denied the opportunity to prosecute his appeal on merit.

16. In arguing ground three, it is submitted that the prosecution has environmental protection at the core and as such ought to have been considered as a matter of public importance or public interest by the lower court. According to Counsel, the court ought to have taken into account the public interest in the matter and allowed the appellant to file the necessary application. Counsel contends that the court adopted a narrow and legalistic approach to the matter thus depriving the appellant an opportunity to have the appeal determined on the merit. He prayed that the appeal be allowed and that the matter be referred back to the lower court for determination.

THE FIRST RESPONDENT'S ARGUMENTS

17. The 1st respondent filed heads of arguments on 3rd April, 2020. Responding to ground one, it is submitted that the learned Judge in the court below was on firm ground when he dismissed the appeal for want of prosecution as the learned Judge observed that the appellant's advocates intended to apply for an adjournment so that they would make the necessary applications that would compel the 1st respondent to provide proceedings for the decision appealed

against. The first respondent's counsel argued that there is nothing on record that shows that the appellant requested the first respondent to avail him with the proceedings or documents from the decision appealed against. It is further submitted that the learned Judge in the lower court observed that the appellant's advocates conducted a search on 16th August, 2019 but took no steps to regularize the appeal until the date of hearing on 17th October 2019, two months later.

18. Counsel further submits that the appellant has failed to show or itemize the documents that were necessary for them to prepare their record of appeal. It is contended that the appellant had no obligation to vigorously prosecute their matter but opted to do so in a manner which was suitable to him and not in line with the Appeal Rules. We are referred to the case of ***Nahar Investments Limited vs Grindlays Bank International Zambia Limited***[2] where the Supreme Court guided appellants and respondents that-

> ***". . . It is their duty to lodge records of appeal within the period allowed."***

19. It is argued that the appellant ought to have applied promptly to obtain the necessary documents from the first respondent as it was their obligation to prepare the record of appeal. We are referred to

the case of ***Mandona vs Total Aviation and Export Limited and others***[3], where Malila, JS stated that-

> ***"The responsibility to prepare and file a conforming record of appeal lies squarely with the appellant. When he is unable to prepare and file the record for any reason, including failure to obtain the notes of proceedings, the appellant must make a prompt application for enlargement of time."***

20. Responding to ground two, it is submitted that the parties had agreed by way of consent Judgment that the appeal would be determined in accordance with the Appeal Rules. According to Counsel, the appellant took no steps to regularize the appeal. It is argued that the lower court was on firm ground when it considered the time frame in its ruling and emphasized that the appellant had not given a cogent reason for seeking an adjournment as the appellant knew that there was no record of appeal filed.

21. Turning to ground three we are referred to the case of ***Zambia Revenue Authority vs Shah***[4] and the first respondent submits that there is a distinction between the appellant's predicament and the case of ***Zambia Revenue Authority vs Shah*** as in casu, the record of appeal did not exist but in the Shah case, the appellant merely omitted to include the order for leave to appeal out of time, which

the Supreme Court stated did not go to the root of the appeal. We are referred to the case of ***Michael Liwanga Kaingu vs Sililo Mutaba***[5] where the Constitutional Court dismissed the appellant's election petition for filing an incomplete and defective record of appeal. Counsel contends that rules of court are there to assist in the orderly administration of justice and must therefore be adhered to strictly. She submits that this appeal must be dismissed with costs for lack of merit.

SECOND RESPONDENT'S ARGUMENTS

22. The second respondent's counsel filed their heads of argument on 14th July, 2020. Responding to ground one, it is submitted that a party intending to appeal cannot sit idle for five years without taking necessary steps to obtain the necessary documentation required for it to prepare its record of appeal. Counsel submits that the appellant lodged its appeal in February, 2014 and only requested for time to obtain the necessary documents from the tribunal in October, 2019.

23. It is submitted that in February, 2015, the second respondent's advocates reminded the appellant about the need to file an appropriate record of appeal but the appellant did not take any steps to rectify this. According to Counsel, there was no formal application that was made by the appellant's advocates when they

sought an adjournment, offending the provisions of Order 30 Rule 1 of the High Court Rules which requires that every application in chambers shall be made by summons. We are referred to the case of ***Rachael Lungu Saka vs Hilda Bwalya Chomba (sued as administratrix of the Estate of the Late Jean M. Chomba) and Attorney -General***[6] where we stated that-

> ***"We however take the opportunity to warn parties and indeed the learned advocates representing parties before this court that in future, when there is dilatory conduct, and deliberate non compliance with the rules of procedure, in particular Court of Appeal Rules the parties shall bear the consequence as we shall not hesitate to refuse applications as the one in casu and consequently dismiss the appeals."***

24. It is submitted that the appellant was reluctant to conform with the rules of prosecuting the matter as reflected by the many opportunities that the appellant was given by the lower court to file necessary documents, including the record of appeal. However, no attempts were made by the appellant to obtain the same from the first respondent and that it took five years for the appellant to make an attempt to regularize his omission.

25. Responding to ground two, it is submitted that the appellant did not show that he made attempts to request the tribunal or the first

respondent to avail him the necessary documents. It is contended that as far back as February, 2014, the appellant was alerted that his appeal was incompetent because he had not filed a record of appeal, but counsel only focused on filing an affidavit in reply and arguments and did not consider the necessity of filing the record of appeal. It is submitted that the appellant exhibited unreasonable delay and improper conduct in failing to file the record of appeal. We are urged to dismiss ground two for lack of merit.

26. Responding to ground three, it is argued that the Minister took into account public interest when he arrived at his decision. We are referred to the case of ***Hichilema vs Lungu and Another[7],*** where the Constitutional Court dismissed the matter notwithstanding the fact that it was a matter of public interest and held that-

> ***"Thus, it is very imperative for the Constitutional court to determine the petition expeditiously so as to avert the anxiety and anticipation in the country as a prolonged hearing would not serve the public interest."***

27. It is submitted that the second respondent complied with the appropriate levels of balance and did not overlook public interest. According to Counsel, the lower court was in order when it dismissed the appellant's appeal for failure to file the record of appeal and that the appellant cannot seek solace in ***Article 118(2)(e) of the***

Constitution of Zambia[3] in the circumstances of this case. We are urged to dismiss the appeal for lack of merit.

THE APPELLANT'S ARGUMENTS IN REPLY

28. In ground one, it is submitted that the appellant retained new counsel on 11th October, 2019 who made an application for the court to compel the first respondent to furnish the proceedings and documents needed to compile the record of appeal. It is argued that the court misdirected itself when it concluded that the appellant's advocates took no steps to regularize the appeal between 10th August, 2019 and 13th October, 2019 as they were only retained on 11th October, 2019.

29. Counsel argues that the lower court ought to have given the appellant an opportunity to make the application for an order to compel the first respondent to avail all the documentation listed under **Rule 5(4) of the High Court (Appeals) (General) Rules**[2]**.** According to Counsel, the second respondent in its heads of argument raises issues with the manner in which the application for leave was made in the lower court. It is contended that it did not raise such issues in the lower court and cannot do so in its heads of argument on appeal. The court is referred to the case of ***Mususu***

Kalenga Building Limited and Winnie Kalenga vs Richmans Money Lending Enterprise[8], where the Supreme Court guided that-

> ***". . . Where an issue was not raised in the court below, it is not competent for any party to raise it in this court."***

Counsel argued that the second respondent's contentions regarding the manner in which the appellant's application was made should not be entertained by this court.

30. In arguing ground three, it is submitted that the court below did not take a liberal approach to the application made by the appellant for leave to file an application to compel the first respondent to avail the proceedings and documents required to compile the record of appeal but dwelled on the technicality that no record of appeal was filed. Counsel contended that the nature of the appeal that was lodged in the lower court was a matter of public interest litigation because the lower Zambezi National Park is a common heritage for both present and future generations.

31. It is contended that manifest injustice was done when the matter was dismissed for want of prosecution as it sought to uphold societal environmental rights. This court is referred to the cases of ***Zambia Revenue Authority vs Shah*** where the Supreme Court held that cases should be decided on the basis of their merits. Further, the court

was referred to the case of ***Henry Kapoko vs The People***[9] in which the Constitutional Court guided that each court should determine whether what is in issue is a technicality and that if that is the case, whether compliance with it will hinder the determination of a case in a just manner.

32. Counsel argues that the court had authority to determine the appellant's application and ought to have placed insistence on a curable technicality and given the appellant an opportunity to file the application. Counsel prayed that the appeal be allowed and that the matter be referred back to the lower court for it to be determined on the merit.

DECISION OF THIS COURT

33. We have considered the Ruling appealed against, the record from the court below and the arguments of the parties. The first ground of appeal is that the learned Judge misdirected himself and fell into grave error when he dismissed the appeal without considering that the documents that needed to form part of the record of appeal were in the custody of the first appellant who needed to furnish them. The reason for this submission in a nutshell is that the appellant was not availed with documents by the Tribunal and ought to have been given an opportunity to file the application for an order to compel the

first respondent to furnish the necessary documents required for the record of appeal and that the court should have granted the appellant leave.

34. We have perused the ***High Court (Appeals) (General) Rules, Statutory Instrument Number 6 of 1984***[2], specifically Rule 5 which states that-

> ***"the appellant shall prepare the record of appeal which shall be bound in book form with an outer cover or stout paper and may if extensive be more than one volume."***

We are of the view that the appellant had an obligation to prosecute the appeal by seeking to be availed with the necessary documents from the respondent which would have been used to prepare the record of appeal. We have not seen any evidence on record to show that the appellant did make follow ups with the tribunal to try and obtain the necessary documents. We note that the appeal was lodged in February, 2014 and the appellant did not endeavor to comply with the rules, only making an application for adjournment to regularize the appeal and file the record of appeal five years later, in October, 2019.

35. There is also evidence on record that the second respondent alerted the appellant that the record of appeal had not been filed in 2015 but the appellant ignored this and failed to rectify the situation. We also do not agree with the appellant's argument that he was not out

of time and that time would only start to run when the appellant would receive copies of the record of proceedings from the tribunal.

36. In the case of ***Chisanga Mushili Mulenga vs ZESCO Limited***[10], the Supreme Court stated that -

> ***"Counsel for the applicant has advanced a very valid reason for the failure to comply with time set for filing the record of appeal which was initially loss of the record in the court below and the subsequent delay in typing of the notes on the record. This is a valid reason for a court to enlarge time. It was therefore incumbent upon him to immediately the sixty days were drawing near, to apply for an extension of time given the problems that beset him. He instead chose to wait and see which, on the authority of the Nahar case, was at the client's peril who must bear the full brunt of the delay."***

37. We are of the view that the appellant exhibited a relaxed attitude from 2014 when the appeal was lodged to 2019 when he now sought an adjournment so as to rectify the appeal by lodging the record of appeal. We are also alive to the fact that the appellant had several opportunities from 2014 to 2019 and would have rectified the irregularity but chose not to do so. We do not find merit in the first ground of appeal and it fails.

38. Ground two is that the learned Judge misdirected himself and fell into grave error when he dismissed the appeal for want of

prosecution when the inactivity of the matter between 2015 and 2019 was not attributable to the appellant. Accordingly, to the appellant between 2015 and 2019, the matter was reserved for Judgment but this was not delivered as Judge Chali passed on. The court then directed that the matter would be heard denovo. Counsel contends that the court should have granted the appellant leave to make an application for an order directing the first respondent to furnish the appellant with the documents and proceedings needed for purposes of compiling a record as opposed to dismissing the appeal for want of prosecution. A perusal of the record from the court below shows that on 16th July, 2019, the lower court informed the parties that the matter would start denovo. However, the appellant submitted that he would rely on the documents on record.

39. It is clear that the appellant made no attempts to file the record of appeal even when he had the opportunity to do so as the matter was starting denovo. The appellant's Counsel submitted that he would file an affidavit in reply. This shows that the appellant had no intentions of filing the record of appeal. The appellant was extremely lax, and did not show much interest in prosecuting the appeal. As was stated by the Supreme Court in the case of ***Nahar Investments vs Grindlays Bank Limited***[2], it was the responsibility of the

appellant to prepare and file a record of appeal in accordance with the rules. As the appellant claims that he was not given the necessary documents from the tribunal, he should have made an application for enlargement of time within good time, not five years after the appeal was lodged. We cannot accept the appellant's argument that he was not blameworthy for the delay in disposal of the appeal between 2015 and 2019 because he neglected to endeavor to file the record of appeal in accordance with the rules. The lower court was therefore on firm ground when it found that the appeal was incompetent. The appellant was laid back and did what is not permissible and highly irregular. We do not find merit in this ground of appeal and it fails.

40. Ground three is that the learned Judge misdirected himself in law and fact when he dismissed the matter for want of prosecution and failed to take into account the public interest in the matter to have the appeal determined on the merit.

41. In summary, Counsel submitted that the present action has environmental protection at the core and as such ought to have been considered as a matter of public importance or public interest by the lower court. We have considered the submissions on ground three. We are of the view that the Judge in the lower court cannot be faulted

as the appellant neglected to follow rules of procedure when it took the appellant over five years to comply with the requirement to file the record of appeal.

42. We further form the view that the lower court was in order when it dismissed the appellant's appeal for failure to comply with Statutory Instrument Number 6 of 1984, regarding the filing of a record of appeal. The appellant did not make any efforts to seek the documents that were relevant for him to file the record of appeal. It is clear that the court dismissed the appellant's appeal for failure to file the record of appeal. We do not find merit in the third ground of appeal and it fails.

CONCLUSION

43. In conclusion, we do not find merit in the appeal and it is accordingly dismissed. Costs are awarded to the respondents, to be taxed in default of agreement.

J. CHASHI
COURT OF APPEAL JUDGE

F.M. LENGALENGA
COURT OF APPEAL JUDGE

P.C.M. NGULUBE
COURT OF APPEAL JUDGE