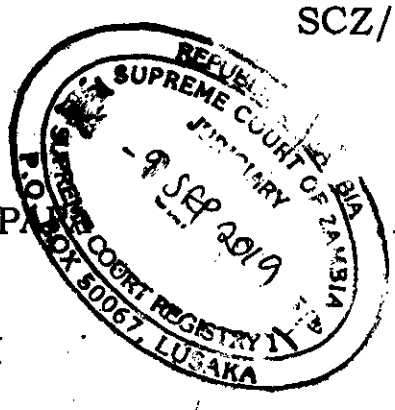
IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

Appeal No.185/2016
SCZ/8/43/2016



BETWEEN:

LILLIAN CHUMA MWANAPA APPELLANT

AND

PATEL CHIBBA JAGDISH RESPONDENT

CORAM: Musonda, DCJ, Kaoma and Kajimanga, JJS

On 3rd September, 2019 and 9th September, 2019

For the Appellant: N/A

For the Respondent: Mr. M. Ndalameta of Musa Dudhia & Co.

J U D G M E N T

Kaoma, JS delivered the judgment of the court

Cases referred to:

1. **July Danobo t/a Juldan Motors v Chimsoro Farms Limited (2009) Z.R. 148**
2. **NFC Africa Mining PLC v Techro Zambia Limited (2009) Z.R. 236**
3. **McArthur Mudenda and another v Ericsson AB Zambia (Selected Judgment No. 48 of 2017)**
4. **Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture (Suing as a firm) – Appeal No. 71 of 2014**
5. **Meamui Georgina Linyama Kongwa v Zambia National Commercial Bank Limited – Appeal No. 132 of 2011**
6. **Getrude Lumai and Mavuto Banda v Paul Kaiche and Diocese of Mongu Development Centre – Appeal No. 13 of 2016**
7. **Lapemba Trading Limited and Lapemba Lapidiaries v Industrial Credit Company Limited - Selected Judgment No. 27 of 2016**

Legislation referred to:

1. **Supreme Court Rules, Cap 25, Rule 58(1), (4)(h) and (i) and 68(2)**

When this appeal came up for hearing on 3rd September, 2019 we dismissed it due to the many defects in the record of appeal. We said we would give our reasons later, and this we now do.

On 28th January, 2016 the High Court nullified the appellant's alleged ownership of Stand No. Liv/4044, Livingstone and ordered the cancellation of her certificate of title, thereby restoring title to the subject property to the respondent's late wife, Urmila Jagdish Patel, who was the original lessee and titleholder of the property.

Dissatisfied with the decision, on 22nd September, 2016 the appellant lodged this appeal, advancing seven grounds of appeal. She also filed heads of argument in support of the appeal.

On 26th August, 2019 learned counsel for the respondent filed heads of argument in response. Later, an affidavit of service sworn by Stafford Nkunika, a mail runner at Musa Dudhia & Co, was filed, to confirm that the respondent's heads of argument were served on the appellant's advocates on 27th August, 2019.

On 28th August, 2019 Chipanzhya & Company filed a notice of change of advocates, in place of Inambao Chipanzhya & Company. They also filed a notice of non-appearance under **Rule 69** of the **Supreme Court Rules** stating that the appellant did not desire to

be present in person or by a practitioner at the hearing of the appeal or at any proceedings subsequent thereto. They left for our consideration, without addressing the defects in the record, the heads of argument filed on 22nd September, 2016.

Now, learned counsel for the respondent, in the respondent's heads of argument, started by attacking the record of appeal. He submitted that the appeal was incompetent because the record of appeal was defective in material particular. That the record was unsafe and unreliable in the following manner:

1. **The affidavit in opposition to originating summons appearing at page 88 of the record is incomplete as there is a missing page between page 90 and 91.**
2. **At page 131 of the record, at lines 17 to 20, counsel for the appellant had informed the court that they had subpoenaed the acting Registrar of Lands and an affidavit to that effect was served. However, the subpoena and affidavit are not contained in the record.**
3. **At page 142 of the record, counsel for the respondent applied to file a supplementary bundle of documents and at page 147 leave was granted. The supplementary bundle of documents subsequently filed by the respondent is not in the record.**
4. **From the record of proceedings at page 136 onwards, both parties referred to bundles of documents. However, neither the appellant's nor the respondent's bundles of documents, have been included in the record of appeal.**
5. **The appellant's heads of argument refer to documents that the appellant herself is unable to locate and refer to in the record.**

Counsel submitted that these defects are too glaring to ignore. He reminded us that we have had occasion to pronounce ourselves on incomplete records of appeal. He likened this case to **July**

Danobo T/A Juldan Motors v Chimsoro Farms Limited[1] where the record of appeal was so incomplete (as the proceedings from the court below were missing), that we could not derive any meaning from it. We held that failure to compile the record of appeal in the manner prescribed by **Rule 58** of the **Supreme Court Rules** is visited by sanctions under **Rule 68(2)**, which is that the appeal may be dismissed.

Counsel also cited the case of **NFC Africa Mining PLC v Techro Zambia Limited**[2] where we stated that Rules of the Court are intended to assist in the proper and orderly administration of justice and as such, they must be strictly followed.

Counsel contended that the requirements of **Rule 58(4)** are mandatory provisions and in these circumstances, failure to compile the record according to the rules, must result in the dismissal of the appeal. He submitted that even if we were to proceed to hear or determine the appeal, the record was so incomplete that we could properly make no sense out of it.

Counsel further relied on the case of **McArthur Mudenda and another v Ericsson AB Zambia**[3] where we refused to pronounce ourselves on the appeal on the basis that we could make no sense

out of the record and heads of argument filed by the appellant. We put the matter as follows:

> **"We have found it extremely difficult to deal with this appeal because of the many inconsistencies, some of which we have highlighted above.**
>
> **.... Regrettably, for the appellants, it is not the responsibility of this Court to untangle the mess that has been created by their counsel.**
>
> **And since we do not understand the incongruous statements by counsel, who has not helped us in any way, we decline to pronounce ourselves on this appeal ... The inevitable fate of this appeal is that it is dismissed with costs to the respondent here and below."**

Counsel implored us, in the same vein, to dismiss the appeal on ground that the appellant had brought before us a record that would require us to untangle the mess that she had created.

We have considered the arguments by learned counsel for the respondent and we have perused the record of appeal. We agree that the record of appeal is defective as alleged. Suffice to add, that though there is a copy of the power of attorney at page 69 of the record, part of it is missing. Further, the lease between the President and the respondent's late wife, at pages 95 to 97 of the record of appeal does not have the page containing clause 2(1) and 2(5), which the lessee is said to have breached and, which is referred to in the notice of intention to re-enter.

Furthermore, the court in its judgment at page J48, lines 8 to 12 stated that counsel for the appellant had drawn her attention in his submissions to many issues. However, having determined the issue of the validity of the actions of the Commissioner of Lands in effecting a re-entry on the subject property, all those issues fell away as they were all predicated on the said validity. Some of the grounds of appeal fault the court for not dealing with those very issues, and yet, the submissions are not in the record of appeal.

Rule 58(4) of the **Supreme Court Rules** stipulates that:

> **"(4) The record of appeal shall contain the following documents in the order in which they are set out:**
>
> > **(h) copies of all affidavits read and all documents put in evidence in the High Court, so far as they are material for the purposes of the appeal ...; affidavits, together with copies of documents exhibited thereto, shall be arranged in the order in which they were originally filed; other documentary evidence shall be arranged in strict order of date, without regard to the order in which the documents were submitted in evidence;**
> >
> > **(i) such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant to the appeal;"**

As can be seen from all the authorities quoted above, we have cautioned parties and their advocates, repeatedly about the need to lodge complete records of appeal and the consequences of not doing so, in terms of **Rule 68(2)** of the **Supreme Court Rules**.

By way of further illustration, in **Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture (Suing as a firm)**[4], counsel for the respondent took objection that the record of appeal had not been prepared in line with Rule 10(1) and (5) and Rule 58(1) and (4) of the Supreme Court Rules. Counsel for the appellant agreed but argued that the defects were curable by filing a supplementary record of appeal.

We held the view that the record of appeal was incompetent and that the breaches in question were fatal and went to the very root of the appeal process. We applied our decision in the **July Danobo**[1] case, and dismissed the appeal, with costs. In the motion that followed later, we stated as follows:

> **"Matters should, as much as possible, be determined on their merits rather than be disposed of on technical or procedural points. This, in our opinion, is what the ends of justice demand. Yet, justice also requires that this Court, indeed all courts, must never provide succour to litigants and their counsel who exhibit scant respect for rules of procedure. Rules of procedure and time lines serve to make the process of adjudication fair, just, certain and even-handed. Under the guise of doing justice through hearing matters on their merit, courts cannot aid in the bending or circumventing of these rules and shifting goal posts, for while laxity in application of the rules may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules."**

Coming to the notice of non-appearance filed by counsel for the appellant, we have said in various cases that while parties have

the right under **Rule 69** of the **Supreme Court Rules** to file a notice of non-appearance, they do so at their own risk.

In **Meamui Georgina Linyama Kongwa v Zambia National Commercial Bank Limited**[5], we said the effect of dispensing with appearance before us, is that parties resign the fate of their submissions to the court without availing themselves of the opportunity, to clarify, for the benefit of the court, any issues upon which we would have sought explanation from them.

In **Getrude Lumai and Mavuto Banda v Paul Kaiche and Diocese of Mongu Development Centre**[6], we lamented as follows:

> **"This appeal is fraught with numerous irregularities. The court would have preferred to engage counsel for the appellants to offer some explanation on many lingering background and procedural questions. However, counsel for the appellant opted to file a notice of non-appearance pursuant to Rule 69 of the rules of the Supreme Court, chapter 25 of the laws of Zambia.**
>
> **....much as parties to an appeal are perfectly within their rights to file a notice of non-appearance and thereby avert or minimise costs, the party who does so instantly deprives himself or herself of the opportunity to offer such explanation in aid of that party's position in the appeal as the court may consider apposite ...**
>
> **A party which opts, as the appellants did in this appeal, not to appear at the hearing by filing a rule 69 notice, may put their position in the appeal in a precarious situation as it places their appeal documents and the heads of argument in a *fait accompli* ..."**

Further still, in **Lapemba Trading Limited and Lapemba Lapidiaries v Industrial Credit Company Limited**[7] we said that:

"We pause here to state that while parties are entitled to avail themselves of the benefit of the provision of Rule 69 of the Rules of the Supreme Court which allows them to dispense with their attendance at the hearing of their appeals, there are risks that lurk in taking that option. One natural consequence of choosing this option is that the court is denied the opportunity to engage counsel on matters that may not be clear from the submissions in the heads of argument, or issues that may not be so evident from the record of appeal. The implications could be dire ..."

In this case, there were glaring defects in the record of appeal, which made it difficult for us to proceed to hear the appeal. Counsel for the appellant was aware of the defective record. However, the appellant and her counsel chose not to address the defects in the record. Instead, they made a deliberate decision not to attend the hearing of the appeal. They did so at the appellant's own peril.

Since the defective record affected the validity of the appeal process, and the appellant was not available to apply to amend the record of appeal or to withdraw the appeal with a view to filing a competent record of appeal, we had no option but to dismiss the appeal, with costs.

M. MUSONDA
DEPUTY CHIEF JUSTICE

R.M.C. KAOMA
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE