IN THE SUPREME COURT OF ZAMBIA **SCZ/8/292/2014**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

B E T W E E N :

KALYANGU KAPEPE & 375 OTHERS **APPLICANTS**

AND

JOHN WILLIAM CLAYTON **1ST RESPONDENT**
KWATHU FARM LIMITED **2ND RESPONDENT**

Coram: **Mwanamwambwa DCJ, Phiri and Malila JJS, on 6th February 2018 and 6th April, 2018.**

For the Applicants: Ms. M. Mushipe – Mesdames Mushipe & Associates

For the Respondent: Mr. K. Wishimanga, Messers A. M. Wood & Company

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RULING

Malila JS, delivered the ruling of the court.

Cases referred to:

1. *Nahar Investments Ltd v Grindlays Bank Limited (1984) Z.R. 81*
2. *D.E. Nkuwa v Lusaka Tyre Services Limited (1977) Z.R 43*
3. *Stanley Mwambazi v Morester Farms Limited (1977) Z.R. 108*
4. *Costellow v Somerset CC (1993) 1 All ER 952*
5. *Finnegan v Parkside Health Authority (1998) 1 All ER 595*
6. *Cropper v Smith (1884) 26 CHD 700*

7. *Sangwa and Simeza, Sangwa & Associates v Hotellier Limited and Ody's Work (SCZ/8/402/2012)*
8. *Stanley Mwambazi v Morester Farms Limited (1977) Z.R. 108.*
9. *Allen v Sir Alfred Mcalpine and Sons Limited (1968) ALL E.R. 543*

Legislation referred to:

1. *Supreme Court Act*
2. *Rules of the Supreme Court, chapter 25 of the Laws of Zambia*

The present motion was taken out by the applicants in terms of section 4(b) rule 12(1) and rule 48(4) of the Rules of the Supreme Court, chapter 25 of the Laws of Zambia. Through it they sought the intervention of this court to vary, discharge or reverse the order of a single judge of this court given on the 25th February, 2015, dismissing the applicants' appeal for want of prosecution.

The background circumstances were that the applicants had, on the 30th of May, 2014, taken out a writ of summons against the respondents in which they sought various reliefs which included a declaration that the land which they occupied did not form part of the respondents Farm No. 1957; a declaration that the intended eviction of the applicants from the said land was illegal and unlawful; an order of injunction restraining the respondents from evicting the applicants from the said land and costs occasioned by the action.

The applicants later took out an application for an interim injunction. The respondents, for their part, having entered conditional appearance, raised preliminary objections on points of law as to whether the action was properly before the High Court in light of earlier, separate proceedings and a substantive judgment in cause No. 1999/HP/0684, and above all, whether or not the applicants' action disclosed any cause of action against the respondents.

The learned High Court judge sustained the preliminary objections and dismissed the applicants' case forthwith. The applicants then filed a notice of appeal to the Supreme Court but did not prepare and file the record of appeal within the period prescribed by the rules. This prompted the respondents to take out an application to dismiss the appeal for want of prosecution. That application came up for hearing before a single judge on the 25th February, 2015.

At the hearing of the application to dismiss appeal for want of prosecution, the learned counsel for the applicants informed the single judge that she had difficulties regarding computation of time within which to file the record of appeal and further, that as the

record of proceedings in the lower court had been prepared late, she had been unable to prepare the record of appeal in time to satisfy the time line prescribed in the rules. She further indicated that the record had, at that time of the hearing of the application to dismiss appeal, been prepared and was ready to be filed.

In response, counsel for the respondents was quick to point out that although the applicants were entitled under the law to apply for enlargement of time in the event that they failed to comply with the rules regarding the time of filing of the record of appeal, they did not avail themselves of that right. The only application before the single judge on that occasion was the respondents' application to dismiss the appeal for want of prosecution, and no other.

The single judge agreed with the respondents' position that the applicants had failed to utilise the window of opportunity provided by the rule which entitles an appellant who delays or perceives a delay for any reason, in undertaking any step towards prosecuting an appeal, to apply for extension of time. He reiterated the position that this court has taken in numerous cases including **Nahar Investment Ltd. v. Grindlays Bank International (Z) Ltd**[1] where it was

emphasised that an appellant who delays in taking a necessary step in the appeal process and waits until an application to dismiss has been filed by his opponent, does so at his own peril. As the applicants had filed no application for extension of time, the single judge considered the only application available, namely, to dismiss the appeal for want of prosecution. The single judge thus proceeded to dismiss the applicants' appeal for want to prosecution.

It is that dismissal of the appeal which has so annoyed the applicants that they have now, through this motion, escalated their grievance by way of renewal of their application before the full court.

In support of the motion, an affidavit sworn by Kalyangu Kapepe for himself and on behalf of the other applicant, was filed on 27th February 2015. In it, the applicants narrated the sequence of events with a plea that the position of the single judge be varied, discharged or reversed.

At the hearing of the motion, Ms. Mushipe, learned counsel for the appellants, relied on the affidavit in support as well as the affidavit in reply. The latter was filed on the 14th August, 2015. The affidavit in support articulated the reasons which the applicants

believed entitled them to the desired reliefs. The deponent asserted that the late-filing of the record of appeal was owing to the fact that the file had gone missing in the High Court Registry. As such, the record of proceedings were typed late, hence the delay in preparing and filing the record.

In the heads of arguments filed on behalf of the applicants, it was contended by counsel for the applicants that it was in the interests of justice that the appeal be heard on its merits. Counsel referred to section 4 (6) of the Supreme Court Act, chapter 25 of the laws of Zambia and pointed out the court's power to vary, discharge or reverse the order of the court sitting as a single judge. Further reference was made to Rule 12 (1) of the Rules of the Supreme Court which provide for the court's power to extend time for the making of any application, upon being furnished with sufficient reason for doing so. It was the applicant's prayer that the court exercises its discretion to extend time in its favour.

The respondents' filed an affidavit in opposition sworn by John William Clayton, in which they opposed the statement of facts as narrated by the applicants, stating that the applicants have not made

a compelling case for the court to extend the time for filing the record of appeal out of time. Mr. Wishimanga, learned counsel for the respondents, relied upon this affidavit as well as the heads of argument filed on behalf of the respondents.

In their affidavit, the respondents highlighted the fact that the applicants had contradicted themselves in stating that the file at the High Court went missing, yet in previous evidence they had alleged that the record of appeal had been filed.

In the heads of argument in opposition filed on behalf of the respondents, counsel for the respondents submitted that it was fatal for the applicants to make an application outside the stipulated time. In addition, he argued that the applicants were not entitled to the reliefs sought, as their failure to comply with the rules required that they avail the court with good reasons for the delay. As far as counsel was concerned, such reasons had not been articulated. He relied on the case of **D. E. Nkuwa v Lusaka Tyre Services Limited**[2], in support of this submission.

In reference to the applicants' contradictory affidavit evidence, the respondents' counsel argued that the deponent of the affidavit had perjured himself and that this was an indication of mala fides on the part of the applicants. Counsel cited the case of **Stanley Mwambazi v Morester Farms Limited**[3], to support his assertion that there must be no improper conduct in the action of the applicant, if he is to be accorded favourable treatment by the court.

In an affidavit in reply, dated 14th August 2015 and sworn again by Kalyangu Kapepe for himself and on behalf of others, the applicants reiterated their earlier assertions as regards the reasons for the delay in filing the record of appeal. Furthermore, the deponent asserted that his earlier evidence to the effect that the record of appeal was already on record was not perjury. Rather, that he was making reference to the client record in the custody of his advocates and not the court record as alleged by respondents.

In the heads of argument in reply dated 12th October 2017, counsel for the applicant submitted that a delay in making an application outside the stipulated time was not automatically fatal. She suggested that whether such delay was or was not fatal

depended on the overall analysis of the circumstances of the case and the overriding principle that justice must be done. In support of this proposition, counsel cited the cases of **Costellow v Somerset CC**[4], **Finnegan v Parkside Health Authority**[5] and **Cropper v Smith**[6], among others. She further pointed out that the respondents had not adduced any evidence that they had suffered any prejudice with regard to the delayed filing of the record of appeal. Furthermore, it was argued that the applicants were only precluded from filing an application for extension of time by the respondents' earlier application to dismiss the appeal. Ms. Mushipe also submitted that the principles enunciated in **Nahar Investments Ltd v. Grindlays Bank Limited**[1] ought to have been distinguished from the present facts by the single judge of this court. She contended that the more applicable cases were **Sangwa and Simeza, Sangwa & Associates v Hotellier Limited and Ody's Work**[7] and **Stanley Mwambazi v. Morester Farms Limited**[8]. Counsel concluded her arguments by asserting that the reasons given by the applicants for the delay were genuine and excusable and that the circumstances of the case did not warrant the dismissal of the appeal, but justified the hearing of the appeal on its merits.

We have carefully considered the evidence presented before us as well as the submissions of the learned counsel. The contention of the applicants hinges on whether or not on the facts of this case the applicants are entitled to a variation, discharge or reversal of the order of dismissal given by a single judge. We have earlier in this judgment narrated the sequence of event that resulted in the applicants' present predicament.

It is not in dispute that the applicants did not at any point make an application for extension of time. This fact flies in the face of the insistence by the applicants and their counsel that they are serious about prosecuting the appeal. One would have expected, at the very least, that the requisite application for extension of time would have been made, as provided by the rules 12(1) of the Rules of the Supreme Court which enacts as follows:

> **The court shall have power for sufficient reason to extend time for making any application, including an application for leave to appeal, or for bringing any appeal, or for taking any step in or in connection with any appeal, notwithstanding that the time limited therefore may have expired and whether the time limited for such purpose was so limited by the order of the court or by these Rules, or by any written law.**

This was not the case. The onus is on the applicant wishing to extend time under rule 12, to avail the court with sufficient reasons as to why an extension of time ought to be granted.

The decision in the case of **D.E. Nkhuwa v. Lusaka Tyre Services Limited**[2], guides that in order to justify an extension of time, there must be some material on which the court can exercise its discretion.

The cardinal question to be asked, therefore, is whether in the present case the court was presented with such material as to warrant an exercise of its discretion in the applicants' favour. We think not. The facts before us reflect a classic scenario of a litigant who fails to abide by the rules of court, and later frantically but belatedly seeks to invoke the protection of rule 12 of the Supreme Court Rules. So frantic were the litigants' efforts in this case that averments in their affidavit are laden with blatant contradictions and disparities. Notably, the applicants' affidavit in support of notice of motion, suggests that the delay in filing the record of appeal was occasioned by the relevant file missing from the High Court Registry. This, the applicants assert, resulted in the unavoidable delay in typing the court proceedings, and hence the failure to file the record

of appeal on time. However, in another breath, the applicants are on record as having averred that they had not failed or neglected to file the record of appeal and that the record was in fact on record, meaning it had been filed. The latter averment was made by the applicants in their affidavit in opposition to the application for dismissal of the action for want of prosecution. The apparent discrepancy in the applicants' evidence, as well as their feeble efforts at goal shifting, detract from the credibility of their evidence and the weight that can be attached to it.

Notwithstanding the above-stated contradictions, however, we are still at a loss as to why the applicants did not bother to apply for an extension of time to file the record out of time and present whatever reasons they considered justified or excused their delay, before the court. Instead, the applicants chose to sit on their rights and allowed time to lapse, resulting in the dismissal of the appeal.

In **Nahar Investments Ltd v. Grindlays Bank Limited**[1], which the single judge relied on in dismissing the appeal for want of prosecution this court stated as follows:

> **We wish to remind appellants that it is their duty to lodge records of appeal within the period allowed, including any extended period. If difficulties are encountered which are beyond their means to control, (such as non-availability of the notes o proceedings which it is the responsibility of the High Court to furnish), appellants have a duty to make a prompt application to the court for enlargement of time. Litigation must come to an end and it is highly undesirable that respondents should be kept in suspense because of dilatory conduct on the part of appellants. 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 an individual case, it appears that the delayed appeal has resulted in the respondent being unfairly prejudiced in the enjoyment of any judgement 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.**

The above principle was similarly echoed in the case of **Sangwa and Simeza, Sangwa & Associates v. Hotellier Limited and Ody's Work**[7], which case was cited by counsel for the applicant herself in the applicant's heads of arguments in reply. In this case, it was held that:

> **We are alive to the provision of Rule 12, however, we must hasten to censure litigants that Rule 12 was not intended to allow litigants and lawyers alike to ignore the time limits provided for certain steps to be taken only to later hide behind Rule 12. It is important that the guidelines which have been provided in cases such as Nahar are adhered to.**

The above authorities settle the point that where the rules of court prescribe specific time limits within which certain steps must be taken, non-adherence to the said rules places a litigant on perilous ground. However, where cogent reasons exist for non-compliance, it is incumbent on a litigant to promptly apply for extension of time within which to comply with the said rules and furnish the court with such reasons. In the present case, the applicants failed to lodge the requisite application. The mere fact that they failed to do so is, in our view, telling and speaks volumes about the applicants' seriousness in prosecuting their appeal.

Counsel for the applicants had, in her submissions, lamented that justice did not require the dismissal of the appeal, as was done by the single judge of this court. This brings home the question when a matter may be dismissed for want of prosecution. The answer was succinctly articulated by Salmon L.J. in **Allen v. Sir Alfred Mcalpine and Sons Limited**[9]. In that case it was held that:

> **When delay in the conduct of an action is prolonged or inordinate and is inexcusable... or that grave injustice will be done... the Court may in its discretion dismiss the action.**

In speaking to what constitutes each of these three elements, namely inordinate delay, inexcusable delay or grave injustice, Salmon J observed the following:

> **(i) That there has been inordinate delay. It would be highly undesirable, and indeed impossible to attempt to lay down a tariff - so many years, or more on one side of the line and a lesser period on the other. What is, or is not inordinate delay must depend on the facts of each particular case. They vary infinitely from case to case, but it should not be too difficult to recognize inordinate delay when it occurs.**
>
> **ii) That this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.**
>
> **iii) That the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between themselves, and third parties. In addition, to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.**

He concluded by stating that:

> **In the end, the Court must decide whether, or not on balance, justice demands that the action should be dismissed.**

It was contended by the counsel for the applicants that the period of delay was not unreasonable and that the applicants were

only two days late in filing for extension of time. Furthermore, counsel asserted that the applicants were only precluded from filing the requisite application by the respondent's application to dismiss the appeal. However, as observed in **Allen v. Sir Alfred Mcalpine and Sons**[9], inordinate delay is not necessarily defined in terms of mathematical precision, but is rather a question of fact to be determined on the circumstances of each particular case. Thus, on the face of it, the delay may not appear unreasonable. However, a holistic assessment of the facts surrounding this matter tends to suggest otherwise when due consideration is given to the evolution of this matter, as well its conduct by counsel for the applicants. We shall comment further on this observation later in this Ruling.

In relation to the question whether or not the delay was excusable, we think it was not. The applicants had ample time within which to make their application for extension of time. This is more so, given their argument that the record was missing, thereby resulting in a delay in typing the record of proceedings. We entertain serious misgiving regarding the assertion by counsel for the applicants that respondent's application to dismiss the action did in

fact precluded her from filing an application for extension of time. That seems to us to be an afterthought.

As regards the prejudice likely to be suffered by the respondent, counsel for the applicants has argued that the respondent has not adduced any evidence of such prejudice. Moreover, the applicants argued, the respondents have been enforcing the judgement awarded in their favour in the lower court. Notwithstanding that the respondents are enjoying the fruits of the judgement, however, we hold that respondents have still been subjected to prejudice and inconvenience owing to applicants' conduct in this matter.

The single judge cannot be faulted for holding as he did.

We find absolutely no merit in the motion. We dismiss it accordingly with costs to the respondent.

M. S. Mwanamwambwa
DEPUTY CHIEF JUSTICE

G. S. Phiri
SUPREME COURT JUDGE

Dr. M. Malila SC
SUPREME COURT JUDGE