

IN THE CONSTITUTIONAL COURT
HOLDEN AT LUSAKA
(Appellate Jurisdiction)



IN THE MATTER OF:

**ARTICLES 47(2), 51, 54, 68, 72
(2) (C) AND 73 (1) OF THE
CONSTITUTION OF THE
REPUBLIC OF ZAMBIA**

IN THE MATTER OF:

**SECTIONS 81, 89, 97 (1), 98 (C),
99 AND 100 OF THE
ELECTORAL PROCESS ACT NO.
35 OF 2016**

IN THE MATTER OF:

**CODE OF CONDUCT RULES 12,
15 (a), (h) and (k)**

IN THE MATTER OF:

**VUBWI CONSTITUENCY
ELECTIONS HELD IN ZAMBIA
ON THE 12TH DAY OF AUGUST,
2021**

BETWEEN:

ALFONSO KAZICHE PHIRI

APPELLANT

AND

BANDA ACKLEO I.A.

1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT

**CORAM: *Munalula, DPC, Sitali, Mulenga, Musaluke and
Chisunka, JJC on 26th July, 2022 and 23rd
September, 2022.***

APPEARANCES:

For the Appellant: Ms. M. Mwiinga – Messrs. James and Doris Legal Practitioners (on a brief from Messrs. PNP Advocates)

For the 1st Respondent: Mr. J. Chirwa – Messrs. Ferd Jere and Company

For the 2nd Respondent: Ms. T. Phiri and Mr. M. Bwalya – In-house Counsel

R U L I N G

Chisunka, JC, delivered the Ruling of the Court.

Cases referred to:

1. Kenson Kapembwa v Mwango Chileshe 2021/CCZ/A0016
2. JCN Holdings Ltd v Development Bank of Zambia (2013) 2 Z.R 299
3. Potipher Tembo v Tasila Lungu and Another 2021/CCZ/A0040
4. Twampamane Mining Co-operative Society Limited v E and M Storti Limited (2011) 3 Z.R. 67
5. Sydney Chisanga v Davies Chisopa and Electoral Commission of Zambia 2021/CCZ/A0027
6. Leopold Walford (Z) Limited v Unifreight (1985) Z.R. 203 (S.C.)
7. Zambia Revenue Authority v Jayesh Shah (2001) Z.R. 60
8. Lily Drake v M.B.L. Mahtani and Professional Services Limited (1985) Z.R. 236 (S.C.)
9. Mukumbuta Mukumbuta and Others v Nkwilimba Choobana and Others, SCZ Judgment No. 8 of 2003
10. Shaba Lawrence v Lungu Arthur and Electoral Commission of Zambia 2021/CCZ/A001

Legislation referred to:

1. **The Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016**
2. **The Constitutional Court Act No. 8 of 2016**
3. **The Constitutional Court Rules, Statutory Instrument No. 37 of 2016**

Works referred to:

1. **The Rules of the Supreme Court of England, 1965 (1999 Edition)**

Introduction

1. This ruling decides preliminary issues raised by the 1st Respondent through a notice of motion filed on 23rd June, 2022. The notice was issued pursuant to sections 8(1)(e), (4)(a) and 23 of the Constitutional Court Act No. 8 of 2016 (the “**Act**”) and Order 11 rules 7 and 12(1) of the Constitutional Court Rules, Statutory Instrument No. 37 of 2016 (the “**CCR**”), as read together with Order 14A and Order 33 rules 3 and 7 of the Rules of the Supreme Court of England, 1965 (1999 Edition) (the “**White Book**”).
2. The motion raised eight questions for our determination as follows:
 - 2.1. **Whether the jurisdiction of this Honourable Court has been properly invoked by stating that it is hearing the appeal in a Constitutional Jurisdiction as opposed to it being Appellate Jurisdiction;**
 - 2.2. **Whether a renewed application for leave to appeal out of time is competently before this Honourable Court and can be entertained if it does not conform to Form VI of the Constitutional Court Rules;**
 - 2.3. **Whether the appeal is competent and can be entertained if it does not state the grounds of appeal of the decision of a**

single Judge who initially declined leave to appeal out of time under cause no. 2022/CCZ/A001;

- 2.4. Whether the record of appeal is competently before this Honourable Court and can be entertained if it does not contain the judgment or ruling of the single judge under cause no. 2022/CCZ/A001;
- 2.5. Whether the record of appeal is competently before this Honourable Court and can be entertained if it does not contain the proceedings of the Court of a single Judge under cause no. 2022/CCZ/A001;
- 2.6. Whether the appeal is competently before this Honourable Court and can be entertained as it is an appeal against the decision of the High Court as opposed to it being a renewed application for leave out of time appealing the decision of the single Judge of this Honourable Court; (sic)
- 2.7. Whether the appeal is competently before this Honourable Court and can be entertained when leave to appeal out of time has not been granted either by the single Judge of this Honourable Court or indeed the full Court; and
- 2.8. Whether this Honourable Court can entertain an appeal against the decision of the single Judge of this Honourable Court outside the requisite 10 days.

Background

3. The background giving rise to the motion is that both the Appellant and the 1st Respondent stood for election as Member of Parliament for Vubwi Constituency on 12th August, 2021. The Appellant stood under the United Party for National Development ('UPND') ticket while the 1st Respondent was the candidate for the Patriotic Front Party ('PF') ticket.
4. The 1st Respondent was declared the winner of the election and duly elected as Member of Parliament for Vubwi Constituency. Dissatisfied with the election results, the Appellant filed a petition on 27th August, 2021, before the High Court alleging that the election of the 1st Respondent

as Member of Parliament for Vubwi Constituency was null and void *ab initio*.

5. On 23rd November, 2021, the High Court delivered its judgment, dismissing the petition and declared that the 1st Respondent was duly elected as Member of Parliament for Vubwi Constituency. Aggrieved by this decision, the Appellant appealed against the whole judgment on 19th May, 2022.
6. The aforesaid judgment did not expressly grant or refuse leave to appeal, thus the Appellant on application sought leave to appeal before the High Court. The application was granted on 27th January, 2022, more than thirty (30) days after delivery of the High Court judgment.
7. Despite having leave to appeal, the Appellant could not file a notice of appeal and memorandum of appeal as the leave to appeal was only obtained outside the thirty (30) day time period stipulated under Order 11 rule 3(5) of the Constitutional Court Rules (CCR). This prompted the Appellant to hastily approach a single Judge of this Court and seek leave to appeal out of time. The single Judge refused to grant leave to appeal out of time on account of a lack of jurisdiction.
8. Subsequently, the Appellant reverted to the High Court and successfully applied for leave to appeal to this Court out of time *ex-parte*.
9. This is the context under which the questions now before us are made.

Affidavit Evidence and Arguments in Support of Motion

A. The 1st Respondent

10. The 1st Respondent's notice of motion was accompanied by an affidavit in support and skeleton arguments. The affidavit in support was sworn by the 1st Respondent. He deposed that:
 - 10.1. On 15th March, 2022, a single Judge of this Court dismissed the Appellant's application for leave to file a notice of appeal and memorandum of appeal out of time.
 - 10.2. On 19th May, 2022, the Appellant filed a notice of appeal and memorandum of appeal.
 - 10.3. On 17th June, 2022, the Appellant filed a record of appeal which did not contain the proceedings before the single Judge nor the grounds of appeal against the decision of the single Judge.
 - 10.4. The Appellant also filed heads of argument without being granted leave by this Court to appeal out of time.
 - 10.5. The Appellant usurped the authority of this Court by filing an appeal without obtaining leave after a single Judge declined to grant leave to file a notice of appeal and memorandum of appeal out of time.
 - 10.6. The Appellant did not follow the procedure laid down in the CCR on how to renew an application for leave thus, this Court has no jurisdiction to entertain this appeal.

- 10.7. The failure to adhere to the CCR was occasioned by the Appellant's own fault, thus his purported appeal should not be entertained as it is moot and misdirected.
11. In the written skeleton arguments filed in support of the motion, the 1st Respondent submitted that:
- 11.1. This Court is clothed with either constitutional or appellate jurisdiction. Article 128 of the Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the "Constitution") and section 8 (1) (e) of the Act, provide that this Court has jurisdiction to determine appeals relating to the election of Members of Parliament.
- 11.2. Appeals relating to election petitions of Members of Parliament, as in this case, fall within the appellate jurisdiction and not the constitutional jurisdiction of this Court.
- 11.3. The Appellant moved this Court by invoking its constitutional jurisdiction when the proper jurisdiction to invoke is its appellate jurisdiction. Since the wrong jurisdiction of the Court was invoked, this Court does not have jurisdiction to hear this matter.
- 11.4. As per the case of ***Kenson Kapembwa v Mwango Chileshe***¹, a court's jurisdiction is not a matter of procedural technicality but it is one that goes to the root of the adjudication process of the Court. Further, that

in the case of **JCN Holdings Ltd v Development Bank of Zambia**², the Supreme Court stated that:

“.... if a Court has no jurisdiction to hear and determine a matter, it cannot make any lawful orders or grant any remedies sought by a party to that matter.”

- 11.5. This Court, therefore, is in want of jurisdiction and cannot reasonably grant any of the remedies sought by the Appellant because he wrongly clothed this Court with constitutional rather than appellate jurisdiction.
- 11.6. The Appellant ignored the procedure on obtaining leave to appeal outlined in Order 11 (6) and (7) of the CCR and the cases of **Potipher Tembo v Tasila Lungu and Another**³ and **Twampamane Mining Cooperative Society Limited v E and M Storti Limited**⁴. The Appellant's purported appeal, therefore, was incompetently before the Court.
- 11.7. In the present case, the Appellant did not advance any valid reasons for him to be granted leave to appeal out of time. Further, the Appellant did not renew his application for leave to appeal out of time within the requisite ten (10) days as stipulated under Order 59 rule 14(2) of the White Book. Instead, the Appellant waited for over one hundred and twenty (120) days before presenting his purported appeal before this Court. This Court must therefore, not exercise its discretion and entertain the Appellant's appeal as his disregard for the CCR resulted in an inordinate delay.

12. At the hearing of the motion, Counsel for the 1st Respondent relied on the case of ***Sydney Chisanga v Davies Chisopa and Electoral Commission of Zambia***⁵, and submitted that the Rules of Court promote orderliness in the conduct of business. That, if this Court entertains the Appellant's appeal which was filed out of time, it would send a wrong message and set a wrong precedent.

B. The Appellant's Affidavit Evidence and Arguments in Opposition

13. The Appellant filed an affidavit in opposition, list of authorities and skeleton arguments on 7th July, 2022. The affidavit in opposition was sworn by the Appellant and it disclosed that:

13.1. The record of appeal in this matter was filed under cause number 2022/CCZ/A004 and all relevant documents pertaining to this cause were included in the record of appeal.

13.2. On 18th May, 2022, the High Court granted the Appellant an *ex parte* order for leave to appeal out of time and therefore, he did not need to seek leave to appeal out of time before this Court.

14. In the Appellant's written skeleton arguments opposing the 1st Respondent's motion, it was submitted that:

14.1. The Appellant approached this Court, in regards to his appeal, as a Constitutional Court and thus, even in this appeal this Court has constitutional jurisdiction. In any case, this Court is clothed with constitutional

jurisdiction even in regard to parliamentary election appeals and therefore, the Appellant has properly approached this Court.

- 14.2. Alternatively, should it be found that the Appellant ought to have cited this Court's appellate jurisdiction as opposed to constitutional jurisdiction, this should not affect the proceedings as it is an error that is curable. In support of this submission the Appellant cited the cases of ***Leopold Walford (Z) Limited v Unifreight***⁶, ***Zambia Revenue Authority v Jayesh Shah***⁷ and ***Lily Drake v M.B.L. Mahtani and Professional Services Limited***⁸.
- 14.3. Order 11 rule 2(7) of the CCR does not mandate the Appellant to renew his application for leave to appeal before the full bench.
- 14.4. Further, pursuant to section 24(1) (a) of the Constitutional Court Act, an appeal does not lie from an order allowing extension of time for appealing from a judgment. On the strength of this provision, the 1st Respondent was therefore, precluded from bringing this motion as a basis for attacking the propriety of the order for leave to appeal out of time granted by the High Court.
- 14.5. The Appellant did not breach any mandatory rules of Court and his appeal must, in the interest of justice, be heard on its merits.

15. At the hearing of the motion, Counsel for the Appellant augmented the written skeleton arguments with the following oral submissions:

- 15.1. The cause number of a matter is indicative of the nature of the jurisdiction of a court. In this matter, the cause number herein, namely 2022/CCZ/A004 clearly indicates that the Appellant moved this Court under its appellate jurisdiction.
- 15.2. The Appellant did not breach any procedure as he was granted an order for leave to appeal out of time by the High Court on 18th May, 2022, and it was on this basis that he filed the record of appeal and heads of argument herein.
- 15.3. As per Order 2 rule 2 of the White Book, the 1st Respondent ought to be proscribed from raising issues to dismiss the Appellant's appeal, because he waived his right to do so the moment he filed his heads of argument in opposition.
- 15.4. In terms of Order 11 rule 9(4)(h) and (i) of the CCR, the Appellant did not have to include the application before the single Judge in the record of appeal because the said application is not directly relevant to the Appellant's appeal. In this case, what is relevant to the Appellant's appeal are the proceedings being appealed against that were before the High Court.
- 15.5. That the 1st Respondent's motion be dismissed.

C. The 2nd Respondent

16. The 2nd Respondent did not make any submissions on the 1st Respondent's motion and elected to leave the matter to the Court for determination.

D. Reply

17. In reply to the Appellant's opposition, the 1st Respondent filed an affidavit in reply and skeleton arguments in reply on 12th July, 2022. The affidavit was sworn by the 1st Respondent and he deposed that:

- 17.1. There were other proceedings under cause number 2022/CCZ/A001 in which a single Judge dismissed the Appellant's application for leave to appeal out of time.
- 17.2. The proper procedure was for the Appellant to renew his application before the full bench challenging the decision of the single Judge under cause number 2022/CCZ/A001. The Appellant's failure to follow the proper procedure denies this Court jurisdiction to entertain these proceedings.
18. In the written skeleton arguments in reply, the 1st Respondent relied on the case of ***Mukumbuta Mukumbuta and Others v Nkwilimba Choobana***⁹, and submitted that the Appellant's conduct amounted to forum shopping and an abuse of court process which courts in this jurisdiction frown upon.
19. In his oral submissions in reply, counsel for the 1st Respondent submitted that:

- 19.1. The cause number of a matter is inserted by registry officers and it is the duty of the litigant to properly invoke the jurisdiction of the court.
- 19.2. In accordance with the guidance in the case of ***Shaba Lawrence v Lungu Arthur and Electoral Commission of Zambia***¹⁰, the 1st Respondent was mandated to file heads of arguments and this did not amount to him waiving his right to raise preliminary issues to dismiss the appeal.
- 19.3. In this case, leave to appeal was not properly granted by the High Court because it was granted twice. First on 27th January, 2022, and secondly on 18th May, 2022. Thus, leave to appeal having not been properly granted, the appeal is improperly before this Court.

Issue for Determination

20. We have considered the motion together with the affidavit evidence, list of authorities and the skeleton arguments filed by both parties and the oral submissions made by counsel. The main issue that falls for determination in this motion is whether or not this appeal is properly and competently before us.
21. The 1st Respondent has urged this Court to dismiss the appeal on grounds that:
 - 21.1. The Appellant moved this Court by invoking its constitutional jurisdiction instead of its appellate

jurisdiction and also the Appellant's failure to appeal the decision of the single judge dismissing the appeal for lack of jurisdiction.

21.2. That since the wrong jurisdiction of the Court was invoked, this Court does not have jurisdiction to hear this matter. Further that the Appellant ought to have renewed the application, that was before the single Judge, to the full bench. This matter was, therefore, incompetently before the Court.

22. On the other hand, the Appellant argued that the issues raised by the 1st Respondent were curable and that he did not breach any mandatory rules of the Court and this appeal was properly before the Court and that it must, in the interest of justice, be heard on its merits.

Evaluation and Decision

23. The issues raised in the motion, go to the jurisdiction of this Court.

24. The starting point in determining any question regarding this Court's jurisdiction is Article 128(1) of the Constitution which provides that (quoting relevant parts):

128. (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear —

- (a) a matter relating to the interpretation of this Constitution;**
- (b) a matter relating to a violation or contravention of this Constitution;**
- (c) a matter relating to the President, Vice-President or an election of a President;**

- (d) appeals relating to election of Members of Parliament and councilors; and
- (e) whether or not a matter falls within the jurisdiction of the Constitutional Court.

25. This Court, therefore, has original and appellate jurisdiction that is derived from Article 128 of the Constitution. Original jurisdiction is the power to hear cases at first instance whereas appellate jurisdiction confers power to hear appeals.
26. Our approach in determining the issue before us is to answer the eight questions presented for determination as they have been posed. These questions appear at paragraph 2 of this Ruling.

Question One

27. In dealing with question one, it should be noted that appeals before this Court effectively fall under the Court's constitutional jurisdiction as this Court's jurisdiction is limited to constitutional matters, issues or questions only as outlined in Article 128(1) of the Constitution.
28. This appeal is therefore a constitutional matter being heard in this Court's appellate jurisdiction pursuant to Article 128(1)(d) of the Constitution and sections 8(1)(e) and 23(1) of the Act.

Questions Two and Eight

29. We note that there is neither a renewed application for leave to appeal out of time nor is there an appeal of the single

Judge's decision in this matter. We are of the view that these questions therefore, have no relevance to this appeal.

Question Three

30. There is no application appealing the decision of the single Judge's decision under cause no. 2022/CCZ/A001. The appeal before us is pursuant to the notice of appeal and memorandum of appeal appearing at pages 158 -162 of the record of appeal.
31. The notice of appeal and memorandum of appeal in this matter were filed after leave to appeal out of time was subsequently granted by the High Court on 18th May, 2022.
32. Since this appeal is neither a renewed application nor an appeal of the single Judge's decision under a different cause number, any grounds of appeal emanating from a single Judge's decision would be irrelevant to this appeal. This appeal arises from the Appellant's dissatisfaction of the High Court's Judgment and not the decision of a single Judge under cause no. 2022/CCZ/A001.

Questions Four and Five

33. As this matter is an appeal from the judgment of the High Court, the record of appeal in this matter cannot contain the decision of the single Judge nor the proceedings before the single Judge under a different cause number.

Question Six

34. As shown on pages 158 - 162 of the record of appeal, the Appellant obtained leave to appeal the judgment of the High Court out of time, before the High Court. Thus, leave to appeal to this Court out of time was granted by the High Court and in terms of Section 24(i)(a) of the Act, an appeal from an order extending time for appealing is not subject to appeal.

Question 7


35. The decision of the single Judge was delivered under a separate cause no. 2022/CCZ/A001. The Appellant did not seek to appeal the single Judge's decision.
36. The present appeal was filed under cause no. 2022/CCZ/A004 pursuant to an order from the High Court granting the Appellant leave to appeal to this Court out of time.
37. The Appellant therefore, filed this appeal on the basis of the High Court's order aforementioned. This is evidenced by the fact that the record of appeal contains the order allowing the Appellant to appeal the judgment of the High Court out of time, in accordance with Order 11 rule 2(5) of the CCR.

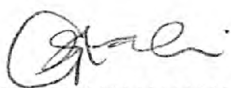
Conclusion

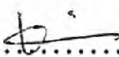
38. For these reasons, we are of the considered view that the notice of motion to raise preliminary issues has no merit.

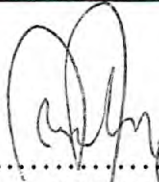
Orders

39. The 1st Respondent's notice of motion to raise preliminary issues fails and is accordingly dismissed.
40. Each party to bear their own costs.
41. The appeal in this matter shall be heard on a date to be communicated to the parties.

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M. M. MUNALULA, JSD
DEPUTY PRESIDENT
CONSTITUTIONAL COURT

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A. M. SITALI
CONSTITUTIONAL COURT JUDGE

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M. S. MULENGA
CONSTITUTIONAL COURT JUDGE

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M. MUSALUKE
CONSTITUTIONAL COURT JUDGE

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M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE