IN THE SUPREME COURT OF ZAMBIA **SCZ/8/05/2019**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

B E T W E E N :

KEKELWA SAMUEL KONGWA **APPELLANT**

AND

MEAMUI GEORGINA KONGWA **RESPONDENT**

Before Hon. Justice Dr. Mumba Malila in chambers on 27th March, 2019 and 17th May 2019.

For the Appellant: Mr. K. Mwale of Messrs Mwack Associates

For the Respondent: Mrs. L. Mushota of Messrs Mushota & Associates

---

R U L I N G

Cases referred to:

1. *D. E. Nkhuwa v. Lusaka Tyre Services Ltd. (1977) ZR 43*
2. *Hakainde Hichilema & 5 Others v. Government of the Republic of Zambia (2017) HP/0888)*
3. *Josia Tembo v. Peter Chitambala (2009) ZR 326*
4. *Penelope Chishimba Mambwe v. Millington Collins Mambwe (Appeal No. 222/2015)*
5. *Kansanshi Mine Plc. v. Joseph Maini Mudimina & Others (Appeal No. 149/2010)*

Legislation referred to:

1. *Court of Appeal Act No. 7 of 2016*
2. *Order XI r4 of the Court of Appeal Rules*

3. *Constitution of Zambia No.2 of 2016*
4. *Supreme Court Rules, chapter 25 of the laws of Zambia*
5. *Practice Direction No.1 of 2002*

This application is sequel to the refusal by the Court of Appeal to grant leave to the applicant to appeal to the Supreme Court following a judgment of that court which has, no doubt, caused annoyance to the applicant.

The dispute that was determined on appeal from the High Court by the Court of Appeal, relates to property settlement following the dissolution of the parties' marriage. The proceedings were initiated in the Local Court, and through the process of appeal, were last determined by the Court of Appeal. The appellant, being unhappy with the judgment of the Court of Appeal, now desires to escalate the grievance to the Supreme Court. In obedience to the requirements of the law as set out in the Court of Appeal Act No. 7 of 2016, the applicant sought leave from the Court of Appeal to appeal. That application was, however, rejected.

In declining leave to appeal, the Court of Appeal stated as follows:

In our considered view, the issues that were raised on appeal to this court do not raise any point of public importance warranting escalation of this matter to the Supreme Court. The issues raised in this court revolve around property adjustment, a subject much discussed by the courts in this jurisdiction.

The applicant then renewed the application before me, sitting as a single judge. He has structured some grounds upon which he intends to assail the decision of the Court of Appeal should leave be granted. Those proposed grounds of appeal are:

(1) **That the Court of Appeal misdirected itself in law and fact when it found that the Kalundu house belonged to the Respondent taking into consideration the need to do justice taking into account the circumstances of the case.**

(2) **That the Court of Appeal misdirected itself both in law and in fact when it found that the Kalundu house belonged to the Respondent thereby granting the Respondent all three houses acquired during the subsistence of the marriage leaving the appellant with no property.**

(3) **That the Court of Appeal misdirected itself in law and in fact when it failed to consider granting the appellant one of the two properties in Ibex Hill, which the appellant had contributed to acquiring, but could not be given one because of the need for the parties to have a clean break thereby resulting in the grant to the appellant of the house in Kalundu.**

As these proposed grounds will form the basis of the applicants' challenge of the decision of the Court of Appeal if leave to appeal is

given, it imperative to measure these proposed grounds of appeal against the criteria for granting leave as set out in section 13 of the Court of Appeal Act which I will reproduce shortly.

Indeed, an appeal to this court against a judgment of the Court of Appeal is no longer a matter of course. The leave of that court must be sought and obtained. Section 13 of the Court of Appeal Act No. 7 of 2016 prescribes the circumstances in which leave to appeal to this court shall be granted by the Court of Appeal. The section enacts as follows:

> **(13)(1) An appeal from the judgment of the court shall lie to the Supreme Court with the leave of the court**
>
> **.....**
>
> **(3) The court may grant leave to appeal where it considers that**
>
> **(a) the appeal raises a point of law of public importance;**
>
> **(b) it is desirable and in the public interest that an appeal by the person convicted should be determined by the Supreme Court;**
>
> **(c) the appeal would have reasonable prospects of success; or**
>
> **(d) there is some other compelling reason for the appeal to be heard.**

When counsel for the parties appeared before me to argue the application, Mr. Mwale, learned counsel for the applicant, intimated that he would rely on the affidavit in support of the motion. There were no skeleton arguments filed. Mrs. Mushota, learned counsel for the respondent, for her part indicated that she would place reliance on the affidavit in opposition as well as the authorities and skeleton arguments in opposition.

Despite Mrs. Mushota's protestation, I granted leave to the learned counsel for the applicant to file heads in reply, which were indeed filed on the 3rd April, 2019.

Both the affidavit in support of the motion and that in opposition merely set out the chronology of events that brought the parties where they are in regard to this application. I can do no better than to merely acknowledge the foundational role of those affidavits.

In her arguments in opposition of the motion, learned counsel for the respondent essentially raised two arguments. The first was jurisdictional. She posited that I, sitting as a single judge of the Supreme Court, have jurisdiction to grant leave where such leave is

in the first place denied by the Court of Appeal. She cited Order XI r4 of the Court of Appeal Rules as authority for that submission.

After alluding to what she merely referred to as the Practice Direction of 16th July 2002 and of 7th August 1997, Mrs. Mushota took the matter further by submitting that the application by the applicant is made under OX1 r4 ARW (whatever this is!) and section 24(b) of the Supreme Court Act. Section 24(b), according to Mrs. Mushota, does not exist. What exists is section 24(1)(b) which provides that no appeal shall lie from an order of a judge giving unconditional leave to defend an action. She then submitted that the applicant has not been granted unconditional leave to defend the action. The application is, according to her, therefore improperly before the court.

The second argument made Mrs. Mushota touched on article 118(1)(e). I assume she meant article 118(2)(e) of the Constitution decreeing that justice shall be administered without undue regard to procedural technicalities. She submitted that precedents set by the Supreme Court are binding unless reviewed by the court itself.

In her words:

> **In the case in *casu*, we submit that this is not a case in which the court should grant the application for leave to appeal, as there is no material which has been presented to this court to enable it consider the application.**

I quite sincerely do not appreciate the point that the learned counsel attempted to make here.

Counsel went on to submit that the provisions under which the application is made are not provisions for renewal of the application that was refused by the Court Appeal. The applicant has not stated in his application that this is a renewed application. After quoting section 13(1) and (3) of the Court of Appeal Act, the learned counsel submitted that:

> **The provision is very specific, and it does not provide this court with any material upon which the court is being moved. In *D. E. Nkhuwa v. Lusaka Tyre Services Limited*[1] where the lower court refused to grant leave to appeal and an application was made to this court, their Lordship were satisfied that the lower court was entitled to hold that it had not been presented with material on which it could exercise its discretion in favour of the applicant. Their Lordship found that the decision of the Court of Appeal was not based on any wrong principle.**

Counsel concluded by praying that the application be rejected.

In response to the arguments by the respondent's learned counsel, Mr. Mwale submitted that this court has power to entertain the application notwithstanding that it was made under a wrong provision of the law or rule. He cited a High Court ruling in the case of *Hakainde Hichilema & 5 Others v. Government of the Republic of Zambia*[2] where a High Court judge stated that:

> **Although it is desirable that a party cited the rule pursuant to which he is making the application the omission of itself is not fatal thereby rendering the application incompetent. Neither does it close the door to a judge or his or her own motion to entertain the application.**

Counsel also cited another High Court judgment of *Josia Tembo v. Peter Chitambala*[3] where the judge held that although it is necessary to indicate the order pursuant to which an application is made in the application document, default in doing so is not fatal and does not in any way prejudice the applicants in the conduct of the defence to the preliminary issue.

The learned counsel was quick to point out that these authorities were not binding on the Supreme Court, but that this court has inherent jurisdiction to determine any application before it

as long as the parties before the court had an opportunity to be heard.

As regards the respondent's argument that this court has no material upon which to act, the learned counsel for the applicant submitted in response that the case of *D. E. Nkhuwa v. Lusaka Tyre Services Limited*[1] cited by counsel for the respondent was in fact cited out of context as that case dealt with an application for extension of time with which to lodge an appeal.

Mr. Mwale advanced one more argument. Citing rule 58 of the Supreme Court Rules, chapter 25 of the laws of Zambia, he submitted that in determining an appeal, the Supreme Court is not limited to the grounds advanced in the memorandum of appeal but is obliged to do justice where the issues form part of the record. He ended by imploring me to grant the application.

It is clear to me that the arguments of the learned counsel for the parties have gone outside the real question in controversy in this application. More importantly, I form the view that both counsel could have spent a little more time reflecting on what the real issues are and how to frame them in a winning fashion.

In specific terms, counsel for the respondent could no doubt have made her arguments a lot more focused and clearer. The reference to the provisions of the Constitution and the relationship between those provisions and the Practice Direction is, to me, a matter of conjecture.

I am even more astonished that the learned counsel for the respondent had the audacity of citing decisions of an inferior court before me, while acknowledging that these are not binding. In *Penelope Chishimba Mambwe v. Millington Collins Mambwe*[4] the respondent cited and sought to rely on High Court judgments to persuade the Supreme Court to make findings favourable to his case. Delivering the judgment of the court, I stated in that case as follows:

> **We have previously stated that in keeping with the fundamental common law principles of *stare decisis* and judicial precedents, in an environment such as ours which is replete with both binding and persuasive case authorities of superior courts, it may well be a misapplication of intellectual effort to attempt to persuade us through High Court decisions, unless there is paucity of authorities on a novel point. This is not the case here.**

The observations of the court in that case perfectly resonate with the situation now before me. The issue that the learned counsel for the applicant was attempting to address and persuade me on

through the use of High Court authorities, namely what the position is where an application does not disclose the law pursuant to which it is made, has been dealt with by the Supreme Court in numerous cases. Counsel should have made an effort to find those Supreme Court authorities and should have cared to explain how the High Court judgments he referred me to fit into the scheme of things.

For good measure, I must quote Practice Direction No.1 of 2002 (which I assume Mrs. Mushota was referring to). It states as follows:

> **All applications brought to court should indicate the Act and section or order and rule under which the application is brought failure of which the application shall not be accepted for filing or entertained.**

In *Kansanshi Mine Plc. v. Joseph Maini Mudimina & Others*[5], the movant of a motion before the court failed to reveal the law pursuant to which it was made. Delivering the ruling on behalf of the full court, I stated as follows:

> **The absence of an indication of the correct provisions under which the motion was taken out, makes the application by the respondent *ipso facto* irregular...**

Mr. Mwale also referred to rule 58(3) of the Supreme Court Rules and contended that in determining an appeal, the Supreme Court is not limited to grounds advanced in the memorandum of appeal but is

obliged to do justice. To me, this argument is clearly misguided. Rule 58 deals with the record of appeal, its contents and the restrictions imposed on the inclusion of grounds of appeal after the record of appeal has been prepared and filed. In my considered view, rule 58 in its current formulation does not extend to the hearing of an interlocutory application such as the one presently before me.

As I have already intimated, however, all these arguments are to me peripheral.

In considering the present application, the critical question that I ask myself and upon which I would have expected counsel to address me fully, is whether the applicant's appeal raises any point of law of public importance in keeping with section 13(3)(a) of the Court of Appeal Act. I must hasten to clarify that the import of section 13(3)(a) of the Court of Appeal Act, is that the proposed appeal in which a point of law of public importance arises, must be directed to this court; not to the Court of Appeal. This clarification is significant in light of the statement of the Court of Appeal made in declining to grant leave. I have earlier in this ruling quoted that statement.

By the quoted statement, the Court of Appeal implied that it is an appeal to that court which should raise a point of law of public importance. It is not. Rather, it is an appeal to this court which should. This is not in any way to suggest that an appeal to the Court of Appeal would not raise a point of law of public importance. It can, and often times appeals to that court will raise such points. And here, I am mindful that if any appeal to the Court of Appeal raises a point of law of public important, it is probable that an appeal to this court will equally raise a point of law of public importance.

It does not follow, however, that every appeal to that court which raises a point of law of public importance will necessarily lead to an appeal raising a point of law of public importance in the Supreme Court. It may well be that the issue upon which a point of law of public importance is raised in the Court of Appeal is so well covered by that court that it becomes unnecessary for a party to attempt to raise it again on further appeal to this court. It may also be that an appeal to the Court of Appeal that had not raised any issue of law of public important may culminate in a decision of that court which

precipitates a new issue of law of public importance upon which a party may be enlivened to appeal to the Supreme Court.

The point I make is that the requirements of section 13 of the Court of Appeal Act, are designed to make the Court of Appeal a filter of the cases coming to the Supreme Court, rather than a filter of the appeals brought before that court. In other words, and for purposes of emphasis, while the requirements of section 13 of the Act, including the need for any appeal raising a point of law of public importance, apply to appeals coming to the Supreme Court after a decision of the Court of Appeal; it does not apply to appeals to be determined by the Court of Appeal itself. The Court of Appeal was, therefore, wrong to make the statement which I have quoted earlier on in this ruling, in declining leave to appeal.

To revert then to the issue of a point of law of public importance as envisioned in section 13(3)(a), I apprehend that for an appeal to satisfy this requirement, it must raise a legal question with a public or general character rather than one that merely affects the private rights or interests of the parties to the dispute. This court, assisted by the Court of Appeal as a filter for appeals, is expected to make

better use of its resources, including time, in hearing only cases worthy of its attention so that it places greater emphasis upon its public role in the evolution of the law and the maintenance of procedural regularity in the courts below, and not to expend its energies upon the private rights of the litigants to the appeal.

An intended appellant ought to demonstrate that the point of law raised is a substantial one, the determination of which will have a significant bearing on the public interest.

The issues that the present intended appeal raises, as I discern them from the proposed grounds of appeal, which I have earlier on reproduced, turn on the property rights of the two parties to the dispute and will not have any impact beyond the two disputants. In my estimation, the dispute cannot possibly transcend beyond the boundaries of the parties' private interests into the public or general realm. The intended appeal can thus not satisfy the public importance criterion. My conclusion, therefore, is that this intended appeal does not raise any point of law of public importance.

Neither party has attempted to argue that the proposed appeal should be allowed on any other ground set out in section 13. I,

therefore, will not venture into that territory either. However, even if neither the Court of Appeal nor myself have had the advantage of assessing any compressive argument in support of the grounds of appeal, it is clear that this appeal, in truth, has no real prospects of success given the background facts and the history of the chief grievance in the intended appeal as can be deciphered from motion documents, and more particularly the judgment of the lower court – the Court of Appeal. The matter is not criminal in nature and thus section 13(3)(b) is totally irrelevant. No compelling reason has been suggested by the applicant as to why the appeal should be heard in terms of section 13(3)(d), either.

The net result is that the application should fail and I dismiss it accordingly. I award the costs of this application to the respondent.

Dr. Mumba Malila
SUPREME COURT JUDGE