



REPUBLIC OF MALAWI

IN THE MALAWI SUPREME COURT OF APPEAL

MSCA CIVIL APPEAL NO. 9 OF 2022

(Being High Court of Malawi, Mzuzu Registry, Civil Appeal No. 9 of 2018, before
Hon. Justice De Gabrielle)

CHIFUNDO KAMWANA AND 5 OTHERS.....APPELLANTS
AND

ILLOVO SUGAR (MALAWI) LIMITEDRESPONDENT

Coram. Madise JA

Mr. Matumbi for the Respondent

Mr. Kadzipatike for the Appellants

RULING

Brief Facts

1. This application comes before me as a single member of the Court. It is supported by a sworn statement of Counsel Matumbi and skeleton arguments. The Appellants have opposed the application and there is a sworn statement by Counsel Kadzipatike with skeleton arguments attached. The Appellants in this matter commenced an action in the Industrial Relations Court of Malawi in Mzuzu, claiming *inter alia* damages for unfair dismissal.
2. After a full trial, the Industrial Relations Court in Mzuzu found for the Appellants herein in its judgment dated the 14th day of August, 2018. The Respondent was

thus ordered to pay the Appellants damages for unfair dismissal, one-month notice pay, withheld leave grants, severance pay, pension benefits, performance related bonus and the 13th cheque. Being dissatisfied with the judgment of the IRC, the Respondent herein filed a Notice of Appeal against it in the High Court of Malawi marked and exhibited herein as 'GJK

3. The Respondent further filed an application for stay of execution of judgment in the said IRC, Mzuzu Registry pending appeal in the High Court. The application was granted on condition that the judgment sum be deposited into Court and money amounting to **MK21, 878, 641.80** (Twenty-one Million Eight Hundred and Seventy-Eight Thousand, Six hundred and Forty-One Kwacha and Eighty Tambala only) was deposited into court. The Appellants are aggrieved by the decision of the High Court which called for a re trial in the IRC and are desirous to appeal herein. The Appellants' Notice and Grounds of Appeal are as contained on the record.
4. This what happened prior to the appeal before this Court. On the 8th June, 2021, the Appellants obtained leave to appeal against the decision of the High Court made in Chambers. On the 9th June, 2021, the Appellants filed a Notice of Appeal and Grounds of appeal and proceeded to settle the Court record for the hearing of the appeal. The Court record will show that the Appellants obtained leave to appeal against the judgment made in chambers only and not seek leave to appeal out of time. It is a requirement that a litigant should obtain leave to appeal out of time when the time to appeal has lapsed as per Section 23 (2) of the same Supreme Court of Appeal Act.
5. The Appellants have filed an appeal in the Supreme Court of Appeal against a High Court judgment of 29th June, 2020, where the court ordered that there must be a retrial of the matter within 60 days from the date of the judgment. The Appellants received a copy of the judgment on the 22nd September, 2020 to comply with the judgment of the court. The Appellants, being of the view that the period within which to appeal had expired as the judgment of the Court below is dated 29th day of June, 2020, made an application for enlargement of time within which to appeal before this Honourable Court per Honourable Justice of Appeal Mzikamanda SC (as His Lordship the Honourable the Chief Justice of the

Republic of Malawi then was.

6. Delivering its Ruling dated the 22nd day of March, 2021, this Honourable Court declined to grant the Appellants leave within which to appeal out of time and instead directed that the Appellants do make the application for leave to appeal before the Court below and further ordered the Court below to deal with the Appellants' application once it is lodged. This decision of Honourable Mzikamanda dated the 22nd day of March, 2021 **marked** and **exhibited** herein as '**GJK 5**'.
7. In compliance with this direction of this Honourable Court, the Appellants made an application for leave to appeal before the Court below and the Court below duly attended to the application and granted the Appellants leave to appeal **marked** and **exhibited** herein as '**GJK 6**'. That immediately after the Appellants herein were granted Leave to appeal by the court below at the directions of this Honourable Court, the Appellants herein filed their Notice and Grounds of Appeal on the record **marked** and **exhibited** herein as '**GJK 7**'.

The Respondent's Arguments

8. The Respondent cited the case of **Raiply Malawi Limited vs- Mike Dzombe** Misc. civil Application No.2 of 2020, on page 6 of the ruling, Hon. Justice Chipeta, SC JA held as follows:

The second limb of this application, also as already noted, is for the suspension or the stay of the enforcement of the judgment desired to be appealed against. On this plain as it has always been, through countless case authorities, that this court deal with stay applications, it is equally settled now that the jurisdiction over such applications being coordinate between this court and the High court, such applications must first be taken up in the High court. They should only come to this court after the High court has refused to give the applicant the relief he seeks. On this point, Order 1 rule 18 of the Supreme Court of Appeal Rules has not minced any words. It clearly shows that in such type of applications this Court is not the first port of call for an applicant.

9. That Hon. Justice Chipeta, SC JA went on to say as follows:

For any litigant who can appeal from a particular judgment as of right, he need not seek leave to appeal. Thus if he fails to appeal within the time prescribed by law he can with ease go to a competent court of law and apply to have time extended beyond the prescribed time limit. However, for party that by law must seek the leave of the court to appeal before securing the right to appeal if such litigant happens also to have gone past the legally acceptable time frame for appealing, it can only make sense for him to seek enlargement of time either after first obtaining leave to appeal or by filing such an application for leave to appeal. To my mind this irregularity is far more serious than the ones I have earlier on pointed out and brushed aside. It being an irregularity that contravenes a provision in the Supreme Court of Appeal Act, it cannot be cured under guise of resort to rule 1 of Order V of the Supreme Court of Appeal Rules. Rules in subsidiary law cannot be used to heal shortfalls in compliance with statutory requirements.

10. The Respondent submitted that the appeal was filed out of time and therefore the Appellants needed to obtain leave to appeal out of time, see Section 23 of the Supreme Court of Appeal Act. That it is a statutory requirement that a litigant who appeals after the time to appeal has lapsed needs to obtain leave to appeal out of time and failure to do so is fatal to the appeal, see the case of Raiply Malawi Limited v. Mike Dzombe. That non-compliance with statutory requirement cannot be cured by subsidiary law. The Respondent prayed to Court to dismiss the appeal for being irregular.

Appellants Arguments in opposition

11. Appellants herein submitted that the Respondent's assertion that the Appellants herein were still more supposed to make an application for enlargement of time within which to appeal before this Honourable Court despite being granted leave to appeal by the Court below, before actually filing their Notice of Appeal, is grossly misleading at law.
12. That secondly, the Respondent has misled itself in asserting that the Appellants herein were out of time at the time they were filing their Notice and Grounds of Appeal and thus must have obtained leave to appeal out of time before this Honourable Court. This is because of the fact that the judgment of the Court below which the Appellants are challenging before this Honourable Court is one which

was delivered in Chambers, and the right to appeal against it only accrues to a litigant after the Court has granted leave to appeal. As such, time for appeal does not start to run until the High Court or this Court grants authority by way of leave for the litigant to appeal.

13. That substantive and procedural laws guiding this Honourable Court actually make it clear that unless an appellant first gets leave to appeal against a judgment delivered in Chambers like in the present matter, such an Appellant has no power to lodge an appeal against this judgment before this Honourable Court. That in view of paragraphs 23 and 24 hereof, it naturally follows that computation of time to appeal in this matter actually started upon the granting of leave to appeal by the Court below. And not after the delivery of the judgment by the Court below in Chambers.
14. That further, the Appellants herein could not come back to this Honourable Court praying for an Order enlarging time within which to appeal after the Court below had already granted them Leave to appeal because, firstly, this Honourable Court became *functus officio* as regards the question whether the Appellants herein indeed ought to have been given an Order enlarging time within which to appeal or not. This same question, also being *res judicata* before this Honourable Court, per the judgment of this Honourable Court dated the 22nd day of March, 2021, exhibited above as **GJK 5**, the time for the Appellant' within which to appeal to this Honourable Court had not yet run out, as already deponed in paragraph 25 hereof.
15. That not only is the Respondent's present application grossly irregular, incompetent, non-meritorious on the grounds advanced above, the Respondent's present application is also wholesomely flawed and scandalous on the point that it has been brought before a very wrong forum. That the law makes it clear that a Single Member of this Honourable Court lacks jurisdiction to dismiss a substantive appeal. This is an exclusive preserve of the Full Bench of this Honourable Court.
16. That the present application is also a miscalculated afterthought cannot be overemphasized. It has taken close to if not more than a year for the Respondent to notice that the Appellant's present appeal is purportedly irregular. In fact, it is on this same purportedly irregular appeal that the Respondent's Cross-Appeal is

premiered on. If the appeal was irregular, the Respondent could not have filed a Cross-Appeal. That to buttress the point that the present application by the Respondent is a miscalculated afterthought, as the Respondent's Cross Appeal on the record does not show or point out or question at any instance, the purported irregularity of the Appellants' appeal herein.

17. That it is in full view of the foregoing that the Appellants herein maintain that the Respondent's application for an Order dismissing the Appellant's appeal herein is grossly irregular, incompetent, untenable, and scandalous. It is the Appellant's prayer that this Honourable Court should exercise its discretion in their favour in dismissing this application with costs. In the very unlikely event that this Honourable Court agrees with the Respondent that indeed leave to appeal out of time ought to have been obtained from this Honourable Court by the Appellants, then the Appellants humbly pray that this Honourable Court should as well exercise its discretion in their favour in granting them such leave, so as to let this whole appeal be determined on the merits and not on mere technicalities.

18. The Appellants humbly pray before this Honourable Court for an Order dismissing the Respondent's application for an Order dismissing the appeal with costs for being grossly irregular, incompetent, scandalous, and non-meritorious. That in *Administrator General v Khofi* [2000–2001] MLR 1 (SCA), it was held as below *'Paragraph (c) of the further proviso of section 21 of the Supreme Court of Appeal Act requires that leave must be obtained from this court before an appeal can be commenced where the order of the High Court was made in Chambers.'*

'In the present case, the order of Kunitsonyo J, was clearly made in Chambers. The appellant was required to obtain leave before proceeding to appeal. No such leave was obtained by the appellant in the instant case. The appellant clearly failed to observe the correct procedure and practice in the present appeal.'

19. That in *Attorney General and Others v Chakuamba and Others* [1999] MLR 17 (HC) it was held as below:

'Counsel for the respondents submitted that the first and third appellants did not obtain leave to appeal. He stated that leave to appeal to this Court is required when

a person desires to appeal against an interlocutory order of a judge of the High Court.'

That Order III Rule III (II) of the Supreme Court of Appeal Rules authoritatively provides as below:

(2) If leave to appeal is granted by the Court or by the Court below the appellant shall file a notice of appeal:

Provided that nothing in this sub rule shall be deemed to prohibit an appellant from filing a notice of appeal prior to the hearing of the application for leave to appeal. [Our emphasis supplied]

20. That in *Arnold and Others v National Bank Westminster Bank PLC* [1991] H.L.

93 it was stated as below –

“It was decided that although issue estoppel constitutes a complete bar to re-litigation between the same parties of a decided point, its operation could be prevented in special circumstances where further material became available which was relevant to the correct determination of a point involved in earlier proceeding but could not, by reasonable diligence, have been brought forward in those proceedings’

21. That a single member of the supreme court of appeal has no jurisdiction to dismiss a substantive appeal. Jurisdiction of this Honorable Court is per Section 7 of the Supreme Court of Appeal Act which reads as below:

‘A single member of the Court may exercise any power vested in the Court not involving the hearing or determination of an appeal’

22. That this Honorable Court has also repeatedly stated that the exercise of this Honorable Court’s jurisdiction by a Single Member does not include making substantive decisions as regards an appeal, including the determination of the propriety of the lodged appeal. On this point, recourse is had to the decision of Honorable Justice of Appeal Chipeta (as His Lordship then was) in *Lackson Chimangeni Khamalatha and Others v Secretary General of Malawi Congress Party and Others* MSCA No. 67 of 2016.

23. That view of the foregoing the Appellants herein maintain that the Respondent's application for an Order dismissing the Appellant's appeal herein is grossly irregular, incompetent, untenable, and scandalous. It is the Appellant's prayer that this Honorable Court should exercise its discretion in their favour in dismissing this application with costs. In the very unlikely event that this Honorable Court agrees with the Respondent that indeed leave to appeal out of time ought to have been obtained from this Honorable Court by the Appellants, then the Appellants humbly pray that this Honorable Court should as well exercise its discretion in their favour in granting them such leave, so as to let this whole appeal be determined on the merits and not on mere technicalities.

Decision

24. This application to dismiss the appeal for being filed out of time without seeking leave must be dismissed with costs for the following reasons. Firstly the judgment of the High Court is dated 29 June 2020 but the parties only received copies of the judgment on 22 September 2020. The question before is when did time start running? In all fairness it cannot be on 29 June 2020. A judgment is delivered once the parties to the case have been made aware of the decision of the court. The parties can only know the contents of the judgment once they have been given copies. A judgment which is written but kept away from the parties is no judgment at all. In this regard the judgment ought to have been dated 22 September 2022 the day the parties got their copies and not the date it was written. It is important that correct dates must appear on a judgment or order and it must correspond with the date the parties receive their copies.

25. Secondly this Court sent the Appellant back to the court below to seek leave as the judgment was a chamber matter. The Appellant went back to the High Court and obtained leave to appeal and immediately filed a notice and grounds of appeal. This Court is of the view that leave must be obtained first before a notice and grounds are filed. Suffice to say that a notice and grounds can be filed before

leave is obtained as an exception to the general rule. Order III Rule III (II) of the Supreme Court of Appeal Rules authoritatively provides as below:

(2) *If leave to appeal is granted by the Court or by the Court below the appellant shall file a notice of appeal:*

Provided that nothing in this sub rule shall be deemed to prohibit an appellant from filing a notice of appeal prior to the hearing of the application for leave to appeal.

26. I'm in agreement with the Appellants that a single member of the supreme court of appeal has no jurisdiction to dismiss a substantive appeal. Jurisdiction of this Honorable Court is per Section 7 of the Supreme Court of Appeal Act which reads as below:

'A single member of the Court may exercise any power vested in the Court not involving the hearing or determination of an appeal'

27. Looking at the facts and the law before this Court, I see nothing wrong with what the Appellants did in coming to this Court. The law is very clear in *Section 23 (2) of the Supreme Court of Appeal Act* *If a person desires to appeal under this Part from the High Court to the Court, he shall, in such manner as may be prescribed by rules of court, give notice to the Registrar of the High Court of his intention to appeal- (b) within six weeks of the judgment from which he wishes to appeal in any other case.*

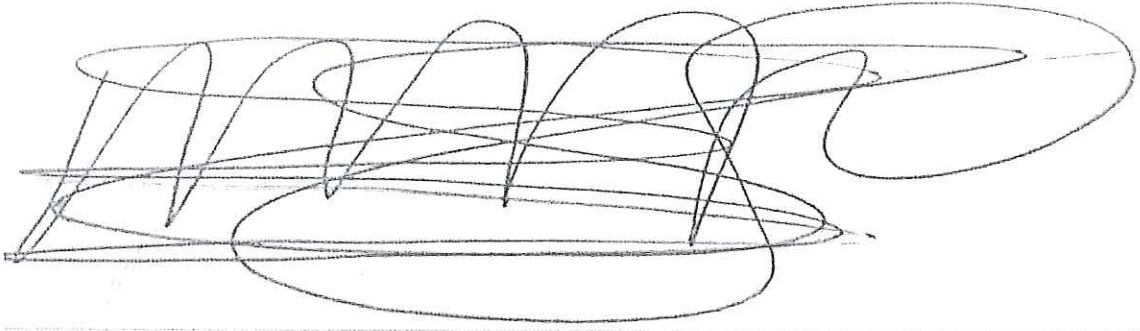
28. It is therefore not true that computation of time to appeal in this matter actually started upon the granting of leave to appeal by the court below and not after the delivery of the judgment by the court below in Chambers. In these premises looking at the facts before me I find that is not true that this appeal was filed out of time. The operative date is 22 September and not 29 June 2020. There was no need for the Appellant to seek leave to appeal out of time.

29. The Court finds that the Appellants were within the allowable time as per *Section 23 (2) of the Supreme Court of Appeal Act.* This application must fall with costs.

The Registrar of this Court must proceed to set a date for the hearing of the appeal before the full bench.

I so order

Made in Chambers at Blantyre in the Republic on 17th August 2022



Dingiswayo Madise

Justice of Appeal