

NAHAR INVESTMENT LIMITED v GRINDLAYS BANK INTERNATIONAL (ZAMBIA)
LIMITED (1984) Z.R. 81 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MUWO, J.J.S.
15TH FEBRUARY, AND 13TH MARCH, 1984
(S.C.Z. JUDGMENT NO. 1 OF 1984)

Flynote

Civil Procedure - Appeal - Delay - Effect of - Time - Extension of.

Headnote

The appellants failed to lodge the record of appeal within the stipulated time, including the extended periods. A single judge dismissed the appeal for want of prosecution. The appellant appealed to the full court.

Held:

- (i) Appellants who sit back until there is an application to dismiss their appeal before making their own application for extension of time, do so at their own peril.
- (ii) In the event of inordinate delay or unfair prejudice to a respondent, the appellant can expect the appeal to be dismissed.

For the appellant: L.P. Mwanawasa, of Mwanawasa and Company.

For the respondent: B.C. Mutale, of Ellis and Company.

Judgment

NGULUBE, D.C.J.: delivered the ruling of the court.

This was an application to the full court for an order to reverse an order made by a simple judge dismissing the applicant's appeal for want of prosecution and to extend the time within which to lodge the record of appeal which is now ready. On 15th February, 1984, we granted

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application; reversed the order of dismissal; granted an extension; but condemned the applicant in costs. We indicated then that we wished to take the opportunity presented by this case to draw attention to certain points for the benefit of appellants and respondents.

The history of this appeal discloses a most unsatisfactory state of affairs: The Notice of Appeal was filed late and necessitated an application for leave which was granted on 6th May, 1982. The applicant then had 60 days within which to lodge the record of appeal and this period expired. On 22nd April, 1983, the respondent took out a summons to dismiss the appeal for want of prosecution and it was only in the process of opposing that summons that the applicant sought, and obtained, an extension of 30 days. The application to dismiss was not granted. After the expiry of the extended period, the respondent obtained, ex parte, an order dated 10th July 1983, dismissing the appeal for want of prosecution. Thereafter, the applicant made a further application for extension of time within which to lodge the record of appeal, but that application was never heard and it transpires that this came about as a result of advice tendered by the master, to the effect that the applicant should move the full court in the matter of the order of dismissal. The application before us discloses that, the appellant had been unable, until after the order of dismissal, to obtain a transcript of the notes of the proceedings from the High Court.

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 the non-availability of the notes of proceedings which it is the responsibility of the High Court to furnish), appellants have a duty to make 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 delay appeal has resulted in the respondent being unfairly prejudiced in the enjoyment of any judgment 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 applicant in this case had such an explanation, but the time to allance that explanation had long expired. The application therefore, was granted mainly because we find that there was a fortuitous circumstance making this an exceptional case. This was that a formal order for dismissal was taken out ex-parte without any supporting application and in the absence of any enabling previous order by the single judge. The respondent, it transpired, acted under the mistaken belief that, when the single judge dismissed its application to dismiss the appeal

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and granted the applicant an extension of 30 days, the order made on that occasion had included a condition to the effect that, should the applicant default, the appeal would, without more, stand dismissed. No such "unless order" was made and none can arise by implication from the mere fact of an extension having been obtained at the hearing of an application to dismiss. It was, no doubt, due to an oversight that the order of dismissal was signed when there was, in fact, no such order made at all.

Application granted, reversed the order of dismissal and granted an extension
