

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)
BETWEEN:

CAZ/08/032/2023

MWANGALA BEATRICE KAMUWANGA

Appellant

AND

HELEN NKAUSU (Trading as Henka General Dealers
SELAH ROMAIN
JAMA ABDIRIZAKA
ABDULLAI HUSSEIN
ELIZABETH TAMARA
INVESTRUST BANK LIMITED
THE ATTORNEY GENERAL



1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent

(On behalf of the Department of Lands and Deeds
Registry and Survey Department)

ATHONY MULUBE (Sued as administrator of the late
Mr. Earnest Samuel Willibalde Mulube)

8th Respondent

Coram: Hon. Lady Justice N.A Sharpe-Phiri in Chambers
on 28 June 2023

For the Appellant:	No appearance
For the 1 st to 5 th Respondent:	Mr. C. Nkhata, Mr. T. Mubita and Ms. R. Kasongo of Messrs Paul Norah Advocates
For the 6 th to 8 th Respondent:	No appearance

R U L I N G

Cases referred to:

1. *Nahar Investment Limited v Grindlays Bank International (Zambia) Limited (1984) ZR 81*

Legislation referred to:

1. *Court of Appeal Rules, Statutory Instrument No. 65 of 2016*

This is an extempore ruling on an application brought by the Respondents on 14 June 2023 to dismiss the Appellant's appeal for want of prosecution. The application has been made pursuant to **Order 10 Rule 7 of the Court of Appeal Rules**¹. The application was supported by an affidavit sworn by one Nathalie Mbuyi, counsel having conduct of this matter on behalf of the 1st to 5th Respondents.

In the affidavit in support, counsel contends that the Appellant filed her notice of appeal and memorandum of appeal on 19 January 2023. That the Appellant is required to file a Record of Appeal and Heads of Argument within 60 days from the date of filing the notice of appeal. Counsel stated that a search was conducted on 10 June 2023 and it was revealed that the Appellant had not filed her Record of Appeal and Heads of Argument. That the Appellant had ailed in her responsibility to prosecute and pursue this matter to its conclusion by complying with the rules of this Court. Counsel further contended that it was apparent that the Appellant was not desirous to prosecute her appeal and asked this Court to dismiss the appeal for want of prosecution.

There was no opposing affidavit filed into Court.

The matter was scheduled for hearing on 21 June 2023. On the said date, counsel for the 1st to 5th Respondents appeared and informed the Court that service of process had not been effected on the Appellant as she was not in town. The matter was adjourned to enable process be served on the Appellant. It was rescheduled for hearing on 28 June 2023.

The matter has come up for hearing of the 1st to 5th Respondent's application to dismiss the action today.

Counsel for the 1st to 5th Respondent is before Court but the Appellant is absent. Counsel has indicated that they have served process on the Appellant and relied on an affidavit of service in their request to proceed with their application.

Upon perusing the affidavit of service of 27 June 2023 and the exhibits thereon, particularly “DM1” which indicates that the Appellant was duly served the process on 22 June 2023 and “DM2” which reveals that the Appellant was notified of the date and time of the hearing of the application on 23 June 2023, I observed that the Appellant did acknowledge having received the documentation and notification relating to this application and is therefore fully aware of the application before the Court today. However, the Appellant is not in attendance despite having been served with the application and being made aware of today’s hearing. In view of the foregoing, I accordingly allowed the Respondents to proceed in the absence of the Appellant.

Counsel for the 1st to 5th Respondents relied on his affidavit in support and list of authorities and skeleton arguments filed on 14 June 2023 and urged the Court to dismiss the appeal.

I have carefully considered the affidavit evidence and the submissions by counsel. The provisions on civil appeals under **Order X Rule 6 (a) of the Court of Appeal Rules** specifically provides a period of sixty days as the time within which a record of appeal should be lodged in the registry after the filing of a notice of appeal. An Appellant desirous of appealing to the Court of Appeal is obliged to lodge the Record of Appeal in the Registry within sixty days after filing their Notice of Appeal.

In the present case, the Appellant filed a Notice of Appeal and Memorandum of Appeal on 19 January 2023. According to the Respondents' counsel, a search conducted on 10 June 2023 revealed that the Appellant has not lodged the Record of Appeal as required under **Order XIII, Rule 3(2) and (3) of the Court of Appeal Rules**. This fact was not disputed by the Appellants who has not opposed the application nor has she attended Court. It is evident that the requisite documentation for the appeal are not before Court in accordance with the Rules.

The Appellant has also not filed an application for enlargement or extension of time within which to file the Record of Appeal, nor has she filed an application to lodge the Record out of time.

From the evidence before me, it is clear that the Appellant has not taken any steps to pursue her appeal since filing the Notice of Appeal and Memorandum of appeal on 19 January 2023. The delay by the Appellant in prosecuting the appeal has prompted the Respondents to bring this application to dismiss for want of prosecution pursuant to **Order 10 Rule 7 of the Court of Appeal Rules**, which provides that:

'If an Appeal is not lodged with the time frame stipulated under rule 6, the respondents may make an application to the Court for an Order dismissing the appeal for want of prosecution, or alternatively for such order with regard to the appeal as the Respondent may require.'

Order X Rule 6(a) and Rule 7 of the Court of Appeal Rules are unambiguous.

They set out the implication of not lodging a Record of Appeal within the stipulated time. If an appeal is not lodged within a 60 day period of filing a Notice of Appeal, a party may apply to dismiss the appeal.

As stated by counsel for the 1st to 5th Respondents, the Supreme Court of Zambia propounded in the case of **Nahar Investment Limited v Grindlays Bank International (Zambia) Limited**¹ that:

'1. 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.

2. In the event of inordinate delay or unfair prejudice to a respondent, the appellant can expect the appeal to be dismissed.'

The Supreme Court has asserted in a plethora of authorities that Appellants who sit back without taking steps to prosecute their appeal, do so at their own risk.

The Appellant has not taken any steps to lodge the Record of Appeal and Heads of Argument as prescribed by the Rules of this Court. A period of over 5 months has lapsed since she filed the Notice of Appeal into Court. Further, the Appellant has made no attempt whatsoever to file an application for leave to file Record of Appeal and Heads of Argument out of time, nor has she defended this application. Form the foregoing, it appears that the Appellant has no serious desire to have the appeal heard.

In view of the above, I allow the 1st to 5th Respondents' application and accordingly dismiss the appeal for want of prosecution with costs to the 1st to 5th Respondents, to be agreed by the parties and in default of agreement, to be taxed.

Dated at Lusaka this 28 June 2023.


N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE