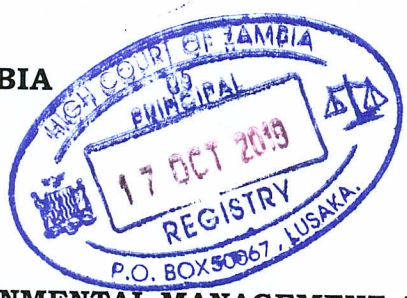
IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



2014/HP/A006

IN THE MATTER OF: THE ENVIRONMENTAL MANAGEMENT ACT 2011

AND

IN THE MATTER OF: THE LOWER ZAMBEZI NATIONAL PARK, KANGALUWI EIA

BETWEEN

VINCENT ZIBA (Suing in his capacity as coordinator of the Zambia Community Based Natural Resource Management Forum)	**1ST APPELLANT**
MORGAN KATATI (Suing in his capacity as Chairperson of the Zambia Institute of Environment Management)	**2ND APPELLANT**
NOAH ZIMBA (Suing in his capacity as Chairperson of the Zambia Climate Change Network)	**3RD APPELLANT**
ROBERT CHIMAMBO (Suing in his capacity as Chairperson of the Chalimbana River Head Waters Conservation Trust)	**4TH APPELLANT**
KASAMPA J. TEMBO (Suing in his capacity as Chairperson Green Living Movement)	**5TH APPELLANT**
DAVID NGWENYAMA	**6TH APPELLANT**

AND

ATTORNEY GENERAL	**1ST RESPONDENT**
MWEMBESHI RESOURCES LIMITED	**2ND RESPONDENT**

BEFORE HON. MR. JUSTICE C. CHANDA IN CHAMBERS ON 17TH OCTOBER, 2019.

For the 1st – 5th Appellants	:	*Mr. H.H Ndhlovu, SC, Messrs H.H Ndhlovu & Company*
For the 6th Appellant	:	*Ms. M. Siansumo, Messrs Malambo & Company*
For the 1st Respondent	:	*N/A*
For the 2nd Respondent	:	*Mr. P.H. Yangailo, Messrs P.H Yangailo & Company*

RULING

Cases referred to:

1. *Nahar Investment Ltd V Grindlays Bank International (Z) Ltd (1984) ZR81*

Legislation referred to:

1. *The Environmental Management Act, No. 12 of 2011 of the Laws of Zambia*

This is a ruling on the 6th Appellant's application seeking a further adjournment of the hearing of the appeal to enable him take steps to ***"regularize the appeal."*** Ms. Siansumo the Learned Counsel for the 6th Appellant sought the said adjournment on the premise that they had just been retained by the 6th Appellant and after conducting a search discovered that no record of appeal was filed.

In moving for the said adjournment Ms. Siansumo intimated that her intention was to later bring the necessary applications to firstly compel the 1st Respondent to provide the proceedings for the decision appealed against and thereafter apply for leave to file a record of appeal.

Mr. Yangailo the Learned Counsel for the 2nd Respondent expressed shock that the 6th Appellant had changed Advocates as no notice to that effect had been served on him. He nonetheless opposed the application for an adjournment insisting that the appeal be determined on the merit as per the affidavits and arguments already filed on record.

It was Mr. Yangailo's contention that the Appellants had more than sufficient time to file the record of appeal which had been outstanding since 2014. He pointed out that my order of 20th August, 2019 had

given the Appellants sufficient time to file any other documents they intended to rely on to prosecute their appeal.

Mr. Yangailo lamented that *justice delayed was justice denied* especially that the appeal had been before the late Justice I.T.C Chali who had adjourned it for judgment. He thus opposed the application for an adjournment contending that no good reasons had been furnished. And in reacting to the issue of the record of appeal, Mr. Yangailo submitted that the absence of a record of appeal rendered this appeal incompetent and prayed for its dismissal including all orders made pursuant to it.

In reply Ms. Siansumo reiterated her prayer for an adjournment and contended that the 6th Appellant would suffer an injustice if he was not allowed to file a record of appeal and the appeal be determined on its merits.

Mr. Ndhlovu, the Learned State Counsel representing the 1st to 5th Appellants came late and was not aware that the 6th Appellant had retained new Counsel.

I have considered the application for an adjournment and taken into account the submissions of Counsel. In considering the said application, it is important to give a brief background of this appeal.

This appeal was filed on the 4th day of February, 2014 appealing against the decision of the Minister of Lands, Natural Resources and Environmental Protection made on the 17th January, 2014 allowing the 2nd Respondent to carry out large scale mining activities in the Lower Zambezi National Park. The said appeal was purportedly filed

in terms of the provisions of the Environmental Management Act, No. 12 of 2011 of the Laws of Zambia.

Although the purported ***"notice of appeal"*** did not state the provisions under which same was filed, the appeal was presumably filed in terms of the provisions of section 116(2) of the said Act which provides as follows: -

> ***"A Person aggrieved with the decision of the Minister may appeal to the High Court within thirty days of the decision."***

It is important to mention that whilst the matter was presided over by the late Justice I.C.T Chali, he had ordered that he would determine the appeal on the basis of affidavits and submissions. The Appellants appealed to the Supreme Court against the said order, which appeal was by consent of all the parties withdrawn on the 29th January 2015. By the said Consent Order, this matter was referred back to the then Judge for it to be heard and determined in accordance with the High Court (Appeals) (General) Rules, Statutory Instrument No. 6 of 1984 hereafter referred to as the Appeal Rules.

The parties then agreed that the appeal be determined on the affidavits and filed their respective submissions and heads of arguments. Judgment was then reserved but regrettably Justice I.C.T Chali passed on without rendering a Judgment.

The matter attended before me and as such was to commence *de novo* for which the initial status conference was held on the 19th June, 2019 but only Counsel for the 2nd Responded was in attendance. I then

rescheduled another status conference for the 16th July, 2019 which was attended by Counsel for the Appellants and the 2nd Respondent. It was at that conference where I informed the parties that the appeal was commencing *de novo* before me as they intimated that they had been waiting for a Court Judgment. The parties then reiterated that they would rely on the arguments and submissions already on record.

However, seeing that the 2nd Respondent had filed a further supplementary affidavit in opposition and supplement skeleton arguments, I granted the Appellants an opportunity to supplement their papers if they so wished and the appeal was set down for hearing on the 20th August, 2019.

On the 20th August, 2019, however, Counsel for the Appellants had not filed any supplementary papers and applied for another extension of time within which to do so. I granted the Appellants the extension of time sought and ordered that their papers if any be filed by close of business on or before 13th September, 2019 and the appeal was set down for hearing on 14th October, 2019.

It was on the 14th October, 2019 that Ms. Siansumo by a notice of change of Advocates filed into court on 11th October 2019 appeared as the new Counsel for the 6th Appellant and sought an adjournment the subject matter of this ruling.

I wish to point out at the outset that an adjournment is not granted willy nilly as a matter of right but resides in the discretion of the Court. Therefore, there must be material before Court on which such discretion can be exercised judiciously.

Are there any cogent reasons advanced by the 6th Appellant to enable the exercise of my discretion in his favour? Regrettably, no such reasons have been advanced except under the pretext that he has engaged new Advocates.

What is interesting is that Ms. Siansumo intimated that they noticed after conducting a search that there was no record of appeal filed in this matter and they wished to take steps to ***"regularize the appeal."*** There is on record a search form dated 16th August, 2019 by Ms. Siansumo's firm confirming her words that they had conducted a search on the record.

It is, however, surprising that from August 2019 when the search was conducted the 6th Appellant's Advocates had known that there was no record of appeal filed and did nothing about taking the steps they now intimate they need to take. It is not that the 6th Appellant has just joined to these proceedings or that he had no Counsel. To the contrary, the 6th Appellant had been party to these proceedings from inception in 2014 and was ably represented by State Counsel. Similarly, it is not that it was only Counsel for the 6th Appellant who had noticed that no record of appeal had been filed in this matter. The 2nd Respondent in its final submission filed into Court on 11th February, 2015 attacked the regularity of his appeal in those submissions the basis upon which the judgment was initially reserved. It is the same submissions the parties intimated they would rely on for me to determine the appeal.

As earlier pointed out, the Appellants knew firstly when they executed a Consent Order withdrawing the appeal from the Supreme Court that this appeal ought to be prosecuted and determined in accordance with the said Appeal Rules. In short the Appellants knew from early in 2015 that they needed to regularize their appeal and comply with the Appeal Rules.

I agree with counsel for the 2nd Respondent, that there are no cogent reasons advanced for seeking an adjournment. This is more so that the issue of there being no record of appeal is not new but had been pointed out and brought to the Appellants attention four (4) years ago but they did nothing about it. The Appellants had more than sufficient time to regularize this appeal but sat on their rights.

There is, therefore, no cogent reason advanced the basis upon which I could exercise my discretion and grant the adjournment sought. And it's not like the 6th Appellant had already made the necessary applications but only expressed his wish to do so through his Counsel.

The application for an adjournment is hereby denied. This, therefore, entails that I must proceed to determine the appeal on its merits on the basis of the affidavits and arguments on record or dismiss the appeal as prayed by Mr. Yangailo.

A Court can only determine the merits of an appeal where there is an appeal properly so called. In fact, it's elementary that an appeal is determined on the basis of the record of proceedings of the decision appealed against. This appeal is no exception.

It follows, therefore, that this appeal is incompetent before me as there is no record of appeal filed by the Appellants. And this fact was acknowledged by Counsel for the 6th Appellant and that was why an adjournment was sought to cure this fatal defect. I cannot therefore determine the merits of the appeal when there is no record of appeal.

The provisions of the said Appeal Rules governing this appeal are very instructive on the obligation of the Appellants to prepare and file a record of appeal. Rule 5(1) thereof enacts in peremptory terms as follows:-

> ***"The Appellant shall prepare the record of appeal which shall be bound in book form with an outer cover of stout paper and may, if extensive, be in more than one volume."***

And this obligation on the Appellant to prepare a record of appeal does not remain indefinitely but must be done expeditiously if the provisions of Rule 5(6) are anything to go by which enacts as follows:-

> **"6.** ***The Appellant shall within thirty days of receiving the certified copies referred to in the sub-rule (5) forward-***
>
> ***(a) to the Registrar the record of appeal and such number of copies thereof as the registrar may determine."***

The Supreme Court had long provided valuable guidance on the need to timeously prepare and file records of appeal within periods allowed when it held in the case of **NAHAR INVESTMENT LTD V GRINDLAYS BANK INTERNATIONAL (Z) LTD**[1] as follows:-

> ***"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, appellants have a duty to make prompt applications 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 delayed 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."***

In this matter, the 2nd Respondent grounded its opposition to the appeal on the very basis that there was no record of appeal. In short, the 2nd Respondent had already moved for the dismissal of the appeal for want of prosecution by its final submissions of 2015 long before the 6th Appellant wished to rectify the fatal omission.

I, therefore, come to the conclusion that this appeal is incompetently before me as there is no record of appeal filed the basis upon which, like every other appeal, it ought to be determined. I further find that the period from 2014 when the appeal was lodged to date amount to an inordinate and inexcusable delay of a failure to lodge a record of appeal.

Consequently, this appeal is hereby dismissed for want of prosecution and as a result the order staying the decision of the Minister to allow the 2nd Respondent to carry out large scale mining in the area concerned is hereby discharged forthwith.

Costs are awarded to the 2nd Respondent which costs are to be taxed in default of agreement.

Leave to appeal to the Court of Appeal is hereby granted.

Dated at Lusaka this 17th day of October, 2019.

C. Chanda
JUDGE