



MALAWI JUDICIARY
IN THE MALAWI SUPREME COURT OF APPEAL
SITTING AT LILONGWE
MSCA CIVIL APPEAL NO. 38 OF 2013

BETWEEN
LANDMARK DEVELOPMENT LIMITED-----APPELLANT
AND
MINISTER OF LANDS, HOUSING AND
URBAN DEVELOPMENT----- RESPONDENT

CORAM: HON. JUSTICE F.E. KAPANDA SC, JA
HON. JUSTICE H.S.B. POTANI JA
HON. JUSTICE J. KATSALA JA
HON. JUSTICE M.C.C. MKANDAWIRE JA
HON. JUSTICE S.A. KALEMBERA JA
HON. JUSTICE D. MADISE JA
HON. JUSTICE R. MBVUNDULA JA
Madalo Banda, Counsel for the Appellant
Mr Shaibu/Tchukambiri, Judicial Researchers
Mrs Chimtande/Minikwa, Recording Officers
Mrs Namagonya/Msimuko, Court Reporters

JUDGMENT

MKANDAWIRE JA,

1. This matter came before us by way of an appeal filed by the appellant on 2nd August 2011. The respondent has not opposed the appeal.

2. In the Court below the appellant's claim was for compensation expenses incurred in the construction of Landmark Development Limited/Century Hotel which was stopped by the Government. On 17th of December 2003 the appellant applied for permission from Lilongwe City Assembly to develop a hotel on plot number 18/45 to be known as Century Hotel. All necessary approvals were given by the City Assembly.

3. On 18th April 2007 the Development Manager of Lilongwe City Assembly directed that all development activities at the plot be stopped on the ground that they were sluggish and manifesting lack of seriousness on the part of the developer. The appellant appealed to the Town and Country Planning Board. On 6th of February 2008 the Board found in favour of the appellant. The Board went further to suggest to the Lilongwe City Assembly that the proper procedure was to act under section 42(1) of the Town and Country Planning Act by revoking the development permission in which case appropriate compensation had to be paid to the appellant.

4. On 21st March 2011, the appellant sought for Judicial Review at the High Court in Lilongwe. On 24th July 2011, the Court below dismissed the appellant's application for Judicial Review on the basis that the application was out of time.

5. The appellant being dissatisfied with the decision of the Court below appealed to the Court on the following grounds:

i) The Court below erred in proceeding to hear the respondent in the absence of the applicant and declining to grant an adjournment of the hearing notwithstanding the existence of cogent reasons for the same and the absence of objection on the part of the respondent

ii) The Court below erred in holding that the applicant's claim was filed out of time and that it is statute barred.

6. Before we could proceed hearing the substantive appeal, the court engaged the appellant's Counsel if the grounds of appeal were properly drafted as required by

Order III Rules 2,3 and 4 of the Supreme Court of Appeal Rules. The Court also wanted to know from Counsel if the application for judicial review was filed within the stipulated time under Order 53 of the Rules of the Supreme Court 1999.

7. Counsel for the appellant addressed the court at some considerable length on these issues. Counsel conceded that the two grounds of appeal were not in conformity with Order 111 rule 2 of the Supreme Court of Appeal Rules. Counsel even went further by distancing herself from these grounds of appeal by saying that she did not take part in the drafting of these grounds. It was Counsel's submission that she took over the matter from previous Counsel and proceeded to prosecute the appeal based on the two grounds which she had found on the file.

8. On the issue of application for Judicial Review, Counsel conceded that she could not produce any evidence to show that there was an application in the court below to extend the time within which to file the application. Counsel also informed the Court that she could not produce any Court Order authorizing extension of time.

9. It is clear that in view of the recent decision of this court¹ the requirement under Order III Rules 2, 3 and 4 of the Supreme Court of Appeal Rules is that the appellant must specifically indicate if it is raising a point of law or a point of fact. Our preliminary survey of these grounds of appeal has given us some anxiety and misgivings about the manner in which they were framed. In the case of **JTI Leaf (Malawi) Limited vs Kad Kapachika**² This court had this to say:

"The framing of the grounds of appeal is an area governed by rules of procedure. Bearing these rules in mind, we have wondered whether some of the grounds of appeal that have been tabled before us are up to the standard that is set and expected by the law. It is for this reason that we found that it would be prudent for us to go through the process of first vetting each of the argued ground of appeal against the applicable rules before we can commit ourselves to determining any particular ground(s). We shall thus have to so proceed because it is our belief that the rules that are available for the framing of grounds of appeal were not put into the procedures of this court for decorative purposes. They were meant to be followed, and they were for the purpose of making appeals understandable and thus easing the work of the court, as well as that of the parties in the handling of the appeals they relate to. It is this exercise, we trust, that will help us to determine, in a sound and reliable way,

¹ JTI Leaf (Malawi) Limited –vs-Kad Kapachika MSCA NO 52 of 2016(Unreported)

² Supra

whether the *prima facie* anxiety and misgivings we have entertained with some of the appellant's grounds of appeal are, or are not, well founded."

10. It is our considered view that indeed the rules that are available for the framing of the grounds of appeal were put there for a purpose. These rules were meant to be followed by the court users. These rules have to be followed to the letter.

11. The starting point is Order III rule 2 of the Supreme Court of Appeal Rules. This legal provision is directly material and relevant in this vetting exercise. In the case of **Dzinyemba t/a Tirza Enterprises-vs- Total (Malawi) Ltd**³ we emphasized and demonstrated that it is vitally important that appellants observe and conform with this provision whenever they are faced with an obligation to draw up grounds of appeal in matters that are to come to this court. If the appellants choose to ignore requirements this provision has elaborately laid down, they do so at their own risk. It should be made clear that in such event, it is open to the court to find the filed grounds of appeal wanting.

12. Starting with sub-rule 2 of the Order and rule in issue, it will be seen that it is a legal requirement that whenever an appellant intends in a ground of appeal to allege a misdirection or an error of law, that such party must clearly state the particulars of such a misdirection or error. Therefore, for any appellant to merely assert a misdirection or an error of law, without due particulars of such a misdirection or error, is wrong. Such an assertion raises an empty ground of appeal.

13. The next provision is sub-rule (3) of the same Order which has been couched in the pre-emptory words: "The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively" (emphasis supplied).

14. Our view is that what this sub-rule demands is so blunt and clear that it leaves no room for doubt or speculation. An appellant that does not comply with this rule ought to know that he/she is doing what is not permissible. Such an appellant should be ready for the consequences.

15. In the case of **Professor A. Mutharika and Electoral Commission-vs- Dr. Saulos K. Chilima and Dr Lazarus M. Chakwera**⁴ this court emphasized the

³ MSAC Civil Appeal No. 6 of 2013

⁴ MSCA Court Appeal No 01 of 2020

importance of appellants conforming to the requirements of Order 111 rule 2 of the Supreme Court of Appeal Rules. In this case the court stated:

“In **Dzinyemba t/a Tirza Enterprises v Total (Mw) Ltd** MSCA Civil Appeal No. 6 of 2013 (unreported), this court emphasized that grounds of appeal must conform to the requirements of Order 111 rule 2 of the Supreme Court of Appeal Rules. The rules require that the grounds must be precise and concise; they must not be argumentative; and that the grounds of appeal must state clearly whether they are based on law or facts, so that this Court and the other party (or parties) to the proceedings are able to appreciate precisely what the appellant is appealing against. This Court also emphasized that the grounds of appeal that do not comply with Order 111 rule 2 of the Supreme Court of Appeal Rules may be struck out by the Court on its own motion or on application by a respondent in the proceedings.” (Emphasis supplied)

16. It is to be observed that under its sub-rule (4) save for allowing an exception on issues of weight of evidence, this provision does not permit for the filing of any ground of appeal that is vague or which is in general terms, or one which does not disclose reasonable ground of appeal. The court has got the power to struck off such a ground either of the court’s own motion or on an application for such a remedy.

17. Going through the two grounds of appeal filed in the notice of appeal in this matter, it is very clear that there was substantial non-compliance with Order 111 rule 2,3 and 4 of the Supreme Court Rules. We have also looked at other considerations underpinning our decision. Our view is that this matter is not the first one in which this court has articulated what is required of any appellant when preparing grounds of appeal. We have in several decided cases guided parties to proceedings on the mandatory requirements of Order 111 rule 2 of the Supreme Court of Appeal Rules. We can therefore have no lenient approach to non-compliance with the Rules of Procedure. Litigants especially where represented by counsel, should thoroughly inform themselves of the provisions of the Statute and the Rules and heed the warning expressed in the judgments of this court. The Supreme Court of Appeal is the highest court of the land. It is therefore expected that those who have audience before it should be very conversant of the Rules and Procedure before it and its jurisprudence. No leniency should be expected except on good cause shown. Such good cause has not been shown by the appellant’s Counsel.

18. It is clear that grounds (i) and (ii) do not direct the Court on whether the error is based on law or fact. These grounds of appeal do not comply with the rules and

the test set out by this court in the **Dzinyemba t/a Tirza Enterprise v Total (Mw) Ltd⁵** and **Professor Arthur Peter Mutharika and Dr. Saulos Klaus Chilima and Dr. Lazarus McCarthy Chakwera.⁶**

19. On the issue of whether there was an Order of the Court below extending the time for application for Judicial Review, it is imperative here to refer to what Order 53 Rule 4(1) of the Rules of the Supreme Court provides. It says:

“An application for permission to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.”

20. After going through all the documents that were filed herein and after hearing the submissions made by Counsel for the appellant, it was very clear that the grounds for the application first arose in 2009. The application for Judicial Review was however made in 2011, some two years later. The appellant’s Counsel miserably failed to produce evidence of any Court Order to show that the Court below had extended the time for filing the application. We find that this matter was actually dead at the time the appellant was filing the application for Judicial Review. It is therefore a matter on which we cannot proceed to entertain. Even if the matter was live at the time the application was made, we found that the two grounds of appeal do not comply with Order 111 Rule 2 sub rules 1 to 4 of the Supreme Court of Appeal Rules.

21. We therefore dismiss this matter. We do not see any need for making any order as to costs because the respondent did not file any documents and did not turn up for hearing.

Delivered in open Court this 4th day of May 2023 at Lilongwe



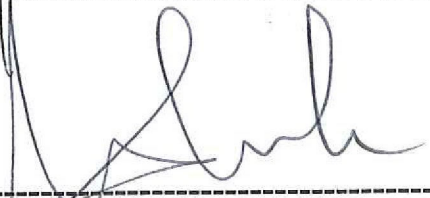
HON. JUSTICE F.E. KAPANDA SC JA

⁵ (Supra)


⁶ (Supra)



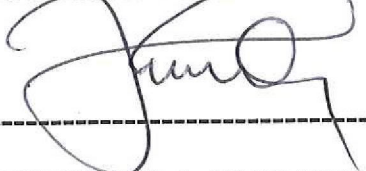
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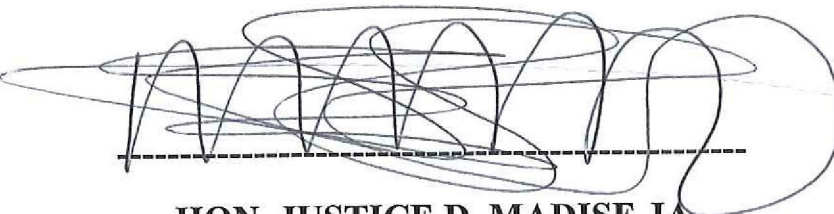
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