

IN THE SUBORDINATE COURT
OF THE FIRST CLASS
FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)

CRMP/0014/2023

BEFORE:

D. CHIBWILI ESQ

BETWEEN:

THE PEOPLE
V
GARDNER SYAKANTU + 7



For the People:

Ms. M. C. Nalwenga
Mr. D. Ngwira
Ms. T. Shumba all of the Anti Corruption
Commission

For the Accused:

Mr. W. Luhanga
Mr. J. Zimba
Mr. M. C. Hamachila
Mr. G. K. Mwamba
Mr. L. Linyama
Mr. M. Chileshe
Mr. W. Chinyemba

RULING

AUTHORITIES REFERRED TO:

1. Statutory Instrument No. 10 of 2024
2. Citibank Zambia Limited V Suhayl Dudhia Appeal No. 6 of 2022

BACKGROUND

When the court sat to conduct its business on the 21/08/2024, the prosecution applied for an adjournment on account that PW5, who was on the stand for cross examination was indisposed and not available.

They produced a sick note from the Coptic Hospital in support of their application.

The defence did not object to the application for an adjournment and indicated through Counsel L. Linyama for Accused 8 that they had intended to apply for an adjournment themselves and had filed into court that very morning a Notice of Motion accompanied by an affidavit in support, questioning the jurisdiction of this court to continue hearing this matter when in their view, the statutory period within which this matter should have been heard had expired.

The matter was then adjourned to 26/08/24 on account of PW5 being unwell which condition I found to be exceptional and compelling and in line with Rule 10 S.I. Number 10 of 2024.

The adjournment was also to enable the state to file a response to the Notice of Motion raised by the defence.

On 26/08/24, the parties were allowed to augment their written submissions with oral submissions.

THE DEFENCE'S SUBMISSIONS

The gist of the defence's application is centered on Rule 3 of S.I. No. 10 of 2024.

The said rule states:

"3(1) The court shall, subject to this rule hear and determine a matter before the court within 5 months from the date on which plea is taken or an appeal is filed."

(2) Despite Sub-rule (1), the court may, where the court considers it necessary, on application by a party or at the court's instance, extend the period specified

Normally, a reply is restricted to issues brought up in a response and no new issues should be canvassed because the other party will not have an opportunity to respond to those issues raised in a reply.

Be that as it was, the state did file their response to the main issue which they augmented with oral submissions.

Both sides cited numerous authorities which I have endeavored to look up and I must admit that a number of them have assisted in my arriving at the decision I have reached.

The defence submitted another application in the alternative through Counsel for Accused 2, Mr. J. Zimba, which was a constitutional reference in terms of Article 128 (2) of the Constitution as emended.

The question, according to Mr. Zimba, for Constitutional reference was whether were a statute in a Criminal matter has prescribed time within which a matter should be determined and the rights and liberties of an individual is at stake, is the court permitted to extend such a time without due regard to the right to a fair trial?

The Counsel further stated that the application was neither vexatious nor frivolous and that he was aware of the Supreme Court's ruling in the case of Citi Bank V Dudhia App No. 6 of 2022, but that that case arose out of interpretation of the Industrial and Labour Relations Act provision which was Civil in Nature.

The Rule in S.I. No. 10 are of a Criminal nature and that they are being tested for the first time hence the defence's desire to have the matter referred to the High Court for their Constitutional interpretation.

THE STATE'S RESPONSE

In their response, the State submitted that even if the time within which this matter could have been determined has expired, the court has power to extend

it as the Rules provide for such extension and that that power to extend may be exercised even when the prescribed period has expired.

They referred this court to Section 37 of the Interpretation and General Provisions, Chapter 2 of the Laws of Zambia which states:

“37 where in any written law a time is prescribed for doing any act or taking any proceeding and power is given to a court or other authority to extend such time, then unless a contrary intention appears, such power may be exercised by the court or other authority although the application for the same is not made until after the expiration of the time prescribed.”

It was the State's further submission that no prejudice will be occasioned to the accused if time was extended and that the accused have not demonstrated such prejudice for the matter to be referred to the High Court.

On the defence's reliance on the case of *Hakainde Hichilema + 1 and Edgar Changwa Lungu and others*, for their submission on the computation of time, the State submitted that that case was distinguishable because the Article 101 (5) which provided for time limits did not have a provision on extension of time.

On the other hand, Rule 3 which prescribes the time with which these proceedings should be concluded has a provision for extension of time.

The State further urged this court to adopt the purposive rule of construction when interpreting the provision in Rule 3 of S.I. No. 10/2024 as guided by the Supreme Court in the Case of **Citibank Zambia Limited V Suhayl Dudhia SCJ No. 6 of 2022**.

It was the state's submission that applying the Literal Rule in reading Rule 3 will give an absurd result and urged the court to follow the recent guidance by the Supreme Court.

Otherwise the above were the condensed arguments by both the defence and the State.

ANALYSIS AND DECISION

I have read that written submissions and heard the oral arguments by both sides which were spirited on both sides.

In my view, the issues to be decided by this court are:

- (i) When did time start running in these proceedings for the defence to say it has expired?
- (ii) If indeed time has expired, what next and what happens to the charges against the Accused and the Accused themselves?

To answer the first question, Rule 3 States that the court shall hear and determine a matter within 5 months from the date on which plea is taken.

It should be appreciated that this case commenced in 2022 before the Criminal Procedure Code (Economic and Financial Crimes Court) Rules 2024 came into being or existence.

However, the rules became applicable to all those matters commenced prior to the coming into effect of the Rules on 01/03/2024 by virtue of Rule 17 of S.I No. 10/24 which States:

17 "Any proceeding or appeal pending immediately before the commencement of these rules shall be deemed to have commenced under, and continued in accordance with these Rules"

Thus, this matter was deemed to have been commenced under and continued in accordance with the rules despite the fact that at that time pleas had already been taken and trial had commenced and there was a witness on the stand.

I called for a status conference where it was agreed between the parties on when the state were to file their list of witnesses and their statements and the documents they were going to rely upon during trial in compliance with the provisions of Rule 4 and Rule 5 of the S. I. No. 10 of 2024.

The state confirmed having complied with the above rules on 02/04/24 and before trial could continue, the defence raised issues by way of Notices of Motion on which rulings were rendered and matter was set for continued cross examination of PW1 on 13/05/24.

In my view and interpretation of the Rules, the period of 5 months commenced with the putting of a witness on the stand after the filing of the documents into court and serving them on the defence.

Under Rule 3, plea is only taken after the filing of the documents and serving them on the defence, after which a pre-trial conference is called in accordance with Rule 6.

Rule 6 (3) states:

"A Court shall, on conclusion of the pretrial conference issue directions which shall include:-

- (a) The dates of commencement of trial and
- (b) The length of the prosecution's case.

Because this was a carry-over case and rules became applicable by virtue of Rule 17, some of the preliminary steps became unnecessary because they had been overtaken by events. Thus, I started calculating the commencement date in this case as the first day a witness took the stand after the status conference which was on 13/05/2024.

Calculating the 5 months period from that date, it shall come to an end on or about 13/09/24.

If am wrong and the calculation of the 5-month period should have started at an earlier date, the question of my jurisdiction having lapsed or about to lapse can still be addressed.

The Supreme Court has guided on the question of the jurisdiction in matters that contain statutory time limits like in this case, in the case of **Citibank Zambia Ltd V Suhayl Dudhia Appeal No. 6 of 2022.**

Both the defence and the State have referred to this case but have interpreted it differently.

Although that was a Civil Case, the Principles of interpretation of Statutes with time limits discussed therein are of universal application.

The Supreme Court went to great lengths to review several authorities including some of its own before arriving at the conclusion that a literal interpretation, should not be used when interpreting a provision in a statute with a time limit. They went on to guide that the courts should also look at the reasons which have caused the delay in disposing of the matter within the stipulated time frame.

They said at paragraph 5.46 that;

“it would be fallacious and unfair to adopt an unbending attitude that portrays and cause of delay as inconsequential, and that provided such delay exceeds one year it should result in the termination of proceedings”.

In the case before me, since its reallocation to my court in July, 2023, the case has suffered nearly 20 adjournment the majority of which were as a result of the defence raising numerous applications which necessitated adjournments to enable the court to come up with rulings.

These undoubtedly have contributed to the slow progress experienced in this and other similar cases and consequently made it impossible to conclude the matters within the 5 months' time frame.

I now come back to the question of time lapse before the case is concluded.

Like in the Citibank case referred to above, the Rules do not say what the consequences of not concluding the matter within 3 months will be but it provides for an extension of the period by 45 days on application by any of the parties or by the Court's own volition.

At paragraph 5.48 in the Citibank case the Supreme Court said:-

"we must stress that using the literal rule of construction to imply loss of jurisdiction is absurd because when jurisdiction is deemed lost, without a possibility of rehearing, there is an injustice occasioned because litigants go without resolving their dispute."

That could never have been the intention of the Industrial and Labour Relation Act."

I have looked at the possible injustice or prejudice that can be caused to the Accused if the 5-month period was extended.

The extension itself is provided for in the Rules, Rule 3(2) therefore no prejudice will be occasioned.

The Supreme Court ruled that there was no loss of jurisdiction at the end of the prescribed period and that the judgment delivered after that period had expired, was not a nullity.

Applying that same reasoning to this case, there is no loss of jurisdiction on my party at the purported expiry of the 5-month period and trial will continue as before as I have extended that period for 45 days in terms of Rule 3 (2) of the S.I. No. 10 of 2024.

Further, the alternative application of referring the matter to the High Court for determination of Constitutional issues cannot stand because no Constitutional issue has arisen here.

What we have are procedural issues which in my view have been resolved by the holding in the Citibank Zambia Ltd case referred to above.

DELIVERED IN OPEN COURT AT LUSAKA.


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HON. D. CHIBWILI
CHIEF RESIDENT MAGISTRATE

