

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL NO. 119/2021

BETWEEN:

HILDAH LOMBANYA

(T/A Hilomu Travel and Car Hire)

AND

GETRUDE SAVIYE KAYOMBO

(T/A Ilanga Travel and Car Hire)



APPELLANT

RESPONDENT

CORAM: KONDOLO, MAKUNGU AND NGULUBE JJA ON 15th June, 2023
and on 27th June, 2023.

For the Appellant: *M. Phiri and P. Phiri - Messrs Makebi Zulu Advocates*

For the Respondent: *C. C. Mwanza and L. Kabaso - Messrs K.B.F & Partners*

J U D G M E N T

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to: -

1. *Flynn vs the Minister for Justice, Equity and Law Reform (2017) ECA, 178*
and Anglo Irish Beef Processor vs Montgomery (2002) IESC 60
2. *Chibote Limited, Mazembe Tractor Company Limited, Minestone (Zambia) Limited, Minestone Estate Limited vs Meridien Biao Bank Zambia Limited (in liquidation) SCZ Number 11 of 2002*
3. *Allen vs Sir Alfred Mc Apine and Sons Limited (1968) QB 229*
4. *G4S Security Solutions Zambia Limited v Lupupa Kabezya Lewis – Appeal No. 170/2015.*

5. *Sultan Hardware Limited v William Murithi Kimani and Charles Odongo – Civil Appeal No. 150 of 2012*
6. *Brimbank Automotive Pty Limited and Jeffrey Moloney v Patricia Murphy & Magistrates Court of Victoria – [2009] VSC 26*
7. *Chellarams Plc v Pashtun Nigeria Limited and Umaru Farouk Aliyu – CA/K/106/2013*
8. *Enock Kavindele & Another v Bologna Properties Limited and Another – CAZ Appeal No. 136/2020*
9. *Macfoy v United Africa Company Limited [1961] 3 All ER 1169*
10. *Owners of the Motor Vessels Lillian S v Caltex Oil (Kenya) Limited (1989) KLR*
11. *Antonio Ventriglia & Another v Finsbury Investments Limited [2020] ZMSC 100*
12. *Elizabeth Catherine Cook v Moses Mpundu – Appeal No. 207/2015*
13. *Dipak Kumar Patel and Yakub Patel v David Kangwa Nkonde – Selected Ruling No. 33 of 2017*
14. *Hu Herong & Luo Feng v John Kapotwe & Kalwa Food Products Limited*
15. *John Chisata v The Attorney General*

Legislation referred to: -

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*

1.0 INTRODUCTION

- 1.1 This is the appellant's appeal from a Ruling of Honourable Mr. Justice C. Zulu, High Court Judge-General Division that was delivered on 2nd December, 2020 in which the Court rejected the application for an adjournment and dismissed the action for want of prosecution.

2.0 THE BACKGROUND TO THE DISPUTE IN THIS APPEAL

2.1 On 30th May 2013, the appellant, who was the plaintiff in the lower Court commenced an action by writ of summons and statement of claim against the respondent (defendant in the lower Court) and claimed the following reliefs:

- i. A sum of K106,000,000.00 or KR106,000.00 being the value of the air tickets that the defendant collected from the plaintiff's firm which she has not paid to date plus interest at the current bank rate; and*
- ii. Costs and any other relief the Court may deem fit.*

2.2 The respondent counter claimed for the sum of KR23,875.00 for having over paid the appellant.

2.3 The matter was set down for trial and the appellant filed the bundle of pleadings on 23rd July 2013. When the matter finally came up for trial on 22nd December 2020, Counsel for the appellant informed the Court that he was not ready to proceed because it was discovered that a document was missing during the pre-trial meeting. The respondent's Counsel also informed the Court that he was unable to proceed as he was only retained on 27th November 2020.

2.4 The Court ruled that in accordance with Statutory Instrument No. 58 of 2020, adjournments are only allowed where the party proffers compelling reasons. The Court went on to state that the parties had failed to show sufficient reasons to warrant the adjournment and then dismissed the action for want of prosecution.

3.0 THE APPEAL

3.1 Being dissatisfied with the Ruling of the High Court, the appellant appealed to this Court advancing one ground of appeal couched as follows-

1. *"The High Court erred in both law and fact when it dismissed the Plaintiff's action for want of prosecution."*

4.0 THE APPELLANT'S CONTENTIONS

4.1 The parties filed heads of argument which they relied upon at the hearing of the appeal.

4.2 The appellant's advocates contended that the lower Court erred in law and fact when it dismissed the matter for want of prosecution. It was argued that the lower Court relied on the rules that provide for adjournments as provided for under Statutory Instrument Number 58 of 2020. According to

Counsel, the rules in the SI do not empower Courts to dismiss matters for want of prosecution but they empower the Court to decline to grant applications for adjournment and proceed with the hearing or trial.

- 4.3 Reference was made to Order 33 Rule 1 of the High Court (Amendment Rules) 2020 (Statutory Instrument Number 58 of 2020) which provides that-

"A Judge shall not grant an application for an adjournment except in compelling and exceptional circumstances.

- 4.4 It was argued that the power of a Judge under this rule does not extend to dismissing a matter for want of prosecution and that in dismissing the matter, the Court was extreme and deprived the appellant of it's right to be heard.

- 4.5 It was contended that the Court had exercised discretionary power and should have exercised it judiciously. It was argued that on the day the matter was dismissed for want of prosecution, both parties were in Court and that this showed that the plaintiff had the desire to prosecute the matter, contrary to the Court's conclusion.

4.6 The cases of *Flynn vs the Minister for Justice, Equity and Law Reform (2017) ECA, 178* and *Anglo Irish Beef Processor vs Montgomery*¹ were referred to, where the Court laid out the factors to be considered when dismissing a matter for want of prosecution as-

- (1) *whether the delay in the prosecution was inordinate and inexcusable*
- (2) *whether or not due to the passage of time a fair trial is no longer possible*
- (3) *whether or not the defendant is or will be prejudiced by the delay.*

4.7 It was argued that none of these factors were present in this matter as there was no delay in its prosecution nor was there passage of time that would negate the possibility of a fair trial. It was argued that the plaintiff sought to file a supplementary bundle so that the matter could be tried fairly.

4.8 The case of *Chibote Limited, Mazembe Tractor Company Limited, Minestone (Zambia) Limited, Minestone Estate Limited vs Meridien Biao Bank Zambia Limited (in liquidation)*² was referred to, where the Supreme Court stated that-

"It is trite law that there are two distinct but related principles in circumstances in which an action can be dismissed for want

of prosecution. Normally when a party has been guilty of intentional and contumelious default and where there has been inordinate and inexcusable delay in the prosecution of the action”.

4.9 It was submitted that there was no application by the defendant to dismiss the matter for want of prosecution and that the plaintiff was never heard on whether the matter should be dismissed for want of prosecution.

4.10 The case of *Allen vs Sir Alfred Mc Alpine and Sons Limited*³ was referred to where the Court stated that

“The power to dismiss should be exercised only where the Court is satisfied that the default is intentional and contumelious.

- (i) That the default has been intentional and contumelious.*
- (ii) That there has been inordinate and inexcusable delay on the part of the plaintiff.*
- (iii) That such delay will give rise to a substantial right that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause prejudice to the defendants or to both parties.*

4.11 It was contended that there was no unreasonable delay, no malafides and no improper conduct on the part of the appellant to warrant the dismissal of the matter for want of prosecution.

4.12 It was argued further that the respondent has not suffered prejudice nor was there inordinate delay in the prosecution of the matter. It was contended that the plaintiff has suffered prejudice by not having the matter heard on the merits. We were urged to allow the appeal so that the matter can be prosecuted and heard on the merits.

5.0 THE RESPONDENT'S CONTENTIONS

5.1 The respondent argued that the broad issue which this appeal raises is whether the lower Court properly exercised its discretion when it dismissed the appellant's application for an adjournment. Counsel for the respondent summarised the activities leading up to the subject appeal. He submitted that the matter came up for a status conference before Justice Yangailo on 18th September 2017 where dates were agreed upon in the presence of all parties concerned.

5.2 It was submitted that the matter was adjourned on various occasions, after that before Justice Zulu on 17th January 2020, 3rd June 2020, 27th July 2020, 4th September 2020 and to 2nd December 2020 when the matter was finally dismissed for want of prosecution. We were referred to the case of **G4S Secure Solutions Zambia Limited v Lupupa Kabezya Lewis⁴** where

the Supreme Court held that proceedings before our Courts are Court driven and the Court is expected to be in control of the proceedings which is part of proper case management. We were also referred to cases from other commonwealth jurisdictions such as *Sultan Hardware Limited v William Murithi Kimani and Charles Odongo*,⁵ *Brimbank Automotive Pty Limited and Jeffrey Moloney v Patricia Murphy and Magistrates Court of Victoria*⁶ and *Chellarams Plc v Pashtun Nigeria Limited and Umaru Farouk Aliyu*.⁷

- 5.3 It was submitted that the Court can grant an adjournment if the refusal to do so would cause injustice to the party applying. It was also submitted that the decision to grant an adjournment lies entirely in the discretion of the Court and the appellate Court should be reluctant to interfere with this discretion. It was submitted further that “*justice delayed is justice denied*” and that the interests of justice require that justice should be administered in a timely and cost-effective manner.

6.0 REPLY

- 6.1 In reply, Counsel for the appellant argued that the lower Court misapplied the provisions of *Order XXX Rule 1 of the High Court Rules* as the import of this provision is not to dismiss an

action for want of prosecution, but deal with an application for an adjournment. It was argued that the lower Court therefore exceeded its jurisdiction. We were referred to the cases of ***Enock Kavindele and Another v Bologna Properties Limited and Another***,⁸ ***Macfoy v United Africa Company Limited***⁹ and ***Owners of the Motor Vessels Lillian S v Caltex Oil (Kenya) Limited***¹⁰ where the consequences of a Court not having jurisdiction were discussed. To buttress the argument that the Court exercised power it did not possess, we were referred to the case of ***Antonio Ventriglia and Another v Finsbury Investments Limited***.¹¹

7.0 ANALYSIS AND DECISION OF THIS COURT

- 7.1 We have considered the arguments and the ruling of the Court below. The question that this appeal raises is whether the lower Court was justified in dismissing the matter for want of prosecution.
- 7.2 We must hasten to mention that the High Court has inherent jurisdiction to dismiss a matter for want of prosecution on its own volition or by application of a party. The rationale for this inherent power was discussed by the Supreme of Zambia in the

case of *Elizabeth Catherine Cooke v Moses Mpundu*¹² where it was held that:

"The art of modern adjudication must be cognizant of the fact that the resources of the Courts are limited and as such the door to justice must only be open to litigants who are willing to prosecute or defend their actions."

7.3 As to what amounts to want of prosecution, the Supreme Court of Zambia stated the following in the case of *Dipak Kumar Patel & Yakub Patel v David Kangwa Nkonde*:¹³

"A dismissal for want of prosecution on the other hand imputes inordinate delay, absence of diligence or interest to proceed with an action."

7.4 We are also further guided by the case of *Chibote Limited Mazembe Tractor Limited & Others v Merdien Biao Bank (Zambia) Limited (In liquidation) (supra)* where the Supreme Court stated that an action could be dismissed for want of prosecution when a party has been guilty of intentional and contumelious default, and where there has been inordinate or inexcusable delay in the prosecution of an action.

7.5 The question therefore, is whether in the circumstances of this case, it can be said that there was inordinate and inexcusable delay in the appellant prosecuting his case.

7.6 It is evident from the record that there was delay in this matter since its commencement in 2013. In fact, in arriving at its decision, the lower Court recounted the history of the delay by stating that the matter was commenced on 30th May 2013 and bundles of documents were settled on 23rd July 2013. The Court concluded that there was lack of seriousness in prosecuting the matter and that there were no compelling reasons to grant an adjournment.

7.7 We opine that the lower Court should not have proceeded as it did. We are fortified by the case of *Hu Herong & Luo Feng v John Kapotwe & Kalwa Food Products Limited*¹⁴ where the Supreme Court of Zambia stated that:

“Although Courts have inherent jurisdiction to dismiss matters for want of prosecution, this should only be done in exceptional circumstances.”

7.8 The practice therefore is that there should be exceptional circumstances to warrant dismissal of a matter for want of prosecution, as it is desirable for matters to be settled on full merit after hearing the evidence rather than to defeat them through procedural technicalities. This was the view taken by

the Supreme Court of Zambia, in the case of *John Chisata v The Attorney General*¹⁵ where it was held as follows:

"We cannot stress too strongly what we have said in the past, that such cases should wherever possible, and where there is no prejudice to either party by some irregularity, be allowed to come to trial so that the issues may properly be resolved. Interlocutory orders which prevent this should be avoided."

7.9 It is our considered view that because both parties were present at the hearing, the lower Court was at fault for dismissing the action for want of prosecution as no exceptional circumstances were shown for the dismissal to prevent the trial Judge from simply refusing the adjournment and proceed to hear the matter.

8.0 CONCLUSION

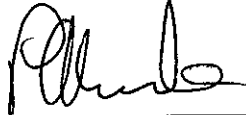
8.1 For the foregoing reasons, the appeal is hereby allowed. We order that this matter be sent back to the High Court for trial before another Judge as it was not heard on its merits. We award costs to the appellant, to be taxed in default of agreement.



M. M. KONDOLO, SC.
COURT OF APPEAL JUDGE



C. K. MAKUNGU
COURT OF APPEAL JUDGE



P. C. M. NGULUBE
COURT OF APPEAL JUDGE