

CHRISTIAN DIEDRICKS

v

KONKOLA COPPER MINES PLC

HIGH COURT

KABUKA, J.

19TH DECEMBER, 2011.

2010/HN/28

[1] Civil procedure - Review - Whether persistent and unjustifiable failure to attend Court amounts to abuse of Court process.

This was an application by the plaintiff for special leave to review an order of the Court by which order this matter was dismissed.

Held:

1. Order 39 of the High Court Rules provides for review of any Court judgment or decision upon such grounds as the Court shall consider sufficient. And upon such review, re-hear the case wholly or in part and to reverse, vary, or confirm the previous decision.

2. Where the application for review is not made within the 14 days period allowed, special leave is required under Order 39, Rule 2, for one to pursue the application for review.

3. The Order of dismissal of the matter sought to be set aside was basically a default pre-emptory order for procedural non-compliance with the time limit set by Court.

4. Persistent issuance of applications which Counsel repeatedly failed to attend on scheduled dates of hearing without any justifiable explanation whatsoever, even in the absence of any prejudice to the other party involved, constitutes conduct falling within the ambit of abuse of the process of Court.

5. The proper and regular administration of business in general before the Courts should not be disrupted as a result of breaches of the rules of the Court which occurred without any justification whatsoever, and notwithstanding the absence of any prejudice to the other party involved.

Cases referred to:

1. Water Wells Limited v Jackson (1984) Z.R. 98.
2. Beachley Property Limited v Edgar (1996) The Times 18.
3. Leeds Zambia Limited v Mazzonite (Z). S.C.J. No 9 of 2001 (unreported)

4. Kymbi v Zulu (2009) Z.R. 183.

Legislation referred to:

- 1 High Court Act, cap 27, Orders 35, Rule 2 and 39, Rule 2.
2. Rules of the Supreme Court (1999) volume 1 Orders 3/5/4, and 3/5/12.

C. Magubbwi of Messrs Magubbwi and Associates for the plaintiff.

No appearance for the defendant.

KABUKA, J.: The chronology of events leading to the present application is as follows. On 18th March, 2010, I issued Orders for Directions requiring the plaintiff to deliver his reply within 14 days. As there was non-compliance with the said order, and no further step taken by the plaintiff in prosecution of the matter, a Notice of Status Conference was issued, returnable on 5th August, 2010. There was no attendance by the parties on that date, and I accordingly struck off the matter with liberty to restore within 14 days. In default thereof, the matter was to stand dismissed for want of prosecution.

The following day, the 6th of August, 2010, the plaintiff's advocates filed a Notice of Restoration which had provision for inserting a date of hearing. The 17th September, 2010, at 08:30 hours was accordingly indicated as the new date for the Status Conference. However, there was again no attendance by the parties on the said scheduled date. This time upon striking out the matter, I further ordered that unless an application to restore was made within 14 days, the matter was to stand dismissed for want of prosecution.

The application to restore the matter to the active cause list was made on 30th September, 2010. In the supporting affidavit sworn by plaintiff's counsel, he explained he was unaware the matter was coming up as it had not been diarised. At the hearing of this second application to restore, on the 5th of October, 2010, the parties were yet again, not in attendance, and the said application was struck off with liberty to have it restored within 14 days.

On 19th of October, 2010, the plaintiff filed a third application described as: summons for leave to restore an application for restoration of matter to the active cause list pursuant to Order 35, rule 2, of cap. 27.

Order 35 r. 2 to the extent that it is relevant states that:

"If the plaintiff does not appear, the Court shall unless it sees good reason to the contrary, strike out the cause.....and make such order as to costs in favour of any defendant appearing as seems fit."

In the supporting affidavit, counsel explained he was unable to attend Court in time for the application as his motor vehicle had earlier, the same morning, developed a fault.

The application was given 29th October, 2010, at 08:30 hours as the date and time, for hearing. There was no attendance by the parties at the hearing, on this occasion, as well. This time, I dismissed

the restoration application for want of prosecution. I further granted leave to appeal.

On the 3rd of December, 2010, plaintiff's counsel issued the fourth application, couched as inter-parte summons for special leave for review of the Court's dismissal order of 29th October, 2010. At the hearing of this application, the plaintiff's advocates were in attendance, but there was no attendance on the part of the defendant, and no affidavit in opposition was filed. On the strength of an affidavit of service which was on record, I allowed the plaintiff's advocate to proceed with his application.

In his oral submissions, learned counsel Mr. Magubbwi relied on the reasons disclosed in his affidavits as earlier highlighted. Counsel submitted, in seeking review, that it was in the interest of justice that the matter is allowed to be heard on the merits. In so submitting, he relied on the case of *Kumbi v Zulu* (4) and observed that the Supreme Court in the said case adjudged that even in instances where a matter is dismissed on account of failure to abide by a condition that the Court sets, the Court still has discretion to extend time in which that order may be abided, and hear the matter on the merits. Counsel claimed he had found himself in that situation, and urged the Court to restore the matter to the active cause list.

I have considered the application, submissions, and authority cited by counsel against the backdrop of the events leading to the dismissal order, which the plaintiff now seeks to be reversed.

Order 39 under which the application has been brought provides for review of any Court judgment, or decision upon such grounds as the Court shall consider sufficient, and upon such review, re-hear the case wholly, or in part, and to reverse, vary, or confirm, the previous decision.

Where the application is not made within the 14 days period allowed, special leave is required under O.39 r. 2 for one to pursue the application for review. In his affidavit in support of the application, plaintiff's counsel contends he was unable to apply for review of the order that dismissed the application for restoration within the 14 days period required, due to pressure of work, as he had been spending most of his time out of Ndola. Hence, the special leave sought pursuant to O.39 r 2.

I am mindful that the order of dismissal of the matter sought to be set aside was basically a default pre-emptory order for procedural non-compliance with the time limit set by Court. In this regard, I have noted the two guiding principles to be considered for dismissal of matters for want of prosecution generally, being:

(1) that the rules of the Court, as well as rules of practice devised in the public interest are intended to promote the expeditious dispatch of litigation, and must be observed.

(2) Ordinarily, the plaintiff should not be denied an adjudication of his claim on the merits by reason of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate: RSC O.3/5/12.

The general approach of the Courts is clearly to advocate the main objective of the law, which is

the advancement of justice. In essence, these were the principles enunciated in the case of *Water Wells Limited v Jackson* (1), where the Supreme Court held that:

Although it is usual on an application to set aside a default judgment not only to show a defence on the merits, but also give an explanation of that default, it is the defence on the merits which is the more important point to consider. If no prejudice will be caused to a plaintiff by allowing the defendant to defend the claim, the action should be allowed to go to trial.

The case of *Kumbi* (supra) relied on by counsel, also followed the same principles. In that case the appellant initially defaulted in filing his record of appeal to the Supreme Court. On application, this period was extended by Court, but the appellant again defaulted, for reasons that were fully explained, and which the Court found feasible, acceptable, and thus justifiable. I find these facts distinguishable from the present case.

There was here a pre-emptory order which was repeatedly, and persistently breached by the plaintiff. On the particular facts hereof, I find the reasons advanced of lack of diarizing; pressure of work and sudden mechanical fault inexcusable. The explanation advanced by Counsel that his motor vehicle developed a sudden fault, in this era of mobile phones, was also one which could have been easily communicated to the Court. For undisclosed reasons, this was not done.

The issue here, is whether, in considering the consequences of a party's failure to comply with a procedural requirement within the timeframe ordered by the Court, the only consideration is possible prejudice that maybe occasioned to the rights of the parties who might otherwise have meritorious cases. Particularly the party not at fault.

On the facts of this case, I find that, persistent issuance of applications which counsel repeatedly failed to attend on scheduled dates of hearing without any justifiable explanation whatsoever, even in the absence of any prejudice to the other party involved, constitutes conduct falling within the ambit of abuse of the process of Court. I am here persuaded by the decision in the case of *Beachley Properties v Edgar* (2), wherein the Court of Appeal in England, gave this different dimension in approach to defaults of such a nature when it observed that:

.....the proper and regular administration of business in general before the Courts should not be disrupted as a result of breaches of the rules of the Court which occurred without any justification whatsoever and notwithstanding the absence of any prejudice to the other party involved..... (emphasis supplied)

In the same vein, our own Supreme Court in the case of *Leeds Zambia Limited v Mazzonites Limited* (Z), refused to set aside a judgment obtained without hearing the defence case on account of persistent defaults and lack of a meaningful defence, holding:

“.....the record showed a history of default and lapses.....coupled with the absence of any meaningful defence to his claim for professional fees, there can be no justification for a re-trial or for setting aside the judgment.”

What the Beachley Properties case (supra) has addressed in my view, is the category of procedural default disclosing contumelious disregard for rules of the Court, laxity, casua,l or a cavalier approach, thereto. I find plaintiff's counsel's persistent failure to attend Court for the reasons advanced, unjustifiable, and in the circumstances of this case, that they constituted an abuse of the process of Court.

Leave to review the Court order of 29th October 2010 is accordingly declined. As there was no attendance by the defendant at all the scheduled hearings, I make no order as to costs, and leave to appeal, is hereby granted.

Application refused.