IN THE HIGH COURT OF ZAMBIA **2005/HP/0748**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

NEW HORIZON PRINTING PRESS LIMITED **PLAINTIFF**

AND

WATERFIELD ESTATES LIMITED **1ST DEFENDANT**
COMMISSIONER OF LANDS **2ND DEFENDANT**

For the plaintiff: *Mr. W. Mwenya of MessrsLukona Chambers.*
For the 1st defendant: *Ms. A.L. Chimuka of MessrsDudhia and Company.*
For the 2nd defendant: *Ms. B. Chilufya, State Advocate, in the Attorney General's Chambers.*

RULING

Cases referred to:

English cases

1. *Saunders v Pawley [1885]14 Q.B.D. 234.*
2. *Schafer v Blyth [1920] 3 K.B. 143.*
3. *Rattam v CamaraSamy [1964] 3 ALL E.R. 933.*

Zambian cases:

1. *Nkhuwa v Lusaka Services Limited (1977) Z.R. 43.*
2. *Industrial Finance Company Limited v Jacques and Partners (1981) Z.R. 75.*
3. *Nahar Investments Limited v Grindlays Bank International (Zambia) Limited (1984) Z.R. 81.*
4. *Ashikkalis and Another v Apostolopoulos (1988 – 1989) Z.R. 86.*

5. *Zambia Revenue Authority v Shah (2001) Z.R. 60.*
6. *Chirumba v union Bank Zambia Limited (in Liquidation) (2003) Z.R. 50.*
7. *Kumbi v Zulu (2009) Z.R. 183.*

Legislation referred to:

1. *High Court Act, cap 27, Order 3; rule 2, and 35, rule 2.*
2. *Supreme Court Rules (White Book) Order 3, rule 5 and, 35 rule 2 91); and 2 (2).*
3. *Act number 6 of 2011; An Act to amend the English Law (Extent of Application) Act.*
4. *Act number 7 of 2011; an Act to amend the High Court Act.*

Works referred to:

1. *Jackson and Powell on Professional Liability, seventh edition (Sweet and Maxwell, 2012).*
2. *Bullen and Leake Precedents of Pleadings, seventeenth edition, Volume 2, (Thomson Reuters (Professional) UK Limited, 2012).*

This action was commenced on 26th July, 2005. The plaintiff's claims are as follows:

1. An injunction requiring the defendants to forthwith remove all such materials, and works that it has brought on to the plaintiff's land, and to restrain the defendant's whether by himself, his servants, or agents, or otherwise howsoever form entering the plaintiff's land, or in any way interfering with the plaintiff's quiet enjoyment of possession, and ownership thereof;
2. A declaration that the plaintiff is entitled as registered and absolute beneficial owner to immediate possession of the premises at subdivision C and D of stand 8634, Lusaka, and an ancillary order for the occupiers to give up possession to the plaintiff;
3. Aggravated damages for trespass;

4. Any other relief deemed appropriate and just by the Court; and
5. Costs.

After several interlocutory proceedings that included an application for an injunction; dismissal of the action for want of prosecution; special leave to review the order to dismiss an action for want of prosecution; application to stay execution pending review of order dismissing the action; and several adjournments, the matter was eventually set down for trial on 4th April, 2011.

Despite the fact that all the parties to this action were notified through their respective counsel about the trial date, only the plaintiff appeared. And on the material date, counsel for the plaintiff made an application to proceed with the trial in the absence of the defendant. I allowed the application on the basis of Order 35 Rule 2 of the High Court Rules, and Order 35, Rule 1 (2) of the Supreme Court Rules (White Book). Order 35, Rule 2 of the High Court Rules enacts as follows:

"2 If the plaintiff does not appear, the court shall, unless it sees good reason to the contrary, strike out the cause (except as to any counter-claim by the defendant) and make such order as to costs in favour of any defendant appearing as seems just.

Provided that, if the defendant shall admit the cause of action to the full amount claimed, the court may if it thinks fit give judgment as if the plaintiff had appeared."

Order 35, Rule (1) (2) of the Supreme Court Rules provides as follows:

"1.(2) If, when the trial of an action is called, on one party does not appear, the judge may proceed with the trial of the action, or any counterclaim in the absence of that party."

Thus granted that this action has been pending in Court for a period in excess of six years without being tried on its merits, I decided to proceed with the trial of the action in the absence of the plaintiff. I was fortified in taking this course of action by Order 35, rule 2 of the High court Rules, and Order 35, rule 1 (2) of the Supreme Court Rules, referred to above.

When the trial commenced on 4th April, 2011, the sole witness for the 1st defendant was only examined in chief. The 2nd defendant did not to call any witness. At the conclusion of the trial, counsel for the 1st defendant undertook to file written submissions within 14 days form 4th April, 2011. Counsel for the 2nd defendant in turn undertook to file the submissions within 14 days upon receipt of submissions from the 1st defendant's counsel.

On 14th April, 2011, the plaintiff filed summons for leave to: arrest judgment; set aside the order allowing trial to proceed in the absence of the plaintiff; set aside proceedings held on 4th April, 2011, and for an order to recommence the trial. The summons were issued pursuant to order 3, Rule 2, of the High Court Rules, and Order 35, Rule 2 92) of the Rules of the Supreme Court (1999) edition.

The application is supported by an affidavit dated 14th April, 2011. The affidavit is sworn by Mr. ShawkyHemeidan. Mr. Hemeidan is the Managing Director of the plaintiff company. He deposed as follows: that the engaged MessrsButaGondwe and Associates, and MessersChibundi and company as the plaintiff's advocates in this matter. He confirmed that by a letter dated 18th March, 2011, from Messrs Musa Dudhia and Company, the plaintiff's advocates were informed that this matter was scheduled for trial on 4th April, 2011. As a result, he instructed MessrsChibundi, and Company to adjourn the

matter on the material date as he had just arrived in the country from Lebanon. He therefore required more time to prepare for trial, and secure witnesses for the plaintiff company.

When the matter was eventually called for hearing on 4th April, 2011, the advocates for the plaintiff company were not present before the Court, despite having been instructed by the plaintiff company to request for an adjournment. Notwithstanding, the trial proceeded as scheduled, in the absence of the plaintiff's advocates, and the witnesses. And thus the case of the defence was heard. The case was closed. And the Court reserved judgment.

When he came to learn about this development, he approached Mr. Chibundi of MessrsChibundi and company, and enquired from him why he did not comply with the instructions to adjourn. He was not given any satisfactory explanation by Mr. Chibundi. Following that development, he elected to engage MessrsLukona Chambers to act for the plaintiff company. He has been informed by MessrsLukona Chambers, and which advice he verily believes, that it is legally tenable to obtain the following reliefs: to arrest the judgment; set aside the order of the Court that allowed the trial to proceed n the absence of the plaintiff on 4th April, 2011; and an order to recommence the proceedings.

He believes that the plaintiff company has a good case against the defendants. And therefore the company has good reasons to seek the recommencement of the proceedings. Lastly, that I order aside to have the matter heard, the plaintiff company is seeking leave to set the order that allowed the trial to proceed in the absence of the plaintiff company.

The application is opposed. The affidavit in opposition was sworn by Ms Abigail LungoweChimuka; counsel for the 1st defendant. Ms. Chimuka deposed as follows: this matter was originally scheduled for hearing on 25th November, 2010. On that date, Mr. Gondwe of MessrsButaGondwe and Associates was present in Court. The trial of the action could not however proceed despite the fact that the defendants were ready to proceed, with the trial. Instead, Mr. Gondwe applied for an adjournment on the ground that Mr. Hemeidan was out of the country. In response, I allowed the application and the matter was adjourned on 18th March, 2011.

In the meanwhile, on 31st January, 2011, the plaintiff appointed, MessrsChibundi and company as additional advocates for the plaintiff company.

On 18th March 2011, the matter could not again proceed to trial because the plaintiff's advocates were not in attendance. For the second time, I reluctantly adjourned the matter to 4th April, 2011. In so doing, I lamented at the fact that the matter had been on the cause list for a very long time. I also directed MsChimuka to notify the plaintiff's advocates about the re-scheduled return date; 4th April, 2011.

On 4th April, 2011, when this matter was called for hearing, the plaintiffs' advocates were again absent without any explanation whatsoever. In the circumstances, an application was made by the 2nd defendant to proceed with the trial in the absence of the plaintiff. I allowed the application.

During the trial, Mr. Chibundi of MessrsChibundi and company walked into Court during the examination in chief of the second witness for the 1st defendant; DW2.

Mr. Chibundi apologized for coming to Court late. He also informed me that he was ready to proceed with the matter since Mr. Hemeidien was within the precincts of the High Court. In view of the assurance, I stood down the matter for a few minutes. And requested Mr. Chibundi to summon Mr. Hemeidan. Surprisingly, he was unable to do so. As a result, I resumed the trial. Understandably, Mr. Chibundi elected to leave the Court.

Ms. Chimuka maintains as follows: that there has been deliberate and inordinate delay on the part of the plaintiff to prosecute this matter. And the record attests to the fact that most of the adjournments were at the behest of the plaintiff. In any event, the plaintiff has not advanced any cogent, or compelling reason(s) to warrant the grant of the reliefs sought. The reasons advanced by Mr. Hemeiden that he had instructed his counsel to adjourn the matter when it was scheduled for hearing on 4th April, 2011, because he had travelled out of the country and that he required more time to prepare for trial, and secure witnesses, are not content and compelling reasons. Ms. Chimuka urged me to dismiss the application.

On 14th June, 2011, the plaintiff filed an affidavit in reply. The affidavit was sworn by Mr. NehmetallahMaukheiber. Mr. Maukheiber claims that he is a “partner” in the plaintiff company. Presumably, he meant that he is a director because the term “partner” in the context of a company is obviously anomalous. Be that as it may, Mr. Maukheiber deposed as follows: that it is undesirable for counsel to swear an affidavit in a highly contentious matter

as the present one. Because it amounts to giving evidence from the bar. He urged me to expunge the affidavit of Ms. Chimuka form the record. I agree that it is highly undesirable for advocates to file affidavits relating to contentious matters (See *Chikuta v Chipata Rural Council (1974) Z.R. 241).* However, in view of the fact that the essential facts relating to this application are not contentious, I will not expunge the affidavit by Ms. Chimuka.

Mr. Maukheiber contends that it is undeniable fact that the plaintiff had not opportunity to prepare for trial with their legal counsel as stated in the affidavit in support. Further, he contended that the Managing Director of the plaintiff company, who is the principle officer of the company, only returned in the country on 3rd April, 2011, and required time to secure witnesses to prepare for trial. A copy of the relevant leaf of the passport, was produced in evidence to prove that Mr. Hemeidan had travelled out to the country. Mr. Moukheiber maintained that the plaintiff company has a strong desire to conclude this matter despite the difficulties it encountered with its previous advocates, which culminated in the events of 4th April, 2011.

The inter-partes application to arrest judgment; to set aside the order allowing the trial to proceed in the absence of the plaintiff; to set aside proceedings, and for an order to recommence the trial: was scheduled to be heard on 20th April, 2011. On the material date, counsel requested for leave to complete the exchange of pleadings and to file written submissions. I allowed the application and directed that the exchange of pleadings, and filing of submissions should be completed not later than 16th May, 2011.

On 4th May, 2011, Mr. Mwenya of MessrsLukona Chambers filed the submissions on behalf of the plaintiff. Mr. Mwenya submitted as follows that this an application by the plaintiff made pursuant to Order 3, Rule 2 of the high Court Rules, and Order 35, Rule 2 (2) of the Rules of the Supreme Court, in which the plaintiff company is seeking leave of the Court to set aside the proceedings held on 4th April, 2011.

In support of the preceding submissions, Mr. Mwenya relied on a plethora of authorities. The first is the case *Kumbi Zulu (2009) Z.R. 183*. He pointed out that in the *Kumbi case*, the Supreme Court held that by statute the Zambian Courts are now bound to follow all the rules and procedures stated in the 1999 edition of the White Book. Mr. Mwenya stressed that the Rules of the Supreme Court of England, no longer perform the function of filing lacuna or gaps in our practice rules. Instead, the Rules of the Supreme Court have now been integrated on incorporated in our practice rules by statute. And are therefore binding on the Zambian Courts of law. Mr. Mwenya submitted that under Order 35, rule 2 (1) of the Rules of the Supreme Court, the Court has discretion to determine an application to set aside any judgment, order or verdict, obtained when one party does not appear before the Court. Mr. Mwenya also pointed out that it is mandatory that an application referred to in Order 35, Rule 2 (1) of the Rules of the Supreme Court is filed within the period of seven days. However, if this requirement is not complied with, then Order 3, Rule 5 of the Rules of the Supreme Court relating to extension of time may be resorted to, as is the case in this matter.

Mr. Mwenya recalled that the reasons for failing to comply with Order 3, Rule 2 (2), are spelt out in the affidavit of Mr. Hemeidan. Mr. Mwenya submitted that the object of the Rule is to give the Court the discretion to extend time in order to avoid infliction of injustice on the parties. In this regard, my

attention was drawn to the cases of *Schafer v Blyth [1920] 3 K.B. 143, and Saunders v Pawley [1885] 14 Q.B.D. 234*. In the circumstances, Mr. Mwenya urged that leave be granted to enable the Court hear the reasons why the plaintiff did not attend Court on 4th April, 2011.

The second case I was referred to, is the case of *Zambia Revenue Authority v Shah (2001) Z.R. 60.* Mr. Mwenya submitted that in the *Shah case*, the Supreme Court held that cases should be decided on the basis of their merit or demerit as the case may be. And at the same time rules of Court must befollowed. However, the effect of a breach will not always be fatal if the rule is merely regulatory or directory. Mr. Mwenya contends that in this case the failure to comply with Order 35, Rule 2 (2) of the Rules of the Supreme Court is not fatal. The rule in question is merely regulatory. And is intended to allow the grant of leave where an applicant has failed to comply with the rules to enable the Court determine the main matter on its merit.

The third case that was drawn to my attention is the case of *Chirumba v Union Bank Zambia Limited (in Liquidation) (2003) Z.R. 50.* Mr. Mwenya submitted that in the *Chirumba case,* it was held that leave should be granted to give the appellant an opportunity to provide proof of his claim at trial. Lastly, Mr. Mwenya, drew my attention to Order 3, Rule 2 of the High Court Rules. Order 3, Rule 2 enacts that:

"Subject to any particular rules, the Court, or a judge may in all causes and matters, make any interlocutory order which it, or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not."

Mr. Mwenya argued that the essence of this Rule is that Courts must be seen to do an promote justice. Justice in this case may entail that both parties be

accorded the right to be heard by the Court. And that where due to a technical, or procedural default on one party to the proceedings, the Court must be seen to address the inequality by invoking this Rule. Mr. Mwenya, urged me to allow the application for leave to enable the main matter be determined on its merits.

On 18th May, 2011, Ms. Chimuka filed the submissions on behalf of the 1st defendant. First, Ms. Chimuka conceded that the rules of the Court do permit the Court to set aside an order made in the absence of the plaintiff. The stepsin her argument are as follows: Order 35, Rule 2 (1) of the Supreme Court Rules enacts as follows:

"Any judgment, order or verdict obtained where one party does not appear at trial may set aside by the Court, on the application of that party, on such terms as it thinks just."

Order 35, (2) (2) goes on to provide that: *"An application under this rule must be made within seven days after the trial."*

Ms. Chimuka submitted that the plaintiff failed to file the application within the period stipulated by law. Ms. Chimuka went on to submit that the factors to be taken into account when considering an application to set aside an order obtained in the absence of the other party are listed in Order 35 (1) (1) of the Rules of the Supreme Court as follows:

i) Where a party with notice of proceedings has disregarded the opportunity of appearing, and participating in the trial, he will normally be bound by the decision;
ii) Where the judgment has been given after a trial it is the explanation for the absence of the absent party that is most

important; unless the absence was not deliberate but was due to accident, or mistake, the Court will be unlikely to allow a re-hearing;

iii) Where the setting aside of judgment would entail a complete re-trial on matters of fact which have already been investigated by the Court, the application will not be granted unless there are very strong reasons for doing so;

iv) The Court will not consider setting aside judgment regularly obtained; unless the party applying enjoys real prospects of success;

v) Delay in applying to set aside is relevant particularly if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it;

vi) In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered; where he has failed to comply with orders of the Court, the Court will be less ready to exercise its discretion in his favour;

vii) A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences; and

viii) There is a public interest in there being an end to litigation, and not having the time of the Court occupied by the two trials particularly if neither is short.

In view of the foregoing, Ms. Chimuka argued as follows: the plaintiff was duly notified about the new date of hearing, and an affidavit of service was duly filed into Court on 23rd March 2011. Thus having been informed of the proceedings, the plaintiff neglected to attend Court at the stipulated time of the hearing. As a result, I allowed the application to proceed in the absence of the plaintiff. Further, the plaintiff's advocates did not file a notice to adjourn, or indeed an application to stand down the matter. These factors,

MsChimuka argued, should be taken into account in considering the application by the plaintiff.

Furthermore, the plaintiff's advocates conducted themselves in a manner that was casual and discourteous to the Court. The conduct was also calculated at delaying and frustrating these proceedings. This conduct was exhibited on more than one occasion. This is conduct evidenced mala fides on the part of the plaintiff. In this regard, my attention was drawn to the case of *Ashikkalis and Another v Apostolopoulos (1988 – 1989) Z.R. 86*. In the *Ashikkaliscsse*, the prosecution of this action in Court, or impropriety in the way an action is defended.

MsChimuka also argued that although the plaintiff alluded to the improper conduct of its previous advocates as being the cause of the trial proceeding in its absence, the proper course of conduct for the plaintiff to take, is to resort to its erstwhile advocates for redress for any loss that it has sustained as a result of their failure to carry out its instructions. In aid of this submission, the case of *Industrial Finance Company Limited v Jacques and partners (1981) Z.R. 75,* was cited. The Industrial Finance Company Limited case, was an action for damages for professional negligence. And the Court held that where a lawyer has instructions, he has a professional duty to protect his client. Where it is shown that the advocate has failed to exercise his duty at the expense of his client, then the lawyer must make good and pay for the damage.

Further, MsChimuka submitted that this matter has been outstanding for over six years, without been tried. It is therefore in the public interest that litigation must come to an end. In support of this submission, my attention was drawn to the case *Nahar Investments Limited v Grindlays Bank International (Zambia) Limited (1984) Z.R. 81.* In the Nahar Investments

Limited case, it was held that litigation must come to an end. And that it is highly undesirable that a party to litigation should be kept in suspense because of the dilatory conduct of another.

Furthermore, my attention was brought to the case of *Nkhuwa v Lusaka Services Limited (1977) Z.R. 43,* where the Supreme Court held that Rules of Court must prima facie be obeyed. And in order to justify a Court in extending the time during which some step in procedure requires to be taken, there must be some material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the Rules. That is to provide a time table for the conduct of litigation. In this case, the plaintiff has not advanced any cogent reason(s) for the extension, save for the alleged negligence of its erstwhile advocates. The alleged negligence of the erstwhile advocates, it was argued, should not prejudice the 1st defendant's case.

Lastly, MsChimuka argued that the prejudice that would arise if the application was allowed is a factor of paramount importance. This is so because this action was commenced in 2005. And the 1st defendant has at all material times made itself available for the hearings in a bid to bring this matter to a close. In this respect, it is noteworthy that the representative of the 1st defendant resides in Ndola. And he has had to travel to Lusaka for all the hearings at a great cost to the 1st defendant. Thus the 1st defendant has incurred considerable expense in defending this matter. Therefore, the 1st defendant should not be inconvenienced any further by the plaintiff's dilatory conduct, and neglect of the Rules of Court. In addition, MsChimuka argued that the plaintiff obtained an injunction over the disputed property,

restraining the 1st defendant form developing the property. This state of affairs explains, MsChimuka submitted, the rather cavalier, or leisurely manner in which the plaintiff company is prosecuting this matter, to the detriment of the 1st defendant. In view of the foregoing, I was urged to dismiss the application.

I am indebted to counsel for their well researched submissions. The question that fall to be determined is this application is whether or not I should exercise my discretion in favour of the plaintiff, and grant leave to file an application to set aside the proceedings held on 4th April, 2011; arrest the judgment; and order the resumption of the trial. The application is premised on Orders 3, and Rule 2 of the High Court Rules. And Order 35, Rule (2) (2) of the Rules of the Supreme Court.

To recapitulate, Order 3, Rule 2, of the High Court Rules is expressed in these words:

"Subject to any particular rules, the Court or a judge may in all causes, and matters make an interlocutory order which it, or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not."

Order 35, rule 2 (1) of the Supreme Court Rules provides that:

"Any judgment, order or verdict obtained where one party does not appear may be set aside by the Court on the application of the party, on such terms as it thinks just."

Order 35, rule 2, (2) of the Supreme Court Rules goes on to provide that:

"An application must be made within 7 days after the trial."

It is instructive to note at the outset that I have the discretion under Order 3, Rule 5, of the Rules of the Supreme Court, to enlarge, or extend the period of

7 days (see *Schafer v Blyth [1920] 3 K.B. 140)*. Order 3, rule 5 is expressed in the following terms:

"5 (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required, or authorized by these rules, or by any judgment, order, or direction to do any act in any proceedings.

2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

3) The period within which a person is required by these rules, or by any order, or directions to serve, file, or amend any pleading, or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.

4) In this rule reference to the Court shall be construed as including references to the Court of appeal a single Court and Registrar of civil appeals."

Resort to the Rules of the Supreme Court, by Mr. Mwenya has been justified on the basis of the decision of the Supreme Court in the case of *Kumbi v Zulu (2009) Z.R. 183*. In essence, the *Kumbi case* held that the entire provisions ofthe Rules of the Supreme Court as expounded in the 1999 edition, including the decided cases, are now part of Zambian law by statute. And as such, are binding on the Zambian Courts. It is instructive to note that the legal position has since been reversed. It was reversed by Act Number 6 of 2011, which took effect on 12th April, 2011. In reserving the legal position, paragraph (e), that incorporated the Rules of the Supreme Court in our statutory laws, has been deleted from section 2 of the Amended English Law (Extent of Application) Act. the net effect, and current legal position, is that the Rules of the Supreme Court no longer enjoy the force of law in themselves. The Rules of the Supreme Court are only to be resorted to, where it is necessary to fill a lacuna, or gap in our rules of procedure. To this extent section 10 of the High Court Act was also repealed and replaced by

Act Number 7 of 2011; an Act to amend the High Court Act. section 10 of the High Court Act is now expressed in these words:

"2 (1) The jurisdiction vested in the Court, shall as regards practice, and procedure be exercised in the manner provided by this Act, the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or any other written law, or by such rules, orders, or directions of the Court as may be made under this Act, the Criminal Procedure code, written law, and in default thereof in substantial conformity with the Supreme Court Practice, 1999 (White Book) of the law, and practice applicable in England in the High Court of justice up to 31st December, 1999.

(2) The Civil Court Practice 1999 (Green Book) of England and any civil Court practice rules issues in England after 31st December, 1999, shall not apply to Zambia."

Be that as it may, in the circumstances of this case, Mr. Mwenya correctly albeit fortuitously, resorted to the Rule of the Supreme Court.

I accept the submission by Mr. Mwenya that cases should be decided on their merit. And rules of procedure must be followed. And further that the effect of a breach will not always be fatal, if the rule is merely regulatory, or directory.

Notwithstanding, I also recognize the force in, and defer to the observation of the Supreme Court in the Nkuwa case, that rules of Court must prima facie be obeyed. And in order to justify a Court in extending the time during which some step in procedure requires to be taken, there must be some material on which the Court can exercise its discretion. If this were not the case, then it follows that a party in breach would have an unqualified right to extension of time. And this will in turn defeat the *raison d'tre* for the rules of Court. Namely to provide a time line for the conduct of litigation. (See *Ratham v Cumarasamy [1964] 3 ALL E.R. 933).*

On the facts of this case, the plaintiff has not placed before me any material or advanced cogent reasons that can justify the exercise of the discretion in isfavour. I agree with MsChimuka that the proper course of action for the plaintiff to take in the circumstances of this case is to get the plaintiff's former advocates to account for their failure to attend to the plaintiff's instructions. (cf *Industrial Finance Company Limited v Jacques and Partners (1981) Z.R. 75).* Further, it is instructive to notice the observation of the learned authors of Bullen and Leake and Jacob's Precedent of Pleadings seventeenth Edition, Volume 2, (Thomas Reuters (Professional) UK Limited, 2012) in paragraph 85 – 01 at page 152 as follows:

"Negligence by a professional person can give rise to liability to the victim in contract, or tort. There is usually some contractual arrangement between the claimant, and the professional person whereby the latter come to be appointed to provide professional services in question. Any contract whereby a person was appointed to provide professional services would, in the absence of any exclusion clause contain express, or implied obligations to provide the services with the circumstances. The content of such implied term would almost always be coterminous with the duty of care which such relationship would give rise to as between the parties to the contract."

Further Jackson and Powell, on Professional Liability, Seventy edition (Sweet and Maxwell, 2012) observe as follows in paragraph 11 – 198, at page 850).

"Once proceedings are underway, the claimant's solicitor has a duty to prosecute the action with reasonable diligence. If therefore, the action is struck out for delay such failing to comply with time limits, he will have not defence to an action for breach of duty, unless the client has caused or consented to the delay. It appears that delay by counsel does not afford the solicitor a defence. If counsel is dilatory, the solicitor should regularly chase up, and if no response is forthcoming withdrawn his instructions, and pass them to another barrister "for a more ready response...."

It is also noteworthy that in the English case *Allen v Sir Alfred Mc Alpine and Sons Limited and Another [1968] 2 Q.B. 229,* Lord Denning M.R. observed at page 245 at follows:

"All through the years men have protested at the law's delay and counted it as a grievous wrong hard to bear. Shakespeare ranks it among the whips, and scorns of time. dickens tells how it exhausts finances, patience, courage, hope. To put right this wrong, we will in this Court do all in our power to enforce expedition: and, if need be, we will strike out actions when there has been excessive delay. This is a stern measure. But it is within the inherent jurisdiction of the Court. And the rules of Court expressly permit it. It is the only effective sanction they contain. If a plaintiff fails within the specified time to deliver a statement of claim or to take out a summon of direction, or set down the action for trial, the defendant can apply for the action to be dismissed."

In this case, the affidavit evidence of Mr. Hemeidan clearly shows or reveals that even assuming that the plaintiff's chief representative, Mr. Hemeidanon was not ready for the trial, despite the fact that the trial date had been previously re-scheduled, and notified to the plaintiff well in advance.

In balancing the scales of justice in this matter, I am also obliged to do justice to the 1st defendant. I have already observed that this action was commenced on 26th July, 2005. This matter has therefore been languishing in Court for over six years now. It is in the public interest that litigation should not only come to end; but come to an end expeditiously. The delay of justice is a denial of justice. The representative of the 1st defendant is based in Ndola. He has had to travel frequently; and for a long time to Lusaka to attend to this case at a high cost. Above all, it is also in my opinion not judicious use of Court time, and public resources to allow applications for extension of time on spurious grounds

In view of the foregoing, I refuse the application. And costs follow the event. Leave to appeal is hereby granted.

Delivered this 13th day of January, 2012.

Dr. P. Matibini, SC
HIGH COURT JUDGE.