

**IN THE HIGH COURT FOR ZAMBIA**  
**AT THE PRINCIPAL REGISTRY**  
**HOLDEN AT LUSAKA**

**2003/HP/0836**

(Civil Jurisdiction)

**BETWEEN:**

**PETER CHIKOPELA**

**AND**

**ZAMBIA BATA SHOE COMPANY PLC**



**PLAINTIFF**

**DEFENDANT**

**Before the Hon. Mr. Justice E. M. Sikazwe**

*For the Plaintiff* : *Mr. K. Wishimanga -*  
*Messrs A.M Wood and Company*

*For the Defendant* : *Mr. P. H Yangailo -*  
*Messrs P.H Yangailo and Company*

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**R U L I N G**

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This was an Appeal against the Ruling of the Deputy Director dated 25<sup>th</sup> April 2014.

In the first place, the Court observes that this matter was commenced on 12<sup>th</sup> September 2003 by Writ of Summons. The current Advocates for both the Appellant and the Respondents are not the ones who started this case before his Lordship the now Acting Honourable Deputy Chief Justice, Justice M.S Mwanamwambwa. On 12<sup>th</sup> May, 2004 the Deputy Registrar issued Order for Directions. The case went on before the High Court with some adjournments made from both camps.

Later on, the Court ordered on 10<sup>th</sup> March, 2011 that this case can be handled by a MEDIATOR and it was sent for Mediation.

The matter was at Mediation up to 21<sup>st</sup> June, 2011 when it was sent back to High Court by Primary Mediator, Mr Thomas Martin M. Phiri. The reason given by the Mediator was that there was no appearance by the Plaintiff and Defendant and their Advocates. A Status Conference was arranged for 19<sup>th</sup> October, 2011 by the Court. This time, the Appellant was in person and the Respondents were still with their Advocates Messrs Christopher Russell and Company. Finally the Status Conference was held by the Court on 15<sup>th</sup> February, 2012.

The Appellant was represented by Messrs Pamat Legal Practitioners and no attendance by the Respondent. The Respondents Advocates were given a benefit of doubt for no attendance and the matter

adjourned to 24<sup>th</sup> May, 2012. Again on 28<sup>th</sup> May, 2012 there was a Notice that the Plaintiff had now appointed Messrs Charles Siamutwa Legal Practitioners and they requested for an adjournment of the hearing of the matter. The matter was adjourned to 26<sup>th</sup> June, 2012. On this date there was no attendance by both parties. The Court struck off the matter from the active cause list with liberty to apply for restoration within fourteen (14) days from the date thereof in default of which it shall stand dismissed for want of prosecution.

The matter was quickly restored to active cause list on 23<sup>rd</sup> July, 2012 and later adjourned to 5<sup>th</sup> September, 2012. On this day again there was no attendance from both sides. On 27<sup>th</sup> July, 2012, there was again a change of Advocates by the Respondents to the Current Advocates Messrs P.H Yangailo and Company. The Applicant was still with Messrs Charles Saimutwa Legal Practitioners and the matter was adjourned to 3<sup>rd</sup> October, 2012. The matter was again adjourned to 19<sup>th</sup> March, 2013 until it was heard by the Court on 5<sup>th</sup> June, 2013. Both Advocates were present. The matter was again adjourned to 9<sup>th</sup> July, 2013. The Court then set 30<sup>th</sup> August, 2013 for Ruling. This Court's Ruling on page R5 in the last paragraph reads that:

***“Affidavit evidence before me shows there was indeed an application to dismiss the action which was granted by the Learned Deputy Registrar on 29<sup>th</sup> August 2006. This evidence has not been challenged by the Plaintiff, despite***

***the Court adjourning the matter on two occasions, at Plaintiff's own instance, for the sole objective of allowing him bring evidence to counter the said allegation. In the premises, on the basis of available evidence, I find that this matter was dismissed by order of the Learned Deputy Registrar dated 29<sup>th</sup> August, 2006. The position of the Law is that an order of dismissal of action for want of prosecution, which is not challenged by an application to set aside the said order, is final. The effect of such an order is that it brings litigation to an end. Consequently, I find that having been so dismissed, this matter was concluded by the order of dismissal which was not set aside and is improperly before me."***

Not satisfied with this Ruling, the Appellant came back to Court with new and current Advocates Messrs A.M Wood and Company to set aside the Ruling of 29<sup>th</sup> August, 2006 by the Deputy Director and the Ruling of this Court of 30<sup>th</sup> September, 2013. This Court referred the Application to set aside ruling of 29<sup>th</sup> August, 2006 to the Director Court Operations with liberty that any party dissatisfied with the decision that will be rendered can then proceed by way of appeal to this Court and this was on 7<sup>th</sup> February, 2014.

The Deputy Registrar heard the appeal on 25<sup>th</sup> April, 2014 and declined stating that setting aside the dismissal of 29<sup>th</sup> August, 2006 will prejudice the Respondents greatly and appeal was granted.

This is a brief background of now how this matter is before this Court.

The applicant put up five grounds namely that:

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1. *The Honourable Deputy Registrar misdirected herself in law and in fact when she dismissed the application to set aside the ruling dated 29<sup>th</sup> August 2006 despite the Plaintiff giving unchallenged evidence that he was never served with the summons to dismiss action for want of prosecution and as such the said Order to dismiss his action was done in his absence.*
  2. *The Honourable Deputy Registrar misdirected herself in law and in fact when she dismissed the Plaintiff's application to set aside Ruling dated 29<sup>th</sup> August 2006 despite the Plaintiff giving unchallenged evidence that he took active steps to reconstitute the Court after it was lost.*
  3. *The Honourable Deputy Registrar misdirected herself in law and in fact when she held that an inactive case for more than ten years should be in the archives despite the Plaintiff showing that the case record was lost.*
  4. *The Honourable Deputy Registrar misdirected herself in law and in fact when she dismissed the*

***Plaintiffs application to set aside Ruling dated 29<sup>th</sup> August 2006 despite the Defendant actually conceding that the case record was lost.***

***5. The Honourable Deputy Registrar misdirected herself in law and in fact when she held that setting aside the dismissal of 2006 would greatly prejudice the Defendant when there was evidence on record that the Defendant has a witness who is well versed with the facts herein.”***

In arguing the appeal, the five grounds were presented. In the first ground it was submitted that the learned Deputy Registrar erred and misdirected herself in dismissing the application to set aside the Ruling dated 29<sup>th</sup> August, 2006 despite the Plaintiff giving unchallenged evidence that he was never served with the summons to dismiss action for want of prosecution and as such the said Order to dismiss his action was done in his absence.

In the second and fourth it was argued that the Learned Deputy Registrar misdirected herself in law and in fact when she dismissed the Plaintiff's application to set aside Ruling dated 29<sup>th</sup> August, 2006 despite the Plaintiff giving unchallenged evidence that he took active steps to reconstitute the Court record after it was lost.

In reply, it was argued that the Plaintiff's evidence was challenged in the Ruling of Honourable Justice J.K Kabuka on what she stated that:

***“Affidavit evidence before me shows there was indeed an application to dismiss the action which was granted by the Learned Deputy Registrar on 29<sup>th</sup> August, 2006. This evidence has not been challenged by the Plaintiff despite the Court adjourning the matter on two occasions, at Plaintiff’s own instance, for the sole objective of allowing him bring evidence to counter the said allegation.”***

On the question of reconstituting the file on his own, it was argued that the Plaintiff took more than seven (7) years from 29<sup>th</sup> August 2006, which is the date that the Plaintiff’s matter was dismissed for want of prosecution. Thus it was urged that it amounted to inordinate delay by the Plaintiff. The Plaintiff further could not rely on Order 32 (6) of the Supreme Court Rules (1999 Edition) as the application was not made timeously as so required by the same Order. It was further noted by Honourable J.K Kabuka’s Ruling of 30<sup>th</sup> September, 2013 where she stated that:

***“In addressing the reason I called for a Status Conference, I observed that there appeared to be very little effort being made to prosecute the matter.”***

It was also argued in grounds three and five that the Honourable Deputy Registrar misdirected herself in law and in fact when she held that an active case for more than ten years should be in the

archives despite the Plaintiff showing that the case record was lost and that setting aside the dismissal of 2006 would greatly prejudice the Defendant when there was evidence on record that the Defendant has a witness who is well versed with the facts herein.

In reply it was argued that the Honourable Deputy Registrar was on firm ground as it is trite that every matter must be prosecuted timeously and having considered the unchallenged evidence tendered by the Defendant showing that the Plaintiff failed to prosecute the matter timeously. Lastly, it was argued that the Deputy Registrar was on firm ground when she stated that setting aside the dismissal of 2006 would greatly prejudice the defendant.

It was further argued that the Honourable Deputy Registrar took into consideration the approach taken by Courts as set out by Lord Diplock in the case of **Birkett v James AC at page 297**. That also the Plaintiff took inexcusable delay in prosecuting his matter and such inexcusable delay would ordinarily prejudice the Defendant taking into consideration that there has been a delay of almost eleven (11) years in prosecuting this matter which would prevent a fair trial as the Defendant will be prevented from being able to properly defend itself because of the fading recollections of potential witnesses that it had lined up. Some of whom are untraceable as they are no longer employed by the Defendant.

I have considered the evidence on record, the three (3) Rulings and submissions by Counsel both in the Lower Court and this Court. It is not in dispute that this matter started on 12<sup>th</sup> September, 2003.



As narrated in my opening remarks in this matter, it is clear that the Plaintiff has been in himself delaying this matter as he had engaged and disengaged various Advocates to attend to his matter. He had not been following the proper procedure in persecuting his matter. He had been taking his own way of prosecuting this matter disregarding the Court's procedure of even re constituting the file on his own for a long time after getting advise from officers of the Court who had nothing to do with this and not necessarily from the Court in charge of the matter. In the process he even misdirected himself of instead taking the matter before the Court he was doing his way and on his own pace, in short directing the Court what to do.

I agree with the Honourable Deputy Registrar. I would hold as did the Honourable Deputy Registrar, that eleven (11) years is inordinate delay and one is not expected to just wait for an outcome without diligently perusing it. Matters which come before the Courts must be prosecuted timeously. This has not been the case with this matter all because of the Plaintiff himself. Even when the Plaintiff tried to reconstitute the alleged missing file he left out deliberately some vital information which were against him, obviously trying to mislead the Court.

All in all and for the reasons I have given, I hereby dismiss this appeal.

Each party will therefore bear its own costs.

Appeal to Supreme Court is granted.

Delivered in Chambers this **14<sup>th</sup>** day of **October, 2015** at Lusaka.



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**E. M SIKAZWE**  
**JUDGE**