

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

2009/HP/1311

BETWEEN:

**UMU KANYANTA
DICKO KANYANTA
KALIDU KANYANTA
BAJARO KANYANTA**



**1ST PLAINTIFF
2ND PLAINTIFF
3RD PLAINTIFF
4TH PLAINTIFF**

AND

**CHARITY KAPONA
SOLOMON KAPONA
NEW HOPE MINISTRIES
ABINASIR ALI NOOR**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
INTERVENER**

**Before the Hon. Mrs. Justice J.Z. Mulongoti
in Chambers on the 22nd day of January, 2016**

For the Plaintiffs:

Dr. OMM Banda of OMM Banda & Co.

For the Defendants:

N/A

For the Intervener:

*Mrs. N.M. Mbao of Nkusuwila Nachalwe
Advocates*

R U L I N G

Cases cited:

1. *John R. Ng'andu V Lazarous Mwiinga* (1988-1989) ZR 197
2. *John Chisata V Attorney General* (1990-1992) ZR 154
3. *RDS Investment V Joseph* (SCZ No. 52 of 1998)
4. *Boniface Mumba and Lusaka City Council V Rosemary Bwalya* (SCZ 8/84/2008)
5. *Bellamano V Ligure Lombard* (1976) ZR 267

The ruling is for an application by the plaintiffs to set aside the Order of 12th April, 2013 dismissing the matter for want of prosecution. The application was made by summons supported by an affidavit dated 25th November, 2015 sworn by the 3rd plaintiff Kalidu Kanyanta. He deposed that the plaintiffs commenced this action on 22nd October, 2009 claiming ownership and possession of properties numbered F/737/151/L and F/737/151/M, Lusaka. The plaintiffs obtained an injunction against the defendants on 29th October, 2009. On 3rd September, 2010 the plaintiffs obtained a default judgment which the defendants applied to set aside on 14th September, 2010. On 17th September, 2010 the defendants applied for a stay which was granted on 24th September, 2010 which was subsequently discharged and the matter was referred to mediation. On 2nd February, 2012 the defendants applied for and obtained an injunction which was subsequently discharged on 23rd March, 2012. The matter then came up for hearing on 17th July, 2012. At that hearing the plaintiff applied for an adjournment and the matter was adjourned to 1st November, 2012 but it did not take off on that date. On 11th April, 2013 the defendants made an ex parte application to dismiss the matter for want of prosecution. On 12th April, 2013, the

Court signed the Order dismissing the matter and gave vacant possession of the properties to the defendants.

The deponent further stated that the plaintiffs had no notice that the defendants had applied to dismiss the matter for want of prosecution as they were not served with the application. That the plaintiffs were not heard on that application and that the Order dated 12th April, 2013 was granted on the strength of the documents filed into Court by the defendants.

Further, that the default judgment obtained by the plaintiff on 3rd September, 2010 had never been set aside and as such the order dismissing the matter was irregularly obtained as the case had come to an end when the default judgment was entered.

Learned counsel for the plaintiffs Dr. Banda, also filed skeleton arguments dated 3rd June, 2015 in support of the application. He submitted that the order dismissing the matter for want of prosecution was irregular as it was not obtained in accordance with the rules of the Court because the plaintiffs were not served with the application. He relied on the case of **John R. Ng'andu V Lazarous Mwiinga(1)** in which it was held that in the absence of proof of service, the only course open to the

Court were to issue a fresh date or strike out the matter and leave it to the parties to restore.

Relying on the cases of **John Chisata V Attorney General(2)**, **RDS Investments Limited V Joseph(3)** and **Boniface Mumba and Lusaka City Council V Rosemary Bwalya(4)**, it was submitted that matters must be heard on their merit and interlocutory applications which prevent a matter from proceeding to trial must be avoided. However, learned counsel acknowledged that the delay in concluding this matter was caused by the parties through their numerous interlocutory applications.

It was further submitted that the application for an order to dismiss the matter was irregular because the summons did not state the Act, Section, Order or Rule pursuant to which it was made, in accordance with the circular of 7th August, 1997 re-issued on 16th July, 2002. That the circular requires that all applications should cite the Act, Section, Order or Rule under which the application is brought failure to which the application shall not be accepted for filing or entertained. It was thus submitted that the application to dismiss the matter should not have been entertained. Learned counsel cited

a number of authorities to that effect including the case of **Bellamano V Ligure Lombard(5)**.

At the hearing held on 2nd November, 2015, learned counsel for the plaintiff, relied on the affidavit in support and the skeleton arguments alluded to. He urged the Court to grant the plaintiffs' application with costs.

Learned counsel for the intervener, Mrs. Mbao, concurred with the position taken by Dr. Banda.

The defendants neither opposed the application nor attended Court despite being aware of the date and time of hearing as shown by the Notice issued and sent out to their advocates Messrs J.C Mulunga & Co. on 20th October, 2015.

I have considered the application and the submissions by learned counsel. I note that the application to set aside the order of 12th April, 2013, dismissing the matter for want of prosecution was filed on 25th November, 2013. At the time my learned sister honourable madam Justice C.B. Phiri, (since retired) had conduct of the matter. The application and several others were never heard to date. Following her retirement the matter was allocated to this court. Subsequently, I issued dates for status conference

which led to hearing of the application to join the intervener and the current one. Upon perusal of the record, I note, as stated in the affidavit in support, that the plaintiffs obtained a default Judgment on 3rd September, 2010. On 14th September, 2010, the defendants applied to set it aside, but to date, this application is pending hearing. Then at the instance of the defendants the matter was dismissed for want of prosecution on 12th April, 2013, prompting the current application by the plaintiffs, as aforementioned. The plaintiffs contend that they had no notice of the defendants' application to dismiss the matter and thus were not heard. In addition that the order dismissing the matter was irregularly obtained as the case had come to an end when the default judgment was entered.

It was further submitted that the application for an order to dismiss the matter was irregular as it did not state the Act, Section, Order or Rule pursuant to which it was made as required by the circular of 1997 reissued on 16th July, 2002.

The defendants neither opposed the application nor attended court on all the numerous occasions I have had to sit in this matter. The notice of hearing relating to this application was issued and sent out to their advocates of record, Messrs J.C. Malunga and Co. on 20th October, 2015. Learned counsel for the intervener did not object as aforestated.

Let me state that I note from the record that the application to dismiss the matter for want of prosecution was made ex parte. Be that as it may, I am inclined to find that it was irregularly obtained, as the default judgment is still in force and was never set aside. The defendants were never heard on the application to set it aside. And instead of pursuing that application applied to dismiss the matter, which as alluded to, was irregular and misconceived.

For this reason, I am inclined to allow the application and set aside the Order dismissing the matter for want of prosecution. I, however, do not agree with Dr. Banda that the Order should be set aside to allow the matter to proceed to trial, in the face of the default judgment which has never been set aside. The application to set aside the default judgment is still pending. I set the 11th of

February, 2016 at 08:30hrs for hearing of that application.

In the net, the Order dated 12th April, 2013 dismissing the matter for want of prosecution is set aside.

Each party to bear own costs.

Leave to appeal is granted.

Delivered at Lusaka this 22nd day of January, 2016.



J.Z. MULONGOTI
HIGH COURT JUDGE