

IN THE HIGH COURT FOR ZAMBIA

2015/HP/1041

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN: -

MSWIMA HARDWARE LIMITED

PLAINTIFF

AND

MARGARET KANUNGWE

1ST DEFENDANT

COMMISSIONER OF LANDS

2ND DEFENDANT

**BEFORE THE HONOURABLE MADAM JUSTICE P. K. YANGAILO
ON 6TH SEPTEMBER, 2017.**

For the Plaintiff: N/A

For the 1st Defendant: Mrs. L. Mushota - Mesdames Mushota & Associates

For the 2nd Defendant: N/A

RULING

CASE REFEFFED TO:

1. *Allen vs. Sir Alfred Mc Alpine and Sons Limited and Another* [1968] 2 Q.B. 229

LEGISLATION REFERRED TO:

1. *High Court Act, Chapter 27 of the Laws of Zambia; and*

The genesis of this case is that on 2nd July, 2015, the Plaintiff launched proceedings against the Defendants. The reliefs sought from the Respondent as contained in the Writ of Summons are: -

1. *A declaration that the Plaintiff is the rightful owner of the Property known as LUS/12720, Lusaka;*
2. *An Order that the 2nd Defendant produces a Certificate of Title to the Property known as LUS/12720 in the Plaintiff's name;*
3. *An injunction restraining the 1st Defendant, her agents or servants from trespassing, occupying, disposing off or carrying out any construction on the property known as LUS/12720, Lusaka; and*
4. *Costs.*

The Writ of Summons was accompanied by a Statement of Claim. On the same date of 2nd July 2015, the Plaintiff also applied *Ex Parte* to this Court for an Interim Injunction pursuant to **Order XXVII** of **The High Court Rules**¹, which application the Court directed that it be heard *Inter Parte* on 13th July, 2015. In the accompanying Affidavit in Support of *Ex Parte* Summons for an Interim Injunction, the Managing Director of the Plaintiff company, Hassan Kibona avers, *inter alia*, as follows: -

1. *That sometime in 2011, the Plaintiff applied for a commercial plot from the 2nd Defendant;*
2. *That on 11th May, 2011, the Plaintiff was duly offered a property known as LUS/12720;*

3. *That in compliance with the terms of offer, the Plaintiff paid the requisite fees;*
4. *That on 20th June, 2011, the Plaintiff received a letter of demand from the Lusaka City Council requiring it to pay service charges in the sum of K8,753.00 which it duly paid;*
5. *That the Plaintiff proceeded to put a small structure on the property in order to make its presence on the ground known to all while the title deed was being processed;*
6. *That it since came to the Plaintiff's attention that the 1st Defendant was also granted an offer letter over the same land by the 2nd Defendant;*
7. *That this offer was given to the 1st Defendant way after the land was already accepted by the Plaintiff; and*
8. *That the 1st Defendant has made intimations of moving onto the property and that if the injunction is not granted the 1st Defendant may cause irreparable harm as the situation is volatile.*

On the return date, the 1st Defendant applied for an adjournment, to enable them to respond to the application, which application was granted. The Court directed the parties to file their skeleton arguments upon which a ruling would be made and delivered on 24th July 2015. The Plaintiff and 1st Defendant filed herein their skeleton arguments as directed by the Court but the record does not show whether or not the Court that had conduct of the record, delivered the reserved ruling on the application for an interim injunction.

On 20th August, 2015 the Plaintiff filed herein an application for Joinder, which was scheduled to be heard on 29th February, 2016

at 09:00 hours, but again the record does not show whether or not this application was heard.

On 25th October 2016, the 1st Defendant filed herein a Notice of Intention to Proceed. On 3rd March 2017, the 1st Defendant filed herein an application to dismiss action for want of prosecution. The record was subsequently re-allocated to this Court. The application by the 1st Defendant, to dismiss action for want of prosecution, was accompanied by an Affidavit in Support deposed by the 1st Defendant, in which she averred, *inter alia*, that: -

1. *That the Plaintiff commenced this action on 2nd July, 2015;*
2. *That ever since the Plaintiff has not taken any step to prosecute this matter;*
3. *That due to the Plaintiff's failure to prosecute, the 1st Defendant has suffered and continues to suffer prejudice;*
4. *That the 1st Defendant continue to suffer prejudice by the financial obligations that she has to meet to defend this action as a result of the delay;*
5. *That the 1st Defendant will be further prejudiced by the difficulties that she may encounter to defend this matter in that the attrition of personnel at the Ministry of Lands with intimate knowledge of this matter, may lead to the 1st Defendant having difficulties in securing potential witnesses to defend this action, which in turn may give rise to a substantial risk in having a fair trial; and*
6. *That the 1st Defendant continues to suffer prejudice in that her duty as Administrator of the Estate of the late Dennis Mbalala Siame cannot be effectively carried out until this matter is concluded.*

I scheduled the hearing of this application for 3rd April, 2017. On the return date, only the 1st Defendant was in attendance. The record showed that the Plaintiff's Advocates Mosha & Company were notified of the date of hearing as evidenced by the Affidavit of Service filed herein on 27th March, 2017. There were no compelling reasons advanced by the Plaintiff for its non-appearance. Accordingly, I proceeded to hear the application before me.

In addition to the contents of the Affidavit in Support of the application to dismiss action for want of prosecution, that the 1st Defendant heavily relied on, the 1st Defendant's Learned Counsel Mrs. Mushota submitted *viva voce*, that Plaintiff has not made any attempt to prosecute this matter since it was launched, which prompted the 1st Defendant to file a Notice of Intention to proceed on 25th October, 2016, but the Plaintiff still has not made any efforts to prosecute the matter. Mrs. Mushota further submitted that the Summons to Dismiss the matter for want of prosecution was served on all the parties to this suit and that all the parties were aware of the hearing of this application. She also submitted that there was an application for joinder, which the Plaintiff has failed to prosecute and that if the matter is dismissed, the party seeking to be joined will not be affected. On that basis, Mrs. Mushota prayed that this action be dismissed with costs.

I have considered the application to dismiss action for want of prosecution, the Affidavit evidence and the *viva voce* submissions by Counsel for the 1st Defendant, for which I am grateful.

The question that falls to be determined in this application is whether or not I should dismiss this action for want of prosecution for failure by the Plaintiff to take out Summons for Directions or to set down the matter for trial. The application is premised on **Orders XIX of The High Court Rules¹** and **Order 25 Rule 1 (4) of The Rules of the Supreme Court²**.

Orders XIX of The High Court Rules¹ is expressed in these words:-

"Order of directions

1. ***The Court or trial Judge shall, not later than fourteen days after appearance and defence have been filed, give directions with respect to the following matters:***

(a) reply and defence to counter claim, if any;

(b) discovery of documents;

(c) inspection of documents;

(d) admissions;

(e) interrogatories; and

(f) place and mode of trial:

Provided that the period for doing any of these acts shall not exceed 14 days.

2. ***Liberty to apply***

Notwithstanding rule 1, the Court may, for sufficient reason, extend the period within which to do any of the acts specified in rule 1."

Order 25 Rule 1 (4) of **The Rules of the Supreme Court²** is expressed in the following words: -

"1. Summons for directions

(4) If the plaintiff does not take out a summons for directions in accordance with the foregoing provisions of this rule, the defendant or any defendant may do so or apply for an order to dismiss the action."

It is instructive to note at the outset that I have the discretion under **Order 25, Rule 1 (5)**, of **The Rules of the Supreme Court²**, to dismiss the action or deal with the application as if it were a Summons for Directions. **Order 25, Rule 1 (5)²** is expressed in the following terms: -

"(5) On an application by a defendant to dismiss the action under paragraph (4) the Court may either dismiss the action on such terms as may be just or deal with the application as if it were a summons for directions."

This matter was commenced on 2nd July, 2015. The record shows that there were also applications for an injunction made on 2nd July, 2015 and joinder of a party on 20th August, 2015, which were never heard or determined. Although these applications were scheduled for hearing by the previous Court that had conduct of the record, there is nothing on record to show why these applications were not heard or determined as scheduled. Therefore, I do not accept the submission by Mrs. Mushota that the Plaintiff has done nothing by way of making progress herein. It is quite clear from the

record that there are interlocutory applications pending that have to be dealt with before the matter can be prepared for trial.

I am mindful of the fact that cases must be tried expeditiously. In the case of ***Allen vs. Sir Alfred Mc Alpine and Sons Limited and Another***¹, Lord Denning M.R. observed at **page 245** as 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 directions, or set down the action for trial, the defendant can apply for the action to be dismissed.”

In casu, the Affidavit evidence of Margaret Kanungwe Maipose Siame the 1st Defendant, shows that the Plaintiff Mswima Hardware Limited, has not taken any step to prosecute this matter. Learned Counsel for the 1st Defendant, Mrs. Mushota submitted that in October, 2016, exactly thirteen (13) months after the Reply to the Defence was filed, she took out a Notice of Intention to Proceed, but to date the Plaintiff has not made the necessary application for an Order for Directions or to set the matter down for trial.

Order 25, Rule 1 (7), of **The Rules of the Supreme Court**², states as follows: -

"(7) Notwithstanding anything in paragraph (1), any party to an action to which this rule applies may take out a summons for directions at any time after the defendant has given notice of intention to defend, or, if there are two or more defendants, at least one of them has given such notice."

I am mindful that rules of procedure must be followed. However, the effect of a breach will not always be fatal, if the rule is merely regulatory, or directory. As seen from the above, there is nothing that stopped the 1st Defendant from taking out a Summons for Directions, after giving Notice of Intention to Proceed. It is the view of this Court that cases should be decided on their merit. Although the Plaintiff did not attend the scheduled hearing of this application, in balancing the scales of justice in this matter, I am obliged to do justice to all the parties. I have already observed that this action was commenced on 2nd July, 2015. This matter has therefore been pending in Court for two years now, which is not a very long time, if we have to take into account that there are pending interlocutory applications, which were scheduled for hearing, but were never heard for some reason which is unknown, as the record is silent on why they were never heard or determined as scheduled. Dismissing this action, when there are pending interlocutory applications, will not be in the interest of justice.

In view of the foregoing, I refuse the application to dismiss the action for want of prosecution and direct that the cause be returnable before this Court on 25th September, 2017 at 12:00 hours to chart the way forward. I make no order as to costs.

Leave to Appeal is hereby granted.

Delivered at Lusaka this 6th day of September, 2017.



**P. K. YANGAILO
HIGH COURT JUDGE**