IN THE HIGH COURT FOR ZAMBIA **2016/HP/2456**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

B E T W E E N:

MUKAMUNYA HOME OWNERS ASSOCIATION REGISTDERED TRUSTEES — **PLAINTIFF**

AND

ZELDA DALI LUPIYA — **DEFENDANT**

Before Honourable Mrs. Justice M. Mapani-Kawimbe in Chambers on the 4th day of December, 2017

For the Plaintiff	:	*Ms. M. Nalomba, Messrs Musa Dudhia & Company*
For the Defendant	:	*Mr. C. M. Magubwi, Messrs Tembo Ngulube & Associates*

R U L I N G

Cases Referred To:

1. *Shocked v Goldschmidt (1998) 1 All ER 371*
2. *Stanley Mwambazi v Morrester Farms Limited (1977) ZR 108*
3. *Finance Bank Zambia Limited v Dimitrios Monokandilos Filandria Kouri (2012) ZR 484*
4. *Twampane Mining Cooperative Society Limited v E and M Storti Mining Limited (2011) ZR 67*
5. *Phillip Mutantika and Mulyata v Kenneth Chipungu SCZ Judgment No. 13 of 2014/Appeal No. 94 of 2012*

Legislation Referred To:

1. *High Court Act, Chapter 87*

This is the Plaintiff's application to set aside the Order of this Court dismissing this action for want of prosecution. It is made pursuant to Order 35 Rule (5) and Order 3 Rule (2) of the Rules of the High Court.

It is supported by an Affidavit sworn by **John Howard** who is one of the trustees of the Plaintiff Association. He states that the Plaintiff commenced this action by writ of summons and statement of claim on 19th December, 2016. The Defendant entered appearance and a defence on 17th March, 2017. That the Court issued an Order for directions on 9th May, 2017 and the Plaintiff failed to comply with it. He also states that the action was scheduled for trial on 23rd October, 2017 but the Plaintiff failed to appear for its case.

The deponent avers that on the date of trial, the Defendant's Advocates made an application to dismiss the Plaintiff's action for want of prosecution and it was granted. He also avers that the Plaintiffs failed to attend trial because its former Advocates, Theotis, Mataka & Sampa Legal Practitioners assured it that they would be

present at the hearing, to withdraw their services. Further, that they would seek an adjournment to enable the Plaintiff to engage new Advocates. This is shown in the exhibit marked "**JW1**" containing correspondence between the Plaintiff and its former Advocates.

That unbeknownst to the Plaintiff, its former Advocate obtained an Order to withdraw on 20th October, 2017 and the Plaintiff only became aware of the fact when it was served the Order by the Defendant's Advocates. The deponent states that he was not aware that the Plaintiff did not comply with the Order for Directions.

The deponent avers that upon following up with the former Advocates, he was informed that the Court excused them from attending trial because it was of the view that the firm of Musa Dudhia & Company had taken over. This is shown in the exhibit marked as "**JW2**." That the Court may have been under the inadvertent mistaken belief that the Plaintiff was being represented

by Musa Dudhia & Company because the firm conducted a search on the record on 9th October, 2017.

The deponent states that the Plaintiff's failure to attend trial or to comply with the Order for Directions was not deliberate and was not meant to demean the Court. The deponent prays that the Order dismissing the Plaintiff's action be set aside because the Plaintiff is desirous of having its matter heard on the merits.

Learned Counsel for the Plaintiff filed Skeleton Arguments on 22nd November, 2017. She submitted that the Court had power to set aside judgment under Order 35 of the High Court Rules. It reads in part that:

> **"3. If the Plaintiff appears, and the Defendant does not appear or sufficiently excuse his absence, or neglects to answer when duty called, the Court may, upon proof of service of notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the Plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the Defendant.**
>
> **(4) Where the Defendant to a cause which has been struck out under Rule 2 has a counter-claim, the Court may, on due proof of service on the Plaintiff of notice thereof, proceed to hear the counter-claim and give judgment on the evidence adduced by the Defendant, or may postpone the hearing of the counter-claim and direct notice of such postponement to be given to the Plaintiff.**

(5) Any judgment obtained against any party in the absence of such party may, on sufficient cause shown be set aside by the Court upon such terms as may seem fit."

Counsel submitted that the considerations taken in setting aside a judgment made in the absence of a party were different from those for setting aside a default judgment. She cited the case of **Shocked v Goldschmidt**[1], where the Court held that:

> **"On an application to set aside a judgment given after trial, in the absence of the Applicant, different considerations applied than on an application to set aside a default judgment in particular, the predominant consideration for the Court was not whether there was a defence on the merits but the reason why the Applicant had absented himself, and if the absence was deliberate and not due to accident or mistake, the Court would be unlikely to allow a rehearing. Other relevant considerations included the prospects of success of the applicant in a retrial, the delay in applying to set aside, the conduct of the applicant, whether the successful party would be prejudiced by the judgment being set aside and the public interest in there being an end to litigation."**

Counsel contended that the Plaintiff failed to appear for trial on 23rd October, 2017, because an assurance was given by its former Advocates that they would attend Court to withdraw from the record and request for an adjournment. The Plaintiff was however, aware of the date of hearing but did not attend Court. Counsel also submitted that the Plaintiff was not aware that its

former Advocates obtained an Order withdrawing from the record a few days before trial.

Counsel submitted rather contradictorily that there was no evidence on the record to show that the Plaintiff was personally aware of the trial date nor the withdrawal of its former Advocates. She asserted that the reasons for the Plaintiff's absence were sufficient to enable the Court to set aside its Order dismissing the matter for want of prosecution.

Counsel went on to state that the Plaintiff's failure to attend trial was not deliberate neither was its failure to comply with the Order for Directions. Counsel further submitted that the Plaintiff's failure to comply with the Order for Directions was curable because the Court has discretion to enlarge the time for compliance under Order XXI Rule 2 of the High Court Rules. She also stated that this was the first trial date given at which the Plaintiff did not attend. As such, the Plaintiff was entitled to another opportunity.

It was her submission that the Plaintiff was likely to succeed at trial if the Order dismissing the matter was set aside. The Plaintiff's case had merit and it was in the interest of justice to afford it a hearing. She called in aid the case of **Stanley Mwambazi v Morrester Farms Limited**[2], where the Supreme Court emphasized that:

> **"At this stage it is the practice in dealing with bona fide interlocutory applications for Courts to allow triable issues to come to trial despite the default of the parties. The situation is different from that which obtains when there has been a trial and there is default in connection with a proposed appeal because then it cannot be said that the parties have been denied the right to a trial. Where a party is in default he may be ordered to pay costs, but it is not in the interests of justice to deny him the right to have his case heard. I would emphasise that for this favourable treatment to be afforded to the applicant there must be no unreasonable delay, no male fides and no improper conduct of the action on the part of the applicant. However, because it would be wrong to deprive the appellant of his right to have his case heard at trial, in my view this is an appropriate case to grant the relief sought."**

Counsel submitted that the Plaintiff was innocent at all times because it was ignorant of the actions taken by its former Advocates, who were entrusted to handle its case. Counsel contended that if the Order was set aside, it would not prejudice the Defendant as she would also be heard.

Counsel further submitted that an Order dismissing a matter for want of prosecution ought to sparingly used and cited the case of **Finance Bank Zambia Limited v Dimitrios Monokandilos Filandria Kouri**[3]**.** In that case**,** the Court held that:

> **"The power to dismiss an action for want of prosecution is a draconian power which must be resorted to sparingly. This is so because it deprives a party of his or her right to trial. And also denies a party the opportunity to remedy procedural defects or irregularities. Dismissal of actions should be limited to plain and obvious cases where there is really no point in having a trial. When the delay in the conduct of an action is inordinate, inexcusable, and there is a substantial risk by reason of the delay that a fair trial of the issue will no longer be possible, or be done to one party, or to both parties, the Court may in its discretion dismiss the action straight away, without giving the Plaintiff opportunity to remedy the default."**

Counsel added that a Judge who dismisses a matter for want of prosecution due to non-compliance is not fuctus officio because he/she has neither rendered judgment on the substantive issues raised nor discharged their judicial functions in the cause. She prayed to the Court to set aside its order dismissing the Plaintiff's action and to afford the Plaintiff an opportunity to rectify its failure.

I am grateful to Counsel for her submissions.

At the hearing, Learned Counsel placed reliance on the Affidavit and Skeleton Arguments filed herein. The Defendant did not file an Affidavit in Opposition and sought an adjournment. However, I declined to grant the adjournment because this application is directed at the Court's order, which was granted at its discretion.

To begin with, I find that it is necessary to set the record straight for the benefit of the parties involved. As rightfully submitted by Counsel, the Plaintiff commenced this action on 19th December, 2016 and served process on the Defendant's Advocates, Messrs Tembo Ngulube & Associates on 20th January, 2017. The Plaintiff's former Advocates filed an affidavit of service into Court on 20th February, 2017 as proof of service. The Defendant entered contidioral appearance on 23rd February, 2017. On 1st March, 2017, the Plaintiff's Advocates filed an amended writ of summons and statement of claim without leave of Court.

On 17th March, 2017, the Defendant filed a defence. On 20th February, 2017, a Ms. C. Mulomba of the former Advocates firm

attended a status conference and there was no appearance from the Defendant. Both Ms. C. Mulomba and Mr. A. Tembo from the Defendant's Advocates' firm attended another status conference on 27th March, 2017. The Plaintiff's Advocates filed a Reply to the defence on 30th March, 2017. On 6th April, 2017, a Ms. V. Oputa from the former Advocates firm attended another status conference and informed the Court that the Plaintiff had filed a Reply and was ready to receive a trial date. There was no appearance from the Defendant. I set this matter for trial on 3rd October, 2017.

In the intervening period, the former Plaintiff's Advocates filed Summons and an Order for Directions on 19th May, 2017, and the trial date was stated therein. On 11th August, 2017, which is the last date that I gave instructions on this record to Mr. Bwalya, my Marshal, I rescheduled the trial date to 23rd October, 2017, because I was not available on 3rd October, 2017. Accordingly, a Notice of Trial was issued instantaneously.

Unknown to me, on 9th October, 2017, Musa Dudhia & Company conducted a search on the record. On 17th October,

2017, the former Advocates filed ex-parte summons for an Order for leave to withdraw as Advocates, which were supported by an Affidavit, a List of Authorities and Skeleton Arguments. I signed the Order on 20th October, 2017, without causing the appearance of the Plaintiff's former Advocates.

The Affidavit in Support deposed to by Ms. Chimuka Sonia Mulomba listed some of the reasons for the application to withdraw as follows:

> **"5. That we have no instructions from the Plaintiff to proceed with this matter on its behalf.**
> **6. That further, our legal fees being profit costs have remained unpaid in spite of numerous reminders to the Plaintiff to settle the same.**
> **7. That in view of the above, we are unable to continue acting for the Plaintiff in this matter.**
> **8. That I verily believe that this honourable Court has jurisdiction to grant an order declaring that Theotis Mataka & Sampa Legal Practitioners have ceased to act for the Plaintiff herein and that this is a proper matter in which it may exercise its discretion to do so."**

From the circumstances of this case, it is unavoidable that I should emphasise the following:

(i) The Plaintiff's former Advocates last appeared in Court on 6th April, 2017.
(ii) The Advocates filed an Order for Directions on 9th May, 2017, which was not complied with.

(iii) Musa Dudhia & Company undertook a search on 9th October, 2017 after I had last seen the record on 11th August, 2017.

(iv) The last time I gave instructions on the record was to alter the hearing date from 3rd October to 23rd October, 2017 on 11th August, 2017.

I am therefore perplexed that the Plaintiff suggests that I prevented its former Advocates from attending trial, when I did not cause their appearance for their application to withdraw. I signed their ex-parte Order on 20th October, 2017, on the basis of the evidence that was availed with the application. In any event, I was out of jurisdiction on that date and could not have spoken to Mrs. C. Mulomba as alleged by the deponent. Further, I was under no "inadvent mistaken belief" that Musa Dudhia & Company was representing the Plaintiff when a Notice of Appointment as Advocates was only filed on 22nd November, 2017.

It would be too narrow a view to assume that the Plaintiff failed to comply with the Order for Directions on account of its former Advocates. They have averred in their Affidavit that they failed to prosecute this case because the Plaintiff did not give them

with instructions and that it failed to settle their legal fees. This blame in my view, solely falls on the Plaintiff.

In the case of **Twampane Mining Cooperative Society Limited v E and M Storti Mining Limited**[4], the Supreme Court held *inter alia* that:

> **"Indeed there is no need to appeal for the sake of appealing when the appeal has no prospect of success. In this regard, we cannot over-emphasise the importance of adhering to Rules of Court as this is intended to ensure that matters are heard in an orderly and expeditious manner. Allowing this appeal would be tantamount to us encouraging laxity and non-observance of rules by practitioners and litigants in general. We repeat what we said in Nkhuwa v Lusaka Tyre Services Limited (3) that those who choose to ignore Rules of Court will do so at their own peril."**

Further, in the case of **Phillip Mutantika and Mulyata v Kenneth Chipungu**[5], the Supreme Court held that:

> **"On our part, we have always underscored the need for parties to strictly adhere to the Rules of Court and that the failure to comply can be fatal to a party's case."**

From these cases, it is trite that the Court has a duty to promote its integrity and process. It can only do so if its Orders are respected. The Orders in this cause were disregarded by the Plaintiff and it must bear the consequences of its conduct.

If at all the Plaintiff encountered any hardships, then it should have brought them to the notice of the Court. It cannot escape its responsibility by ousting the Court's order on an Affidavit, which I must state is not entirely truthful in the averments.

Once a case has been dismissed for want of prosecution, the remedy lies in recommencing a fresh action. There is a great difference between dismissing a matter for want of prosecution, which results from the Plaintiff's conduct and dismissing a Plaintiff's case for non-attendance of trial. The earlier suggests that there is indifference by the Plaintiff to its case, which is committed with impunity as opposed to failing to attend trial probably on account of good reason.

I therefore, decline to set aside my Order dismissing the Plaintiff's action for want of prosecution and I make no order as to costs.

Dated this 4th day of December, 2017.

M. Mapani-Kawimbe
HIGH COURT JUDGE