

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

2018/HP/1268

(Civil Jurisdiction)



BETWEEN:

| | |
|---------------------------------|---------------------------------|
| PATIENCE CHIRUNDU NYAMBE | PLAINTIFF |
| AND | |
| DELIWE TEMBO | 1ST DEFENDANT |
| LEYA MBEWE | 2ND DEFENDANT |
| RUTH DAKA SAKAIMBO | 3RD DEFENDANT |

**BEFORE THE HONOURABLE JUSTICE P. K. YANGAILO, IN
CHAMBERS, ON THE 22ND JUNE, 2020.**

For the Plaintiff: N/A

For the 1st & 2nd Defendants: N/A

For the 3rd Defendant: N/A

RULING

CASES REFERRED TO:

1. *Robert Lawrence Roy vs. Chitakata Ranching Company Limited* (1980) Z.R. 98;
2. *Jamas Milling Company Limited vs. Imex International (PTY) Limited* (2003) Z.R. 79, P.83;
3. *Walusiku Lisulo vs. Patricia Anne Lisulo* (1998) Z.R. 75;
4. *Saban & Another vs. Gordic Milan* (2008) Z.R. 233; and
5. *Kangwa Simpasa & Yu Huizhen vs. Lackson Mwabi Mwanza - Appeal No. 28/2012* (SCZ/8/21/2012).

LEGISLATION REFERRED TO:

1 INTRODUCTION

- 1.1 On 21st September, 2018, the Court issued an Order for Directions, which was extended by 60 days on 20th November, 2019, following the parties' failure to comply within the time given.
- 1.2 On 28th January, 2020, the matter came up for status conference to ascertain compliance with the Order for Directions, which had been extended by 60 days. None of the parties had complied and the Plaintiff who was in attendance requested for a further extension to enable the parties to comply. The Court considered the application and granted the parties further 30 days period to comply failure of which the matter would stand dismissed for want of prosecution.
- 1.3 Upon failure of the parties to comply within the further extended period of 30 days, on 2nd March, 2020, the Court dismissed this action for want of prosecution. It is this Order that the Plaintiff has applied to review.
- 1.4 Upon Considering that Zambia is currently faced with Covid-19, a global pandemic which demands social distancing and that the application is one which can be disposed of on Affidavit evidence, whilst adhering to the social distancing guidelines given by the Judiciary and the relevant government authorities, I have dispensed

with hearing submissions *viva voce* and will consider and render my Ruling based on the Affidavit evidence.

2 BACKGROUND

2.1 The application to review the Order was filed herein on 11th March, 2020 and is made pursuant to **Order XXXIX, Rule 1** of **The High Court Rules**¹.

2.2 On 18th May, 2020, I directed the Plaintiff to serve the application on the other parties and that all the parties must file their respective responses to the application and skeleton arguments upon which this Court would render its Ruling. Only the Plaintiff has filed her skeleton arguments, but there is no proof of service that the application was served on the other parties, despite the Plaintiff being directed to file proof of service in the Order issued on 18th May, 2020.

3 AFFIDAVIT EVIDENCE

3.1 The application is accompanied by an Affidavit in Support, deposed to by one Sylvester Chibangu Mwananshiku, in which it is averred *inter alia*, that after the status conference of 28th January, 2020, he wrote to the 3rd Defendant's Advocates notifying them of the Court's Order to extend the period of compliance by 30 days and that having not received the 3rd Defendant's Defence, he proceeded to file the Plaintiff's Reply and Defence to the 1st and 2nd Defendant's Counterclaim and

List of Documents on 27th February, 2020, before the expiry of the 30 days extension period.

3.2 It is further averred that the Plaintiff is still very much interested in prosecuting this matter so that she can be heard by the Court.

4 SUBMISSIONS

4.1 In her brief submissions, the Plaintiff relies on **Order XXXIX, Rule 1 of The High Court Rules¹** and urges the Court to review its decision to dismiss this matter for want of prosecution.

5 THE LAW

5.1 The application is made under **Order XXXIX, Rule 1 The High Court Rules¹**, which provides as follows: -

"1. Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision:

Provided that where the judge who was seized of the matter has since died or ceased to have jurisdiction for any reason, another judge may review the matter. (Court's emphasis)

6 **ANALYSIS AND FINDINGS**

6.1 I have considered the Affidavit evidence. In considering the application, in my view, I must first look at the legal interpretation of the above cited provision of the law as handed down by our Supreme Court in some cases. In the case of **Robert Lawrence Roy vs. Chitakata Ranching Company Limited**¹, the Court held that: -

"1. *Events which occur for the first time after delivery of judgment could not be taken into account as grounds for review of a judgment.*

2. *Setting aside a judgment on fresh evidence will lie on the ground of the discovery of material evidence which would have had material effect upon the decision of the court and has been discovered since the decision but could not with reasonable diligence have been discovered before.*

(Court's emphasis)

6.2 In the case of an application for review, approving the holding in the above cited case of **Robert Lawrence Roy vs. Chitakata Ranching Company Limited**¹, the Supreme Court in the case of **Jamas Milling Company Limited vs. Imex International (PTY) Limited**² stated as follows: -

"For review under Order 39 Rule 2 of the High Court Rules to be available, the party seeking it must show that he has discovered fresh material evidence which would have had material effect upon the decision of the court and has been discovered since the decision but

could not with reasonable diligence have been discovered before... the fresh evidence must have existed at the time of the decision but had not been discovered before."

- 6.3 In *casu*, this matter was dismissed on the basis that the parties failed to comply with the Order for Directions, despite it being extended on two occasions, for 60 days and 30 days, respectively. Within the first 60 days extension period, the parties did nothing to show that they are willing and ready to prosecute this matter. The only reason advanced for review of my Order is that in the next 30 days extension period, the Plaintiff filed her Reply and Defence to the 1st and 2nd Defendants' Counterclaim and List of Documents. The 3rd Defendant only filed its Defence, List of Documents and Bundles of Documents on 17th April, 2020, when the matter had already been dismissed. In my view, the reason given by the Plaintiff is not new material that would have had an effect on my decision. Further, none of the parties made an application for extension before the 30 days extension period lapsed.
- 6.4 Therefore, no sufficient reason has been advanced by the Plaintiff to warrant the review of my Order. The parties have simply failed to comply with the Order for Directions, in a matter which was commenced on 25th July, 2018 and is now in backlog. There has been a

period of close to two years since the Order for Directions was issued on 21st September, 2018.

6.5 By failing to take the necessary steps to prosecute this matter, it is evident that the parties are not willing to prosecute this matter. The parties have simply failed to comply for no reason at all. The rules of Court are very clear. Where the Court has issued an Order for Directions, the parties must obey 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. In *casu*, there is no new material that has been placed before me to warrant the review of my Order dismissing this action.

6.6 I am fortified by the case of ***Walusiku Lisulo vs. Patricia Anne Lisulo***³ in which the Supreme Court held as follows: -

- "1. **The power to review under Order 39 Rule 1 is discretionary for the Judge and there must be sufficient grounds to exercise that discretion.**
2. ***Evidence relating to the Appellant's financial statements was available throughout the hearing. Therefore it cannot be said to be fresh evidence for the purposes of review under Order 39 Rule 1 of the High Court Rules.***
3. ***Order 39 Rule 1 of the High Court Rules is not designed for parties to have a second bite. Litigation must come to an end and successful***

parties must enjoy the fruits of their judgments."

(Court's emphasis)

6.7 The position in *casu* is precisely what the Supreme Court further stated in the above cited case that: -

"Looking at the reasons for asking for review, it is obvious that the new evidence is not new that came to light later which no proper and reasonable diligence could earlier have secured." *(Court's emphasis)*

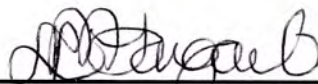
6.8 I am fortified further by the holding of the Supreme Court in the cases of ***Saban and Another vs. Gordic Milan***⁴ and ***Kangwa Simpasa & Yu Huizhen vs. Lackson Mwabi Mwanza***⁵ in which it restated that the power to review under ***Order XXXIX, Rule 1*** is discretionary and that *"there must be sufficient grounds to exercise that discretion"*.

7 CONCLUSION

7.1 In the circumstances, I do not find any grounds at all, let alone sufficient grounds for reviewing my Order dismissing this action. The application is accordingly dismissed.

7.2 Leave to Appeal is granted.

Delivered on the 22nd day of June, 2020.



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