

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

2005/HP/0512

BETWEEN:

**COMPREHENSIVE HIV/AIDS
MANAGEMENT PROGRAMME**

PLAINTIFF

AND

**GAVIN SILWAMBA
TRYWELL PHIRI
KNOX NGÁNDU**



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

Before:

The Hon. Mr. Justice Charles Zulu.

For the Plaintiff:

Mr. M. Mwanza and Ms. E. Hanene of
Messrs J & M Advocates.

For the first Defendant:

Mr. L. Kabaso of Messrs K.B.F & Partners.

RULING

Cases referred to:

1. *Development Bank of Zambia and Mary Ncube (Receiver) v Christopher Mwanza & 63 Others (SCZ/8/103/08).*
2. *Owens Bank Limited v Bracco and Others [1992] 2 All E.R. 193 at 203.*
3. *Mopani Copper Mines PLC v Monlo Investments Limited (SCZ Appeal No. 36/2011).*
4. *Stanley Mwambazi v Morester farms Limited (1997) Z.R. 108 (SC).*
5. *Ruth Kumbi v Robinson Caleb Zulu (SCZ Judgment No. 19 of 2009).*
6. *Country Pub and & Another v Tina Hadjipetrou & Another (CAZ Appeal No. 17/ 2019).*

Legislation referred to:

1. *Rules of the Supreme Court 1965(White Book, 1999 Edition).*
2. *The High Court Rules Chapter 27 of the Laws of Zambia.*

This ruling is in respect of a notice of motion to raise preliminary issues, otherwise for convenience called the “second preliminary issue”, dated June 18, 2020, made pursuant to Order 14A and Order 33 rule 3 of the **Rules of the Supreme Court 1965, (White Book) 1999 Edition**. The second preliminary issue or objection emerged following an application by the first Defendant for extension of time within which to comply with the Unless Order dated June 6, 2017, for purposes of having access to prosecute the counter-claim. And the arguments by the Plaintiff’s Counsel vide the preliminary objection in essence is that, the Court is *functus officio* to hear and determine the application after the counter-claim was dismissed for want of prosecution following the first Defendant’s failure to comply with the Unless Order.

A brief background to this case is that, the Plaintiff took out a writ of summons and a statement of claim dated May 19, 2005, against its then employees, the Defendants, for damages for breach of confidentiality and infringement of copyright. The first Defendant is now deceased. The first Defendant filed a defence and a counter-claim in the sum of USD \$9,768.00 allegedly being monies due and owing by the Plaintiff, arising from the contract(s) of employment.

When the matter was cause listed for trial on June 6, 2017, before Yangailo J., who had previous conduct of the matter, both parties were not present. And the Judge proceeded to make the following order:

BY REASON OF NON-ATTENDANCE BY THE PARTIES; this matter is struck off the Active Cause List with liberty to restore within fourteen (14) days, failure to which shall render the matter dismissed for want of prosecution.

None of the parties filed an application as directed respectively to restore the action. The order above was proceeded by another order dated June 21, 2017, couched as follows:

UPON FAILURE by the Plaintiff to restore to the Active Cause List, the matter struck out on 6th day of June, 2017 within Fourteen (14) days thereof, I accordingly Order that this matter be and is hereby dismissed for want of prosecution.

Notwithstanding the foregoing, on June 5, 2019, the first Defendant caused to be issued a notice of intention to proceed with the counter-claim. The notice was made pursuant to ***Order II rule 3 of the High Court Rules Chapter 27 of the Laws of Zambia***. However, the Plaintiff raised preliminary objections, otherwise called the first preliminary objection, which objection was couched as follows:

- (i) whether the Defendants can rightly cause to be filed into Court an Intention to Proceed with counter-claim or any other Court Process following an Order dismissing the matter for want of prosecution.***
- (ii) whether this Honorable Court, having been rendered functus officio by an Order directing that the entire matter had been dismissed for want of prosecution, has jurisdiction to hear the 1st Defendant's Counter-claim or any other issue arising in the matter herein following its dismissal; and***
- (iii) that consequent to the foregoing, the Notice of Intention to proceed with the counter-claim before this Court is defective and incompetent and the Order granting the substitution of parties should be discharged.***

In respect of the above, a ruling was rendered dated January 24, 2020 and this is what I had to say in part, in upholding the preliminary objections:

... I agree with Ms. Kalima's submissions that both the main matter and the counter-claim stand dismissed for want of prosecution. Given this position, it is obvious that this court is functus officio and cannot therefore proceed to hear and determine the counter-claim.

Remarkably, I went further to state that:

... In any case it is inconceivable to hear and determine a dismissed matter unless it is restored and revived. And I am in countenance with Ms. Kalima's submissions that there is

no basis upon which this court can revive the counter-claim that was dismissed for want of prosecution together with the main matter.

And it follows that the notice of intention to proceed to trial with the counter-claim filed post the dismissal of both the main action and the counter-claim was irregular.

After the above ruling was rendered, on January 24, 2020, the first Defendant filed summons for extension of time within which to comply with the Unless Order aforementioned dated June 6, 2017. And as earlier noted, it was this application by the first Defendant that has given rise to the present preliminary objection by the Plaintiff couched as follows:

- (i) whether this Honorable court can extend time within which to comply with an Unless Order when the Court in its Ruling of 24th January 2020 dealt with the Unless Order and its effect thereby rendering anything to do with the said Unless Order, res judicata;**
- (ii) whether the Honorable Court, having been rendered functus officio by an Order directing that the entire matter had been dismissed for want of prosecution and further by the Ruling dated 24th day of January, 2020, has jurisdiction to hear the 1st Defendant's application for extension of time;**
- (iii) whether the Defendant's application for extension of time, coming after a clear directive from the Court that the matter stood dismissed, amounts to an abuse of Court Process; and**
- (iv) that consequent to the foregoing, the application for extension of time within which to comply with the Unless Order is defective and incompetently before this Honorable Court and should be dismissed with costs.**

The Plaintiff filed an affidavit and skeleton arguments in support of the application, and the first Defendant's Counsel in response entirely relied on skeleton arguments earlier filed in support of the application for extension of time.

The Plaintiff's Counsel submitted that, the first Defendant's application for extension of time made after several attempts over the years was intended to circumvent the Unless Order after he failed to comply with the said order, and went against the principle of finality to litigation. In this regard reference was made to the case of **Development Bank of Zambia and Mary Ncube (Receiver) v Christopher Mwanza & 63 others SCZ/8/103/08** wherein the Supreme Court held:

There must be finality to litigation and a part who is clearly in default should reap the consequences of its inertia and cannot be allowed to run to the Court like a headless chicken more so that the party was represented by Counsel.

In similar vein, it was argued that the issue in respect of the Unless Order was *res judicata* following my ruling dated January 24, 2020. And that the application for extension of time amounted to abuse of the court process. The Plaintiff's Counsel called in aid the case of **Owens Bank Limited v Bracco and Others [1992] 2 All E.R. 193 at 203**, which speaks to the Court's duty to prevent abuse of the process of the Court. In that case it was held:

Moreover, this court has inherent jurisdiction not only to prevent abuses of the court process, but also to protect its authority and dignity.

Furthermore, it was argued that, the matter having been dismissed, by court order dated June 6, 2017, the Court became *functus officio* and could not thereafter proceed to hear the matter for extension of time. In this regard, Counsel relied on the case of **Mopani Copper Mines PLC v Monlo Investments Limited (SCZ Appeal No. 36/2011)** wherein it was held:

Quite apart from this ruling disclosing the fact that she did not apply her mind to the authorities which were deployed before her (even though she was not obliged to consider them), the judge fell into error when she decided to review her decision because she became functus officio the moment she delivered her ruling on the 8th of August, 2006 and 19th

February, 2007. She therefore ceased to have jurisdiction in so far as the two rulings were concerned. the only limited option was to review the rulings in accordance with Order 39 of the High Court Rules Cap 27 of the Laws of Zambia. We Must however point out that there was no application for review or any proof of new evidence which could not have been obtained with due diligence to warrant her review of her two earlier decisions. There was no good reason to reverse her earlier decision as any dissatisfied party could have appealed.

Counsel added that this Court was not clothed with the requisite jurisdiction to proceed to hear and determine the first Defendant's application, the matter having been dismissed.

Based on the skeleton arguments relied on by Counsel for the first Defendant, it was argued that, when dealing with bona fide interlocutory applications and in the interest of justice, the Court had to allow triable issues to go to trial despite the default of the parties. Mr. Kabaso relied on the memorable case of **Stanley Mwambazi v Morester farms Limited (1997) ZR 108 (SC)**. Further, Counsel submitted that the Court had jurisdiction to extend time within which an act could be done. In support of this proposition, reference was made to the case of **Ruth Kumbi v Ronbinson Caleb Zulu (2009) Z.R. 183** wherein the Supreme Court said:

In Zambia where Unless Order has been made, and there has been failure to comply with the order within a specified period, that does not necessarily mean the action is dead or defunct or that the Court is thereby deprived of the jurisdiction or power to extend time for doing a specific act within a specified period.

Mr. Kabaso also made reference to the case of **Country Pub and & Another v Tina Hadjipetrou & Another (CAZ Appeal No. 17/ 2019)** wherein the Court of Appeal adopted the decision in the **Ruth Kumbi v Robinson Caleb Zulu** (supra).

I have considered the relevant facts and arguments thereof respectively rendered by Counsel. The facts summarized in the introduction are hereby reaffirmed. Having regard to the preliminary objection raised, the issues for determination can best be narrowed to the following issue:

Whether this Court has jurisdiction to hear and determine the first Defendant's application, bearing in mind that this matter was dismissed by this Court by order dated June 6, 2017 and/or whether this Court by its ruling dated January 24, 2020 is deemed functus officio to deal with any other application herein.

Accordingly, I will holistically deal with the preliminary objections given their legal affinity.

Having regard to my ruling dated January, 24, 2020, I find this second preliminary objection to be unnecessary, because in that ruling it was made clear at page R6, when I said:

... where a matter is dismissed for want of prosecution resulting from failure to comply with an unless order, the court's jurisdiction is generally and primordially limited to hearing an application for extension of time to restore the matter, but not to automatically hear and determine the action as though it was not dismissed. The Supreme Court in the Ruth Kumbi case (supra) was categorical that the court had jurisdiction to extend time on an unless order based on the merits of each case.

Once again, having regard to the case of **Ruth Kumbi v Robinson Caleb Zulu and Country Pub and & Another v Tina Hadjipetrou & Another**, it is settled law that failure to comply with an unless order which may result in the dismissal of the action does not necessarily mean that the matter or action is eternally dead or defunct. It follows, therefore, that a party aggrieved by such an unless order resulting in the dismissal of a matter is not procedurally prevented from making an application for extension of time within which to seek an extension of time in order to comply with the order. As such, the Court retains the power to extend the time within which to comply upon application,

provided the application is meritorious. The holding in the two above stated cases, to which I am bound to adopt via the principle of *stare decisis* also conforms to practice direction under para. 3/5/9 of the **White Book 1999 Edition**, which provides:

“Unless” or conditional order to extend time- where the court makes an “unless” or conditional order that a party is required to do an act within a specified time but the order to do that act is not complied with within the time specified, the court nevertheless retains the power to extend the time within such act should be complied with. (Samuels v. Linzi Dresses Ltd [1981] Q.B 115; [1980] 1 All E.R. 803. CA.

The Plaintiff misconstrued the tenor of my decision in my Ruling dated January 24, 2020, in which I said the Court was *functus officio* to proceed to hear and determine the counter-claim which was dismissed by virtue of the first Defendant’s failure to comply with the Unless Order. Yes indeed, in the absence of an application to extend time within which to comply with the Unless Order, the Court was divested of the jurisdiction to proceed to hear and determine the matter which was dismissed. However, I wish to reiterate that the Court is not *functus officio* to hear and determine an application for extension of time in respect of the Unless Order, and when an application for extension of time is allowed, it is a gateway to reviving the matter.

In view of the foregoing, the application for extension of time is regular and sound, however, I must state that, the main application still remains to be resolved; thus whether the application for extension of time within which to comply should be allowed or not, and appropriate considerations are factored in. To this extent, I consider it unnecessary or prejudicial to deal with some of the matters raised in the arguments relied on at this stage, that seemingly hinge on the application yet to be resolved.

All in all, the preliminary issues or objections raised are hereby dismissed. Costs shall follow the event, to be taxed in default of agreement.

DATED THE 10TH DAY OF JULY, 2020.

A handwritten signature in dark ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

THE HONORABLE MR. JUSTICE CHARLES ZULU