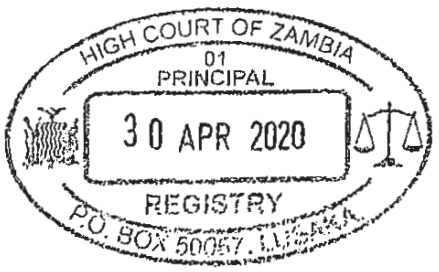
IN THE HIGH COURT FOR ZAMBIA **2008/HP/1209**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:



MICHAEL INAMBAO **PLAINTIFF**

AND

AHMED OMAR **DEFENDANT**

Before Hon. Mr. Justice M.D Bowa on 30th April 2020.

For the Plaintiff: Mr. M. Chipanzya of ICN Legal Practioners
For the Defendant: Mr. S. Bwalya of Solly Patel Hamir & Lawrence

RULING

Authorities referred to

1. *Stanley Mwambazi vs. Forester 1977 ZLR.*

2. *Gloma vs. Sokoloft & others 1969 vol 1 1 ALL ER*

3. *Allen v MC Alpine (1968) 2 Q B 229*

4. *Matibini P "Zambian Civil Procedure Commentary and cases" lexis Nexis 2017 at p 361*

5. *RSC of England (White Book) 1999 edition order 25/L/1, 25/L/2 25/L/ 4*

The substantial delay in the delivery of this ruling is regretted.

This is the Defendants application to dismiss the action for want of prosecution brought pursuant to order 25/L/1 of the rules of the Supreme Court as read with Order 3 rule 2 of the High Court Rules dated 29th August 2017. The affidavit in support of even date was sworn by Steven Bwalya counsel seized with conduct of the matter. He deposed that on the 24th of November 2008, the Plaintiff caused to be issued out of the Principal Registry of the High Court originating process against the Defendant by way of writ of summons accompanied by a statement of claim. That on the 16th of March 2009, the Plaintiff filed into court a reply to the Defendant's defence after which the court issued orders for Directions which both parties complied with in readiness for trial which was scheduled to take place on the 8th of October 2008.

Mr. Bwalya deposed further that trial did not take place on the scheduled date and the matter was by order of the court dated 12th of May 2011 referred to mediation. The hearing of the matter took place on 7th of May 2011. It was averred further that when the

parties failed to settle the dispute at mediation, the matter was sent back to court for possible commencement of trial which was scheduled to be heard on the 22nd of February 2012. However trial did not take off as the court record could not be traced or located at the Principal Registry.

It was averred further that the Judge in Charge honourable Mr. Justice J.M Siavwapa wrote a letter to the Plaintiff's advocate advising that the missing file relating to the matter be reconstructed using the documents or materials in the Plaintiff's possession so that it could be re-assigned to another Judge for trial. That at the time of the deposition it had been one year since Justice T. M Siavwapa wrote to the Plaintiff's advocates advising that they reconstitute the missing file advice they did not correspondingly respond to.

It was deposed further that the Plaintiff has not actively prosecuted the matter since 7th of June 2011 when the matter came up for mediation almost 7 years at the time of the filing of the present application. Further that the Plaintiff has not filed or caused to be filed a notice of intention to proceed with the prosecution of the

matter. In addition, that the Plaintiff did not appear when the matter came up for a status conference on the 30th of June 2017.

It was contended further that the Plaintiff's inordinate and inexcusable delay in prosecuting the matter before this court will give rise to substantial risk that it will not be possible to have a fair trial granted the nature of the Plaintiff's claims. Counsel believed that the facts presented make this a proper and fit case in which the court can exercise its inherent jurisdiction of dismiss the Plaintiff's action.

The Plaintiff opposed the application by affidavit in opposition dated 7th September 2017 sworn by Maimbwe Chipanzya counsel seized with conduct on behalf of the Defendant. He deposed that contrary to the assertions in the affidavit in support, the construction of the missing case record was not procured at the instance and instigation of the Judge in Charge but the Plaintiff's own instance and request for guidance as per letter dated 25th August 2016 exhibited "MC1." That the missing case record was duly reconstructed as advised by the Judge in Charge and subsequently

forwarded to the office of the Chief marshal by cover letter dated 11th October 2016 exhibited "MC2."

He further stated that a notice of intention to proceed could not be filed as there was no case record. Nonetheless that there had been in between 5th October 2016 to the 29th of May 2017 numerous correspondence between the Plaintiff's advocate and the office of the Chief Marshal regarding the re-allocation of the matter as well as requesting for a date of hearing. Exhibited "MC3" are copies of the notice of intention to proceed as well as the correspondence referred to.

As a consequence of the above, it was counsel's averment that he believed that the Plaintiff's delay in prosecuting the matter was neither inordinate nor in inexcusable but rather due to circumstances beyond his control. Further that considering that the case record has since been re-constructed and the matter properly re allocated, it is in the interest of justice that the issues in dispute be determined on their merits.

The Defendant responded in an affidavit in reply to affidavit in opposition dated 09 November 2017. It was deposed that the trial in

this matter failed to proceed on the 22nd of February 2012 as scheduled because the court record could not be traced in the principal registry. That from this discovery in 2012, the Plaintiff did not make any follow up on the matter until 4 years later on the 25th August 2016 when his advocates wrote to the Judge in Charge to merely request for guidance on the way forward.

It was deposed further that where a court record or file of a cause is missing at the Registry of the High Court and a party desires to file any document on the file relating to that cause, the practice has always been to make arrangements with the Assistant Registrar to open a temporary jacket on which the said documents could be filed and service of the same effected on the other side. Therefore that the Plaintiff could have made arrangements with the office of Assistant Registrar of the High Court to have a temporary jacket opened for purposes of filing the Notice of intention to proceed.

Further that the notice of intention to proceed exhibited in the affidavit in opposition is in draft form and does not constitute proof that indeed an attempt was made to file a notice of such intention in the absence of any other evidence. In addition that contrary to

the averment that there was numerous correspondence with the office of Chief Marshal regarding the re-allocation of the matter, the evidence shows that the Plaintiff's advocates only communicated to the Chief Marshal on 2 occasions.

The deponent believed that the writing of 2 letters to the Chief Marshal to seek advice on when the matter would be re-allocated does not amount to prosecuting the matter within the meaning of the law. In view of the above, that the Plaintiff's delay in prosecuting the matter is inordinate and inexcusable and the delay was not occasioned by circumstances that can be deemed to be beyond the Plaintiff's control.

It was deposed further that Counsel had been advised by the Defendant that the vehicle that had been the subject of the proceedings has since been sold off by the Plaintiff which renders the matter unlikely to be properly determined on its merits. He added that the Plaintiff's inordinate delay in prosecuting this matter has seriously prejudiced the Defendant on the issue of damages so that there is a substantial risk that a fair trial of the issue cannot be had.

At the hearing Counsel for the Defendant relied on the affidavit in support and in reply dated 29th August 2017 and 9th November 2017 respectively. He submitted as undisputed the fact that the matter was commenced in 2008 which was 10 years prior to the application before court. That the matter came up for trial in 2012 and it was discovered that the court record had been misplaced hence the matter could not proceed. Counsel argued that the matter remained dormant for a consecutive period of almost 6 years thereafter until it was resuscitated by notice of this court requiring the parties to appear for a status conference on 30th June 2017.

Counsel submitted that in spite of the notice, the record confirms the Plaintiff did not attend the said hearing. That the Plaintiff only awoke from his slumber when the Defendant filed in the application currently before this court. He thus argued that there has been inordinate or inexcusable delay by the Plaintiff in prosecuting this action which has resulted in prejudice being occasioned on the part of the Defendant.

Counsel submitted further that when it was discovered that the court record went missing, the Plaintiff did not do anything

indicating he was desirous of prosecuting the action. That it was only in 2015 that the Plaintiff through its advocates wrote a letter to the Judge in Charge seeking guidance on how to proceed.

Counsel invited the court to take judicial notice of the long prevailing practice in the High Court of engaging the Assistant registrar to open a temporary jacket to facilitate the prosecution of actions before the High Court. However in this case that 4 years lapsed and the Plaintiff did not take advantage of that avenue. Instead, that the Plaintiff merely wrote a letter to the Chief Marshal on 5th of October 2016 , the 21st of February 2017 and the 9th of May 2017. It was submitted that these steps taken by the Plaintiff did not constitute an active prosecution of the action.

Lastly that the record will confirm that the Plaintiff did not file in the notice indicating his appetite to continue prosecuting it action. Based on the foregoing, it was argued that permitting the Plaintiff to proceed will occasion injustice on the part of the Defendant especially in light of the fact that the motor vehicle that was subject of suit has since been disposed of.

Counsel acknowledged that there is need for matters to be heard on their merits based on authority of ***Stanley Mwambazi vs. Forester***[1]. However, reliance was placed on the case of ***Gloma vs. Sokoloft & others***[2] in which the court held that if a Plaintiff is guilty of prolonged and inexcusable delay leading to prejudice of the Defendant to the extent there is a substantial risk that fair trial may be unattainable, and then the action can be struck out for want of prosecution. Further that this can be ordered even though liability has been admitted by the Defendant.

He prayed that the action having been commenced over 10 years ago be dismissed for want of prosecution and that costs be borne by the Plaintiff.

For the Defendant, Mr. Chipanzya opposed the application. He relied on the affidavit in opposition dated 7th September 2017 and in particular paragraphs 5, 6, 7, 8 and 9 with its attendant exhibits. He added that the history of the matter should be understood to be a sad reflection of the inefficiency inherent in the administration of the justice system in the Republic. That it is a serious indictment on the judicature. He submitted that the matter was initially before

retired Judge P Musonda (retired). That numerous notices of hearing were issued but no progress was made. The matter was subsequently allocated to Judge Sunkutu but no progress was made before that court as well.

Counsel invited me to look at the record and invariably conclude that the delay was not solely the Plaintiff's fault but by and large due to the involvement of other players. It was submitted further that Order 3 of the High Court Rules empowers the court to make any order in the interests of justice. That the matter is now properly before the court and there is a defence filed by the Defendant on a reconstructed record under the authority of the Judge in Charge. He asked that the matter proceed to be heard on its merits.

It was submitted that paragraph 6 of the affidavit in opposition will show that there was some effort made by judicial staff to find the record. On account of this there were no documents which could be filed until the Judge in charge gave the authority to reconstruct the record. Counsel invited the court to consider the history leading to the current position and to arrive at the inescapable conclusion that the delay was not of the Plaintiff's doing. He concluded that the

pleadings now being on the record is an indication that the matter is ready to proceed to trial and prayed that the Defendant's application be dismissed with costs.

In reply, Mr. Bwalya argued that the history of the case reflects a laxity on the part of the Plaintiff to prosecute its case and failure to comply with elementary rules of procedure that govern this court. That the Plaintiff has not accounted for the period of inactivity between 2012 and 2015 when it first approached the Judge in Charge as indicated. Additionally, the Plaintiff did not file a notice of intention to proceed with the prosecution of its cause as required by the rules.

He repeated his argument that a temporal jacket could have been opened to facilitate the prosecution of this matter. He added that the rationale for the inherent power that this court has to dismiss actions for want of prosecution is not gagged by the existence of bundle of pleadings and documents on the record. He stressed that it is the prejudice that the Defendant is likely to suffer as indicated in the case of *Gloma vs. Sokoloft & others* supra even in the face of

admission of liability that this court can still proceed to dismiss a matter.

Lastly, that the peculiar facts of the matter before the court presents a perfect opportunity for the court to make authoritative pronouncement on what amounts to prosecution of a matter. He reiterated his prayer that this was a proper and fit cause for the court to exercise its jurisdiction to dismiss this action for want of prosecution with costs.

I have carefully considered the parties affidavits and respective arguments in support and in opposition of the application before me. The application is brought pursuant to order 25/L/1 of the rules of the Supreme Court by which the court has inherent jurisdiction to dismiss an action for want of prosecution if there has been default in complying with the rules or excessive delay in the action. Rule 25/L/2 provides:

"There are two distinct though related, circumstances in which an action may be dismissed for want of prosecution, namely (a) when a party has been guilty of intentional and contumelious default (b) Where

there has been inordinate, and inexcusable delay in the prosecution of the action."

The circumstances in this case do not allege a default in complying with the court order but rather inordinate and inexcusable delay as defined in order 25/L/4. Under this head the rule provides that:

"The requirements are (a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers. (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between them and a third party"

The authors suggest that inordinate delay means.

"Materially longer than the time usually regarded by the profession and courts as an acceptable period."

The authors further suggest that "inexcusable delay." Ought to be looked at primarily from the Defendant's point of view or at least objectively with some reasonable allowance for illness and accidents. In the case of ***Allen v MC Alpine[3] it*** was held that what amounts to prejudice to the Defendant is a matter of fact and

degree such as the effect of lapse of time on the memory of a witness or in course of such time of their death or disappearance being considered the most usual factors.

Justice Patrick Matibini in his work titled ***"Zambian Civil Procedure Commentary and cases" lexis Nexis 2017 at p 361*** writes that the power to dismiss for want of prosecution is a draconian power which must be exercised sparingly as it deprives a party of his right for a trial or to remedy defects or irregularities. Consequently that a dismissal of actions should be limited to plain and obvious cases where there is really no point of having a trial.

The law settled, the undisputed facts before me are that this matter was commenced in 2008 and previously handled by 2 different judges. Trial did not commence and at some point the matter was referred to mediation. When referred back to the court for trial on account of the failed mediation the record went missing in 2012. This was followed by 4 years of inaction until a request for advice on the way forward was made by the Plaintiff to the Judge in Charge who confirmed the file could not be located.

The Defendant takes issue with the fact that no action was taken by the Plaintiff in this period thus demonstrating his laxity and seeming unwillingness to prosecute the matter. Further that he made no attempt to even have a temporal jacket opened through the Assistant Registrar to facilitate prosecution of the matter.

The Plaintiff on his part contends he was not solely responsible for the delay and basically lumps the blame on the Judiciary who not only failed to hear the matter but also subsequently misplaced the file. He points to efforts that he made that culminated into the reconstruction of the file and that because of that effort pleadings were now settled and bundles of documents filed rendering the matter ready to proceed to trial. The plaintiff in short basically does not concede that the delay was inexcusable.

The one thing that cannot be avoided is my acknowledgment that the Judiciary did play a large part in the delay of the matter when the file went missing. The Judge in Charge clearly acknowledged the Registries inability to trace the file or to reconstitute the record from the system. It is thus difficult to see how the argument of the opening of a temporal jacket advanced by the Defendant would have

yielded anything as there were simply no documents to enable the Judiciary to reconstitute the record. This is why the Judge in Charge suggested that the Plaintiff proceed to do so, based on the documents in his possession.

I note that the letter from the Judge in Charge was written in August of 2016 and the Plaintiff forwarded the documents in his possession to the Chief Marshal in October 2016. This can hardly be considered inordinate delay. I would further agree that it was not possible for the Plaintiff to file a notice of intention to proceed earlier for the simple reason that there was not record to file it on.

Whilst I agree that the exhibited notice looks like nothing more than a draft with no proof that it was eventually filed, there is no taking away that the Judiciary's own poor record keeping at the material time contributed to the delay of the prosecution of the matter. The prejudice contemplated by the Defendant and his appeal to the risk of the possibility of unfair hearing is premised on the revelation that the vehicle subject of the proceedings was sold.

However, I note that in his affidavit in reply Mr. Bwalya asserts that this was brought to his attention by his client squarely making this

hearsay evidence as the Defendant did not dispose to the affidavit. Secondly, the revelation was only being made in the affidavit in reply giving no opportunity for the Plaintiff to respond.

I take cognizance that the claim for liability in this case was admitted leaving only the question of the quantum of damages to be tried. I see no prejudice in the parties proceeding with the trial. After all the burden of proof remain squarely on the Plaintiff to prove his claims. For the above reasons and in the interest of justice I would dismiss the application with costs to the Plaintiff to be taxed in default of agreement the matter will come up for trial on the 6th August and at 14:00 hours & 24th September at 09:30.

Dated at Lusaka the .....30th.....day of .....April.....2020

HON. JUSTICE M.D BOWA