

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

**2012/HP/0948**

BETWEEN:

**BRIAN MATAKA MAMBWE**



**PLAINTIFF**

AND

**ANDERSON GEOFFREY CHONGO**

**1<sup>st</sup> DEFENDANT**

**SARZAM ENTERPRISES LIMITED**

**2<sup>nd</sup> DEFENDANT**

**ALICE MOONO**

**1<sup>st</sup> THIRD PARTY**

**BRENDA MOONO**

**2<sup>nd</sup> THIRD PARTY**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 16<sup>th</sup> DAY OF  
NOVEMBER, 2017**

*For the Plaintiff and third Parties : Ms O. Chirwa, Ranchod and Chungu  
Advocates*

*For the 1<sup>st</sup> Defendant : Mr Raymond Musumali, SLM Legal  
Practitioners*

*For the 2<sup>nd</sup> Defendant : No appearance*

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## **R U L I N G**

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LEGISLATION REFERRED TO:

- 1. The High Court Rules, Chapter 27 of the Laws of Zambia**

This is a ruling on an application made by the 1<sup>st</sup> Defendant on 23<sup>rd</sup> August, 2017, for an order to review the order of dismissal of the action

dated 10<sup>th</sup> August, 2017, made pursuant to Order XXXIX Rules 1 and 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.

When the matter came up for hearing of the said application on 11<sup>th</sup> October, 2017, Counsel for the 1<sup>st</sup> Defendant informed the court that they were not ready to proceed on account of the fact that to their knowledge, the matter was coming up for a status conference, as evidenced by the notice of hearing that was issue by the registry. Further that they had been served an affidavit to cross examine the deponent of the affidavit, and that they wished to file an affidavit in reply to the same, as well as detailed arguments. Counsel stated that after the same were filed, the court could proceed to deliver its ruling.

Counsel for the Plaintiff and the third parties to the counterclaim objected to the application, but the same was overruled on account of the notice of hearing stating that the matter was coming up for a status conference. Counsel for the 1<sup>st</sup> Defendant was granted leave to file the affidavit in reply as well as the arguments within seven days of that date, and Counsel for the Plaintiff and the third parties was also granted leave to file arguments within seven days thereafter. To date the same have not been filed.

I have considered the application. Before I deal the application before me, a review of the events leading up to the application being made is necessary. This matter came up for trial on 5<sup>th</sup> July, 2017, of the Defendant's counterclaim, the main claim having been discontinued by the Plaintiff. As the Defendants were not before court, Counsel for the Plaintiff and the third parties applied that the matter be dismissed for want of prosecution. I however ordered that the matter be struck off the active cause list with liberty to restore within thirty days, failure to which it would stand dismissed for want of prosecution.



On 8<sup>th</sup> August, 2017, the Plaintiff and third parties filed an order to dismiss the matter as it had not been restored within thirty days of the date on which it was struck out, which I signed on 10<sup>th</sup> August, 2017. However the record shows that the 1<sup>st</sup> Defendant filed an application to restore the matter to the active cause list on 3<sup>rd</sup> August, 2017, which I endorsed as returnable on 1<sup>st</sup> September, 2017, but which was placed on the court record after I had signed the order of dismissal. Then on 23<sup>rd</sup> August, 2017 the 1<sup>st</sup> Defendant filed the summons to review the order of dismissal, which I endorsed as returnable on 15<sup>th</sup> September, 2017.

The Plaintiff and third parties filed an affidavit in reply to that application on 11<sup>th</sup> September, 2017. On 15<sup>th</sup> September, 2017, when the matter came up, only Counsel for the Plaintiff and third parties were before court. Counsel applied that the application be dismissed for want of prosecution, but I struck it off the active cause list with liberty to restore within fourteen days, failure to which it would stand dismissed for want of prosecution.

An ex-parte application to restore the said application was filed on 18<sup>th</sup> September, 2017, and it was granted on the same date, and the hearing of the application, subject of this ruling was heard on 11<sup>th</sup> October, 2017.

The gist of the affidavit in support of the summons to review the order of dismissal of the counterclaim is that the Defendants filed the summons to restore the same on 3<sup>rd</sup> August, 2017, well within the thirty day period granted in the order striking out the matter, as shown by exhibit 'AGC1-3' to the said affidavit. In paragraph 8 of that affidavit it is deposed that a wrong cause number was put on the application to restore, as exhibit 'AGC1-3' shows the cause number as 2016/HP/0948, when this matter is cause number 2012/HP/0948.

That it thereafter came to his knowledge that the matter had been dismissed, and that is how the 1<sup>st</sup> Defendant had discovered the error in the cause number, hence the application for review, before me.

In the affidavit in opposition to the application, the Plaintiff deposes that before documents are filed, the file is pulled out of the registry to ensure that all the necessary requirements have been complied with before any documents can be filed. Further that a cashier who receipts the documents indicates the cause number on the receipt, and thereafter the receipt together with the documents are placed on the file, and the filed documents are scanned and placed on the electronic copy of the record.

The Plaintiff in paragraphs 15 and 16 of the affidavit in opposition to the summons for review, deposes that his advocates had consulted with the Assistant Registrar in charge of the registry that deals with matters instituted in the year 2016, and he had informed them that to his knowledge no documents had been erroneously filed under cause number 2016/HP/0948, or that the 1<sup>st</sup> Defendant had communicated the error to him.

Other facts deposed to relate to when the Plaintiff filed the writ and statement of claim on 8<sup>th</sup> September, 2014, and that a default judgment was entered on 24<sup>th</sup> November, 2014 as despite the 1<sup>st</sup> Defendant having acknowledged receipt of the same on 7<sup>th</sup> October, 2014, he did not enter appearance or file a defence. That thereafter an application to issue a writ of possession was filed, as well as contempt proceedings, and that the 1<sup>st</sup> Defendant only applied to set aside the default judgment on 25<sup>th</sup> June, 2015. On the same being granted, the defence and counterclaim were filed on 23<sup>rd</sup> July, 2015.

That the Plaintiff discontinued his claims as he had already enforced them, and that efforts to have the 1<sup>st</sup> Defendant prosecute the



counterclaim had been either neglected or failed, as the 1<sup>st</sup> Defendant had neglected to appear on the various dates set for trial by the court. That this prompted the Plaintiff and third parties to apply that the matter be dismissed for want of prosecution. Therefore the 1<sup>st</sup> Defendant having failed to restore the matter as directed, there were no special circumstances warranting this court to review the order of dismissal of the action.

On the same day that the Plaintiff and third parties filed the affidavit in opposition to the application to review the order of dismissal of the action, they also filed a notice of motion for leave to cross examine the deponent, pursuant to Order XXX Rules 20 and 21 of the High Court Rules, Chapter 27 of the Laws of Zambia. The reason for this application was that the averments by the deponent of the affidavit in support of the application for review bring out contentious issues that would be clarified by oral evidence, so that the ends of justice are served.

In the affidavit in opposition to the motion dated 20<sup>th</sup> September 2017, it is stated that there is nothing contentious in the affidavit in support of summons for review of the order of dismissal that would need to be clarified by oral evidence.

I have already stated that after I signed the order dismissing the matter for want of prosecution on 10<sup>th</sup> August, 2017, as there was no application to restore the matter within thirty days of 5<sup>th</sup> July, 2017 when I struck it out that had been made, the 1<sup>st</sup> Defendant's application to restore the matter to the active cause list dated 3<sup>rd</sup> August, 2017 was placed on the record.

This application has the cause number 2016/HP/0948 which is not for this action, and is the reason given for the court to not have had sight of the application, as it was sitting on a file with that cause number. The

Plaintiff and third parties dispute the said averments stating that there is need for oral evidence to be taken to establish the said averments. Order XXX Rules 20 and 21 of the High Court Rules, pursuant to which the motion to cross examine the 1<sup>st</sup> Defendant as deponent of the affidavit in support of summons to review was made state that;

***“20. Oral evidence shall not be heard in support of any motion unless by leave of the Court or a Judge.***

***21. In addition to or in lieu of affidavits, the Court or a Judge may, if it or he thinks expedient, examine any witness viva voce, or receive documents in evidence, and may summon any person to attend to produce documents, or to be examined or cross-examined, in like manner as at the hearing of a suit.”***

Going by the above provisions, oral evidence in support of any motion may only be heard with the leave of the court, and that a deponent of an affidavit may be examined or cross examined in addition to or in lieu of an affidavit, where the Judge or the Court thinks it expedient. Thus the question is whether it is expedient to allow the cross examination of the 1<sup>st</sup> Defendant over his affidavit evidence in relation to why the application for restoration of the matter to the active cause list was not brought to the court's attention before the lapse of the thirty days from 5<sup>th</sup> July, 2017, when the order striking out the matter with liberty to restore was made?

The reasons for requesting for the leave to so cross examine the 1<sup>st</sup> Defendant in relation to the affidavit relates to the veracity of his averments. While the court has power to order the cross examination of any deponent of an affidavit, my view is that this case is not a proper one where such an order may be granted, as experience with our registries has shown that there are inefficiencies resulting in documents being



placed on wrong files due to parties and cause numbers not being verified. Therefore cross examination of the 1<sup>st</sup> Defendant would not in itself establish the truth of the 1<sup>st</sup> Defendant's averments in his affidavit.

The documents on record show that a wrong cause number is on the application filed in support of the summons to restore the matter, stamped 3<sup>rd</sup> August, 2017, and as to whether there was collusion to do so is a matter that would attract discipline on the part of any registry staff engaged in such conduct. But like I have stated there is a lot of inefficiency in the registries, which would not further the justice of this case, and I decline to grant the order to cross examine the 1<sup>st</sup> Defendant in relation to the said affidavit on that basis.

Having said so, the question that remains is whether I can exercise my powers of review as applied for by the 1<sup>st</sup> Defendant?

Order 39 of the High Court Rules, Chapter 27 of the Laws of Zambia, provides that;

***"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."***

This order is wide in scope, and allows a Judge to review any order or judgment, where there is no appeal. In this case the 1<sup>st</sup> Defendant has

asked me to review my order dismissing the action for want of prosecution, as it was not restored within thirty days of being struck out on 5<sup>th</sup> July, 2017. The reasons as already seen for the failure to restore the matter within the stipulated time was that there was an error on the cause number indicated on the application. This reason is plausible taking into account the inefficiencies in the registries that receive and file the documents.

I have taken note of the reasons for opposing the application for review, which largely centre on the failure by the 1<sup>st</sup> Defendant to prosecute his counterclaim. The reasons are valid, but it is trite that matters must be heard on their merits, and that where a party is seen to be dragging its feet in prosecuting a claim, that can be a ground for dismissal of the action. In this case, the error was in the cause number, hence the order of dismissal being granted. It is an excusable reason, and there is no evidence to show wrong doing in filing that document with the wrong cause number, and on that basis I hereby exercise my powers of review, and reverse the order dismissing the matter, but caution the 1<sup>st</sup> Defendant to be prudent in his prosecution of the counterclaim.

The matter shall come up for trial of the counterclaim on 5<sup>th</sup> April, 2018 at 09:00 hours. Costs shall be in the cause. Leave to appeal is granted.

**DATED THE 16<sup>th</sup> DAY OF NOVEMBER, 2017**

  
**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**