

IN THE COURT OF APPEAL OF ZAMBIA

Appeal No. 139 of 2023

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

NEVERS MUMBA

AND

OLIVER SCOTT



APPELLANT

RESPONDENT

CORAM: SIAVWAPA JP, CHISHIMBA & PATEL, JJA

On 13th May & 13th June 2024

For the Appellants: Mr. K. Mulenga & Ms. C. Nachimba
Messrs. J & M Advocates

For the Respondent: Ms. Charlotte Mwemba & Ms. Sophie Simachela
Messrs Charlotte Chuma Advocates

JUDGMENT

Patel, JA, delivered the Judgment of the Court.

Cases Referred to:

1. Bellemano v Lique Limited (1976) Z.R 263.
2. Morton v Palmer (1882) 9QBD 89.
3. Investment Invoice Financing Ltd v Limehouse Board Mills Ltd (2006) 1 W.L.R. 985.
4. Societe Nationale Des Chemis De Pur Du Congo (SNCC) vs Joseph Nonde Kakonde -SCZ Selected Judgment No. 19 of 2013.
5. Henderson vs Henderson [1843-1860] All ER 378.
6. Elizabeth Catherine Cook v Moses Mpundu and Others -SCZ Appeal No. 207/2015.
7. Gaedonic Automotives Limited and another v Citizens Economic Empowerment Commission -SCZ Selected Judgment No. 39 of 2014.

Legislation & Rules referred to:

1. The Rules of the Supreme Court of England 1965, (White Book) (1999) Edition. (RSC)
2. The High Court Act, Volume 3, Chapter 27 of the Laws of Zambia.

Other Texts and Materials referred to:

1. Halsbury's Laws of England 4th Edition Vol.16.

1.0 INTRODUCTION

- 1.1 This is an appeal by the Appellant, (the Defendant in the court below) against the Ruling of **R. Chibbabuka J**, delivered on 16th September 2022, rendered on an application made by the Appellant in the lower court.
- 1.2 This Appeal arises out of an interlocutory Ruling and interrogates the law and procedure on the award of costs following an order of dismissal for want of prosecution as a pre-cursor to the party's right of proceeding by way of appeal or by commencing a fresh cause of action.
- 1.3 The Appellant seeks to extensively canvass the principle of res judicata, without advancing a corresponding ground of appeal. We will refer to this in our Judgment.
- 1.4 Needless to say, being an interlocutory appeal, we will not comment on the claims, the subject of the action.

2.0 BACKGROUND

- 2.1 For the purposes of this section, and the next, we will refer to the Appellant and Respondent, as Defendant and Plaintiff respectively, as they were in the Court below.
- 2.2 On 9th November 2020, the Plaintiff, Oliver Scott, instituted proceedings against the Defendant Nevers Mumba, under cause number 2020/HP/1238 (*hereinafter referred to as the first action*), seeking the following reliefs:

- i. An Order for specific performance of the contract of sale dated 6th June 2018, being the transfer, assignment and vacant possession of the property known as LUS/38497, Ibex Hill, Lusaka.
- ii. Any other relief as the Court deems fit; and
- iii. Costs

2.3 It is not contested that the Order for Directions not having been complied with, the Defendant moved for an order of dismissal of the first action for want of prosecution. It is also not in contention that **C. Zulu J.**, in a Ruling dated 21st March 2022, dismissed the Plaintiff's case (*the first action*) for want of prosecution with costs to the Defendant to be taxed in default of agreement. The Court also granted leave to appeal.

2.4 On 30th March 2022, the Plaintiff commenced a fresh action under cause number 2022/HP/0486 (hereinafter referred to as the second action) and the matter from which the appeal emanates, seeking the same reliefs as in the first action.

2.5 It is not contested that the Defendant, upon filing its defence and counterclaim, proceeded to make an application on 14th April 2022, by way of Notice of Motion to raise preliminary issues pursuant to the provisions of **Order 14A** and **Order 33 rule 3** of the Rules of the Supreme Court of England¹ as read with **Order 3 rule 2** of the High Court Rules² for the determination of the following questions of law:

- i. Whether the Plaintiff herein can commence a fresh action when he disregarded the sufficient opportunity to be heard under cause number 2020/HP/1238 and failed to prosecute the matter for want of jurisdiction thereby making the matter res judicata;
- ii. Whether the Plaintiff can commence a fresh action where a matter was dismissed for want of prosecution and leave to appeal was accordingly granted. Therefore, the proper action to take was to appeal the decision of the court and not re-file;
- iii. Whether the Plaintiff can commence a fresh action before payment of costs which were awarded to the Defendant in a matter dismissed for want of prosecution.

2.6 The Plaintiff caused to be filed its opposing process and arguments which are noted from **pages 65 to 70** and the Defendant filed his Reply which is noted from **pages 71 to 74** of the Record of Appeal respectively.

3.0 DECISION OF THE COURT BELOW

3.1 For the purposes of this section, we shall refer to the parties as they were in the court below.

3.2 The lower Court heard the Defendant's application on 31st May 2022. It is noted that the Defendant was not present at the hearing. However, the lower Court considered the Parties' affidavits, oral and written arguments, and delivered its Ruling (the subject of this appeal), on 16th September 2022. The Ruling is noted from **pages 7 to 18** of the Record of Appeal.

- 3.3 The learned Judge began by addressing the Respondent's argument, which dealt with the court's jurisdiction. It was counsel's argument that the Appellant did not cite a law for his application to raise the preliminary issues before the court and placed reliance on **Bellemano v Lique Limited**¹.
- 3.4 The learned Judge explained that the holding of the Supreme Court above guides that it is always necessary for an application to contain a reference to the order or rule number or authority under which relief is sought. It was further explained that the importance of citing the law or authority relied on by an applicant in any application cannot be glossed over as a mere regulatory rule which can be cured. It was the learned Judge's considered view that the lack of citation of a rule, order and or authority relied on, for a claim or relief is fatal and will warrant such application being dismissed for being incompetently before court.
- 3.5 The learned Judge considered the argument by the Plaintiff's Counsel, that **Order 14A** of the Supreme Court Rules¹ was not the appropriate rule to cite for the preliminary issue of *res judicata*, as the said order, is only applicable to matters that do not need to go to trial.
- 3.6 The learned Judge found that the issue of *res judicata* raised is not a substantive matter that needs to be determined at trial as it is more of a technical issue and cannot be addressed under **Order 14A** of the Rules of the Supreme Court¹. She noted that this order was not cited in isolation as other provisions of the law were cited such as **Order 33 Rule 3** of the Rules of the Supreme Court¹ as well **Order 3 Rule 2** of the High Court Rules². She

found that the court had inherent jurisdiction under **Order 3 Rule 2** of the High Court Rules² to determine the questions raised as preliminary issues.

3.7 The learned Judge proceeded to address the following questions:

1. *Whether the plaintiff herein can commence a fresh action when he disregarded the sufficient opportunity to be heard under cause number 2020/HP/1238 and failed to prosecute the matter resulting in a dismissal of the matter for want of prosecution thereby making the matter res judicata.*
2. *Whether the plaintiff can commence a fresh action where a matter was dismissed for want of prosecution and leave to appeal was accordingly granted. Therefore, the proper action to take was to appeal the decision of the court and not re-file.*
3. *Whether the plaintiff can commence a fresh action before payment of costs which were awarded to the defendant in a matter dismissed for want of prosecution.*

3.8 In addressing the first question, the learned Judge explained that it is trite that a matter can only be declared *res judicata* when it has been determined on the merits and a judgment on the issues has been made. She explained that it is apparent that for the defence of *res judicata* to stand the three essential elements must coexist—(1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.

- 3.9 The learned Judge noted that the question that begged an answer was whether the plaintiff was at liberty to recommence a fresh cause of action against the same defendant for the exact same reliefs that he had claimed in the initial cause of action when he failed to prosecute the initial matter.
- 3.10 The learned Judge, in analyzing the case before her and in reviewing the case that was before Justice C. Zulu, found that the plaintiff had ample opportunity to recover what he sought in the action before the lower court but for his own fault did not do so. The learned Judge noted that a perusal of the cause of action that was before Justice C. Zulu, revealed that it was not determined on its merits as the same was dismissed due to the laxity of the plaintiff in prosecuting the matter.
- 3.11 As such, the learned Judge found that there was no earlier decision on the issues between the parties and there was no final judgment on the merits. She explained that the only element that was present was that the issues raised were the same and between the same parties.
- 3.12 It was the learned Judge's considered view that as the other two essential elements were not present, the said cause of action could not be said to be *res judicata*. On that basis the court found that the arguments advanced by the defendant on the first question could not stand.
- 3.13 In addressing the second question, the learned Judge took the view that although a party has an inherent right to choose to appeal against a decision or to recommence a fresh cause of action this must be done within the parameters of the law. As such, the learned Judge took the view that the case before the Court was not *res judicata* which meant that the

plaintiff was well within his rights to recommence a fresh cause of action. Since the matter had not yet been determined and final judgment had not been delivered on its merits, she ultimately found that the arguments advanced with regard to the second issue for determination, could not stand.

- 3.14 Turning to the last question, the learned Judge referred to **Order 40 Rule 8** of the High Court Rules². She explained that this Order indicates that the granting of a stay of proceedings in order for costs to be paid and or security given shall not supersede the use of any other lawful method of enforcing payment. She further explained that it was not in dispute that the defendant was awarded costs when the cause of action bearing cause number 2020/HP/1238 was dismissed by Justice C. Zulu, which costs were to be taxed in default of agreement. She also found that it was not in dispute that these costs had not been paid either through agreement or after taxation.
- 3.15 The learned Judge explained that it goes without saying that upon the parties failing to agree on costs to be paid to the defendant, the defendant should have applied to have his costs taxed which avenue was still open to the defendant as he was the party that was awarded the costs.
- 3.16 The learned Judge took the view that although the defendant was awarded costs in the previous matter, the plaintiff could not be barred from commencing a fresh cause of action and or proceeding with this cause of action as and against the defendant. On that premise, the learned Judge found that this was not a suitable application to grant a stay of proceedings

as to grant the stay would in effect make this order supersede or supplant, the taxation process.

3.17 Ultimately, the learned Judge found no merit in the preliminary issues raised by the defendant and dismissed them accordingly.

4.0 THE APPEAL

4.1 Aggrieved with the Ruling of the lower Court, the Appellant filed a Notice of Appeal and Memorandum of Appeal on 20th October 2022, advancing three (3) grounds of appeal:

- i) *The Honourable High Court Judge erred in law and fact by failing to properly examine the matter before her which revealed that the Respondent, under cause number 2020/HP/1238 failed to prosecute his claim which resulted in the Appellant incurring legal costs which ought to have been paid to the Appellant by the Respondent prior to commencing a fresh matter.*
- ii) *The learned High Court Judge erred in law and fact when she allowed for the claim under cause number 2022/HP/0486 to proceed in the absence of the Respondent paying the Appellant's costs incurred under cause number 2020/HP/1238.*
- iii) *The learned Puisne Judge erred in law and fact when she failed to take into consideration the fact that the Respondent herein was dissatisfied with the Ruling of the Honourable Justice C. Zulu under cause number 2020/HP/1238 which dismissed the Respondent's claim*

for want of prosecution. As such, being dissatisfied with the Ruling, the Respondent ought to have appealed and not commenced a fresh action.

5.0 **APPELLANTS' ARGUMENTS IN SUPPORT OF THE APPEAL**

- 5.1 We have duly considered and appreciated the Appellants' Heads of Argument and those in Reply filed on 11th May 2023 and 3rd August 2023.
- 5.2 The Appellant has canvassed the position that a Court, when faced with a situation such as the one in *casu*, ought to stay the proceedings (the second claim) until the costs ordered in the first claim have been paid. In support of this practice, the Appellant has referred to the decision of the Courts in the cases of **Morton v Palmer**² and **Investment Invoice Financing Ltd v Limehouse Board Mills Ltd**.³
- 5.3 The Appellant has forcefully submitted that it is against the interest of justice for the Respondent to seek audience before the Court before paying the costs for the dismissed matter. It is the Appellant's contention that the Respondent's act of commencing the second action, is an abuse of court process and an attempt to deny the Appellant enjoying the fruits of the Ruling under the first action.
- 5.4 On the issue of res judicata, the Appellant seeks to rely on **Halsbury's Laws of England** 4th Edition Vol.16 paragraph 1528¹ which states as follows:

"in order that a defence of res judicata may succeed, it is necessary to show that the cause of action was the same, and also that the

plaintiff had an opportunity of recovering but for his own fault might not have recovered in the first action that which he seeks to recover in the second.

5.5 It is acknowledged that the purpose of the principle of *res judicata* is to support the good administration of justice in the interests of both the public and the litigants, by preventing abusive and duplicative litigation. This was echoed in the case of **Societe Nationale des Chemis De Pur Congo (SNCC) v Joseph Nonde Kakonde**⁴. It is also trite that the two principles that emerge are the following:

- i. The public interest that courts should not be clogged by re-determinations of the same disputes and;
- ii. The private interest that it is unjust for a man to be vexed twice with litigation on the same subject matter. It is therefore important that parties to litigation bring forward their whole case at once.

5.6 The Appellant also placed reliance on the case of **Henderson v Henderson**⁵ in support of his argument that the Respondent's failure to prosecute the first action and commence the second action without paying costs was an abuse of process.

5.7 The Appellant also relied on the case of **Elizabeth Catherine Cook v Moses Mpundu and Others**⁶.

5.8 With respect to ground 3, the Appellant has once again canvassed its argument on the issue of costs and that the same ought to have been paid and that the Respondent ought to have proceeded by way of appeal as

opposed to commencing the second action. It was also submitted that the lower Court erred by not staying the second action, pending the payment of costs.

5.9 The Appellant has prayed that the Ruling be set aside, and that the matter before the lower court be dismissed with costs, and in the alternative, be stayed, pending payment of costs by the Respondent for the first action.

6.0 RESPONDENT'S HEADS OF ARGUMENT

6.1 We have equally considered and appreciated the Respondent's Heads of Argument filed on 12th June 2023.

6.2 In opposing the argument of the Appellant, the Respondent has called in aid the provisions of **Order 62 rule 29** of the **Rules of the Supreme Court**¹ in support of the argument that costs awarded, must as a matter of necessity be ascertained and within the requisite time frame allowed by the Rules of Court.

6.3 On the issue of *res judicata*, the Respondent has submitted that in *casu*, there was no judicial decision on the issue between the parties and no judgment on the merits. It is not in contention that the issues in dispute and the parties are the same and that there has been no determination on the merits.

6.4 With respect to ground 3, the Respondent has strongly canvassed that an action dismissed for want of prosecution is not a decision on merit and that

the Appellant has not cited any authority for the proposition that a party is compelled to proceed by way of appeal.

- 6.5 The Respondent has maintained that the lower court was on firm ground when it dismissed the Appellant's application and prays for the dismissal of the appeal with costs.

7.0 THE HEARING

- 7.1 At the hearing, Counsel relied on the Record of Appeal and Heads of Argument respectively.

8.0 DECISION OF THE COURT

- 8.1 We have carefully considered the grounds of appeal reproduced in *paragraph 4* above, the impugned Ruling, and the arguments and submissions of the Parties.
- 8.2 We note however that of the three (3) grounds of appeal, the first and second both relate to the issue of costs that had been awarded to the Appellant and challenge the lower court for having allowed the second action, the action in *casu*, to have proceeded without the Respondent having paid costs for the first action. The third ground of appeal challenges the propriety of the Respondent having commenced a fresh action as opposed to having launched an appeal against the dismissal of the first action.

8.3 We have also noted that the Appellant has expended much time and energy in canvassing the issue of res judicata in its heads of argument and reply. To the extent that the principle of res judicata has not been framed as a ground of appeal, although we note it was the first question for determination in the Appellant's preliminary application before the lower court (**see paragraph 2.5 above**). We are of the considered view that the Appellant has abandoned his argument that the action in *casu* is *res judicata*, and accordingly, we will not give this non-issue any further judicial consideration.

8.4 At the core of this appeal are the following pertinent questions, which we consider will sufficiently address all the grounds of appeal raised by the Appellant:

- i. What is the fate of a matter dismissed, not on merit, but on account of a procedural lapse?
- ii. How does a party recover the costs awarded to it?

8.5 As we direct our minds to the first question posited above, the Supreme Court in the case of **Elizabeth Catherine Cook v Moses Mpundu and others**⁶ on the recourse by a party to a dismissed action stated as follows:

"In these cases, a party has a right to recommence a fresh action if it is dismissed because he fails to apply to restore it in the prescribed time because the initial case was not determined on the merit but rather a technicality. This of course, is subject to the limitation period and payment of costs to the other party."

The Supreme Court further stated:

“what we have said in the preceding paragraph in no way compromises the ends of justice because, as we have stated, a party who loses his right to prosecute his case arising from the dismissal of an action can institute a fresh action.”

- 8.6 In *casu*, the first action was dismissed for want of prosecution. It is trite and settled in our jurisdiction, that a party is at liberty to commence a fresh action for a matter dismissed not on merit.
- 8.7 We are guided by Supreme Court in the case of **Gaedonic Automotives Limited and another v Citizens Economic Empowerment Commission.**⁷
- 8.8 We are of the considered view that the Appellant himself has conceded the position, that a party may elect to recommence an action which has been dismissed for want of prosecution. This is noted in **paragraph 4.2 page 6** of the Appellant’s heads of argument in reply. The Appellant however seeks to place a caveat on his position on account of costs awarded and not paid.
- 8.9 It has not been contested that the Appellant was awarded costs in the first action when it was dismissed for want of prosecution. The Ruling dated 21st March 2022, in the first action (which is not the subject of the appeal before us) provided at **page 54** of the Record of Appeal as follows:

*“Accordingly, the Plaintiff’s action is hereby dismissed for want of prosecution with costs, **taxable in default of agreement.**”* (emphasis is ours).

- 8.10 It is also not contested that the costs as awarded were neither agreed nor taxed. The Record reflects an exchange of letters between counsel dated 25th and 31st March 2022. The Appellant has argued that non-payment of costs awarded to it, is reason enough for the lower court to have dismissed the action upon having been moved pursuant to the provisions of **Order 14A and Order 33 rule 3** of the Rules of the Supreme Court ¹ as read with **Order 3 rule 2** of the High Court Rules ².
- 8.11 We have considered this argument and take the view that the Appellant slept on his own rights by failing to tax his costs after negotiations to agree on costs failed or stalled. **Order 62 rule 29** of the Rules of the Supreme Court¹ is pertinent on the subject of costs. It is important to note that a party entitled to recover costs must begin proceedings for taxation of those costs within three months after the award of costs was made. This is a mandatory provision. It is noted that not only was there no agreement on costs but also that the Appellant did not within the three-month period, take any action to have his costs taxed. Laxity on the part of the Appellant to have his costs taxed, cannot be cited as a ground to have the action dismissed.
- 8.12 This would be akin to the Appellant abusing the Order of costs and using it as a double-edged sword, benefitting from his own default whereby he neither makes a claim for costs, nor proceeds to have them taxed and yet uses that same failure to pay costs, as a means to prevent the Respondent from prosecuting his claim. The Appellant cannot seek to have his cake and eat it too.

8.13 Clearly, this haphazard approach of the Appellant must meet with our disapproval and dismissal of all three grounds of appeal. The net result is that we find no merit in any of the grounds of appeal.

9.0 CONCLUSION

9.1 The appeal being bereft of merit, it is dismissed in its entirety.

9.2 The matter is referred back to the lower court for determination on the merits.

9.3 We award costs to the Respondent, to be agreed or taxed in default.

M. J. SIAVWAPA
JUDGE PRESIDENT

F.M. CHISHIMBA
COURT OF APPEAL JUDGE

A.N. PATEL S.C.
COURT OF APPEAL JUDGE

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**M. J. SIAVWAPA
JUDGE PRESIDENT**



**F.M. CHISHIMBA
COURT OF APPEAL JUDGE**



**A.N. PATEL S.C.
COURT OF APPEAL JUDGE**