**IN THE COURT OF APPEAL OF ZAMBIA** **Appeal No. 396/2023**
**HOLDEN AT LUSAKA**
**(Civil Jurisdiction)**



**BETWEEN:**

**FRANK NKOMANGA** **APPELLANT**

**AND**

**SERAH KALAMBO MBETWA** **RESPONDENT**

**CORAM : Siavwapa JP, Chishimba, and Banda Bobo**

**On 23rd April, 2024 and 7th June, 2024**

For the Appellant : No Appearance by - Messrs. Mando & Pasi Advocates

For the Respondents: No Appearance by Messrs. Douglas & Partners

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# JUDGMENT

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**CHISHIMBA JA,** delivered the judgment of the Court.

## CASES REFERRED TO:

1) Evelyne Helen Mwambazi v Wedson Chisha Mwambazi (1986) Z.R. 132
2) Mohammed Jab v Yakub Mulla & Others CAZ Appeal No. 105 of 2019
3) Hu Herong & Luo Feng v John Kapotwe & Kalwa Food Products Limited SCZ Appeal No. 65 of 2007
4) Chibote Limited, Mazembe Tractor Company Limited, Minestone (Zambia) Limited & Minestone Estates Limited v Meridien Biao Bank (Zambia) Limited (In Liquidation) (2003) ZR
5) Hildah Lombanya (T/A Hilomu Travel and Car Hire) v Gertrude Saviye Kalombo (T/A Ilanga Travel and Car Hire) CAZ Appeal No. 119 of 2021
6) Elizabeth Catherine Cooke v Moses Mpundu, Joseph Musonda, Jeremiah Malambo & Others SCZ Appeal No. 207 of 2015
7) Development Bank of Zambia & Mary Ncube (Receiver) v Christopher Mwansa & 63 Others SCZ/8/103/08
8) D. E. Nkhuwa v Lusaka Tyre Services Limited (1977) ZR 43

REPUBLIC OF ZAMBIA
COURT OF APPEAL
07 JUN 2024
CIVIL REGISTRY 2
P.O BOX 50067, LUSAKA

9) John R. Ng'andu v Lazarous Mwiinga (1988 - 1989) Z.R. 197

**LEGISLATION CITED:**

1) The High Court Rules Chapter 27 of the Laws of Zambia

## 1.0 INTRODUCTION

1.1 This appeal arises from an order dated 20th June, 2023 by Mrs. Justice P. Lamba dismissing the matter for want of prosecution following a *viva voce* application to adjourn by Counsel for the appellant. The matter was dismissed on account of the failure of the appellant to bring witnesses for trial and for breach of **Order 33 Rule 1 and 2 of the High Court Rules.**

## 2.0 BACKGROUND

2.1 The record shows that the appellant commenced the action on 21st October, 2021 by writ of summons and statement of claim seeking a declaration that he is the beneficial owner of Stand No. 229, Kabushi, Ndola; an order for possession and mesne profits for the period the respondent was alleged to have been in wrongful occupation of the property.

2.2 On 3rd December, 2021, the court below issued Orders for Directions which were not complied with on account of the failure of the respondent to serve the appellant the defence,

list of documents and bundle of documents within the required time. This prompted an application by the appellant on 28th February, 2022 for extension of time within which to file the plaintiff's bundle of documents, pleadings and witness statement. The application was granted in an order dated 16th March, 2022.

2.3 On the same date, the learned Judge issued a Further Order for Directions in which, *inter alia*, she set 28th April, 2022 as the date for a scheduling conference. The record shows that, the matter came up on 15th June, 2022 for a scheduling conference. The appellant's advocates were absent. Counsel for the respondent informed the court that they were served the notice for the scheduling conference on 9th May, 2022 by the appellants. That the respondent had not complied with the order for directions and not filed their witness statements. On that basis, an adjournment was sought. The court granted the application and adjourned the matter to 14th July, 2022.

2.4 On that date, the record shows that Mr. Mazumba, learned counsel for the respondent appeared and informed the court that the appellants were notified of the date and had

acknowledged receipt of the notice as per the letter dated 22nd June, 2022.

2.5 The learned Judge struck out the matter from the active cause list and in the event of failure to restore within 30 days, the matter would stand dismissed for want of prosecution with costs. The matter was subsequently restored to the active cause list on 8th August, 2022.

2.6 On 6th September, 2022, the matter was adjourned to 23rd September, 2022 as counsel for the appellant was not before court and there was no proof of service.

2.7 On 23rd September, 2022, counsel for the parties attended court and the matter was adjourned to 28th September, 2022 for another scheduling conference in order to give the parties time to resolve the issues for determination at trial. On the said return date, both counsel were present. The court identified the issues for determination at trial. The matter was then adjourned to 18th May, 2023 for a compliance conference and the trial date of 20th June, 2023 was set. In the meantime, the court referred the matter to mediation, which yielded no settlement.

2.8 When the matter came up for trial on 20th June, 2023, counsel for the parties were present. Mr. Pasi, learned Counsel for the appellant sought an adjournment. He informed the court that the parties could not attend mediation due to numerous scheduling conflicts. He sought further time to attempt mediation to resolve the dispute. Mr. Mazumba, learned Counsel for the respondent did not oppose the application.

## *3.0* DECISION OF THE COURT BELOW

3.1 After noting the history of the matter, the learned Judge took the view that sufficient time had been given to the parties to seek mediation. That had the parties desired more time for mediation, then they ought to have filed the necessary process as opposed to making a viva voce application to adjourn the proceedings in blatant contravention of the rules of court requiring not less than ten days before hearing for such application. The court further found the reasons advanced to be neither exceptional nor compelling to sway her to grant the application. She then dismissed the application for an adjournment.

3.2 Mr. Pasi then informed the court that the witness (appellant herein) had travelled to Lusaka. He was at a loss as there was no witness for that day. The respondent's witness was available.

3.3 The learned Judge ruled that she saw no basis for keeping the matter on the active cause list and proceeded to dismiss it for want of prosecution and breach of the High Court Rules with costs.

## 4.0 GROUNDS OF APPEAL

4.1 Being dissatisfied with the ruling of the court below, the appellant appealed advancing three grounds of appeal as follows:

1) ***The court erred in law when it dismissed the matter for want of prosecution when the matter had not been struck off the active cause list prior;***
2) ***The court misdirected itself in law and fact when it dismissed the matter for want of prosecution when the matter did not come up for a status conference on 18th May, 2023 due to the court being out of jurisdiction; and***
3) ***The court misdirected itself in law and fact when it dismissed the matter for want of prosecution when the appellant's advocates had consistently attended court and had complied with the court's order for directions.***

## 5.0 APPELLANT'S HEADS OF ARGUMENT

5.1 The appellant filed heads of argument on 12th December, 2023. In ground one, it was argued that the matter could only be dismissed for want of prosecution if the court had first struck it out of active cause list. As authority, we were referred to the case of **Evelyne Helen Mwambazi v Wedson Chisha Mwambazi** [1] where it was held that:

> ***"Where a plaintiff or petitioner fails to appear on the date set for hearing the proper course, under Order 35. Rule 2, is to strike out the cause from the list. It is not proper to dismiss the action."***

5.2 Reference was made to **Order 35 rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia** which provides for striking out a matter where the plaintiff is absent. The appellant contends that the matter was dismissed when both parties were in attendance; a reason was advanced as to why the plaintiff was not prepared to proceed with trial on that day; and there was compliance with the court's order for directions by the parties.

5.3 Our decision in **Mohammed Jab v Yakub Mulla & Others** [2] was also called in aid where we stated as follows:

***"The guidance given to courts in such situations as the one that the trial court faced is set out in Order 3 Rule 5(12) of the Rules of the Supreme Court which states that-***

> ***"Two principles are to be considered. The first is that the rules of court and the associated rules of practice devised in the public interest to promote the expeditious dispatch of litigation must be observed. The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on the merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate. Neither principle is absolute but the court's practice has been to treat the existence of such prejudice as a crucial and often decisive factor. In the majority of cases, it will be appropriate for the court to hear both summonses together so that the case is viewed on the round. A rigid mechanistic approach is inappropriate."***

5.4 In ground two, the appellant contends that the matter should not have been dismissed for want of prosecution when it did not come up for a status conference on 18th May, 2023 due to the court being out of jurisdiction. In the absence of the court, a new date for hearing was not communicated to the parties. In this regard, it was submitted that the default was not of the parties but the non-communication of a new date

for the status conference by the court, or that the status conference had been dispensed with.

5.5 Counsel further argued that at the hearing, the court below ignored the fact that both parties were willing to continue mediation to try and find an amicable way to settle the matter by asking for more time from the court which was denied.

5.6 The appellant submitted that the inherent jurisdiction to dismiss matters for want of prosecution should be done in exceptional circumstances where a party has been guilty of intentional and contumelious default, and where there has been inordinate and inexcusable delay in the prosecution of the action. This is because it is desirable for matters to be settled on merit after hearing the evidence rather than to defeat them through procedural technicalities. The following authorities were drawn to the attention of the court namely **Hu Herong & Luo Feng v John Kapotwe & Kalwa Food Products Limited** [3], **Chibote Limited, Mazembe Tractor Company Limited, Minestone (Zambia) Limited & Minestone Estates Limited v Meridien Biao Bank (Zambia) Limited (In Liquidation)** [4] and **Hildah Lombanya (T/A**

**Hilomu Travel and Car Hire) v Gertrude Saviye Kalombo (T/A Ilanga Travel and Car Hire)** [5].

5.7 Lastly, in ground three, the appellant contends that the matter should not have been dismissed for want of prosecution when the appellant's advocates had consistently attended court and complied with the court's order for directions. We were referred to the **Hu Herong case** on the principles a court must consider in deciding whether or not to dismiss a matter for want of prosecution being that:

1) The default has been intentional and contumelious;
2) There has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers; or
3) 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 prejudice to the defendants.

5.8 It was argued that both the appellant and respondent complied with the order for directions and did not miss a court date as the record will show to cause inordinate delay, or a lack of interest on its part or any prejudice to the respondent.

## 6.0 ARGUMENTS BY THE RESPONDENT

6.1 The respondent filed heads of argument dated 6th March, 2024. In response to ground one, the respondent argued that at the time the matter was finally dismissed, the appellant had been defaulting in appearance for some time, including on the day it was dismissed. That page 10 of the record of appeal also shows that the matter had been struck out of the active cause list first, and then dismissed later.

6.2 The case of **Elizabeth Catherine Cooke v Moses Mpundu, Joseph Musonda, Jeremiah Malambo & Others** [6] was cited as authority that where there are several defaults in appearance on the part of the plaintiff, the Court may dismiss the matter. That there must be finality to litigation with a party in default reaping the consequences of its inertia by not being allowed to roam the courts. Our attention was drawn to the cases of **Development Bank of Zambia & Mary Ncube (Receiver) v Christopher Mwansa & 63 Others** [7] and **D. E. Nkhuwa v Lusaka Tyre Services Limited** [8].

6.3 It was further argued that on the day the matter was dismissed, it was scheduled for trial, and that the appellant was still not ready to proceed being out of town. Reference to

**Order 33 rule 1 and 2 of the High Court (Amendment) Rules, 2020** was made on adjournments being granted upon compelling and exceptional circumstances as well as the requirement that an application must be made ten days before the date set for trial.

6.4 That in this case, the appellant's counsel made the application on the day of hearing. Hence the Judge refusing to grant the adjournment and allowing the matter to proceed to trial.

6.5 In ground two, the respondent submits that while the status conference was not held on 18th May, 2023, the parties had held a scheduling conference on 6th February, 2023 at which it was agreed that trial would proceed on 20th June, 2023 at 10:00 hours. This was in compliance with **Order 19 rule 5 of the High Court (Amendment) Rules, 2020**. Therefore, even in the absence of a status conference, both parties were aware that the trial date stood as agreed. It is for this reason that the respondent showed up ready for trial on 20th June, 2023.

6.6 Even though the matter had been referred to mediation in the mean-time, which did not occur due to the non-attendance

of both parties, this did not in any way change the trial date. Therefore, the court below was on firm ground in dismissing the matter for want of prosecution.

6.7 Lastly, in ground three, the respondent maintained that the appellant was in constant default of appearance for the first four sittings and only started to appear after that. That the court was always lenient and gave him the benefit of doubt regardless of the respondent's advocates showing that the appellant ought to have been aware of the hearing date.

6.8 The court was referred to the case of **Hu Herong & Luo Feng v John Kapotwe & Kalwa Food Products Limited** [3] as authority that where there has been prolonged or inordinate and inexcusable delay on the part of the plaintiff or his lawyers, the court is at liberty to dismiss the action for want of prosecution, as it was in this case. That the delay in this case is attributable to the appellant's non-attendance.

6.9 We were urged to dismiss the appeal with costs to the respondent

## 7.0 DECISION OF THE COURT

7.1 We have considered the appeal, the authorities cited and the arguments advanced by Learned Counsel. The appellant in

the grounds of appeal contends that the matter was dismissed for want of prosecution when;

1) The matter had not been struck off the active cause list;
2) No status conference was held on 18th May, 2023 due to the non-availability of the court; and
3) The appellant's advocates had consistently attended court and complied with the court's order for directions.

For this reason, we shall address the three grounds together.

7.2 The main issue for determination is whether, the matter should not have been dismissed for want of prosecution, but should have instead been struck out. The factors for dismissing for want of prosecution are inordinate and inexcusable delay, absence of interest to proceed with an action and prejudice to be occasioned by the delay amongst others. Dismissal is resorted to in exceptional circumstances.

7.3 **Order 35 rule 2 of the HCR** provides that:

> ***If the plaintiff does not appear, the Court shall, unless it sees good reason to the contrary, strike out the cause (except as to any counter-claim by the defendant), and make such order as to costs, in favour of any defendant appearing, as seems just:***

7.4 In this case, the appellant's advocate was present on the date of trial as the record shows. The advocate sought an adjournment on the basis that they needed more time for mediation and that his witness, was not before court, having travelled out of town.

7.5 We must look at the dismissal of the matter from two points. When the matter came up for trial on, a date both parties were aware of, the appellant applied for an adjournment viva voce on the basis of the parties attempting further mediation to resolve the dispute. The application to adjourn was made in total disregard of the Rules of court, in particular **Order 33 rule 2 of the High Court Act (Amendment Rules** that provides as follow;

> **"(1) A judge shall not grant an application for an *adjournment except in compelling and exceptional circumstances.***
>
> ***(2) A party intending to apply for an adjournment of hearing shall, not less than ten days before the date set for the hearing file a notice of that intention."***

7.6 The appellant did not apply for the adjournment within the stipulated ten days before the trial date. Therefore, the application was in breach of the Rules of the court. We cannot fault the court below for having refused to adjourn the

matter on that basis. Further as correctly noted by the court, had the parties desired to go back to mediation, they would have applied before the date set for trial. The evidence on record shows that mediation did not occur due to the non attendance of both parties, revealing lack of interest to proceed with mediation or settlement of the dispute.

7.7 The court having refused to adjourn, the matter, the appellant informed the court that the witness was out of town. This is the second excuse given in an attempt to adjourn the matter. The court saw no basis to maintain the matter on the active cause list and dismissed it for want of prosecution. The appellant assails the order of dismissal contending that the court ought to have struck the matter out instead of dismissing it.

7.8 It is trite that before a matter is dismissed it is a legal requirement that it be struck out from the active cause list and the plaintiff be given an opportunity to restore it. We refer to the **Hellen Mwambazi** case where the above was stated.

7.9 Further, **Order 35 rule 2 of the HCR** earlier cited provides the same procedure to first strike out a matter when the

plaintiff is absent, and not dismissing it outright. Dismissal of an action is provided for under **Order 19 rules 7 and 8 of the High Court (Amendment) Rules, 2020** where the parties fail to attend a scheduling conference or status conference on two occasions without justifiable cause or where sixty days after filing of an action, there is no progress.

7.10 The Supreme Court guided in the case of **John R. Ng'andu v Lazarous Mwiinga** [9] that where a plaintiff fails to appear on the date set for hearing, the proper course, under **Order 35 rule 2 of the HCR**, is to strike out the cause from the list and that it is not proper to dismiss the action.

7.11 The issue is, are there circumstances under which a court can proceed to dismiss a matter for want of prosecution instead of striking out a matter for non appearance?

7.12 In the case of **Elizabeth Catherine Cooke v Moses Mpundu, Joseph Musonda, Jeremiah Malambo & Others** [6] cited by the respondent, the Supreme Court distinguished the case of **Evelyn Mwambazi v Wedson Mwambazi** [1] by stating that where there are several defaults in appearance on the part of the plaintiff, the court may take a much more severe approach of dismissing the matter as opposed to striking it

out of the active cause list. Is this such a case that warranted dismissal on account of defaults in appearance?

7.13 A perusal of the record of appeal shows a history as follows; that the appellant commenced this matter in October, 2021. Order for directions were issued. The appellant and his advocates were absent on 15th June, 2022 when the matter came up for a scheduling conference despite having served the respondent the notice of hearing. The appellant was also absent on 14th July, 2022 having been served with the notice of hearing and documents by the respondent as evidenced by the letter acknowledging service that was noted by the court. This led to the matter being struck out of the cause list with liberty to restore. The matter was restored on 8th August, 2022. The appellant and counsel's attendance was excused on 6th September, 2022 on account of counsel attending the funeral of a member of the Law of Association of Zambia.

7.14 The Parties attended the next two hearings on 23rd September, 2022 and 16th February, 2023. The court at the scheduling conference of 16th February, 2023 set the date for trial of 20th June, 2023 and a status conference for 18th May, 2023 while referring the matter to mediation. The status

conference did not take place due to the Judge being indisposed. The appellant was absent on the date set for trial except for his advocates who sought an adjournment, which was dismissed.

7.15 From the circumstances above, we note that the appellant has on at least three occasions been absent without advancing any reasons for the non attendance. On the third occasion, only counsel was present, his witness was not before court for trial. We note that the matter had once been struck out of the cause list due to the non attendance of the appellant.

7.16 The fact that the Judge was not available for the status conference on 18th May, 2023 is of no help to the appellant considering that a trial date had already been set and agreed. We are fortified in so holding by the view of the Supreme Court in the **Elizabeth Catherine Cooke** case that:

> ***"..., we know of no rule of practice or law which says that where a Court gives two or more dates for trial the parties have an option to attend on the day suitable to them. The practice in our Courts is that if two or more dates are set and the plaintiff, without cause being shown, does not attend on the first day, the presumption is that it is not his wish to have the matter prosecuted as such all subsequent trial dates are vacated."***

7.17 We hold the view that in the particular circumstances of this matter, the court below was on firm ground to dismiss the matter for want of prosecution. The appellant was aware of the date set for trial. We are satisfied that the default was intentional, hence the attempted adjournment sought in breach of Rules of court. Further, we are of view that there has been inordinate delay in prosecuting this matter which was once struck out, evidenced by a number of non attendances by the appellant. Litigation is Judge - driven and litigants cannot dictate the pace of proceedings by bringing applications for adjournment on the day of trial, and in blatant disregard of Rules of court.

7.18 We wish to reiterate that **Order 33 rule 2 of the High Court (Amendment) Rules, 2020**, requires a party intending to apply for adjournment of a hearing, to do so not less than ten days before the date set for the hearing by filing a notice of that intention. The appellant and counsel showed scant respect for the Rules of court by making the application viva voce on the date set for trial.

7.19 We cannot fault the court below for dismissing the matter in view of the three absences of the appellant, particularly on

the date set for trial, coupled with the matter having been previously struck out of the active cause list once for non-attendance by the appellant. We must state that though the appellant opted to exercise his right of appeal upon dismissal of the matter, simply commencing a fresh action would appear to us to be more prudent, the matter not having been determined on merits.

**8.0 CONCLUSION**

7.20 We find no merit in the appeal and accordingly dismiss it with costs to the respondent to be taxed in default of agreement.

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M. J. Siavwapa

**JUDGE PRESIDENT**

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F. M. Chishimba

**COURT OF APPEAL JUDGE**

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A. M Banda Bobo

**COURT OF APPEAL JUDGE**