

IN THE HIGH COURT FOR ZAMBIA

2010/HP/254

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)



BETWEEN

MARTIN NKANDU

PLAINTIFF

AND

THE ATTORNEY GENERAL

DEFENDANT

Before: *The Hon. Mr. Justice Charles Zulu.*

For the Plaintiff: Mr. C. Bwalya, of Messrs Legal Aid Board.

For the Defendant: Col. F. Chidakwa, Principal State Advocate.

R U L I N G

Case referred to:

1. ***Finance Bank Zambia Limited v Dimitrios Monokandilos, Filandraia Kouri (2012) Z.R. Vol.1 484.***

Legislation referred to:

1. ***Constitution of Zambia (Amendment) Act No. 2 of 2016.***
2. ***Rules of the Supreme Court of England and Wales 1965 (White Book 1999 Edition).***

1.0 **INTRODUCTION**

- 1.1 This ruling is in respect of an application dated March 11, 2025 by the Defendant, the Attorney, to dismiss matter for want of

prosecution. The application was made pursuant to Order III rule 5 (12) of the **Rules of the Supreme Court of England and Wales 1965 (White Book 1999 Edition).**

2.0 BACKGROUND

- 2.1 The Plaintiff, Martin Nkandu, a former employee of the Zambia National Service, took out a writ of summons and statement of claim dated March 15, 2010 against the Attorney General, essentially seeking damages for unlawful retirement and damages for personal injuries suffered in the course of employment.
- 2.2 On June 17, 2010 the Defendant entered appearance, and in its defence averred that the Plaintiff was lawfully discharged on medical grounds at his instance.
- 2.3 The Plaintiff filed his reply to the defence on June 19, 2010 and maintained his averments in his statement of claim.
- 2.4 Notably, on October 28, 2010 the Plaintiff then represented by Messrs Paul Pandala Banda & Company, filed a request to set down the matter for trial. And on December 4, 2015 the Plaintiff filed his bundles of documents and pleadings.
- 2.5 It is apparent from the record that after filing the bundle of documents and pleadings the matter became inactive until the Defendant filed the present application to dismiss action for want of prosecution.

3.0 **AFFIDAVIT EVIDENCE & ARGUMENTS**

- 3.1 An affidavit in support was deposed to by Captain Esanju Abigail Ulika, a State Advocate. She stated that a search conducted on July 25, 2024 revealed that the Plaintiff had not taken any steps to prosecute the action for the past eleven (11) years.
- 3.2 An affidavit in opposition was deposed to by the Plaintiff, Martin Nkandu. He explained that post the commencement of the action and serving the same on the Defendant, he was unwell as a result of the injuries sustained in the accident. And that he was represented by Mr. Paul Pandala Banda until his demise in 2017.
- 3.3 He added that after the demise of his lawyer, the law firm, Messrs Paul Pandala & Company was put under the care of Messrs Ellis & Company, who in 2018 demanded that he pays them the sum of K15,000.00 so that they could continue representing him. He stated that due to his indigent state, he had alternative recourse to Legal Aid Board.
- 3.4 He said after Legal Aid Board was engaged, the case record was reported missing and he had to wait for the same to be located.
- 3.5 He added that he was still desirous to prosecute the action since he had shown commitment to attend court, and that the delay to prosecute the action was not intentional.

3.6 An affidavit in reply was deposed to by Samarantha Banda, the Defendants Advocate. The thrust of her reply was that despite the Plaintiff being unwell, this matter would have still been prosecuted within a reasonable time frame. And that the demise of the Plaintiff's Counsel was not sufficient reason not to prosecute the matter because, the Plaintiff would have found alternative legal representation.

3.7 And in support of the application it was contended that the Plaintiff's delay to prosecute the matter for over ten years had greatly prejudiced the Defendant, which prejudice cannot be atoned for in damages. According to the Defendant, the pendency of this matter had given leverage to the Plaintiff to continue occupying the institutional house to the Defendant's prejudice.

3.6 I was urged to grant the application.

3.7 In opposition, citing Article 118(2) (e) of the **Constitution of Zambia** as amended by Act No. 2 of 2016, it was argued that matter should not be dismissed but that it should be heard on its merits.

4.0 DETERMINATION

4.1 I have carefully considered the application, the affidavit evidence and the parties' respective arguments for and against the application. It is trite law that this Court has the requisite jurisdiction to dismiss an action for want of prosecution under

Order 3 rule 5(12) of the **RSC**. And I am mindful of the case of **Finance Bank Zambia Limited v Dimitrios Monokandilos, Filandraia Kouri**¹ cited by the Defendant, which gives circumstances when an action can be dismissed for want of prosecution.

- 4.2 The circumstances under which a matter may be dismissed for want of prosecution are: (i) where a party has been guilty of intentional and contumelious default and (ii) where there has been inordinate delay in the prosecution of the matter.
- 4.3 The questions for determination are; (i) whether the Plaintiff is in default of court rules or orders and (ii) whether there has been in ordinate delay to prosecute the matter.
- 4.4 The Defendant's allegation to justify dismissal for want of prosecution was that, post service of the list of documents on the Defendant dated August 7, 2013, the Plaintiff has neglected to take steps to prosecute his action.
- 4.5 From the record it is clear that the Plaintiff is not in default of any rule or direction by the Court because, he duly filed his bundles of documents and pleadings. And thereafter, the reciprocal duty was on the Court to issue a date of trial since there was a pending request by the Plaintiff to settle down the matter for trial.
- 4.6 The second issue is whether the Plaintiff is guilty of inordinate delay to have the matter prosecuted. The issue of inordinate

delay is clear and obvious that the matter has never gone to trial after the Plaintiff filed his bundles of documents and pleadings. Part of the reasons given for the delay, is that, the record at some stage went missing and could not be located. This excuse is probable and excusable.

4.7 It is probable that the record indeed went missing because, a temporal jacket otherwise called "TJ" was opened. The inaccessibility of the record at the time of its missing at the Registry is not a blame to be apportioned to the Plaintiff.

4.8 In the light of the foregoing, and in the interest of justice it is only fair to give the Plaintiff the benefit of the doubt by not finding him guilty of want of prosecution, especially that at some stage he was indisposed.

5.0 **CONCLUSION**

5.1 The application to dismiss the action for want of prosecution is dismissed. The matter is listed for status conference to be held on **May 21st, 2025 at 08:45hours** to chart the way forward.

5.2 I make no order as to costs.

5.3 Leave to appeal is granted.

DATED THE 2ND DAY OF MAY, 2025



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THE HON. MR. JUSTICE CHARLES ZULU