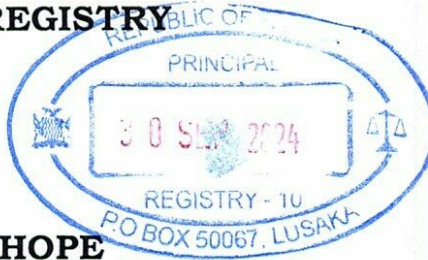


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2012/HP/1086



**BETWEEN:
AFRICAN VISION OF HOPE
ZAMBIA LIMITED**

PLAINTIFF

AND

**STEPHEN PHIRI
KABULONGA BAPTIST CHURCH
REGISTERED TRUSTEE**

1ST DEFENDANT2ND DEFENDANT

BEFORE THE HONOURABLE MRS. JUSTICE M.C KOMBE

For the Plaintiff:

*Mr. C. Nyimbili – Messrs. Makebi Zulu
Advocates.*

For the 2nd Defendant:

*Mr. M. Nkole – Messrs. Kaumbu
Mwondela Legal Practitioners.*

R U L I N G

Cases referred to:

1. **Godfrey Miyanda v. The High Court (1984) Z.R 62.**
2. **National Pension Scheme Authority v. Metraclark (Zambia) Limited, Handy Air Conditioning Limited and Charles Phiri (CAZ 08/80/2016).**
3. **Access Bank Ltd v. Group Five/ZCON Business Park Joint Venture (Suing as a Firm) (SCZ/ 8/52/2014).**
4. **Allen v. Sir Alfred McAlpine & Sons Ltd (1968) 1 All ER 543.**
5. **Nahar Investment v. Grindlay Bank International Zambia (1984) Z.R 81.**
6. **Stanley Mwambazi v Morester Farm Limited (1977) Z.R 108.**

7. **Flynn v. the Minister for Justice, Equity and Law Reform (2017) ECA.**
8. **Dipak Kumar Patel & Yakub Patel v. David Kangwa Nkonde (Selected Ruling No. 33 of 2017).**
9. **Elizabeth Catherine Cooke v. Moses Mpundu (Appeal No. 207/2015).**
10. **Chibote Limited, Mazembe Tractor Company Limited, Minestone (Zambia) Limited, Minestone Estate Limited v. Meridien Biao Bank Zambia Limited {in liquidation} (SCZ No. 11 of 2022).**
11. **Zambia Revenue Authority v. Jayesh Shah (2001) ZR 61.**
12. **Hu Herong & Luo Feng v. John Kapotwe & Kalwa Food Products Limited (Appeal No. 65 of 2007).**
13. **Henry Kapoko v. The People, 2016/CC/0023.**

Legislation and other material referred to:-

1. **The Constitution of Zambia (Amendment) Act No. 2 of 2016.**
2. **The High Court Rules, Chapter 27 of the Laws of Zambia**
3. **The Rules of the Supreme Court of England, 1999 Edition, White Book**
4. **Halsbury's Laws of England, Vol 37, 4th Edition.**

1. INTRODUCTION

- 1.1 This is a Ruling on the Defendant's application for an order to dismiss action for want of prosecution pursuant to Order 3 rule 5(2) and Order 19 rule 1 of the Rules of the Supreme Court 1965 (White Book) 1999 Edition.

2. DEFENDANT'S AFFIDAVIT EVIDENCE

- 2.1 The application is supported by an affidavit deposed to by **DERRICK NYIRONGO**, the Pastor and Trustee of the 2nd Defendant who deposed that the Plaintiff filed and issued out

of the Principal Registry a Writ of Summons and Statement of Claim on 19th September, 2012.

2.2 That the court record showed that the Plaintiff had amended its originating process once without leave of Court and also made applications to amend with the leave of Court on 16th October, 2020 and 20th July, 2022 respectively.

2.3 A Ruling dated 27th October, 2023, was issued by this Court in which the Court ordered and directed that the Plaintiff files and serves on the Defendant the amended originating process on or before 10th November, 2023.

2.4 The Plaintiff had up to the date not filed and served on the Defendant the amended originating process. The Defendants through their Advocates conducted a search on the physical and electronic file on 16th January, 2024 and were advised that their finding was that the Plaintiff had as at the date of the search not filed the amended originating process contrary to the Court's order.

2.5 This was a fit and proper case for the Court to dismiss the action for want of prosecution.

3. PLAINTIFF'S AFFIDAVIT EVIDENCE

3.1 The Plaintiff filed an affidavit in opposition deposed to by **KENNEDY HAKOBWA**, the Director in the Plaintiff company.

- 3.2 He deposed that the Plaintiff's inability to file and serve on the Defendants was not deliberate and not meant to disregard or disrespect the Court.
- 3.3 He explained that he was aware that the Ruling of 27th October, 2023 was only brought to his attention the second week of November and by then, they were preparing for the Christmas break. He tried to reach the retained Advocates on record in December, 2023, but failed as they were closed for the industrial break which ended second week of January, 2024.
- 3.4 The Advocates became available after the break but the Plaintiff company struggled with resolutions and or cash flow coming from the festive period to enable its Advocates to swiftly attend to the necessary court issues.
- 3.5 That the Plaintiff had given full instructions to proceed with this matter and oppose the application in the interest of justice. He deposed further that he was aware that through the Plaintiff's Advocates, an application for leave to file into Court amended originating process out of time had been filed. A copy of the affidavit in support of summons was exhibited and marked "**KH1**".

- 3.6 He was aware that the delay on acting on the Court's Order and to file and serve the amended process was not deliberate, but due to the reasons advanced above and the delay was not inordinate.
- 3.7 Further, that the rules governing dismissing an action for want of prosecution were not met by the Defendants' application. That this matter had been active and that the said application could not stand as an active matter could not be dismissed.
- 3.8 He deposed that the 2nd Defendants' application was improperly before this Court and that the Defendants would not be prejudiced by the Court not granting the application.

4. DEFENDANT'S AFFIDAVIT IN REPLY

- 4.1 The 2nd Defendant filed an affidavit in reply deposed to by **DERRICK NYIRONGO**. He deposed that the delay by the Plaintiff did not stop time from running and the Plaintiff had ample time from 27th October, 2023, in which to file the amended process as the Christmas break was in the third week of December.
- 4.2 That the Plaintiff slept on their rights and their actions ought not be rewarded. He added that paragraphs 14, 15, 16, 17

and 18 contained legal arguments contrary to the rules of affidavit evidence.

4.3 The Defendant would suffer great injustice and be prejudiced as the Plaintiff had not been serious with prosecuting this matter which commenced twelve years ago.

4.4 That the Plaintiff had not provided satisfactory reasons to justify or otherwise explain its failure to file and comply with the Court's directions within the prescribed time. Further that the Plaintiff's application lacked merit and he did not perceive any reasons advanced by the Plaintiff that would provide this Court with a foundation of fact in order to review the prospects of the application.

4.5 In addition, it was deposed that no compelling reasons had been advanced by the Plaintiff why the Court should not grant an application for an Order to dismiss action for want of prosecution.

5. HEARING

5.1 At the hearing of the application, learned counsel for the 2nd Defendant, Mr. M. Nkole relied on the affidavit and the skeleton arguments filed in support of the application.

5.2 In the skeleton arguments, Mr. Nkole proposed to argue the application under two heads namely:

- i) Does this Honourable Court have jurisdiction to hear and determine this application?
- ii) What are the principles underpinning an application to dismiss an action for want of prosecution?

5.3 Under the first head, Mr. Nkole referred to Order 3 rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia which provides as follows:

“Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not.”

5.4 He also referred to Order 30 rule 1 of the High Court Rules, which provides that:

“Every application in chambers shall be made by summons to be supported by an affidavit.”

5.5 He referred to the definition of ‘jurisdiction’ by the authors of The International Criminal Court as:

“...the power of a court to adjudicate cases and issue orders... the jurisdiction to prescribe must exist before the jurisdiction to adjudicate and enforce.”

5.6 Learned counsel referred to **Godfrey Miyanda v. The High Court**⁽¹⁾ where the Supreme Court guided that:

“The term jurisdiction should first be understood. In one sense, it is the authority which a court has to decide matters that are litigated before it; in another sense, it is the authority which a court has to take cognizance of matters presented in a formal way for its decision. The limits of authority of each of the courts in Zambia are stated in the appropriate legislation.”

5.7 It was submitted that this Court was clothed with jurisdiction to hear and make any order which it considered necessary for doing justice.

5.8 Under the second head, Mr. Nkole referred to Order 3 rule 5(12) of the Rules of the Supreme Court 1965 1999 Edition which provides that:

“In Costellow v Somerset County Council (1993) 1 WLR 256 1993) 1 All ER 952 CA Court of Appeal (Sir Thomas Bingham M.R Stuart -Smith and Simon L.JJ) gave the following guidance for courts confronted by a situation where a defendant applies to have an action dismissed because of a failure by the Plaintiff to take some step in the proceedings within the time required by the rules and where the Plaintiff at the same

time applies (or indicates that he will apply) for an extension of time under Order 3 rule 5 to take the step in question.

The principle to be considered 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.”

5.9 He submitted that the order above highlighted the principle to be considered when a defendant applied to have an action dismissed because of a failure by the plaintiff to take some step in the proceedings within the time required by the rules. That is that the rules of court and associated rules of practice devised in the public interest to promote the expeditious dispatch of litigation must be observed.

5.10 Reference was also made to the Court of Appeal case of **National Pension Scheme Authority v. Metraclark (Zambia) Limited, Handy Air Conditioning Limited and Charles Phiri** ⁽²⁾ where it was stated that:

“In view of the authorities cited, it is clear that this Court has power to dismiss an action for want of prosecution and the deciding factors are that there must be intentional or contumelious disregard of the relevant rules and prolonged or inordinate delay in prosecuting the appeal.”

5.11 Mr. Nkole placed further reliance on the case of **Access Bank Ltd V Group Five/ZCON Business Park Joint Venture (Suing as a Firm)** ⁽³⁾ where the Supreme Court stated that:

“... although matters should as much as possible, be determined on their merits rather than be disposed of on technical or procedural points, the ends of justice also require that this court, indeed all, courts, must never provide succor to litigants and their counsel who exhibit scant respect for rules of procedure as rules of procedure and timeliness serve to make the process of adjudication fair, just, certain and even-handed.”

5.12 He also referred to **Allen v. Sir Alfred McAlpine & Sons Ltd** ⁽⁴⁾ where the Court held that when delay in the conduct of an action was prolonged or inordinate and was inexcusable ...or that grave injustice would be done... the Court may in its discretion dismiss the action. In the end, the Court must decide whether, or not on balance, justice demanded that the action should be dismissed.

5.13 The case of **Nahar Investment v. Grindlay Bank International Zambia** ⁽⁵⁾ was also referred to on the Court's power to dismiss for want of prosecution.

- 5.14 Counsel submitted that it was clear that the action was commenced by way of writ of summons and statement of claim on 19th September, 2012 and trial had not yet commenced due to the Plaintiff's occasioned delays.
- 5.15 It was argued that the Defendant had not yet been served with the amended process as per Court's direction in its Ruling dated 27th October, 2023, hence this application. He submitted that the application ought to be dismissed for want of prosecution as the Plaintiff had not taken any further step to prosecute the matter.
- 5.16 In opposing the application, learned counsel for the Plaintiff Mr. Nyimbili relied on the affidavit and skeleton arguments filed in opposition.
- 5.17 In the skeleton arguments, Mr. Nyimbili argued that through Order 3 rule 2 of the High Court Rules already referred to by Counsel for the Defendant, this Court had sufficient jurisdiction to hear and determine this matter.
- 5.18 He referred the Court to the learned authors of Halsbury's Laws of England, Vol 37, 4th Edition at paragraph 448 wherein they stated that:

“On an application to dismiss for want of prosecution, the court will take into account all the circumstances of the case, including the nature of the delay and the extent to which this had prejudiced the defendant, as well as the conduct of all the parties and their lawyers.”

5.19 Mr. Nyimbili submitted that although the failure by the Plaintiff to adhere to the Orders of this Court was evident and grossly regrettable, an application to dismiss an action for want of prosecution to succeed needed to meet the above threshold which the 2nd Defendant had not met.

5.20 It was argued that the Plaintiff in its affidavit in opposition had stated the circumstances which led to the non-adherence to this Court’s orders and on the face of it, it could be depicted that the failure was not intended and by no means inordinate and the 2nd Defendant in his arguments already discussed the nature of the delay or pointed out the delay to file and serve was either in advertent or inordinate.

5.21 That the 2nd Defendant had not demonstrated in any way to which extent the non-adherence had prejudiced. It was submitted that the 2nd Defendant would not suffer any prejudice if the application to dismiss was not granted. He thus

submitted that this was not a fit and proper case for the Court to dismiss the action for want of prosecution.

5.22 Mr. Nyimbili argued that the Plaintiff was desirous to prosecute this cause and this desire had been demonstrated by his application to amend originating process and his swift response in opposing this application.

5.23 Further reliance was placed on ***Access Bank (Zambia) Limited v. Group Five/ZCON Business*** already referred to by the Defendant where the Supreme Court held *inter alia* that:

“Matters ought to be decided on their merit as opposed to being disposed of on technicalities.”

5.24 Mr. Nyimbili submitted that dismissing this matter as prayed by the 2nd Defendant would be terminating the matter on a technicality when there was an opportunity for the matter to be disposed of once and for all on the merit and in the interest of justice.

5.25 He further placed reliance on the case of **Stanley Mwambazi v. Morester Farm Limited** ⁽⁶⁾ where the Court stated that:

“The party in default may be ordered to pay costs because it is not in the interest of justice to deny him to have his case heard.”

5.26 It was submitted that the Plaintiff had acted grossly irresponsible and a much more just route to consider would be to order in the interest of justice, the payment of costs and not granting an application for an order to dismiss the action for want of prosecution.

5.27 In augmenting the written submissions, Mr. Nyimbili reiterated that the Defendant's affidavit in support of the application did not include any basis for which an application for dismissing the matter for want of prosecution could be based on. He placed reliance on the ***NAPSA v. Metra Clark (Z) v. Charles Phiri case*** where the Court of Appeal indicated that in deciding whether to dismiss a matter for want of prosecution, there must be intentional or contumelious delay in prosecuting a matter. That a look at the affidavit in opposition showed that there had not been inordinate delay and an explanation for the delay was given.

5.28 He also placed reliance on the case of **Flynn v. Minister of Equity & Reform** ⁽⁷⁾ where the Court highlighted the circumstances under which a matter could be dismissed for want of prosecution. He argued that the affidavit in support did not support any of the three requirements.

- 5.29 It was further submitted that in the case of **Dipak Kumar Patel and Yakub Patel v. David Kangwa Nkonde** ⁽⁸⁾ the Supreme Court stated that dismissal for want of prosecution imputed inordinate delay, it also imputed the absence of diligence or interest to proceed with an action.
- 5.30 He reiterated his submission that the Plaintiff had shown that it had interest to prosecute this matter and the application by the Defendant should be dismissed.
- 5.31 In his arguments in reply, learned counsel for the Defendant, Mr. Nkole reiterated what is contained in his arguments. He submitted that the Court in its Ruling on an application made by the Plaintiff to amend originating process directed that the Plaintiff files on or before 10th November, 2023 and the directive was not followed for a period exceeding 60 days. He submitted that the Plaintiff slept on their rights in this regard.
- 5.32 He submitted that in addition to the skeleton arguments, the High Court Rules Order 19 gave this Court inherent jurisdiction to dismiss an action if there was inactivity for a period of 60 days.
- 5.33 In response to a question as to whether Order 19 applied to this case, Mr. Nkole submitted that the rules applied as there was

no direct authority but that the change made the proceedings judge driven and not party driven.

5.34 It was further argued that the reasons advanced by the Plaintiff for the delay were not good and sufficient. That it was only upon the filing of the Defendant's application that the Plaintiff awoke from its slumber and filed the application to file amended documents out of time.

6. DECISION OF THE COURT

6.1 I have considered the submissions by the parties which I have taken into account when arriving at this decision.

6.2 By this application, I have to determine whether the Defendant is entitled to an Order to dismiss this action for want of prosecution.

6.3 The application is anchored on **Order 19 (1) of the Rules of the Supreme Court of England** which provides that:

“Where the plaintiff is required by these rules to serve a statement of claim on a defendant and he fails to serve it on him, the defendant may, after the expiration of the period fixed by or under these rules for service of the statement of claim, apply to the Court for an order to dismiss the action, and the Court may by order dismiss the

action or make such other order on such terms as it thinks just.”

- 6.4 Order 19(1) allows a defendant to apply to the Court for an order to dismiss an action after expiration of the period prescribed where the plaintiff has failed to serve on the defendant a statement of claim.
- 6.5 The gist of the Defendant’s application is that by Ruling dated 27th October, 2023, this Court ordered and directed that the Plaintiff file and serve on the Defendants the amended originating process on or before 10th November, 2023. The Plaintiff in disregard of the Court’s order and directive had however not filed and served the amended originating process. It is contended that the matter ought to be dismissed for want of prosecution as the Plaintiff has not taken any further step to prosecute the matter.
- 6.6 The Plaintiff on the other hand argues that its inability to file and serve on the Defendants the amended originating process was not deliberate and not meant to disregard or disrespect the Court but that the Ruling was only brought to their attention in the second week of November and by then they were preparing for Christmas break.

6.7 It is argued that attempts to reach their retained Advocates on record in December, 2023 failed as the firm was closed for the industrial break which only ended in the second week of January, 2024. By the time their Advocates were available, the Plaintiff struggled with resolutions and or cash flow to enable its Advocates swiftly attend to the necessary court issues.

6.8 I must hasten to point out from the onset that the High Court is clothed with jurisdiction to remove litigants who are needlessly not willing to prosecute their cases from their cause list. The Supreme Court discussed this power in the case of **Elizabeth Catherine Cooke v. Moses Mpundu** ⁽⁹⁾ where it was held that:

“The art of modern adjudication must be cognizant of the fact that the resources of the Courts are limited and as such the door to justice must only be open to litigants who are willing to prosecute or defend their actions.”

6.9 The imputation of dismissal for want of prosecution was defined in ***Dipak Kumar Patel & Yakub Patel v. David Kangwa Nkonde*** case as:

“A dismissal for want of prosecution on the other hand imputes inordinate delay, absence of diligence or interest to proceed with an action.”

6.10 The factors to be considered when dismissing a matter for want of prosecution have been laid down in a plethora of cases including the case of ***Flynn v. the Minister for Justice Case*** already referred to by the Counsel for the Plaintiff as-

“(1) whether the delay in the prosecution was inordinate and inexcusable;

(2) whether or not due to the passage of time a fair trial is no longer possible; and

(3) whether or not the defendant is or will be prejudiced by the delay.”

6.11 It is clear that when dismissing a matter for want of prosecution, the Court has to consider whether the delay in the prosecution was inordinate and inexcusable, whether due to the passage of time, a fair trial is no longer possible and whether or not the defendant will be prejudiced by the delay.

6.12 Similar sentiments were expressed in the ***Allen case*** already referred to by the Plaintiff is also illustrative on when to exercise the power to dismiss when it is stated that:

“The power to dismiss should be exercised only where the Court is satisfied that the default is intentional and contumelious.

(i) That the default has been intentional and contumelious.

- (ii) That there has been inordinate and inexcusable delay on the part of the plaintiff.
- (iii) That such delay will give rise to a substantial right 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 or to both parties.”

6.13 Apart from the factors laid down in the *Flynn case*, it is evident from the *Allen case* that the power to dismiss should be exercised only where the Court is satisfied that the default is intentional and contumelious.

6.14 This principle was further pronounced in **Chibote Limited, Mazembe Tractor Company Limited, Minestone (Zambia) Limited, Minestone Estate Limited v. Meridien Biao Bank Zambia Limited (in liquidation)**⁽¹⁰⁾, where the Supreme Court stated regarding dismissal for want of prosecution that:

“It is trite law that there are two distinct but related principles in circumstances in which an action can be dismissed for want of prosecution. Normally when 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.”

6.15 I have carefully considered the Plaintiff's argument which as I earlier alluded to is that the inability to file and serve on the Defendants the amended originating process was not meant to disregard or disrespect the Court but that the Ruling was only brought to their attention in the second week of November and by then they were preparing for Christmas break.

6.16 It is argued that attempts to reach their retained Advocates on record in December, 2023 failed as the firm was closed for the industrial break which only ended in the second week of January, 2024. By the time their Advocates were available, the Plaintiff struggled with resolutions and or cash flow to enable its Advocates swiftly attend to the necessary court issues.

6.17 I must mention and condemn in the strongest terms the lax approach exhibited by the Plaintiff in the manner they dealt with the Court's order and directive to file and serve the amended originating process within the time prescribed. Even if they were in the midst of Christmas preparations, they had sufficient time to give instructions to their retained Advocates before the industrial break began.

6.18 I have however given the Plaintiff a benefit of a doubt for the reason that they struggled with resolutions and financial

constraints to enable their Advocates carry out the necessary instructions.

6.19 I have therefore weighed the factors to be considered when dismissing a matter for want of prosecution against the Plaintiff's case. It goes without saying that the delay was inordinate as the Court's order and directive was given in October and the Plaintiff were awakened by the Defendant's filing this application. As I have already given them a benefit of a doubt for the reasonable explanation that they had financial constraints that made it difficult for their Advocates to carry out their instructions, I find that the delay, though inordinate, is excusable.

6.20 I am further of the considered view that despite the delay, a fair trial is still very much possible and the Defendants will not be prejudiced.

6.21 I am guided by what was stated by the Supreme Court in **Hu Herong & Luo Feng v. John Kapotwe & Kalwa Food Products Limited**⁽¹¹⁾ that:

“Although Courts have inherent jurisdiction to dismiss matters for want of prosecution, this should only be done in exceptional circumstances.”

6.22 It is clear that even though the Court has the inherent jurisdiction to dismiss matters for want of prosecution, this jurisdiction should be exercised in exceptional circumstances.

6.23 It has been a long-standing principle of law that **Zambia Revenue Authority v. Jayesh Shah** ⁽¹²⁾ that cases should be decided on their substance and merit notwithstanding procedural technicalities.

6.24 **Article 118 (2)(e) of The Constitution of Zambia (Amendment) Act No.2 of 2016** also enjoins the courts in exercising judicial authority to administer justice without undue regard to procedural technicalities.

6.25 On the rationale of Article 118(2)(e) of the Constitution, the Constitutional Court held in **Henry Kapoko v. The People** ⁽¹³⁾ that:

“In enacting Article 118(2)(e) the framers of the Constitution did not intend to throw out our rules of procedure or indeed technicalities; it was to avoid undue regard being accorded to technicalities in a situation where such undue regard prevents gratuitously, the just disposition of cases before the courts.”

6.27 It is thus clear that Article 118 (2)(e) was enacted to avoid undue regard to technicalities where such undue regard prevents the just disposition of cases before the courts.

6.28 In light of the foregoing, I am of the view that this is a fit and proper case in which to administer justice without undue regard to technicalities in order to pave way for the just disposition of this case. I have considered the fact that the Plaintiff has since filed an application for leave to file into Court amended originating process out of time. In my exercise of judicial authority, I form the view that the Plaintiff's case does not warrant a dismissal for want of prosecution.

6.29 Be that as it may, I did state earlier that the Plaintiff's lax approach in following the Court's order and directive is condemned in strong terms. The Supreme Court in ***Access Bank (Zambia) Limited v. Group Five/ZCON*** held that:

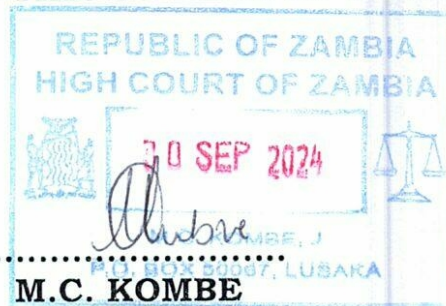
“Under the guise of doing justice through hearing matters on their merit, courts cannot aid in the bending or circumventing of these rules and shifting goal posts, for while laxity in application of the rules may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.”

6.30 It is evident that under the guise of doing justice through hearing the matter on merit, the courts cannot aid in circumventing of rules for while laxity may aid one side, it unfairly harms the innocent party who strives to abide by the rules.

6.31 I find from the facts on record that whilst in doing justice to the Plaintiff by allowing their case to be heard on the merit, the Defendants are unfairly harmed by the Plaintiff's reluctance to prosecute their case. I therefore condemn the Plaintiff to costs in this regard.

6.32 The upshot of my findings is that I find no merit in the Defendant's application and accordingly dismiss it. For the reasons stated, I award costs of this application to the Defendants as the application was occasioned by the Plaintiff's failure to comply with the Order of the Court.

DELIVERED AT LUSAKA THIS 30TH DAY OF SEPTEMBER, 2024



M.C. KOMBE
JUDGE