

IT

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2020/HP/0002

(Civil Jurisdiction)

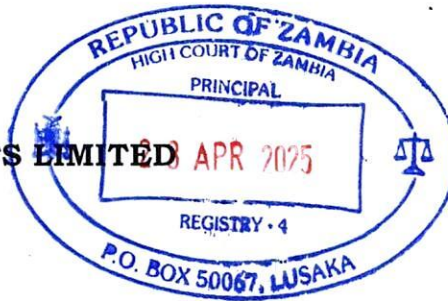
BETWEEN:

MUKELS INVESTMENTS LIMITED

AND

MUMA E. MWAMBA

PAISON CHIKOKO



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

**BEFORE THE HONOURABLE MR. JUSTICE S.V SILOKA ON THIS 23RD DAY
OF APRIL 2025.**

For the Plaintiff: Mr. P. I Mangenda of Messers Victor Kachaka & Company

For the 1st Defendant: Ms. S. Dyamini – Messers Equitas Legal Practitioners

For the 2nd Defendant: N/P

RULING

CASES REFERRED TO:

1. *Hu Herong, Luo Feng and John Kapotwe and Another SCZ/8/58/2007/Appeal No. 65/2007:*
2. *Birkett v James (1977) 2 ALL ER 801;*
3. *Finance Bank Zambia vs Dimitrios Monkandilos and Filandraia Kouri (2012) ZR 484 Volume 1:and*
4. *Dipak Kumar Patel & Yakub Patel v David Kangwa Nkonde- selected Ruling No.33 of 2017.*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The High Court Rules Chapter 27 of the Laws of Zambia; and*
2. *Halsbury's Laws of England, Vol.37, 4th Edition.*

1.0. INTRODUCTION

This application was commenced by the 1st Defendant by summons accompanied by an Affidavit in support and skeleton arguments of even dates.

2.0. 1ST DEFENDANTS AFFIDAVIT EVIDENCE IN SUPPORT

- 2.1. The Affidavit in support was deposed to by Judith Kamoko who deposed that she is Counsel seized with conduct of this matter, on behalf of the 1st Defendant and therefore duly authorized to make this Affidavit from matters within her personal knowledge.
- 2.2. The Deponent deposed that the Plaintiff commenced this matter against the 1st and 2nd Defendant on 2nd January, 2020 seeking among others a Declaratory Order that the Plaintiff is the lawful owner of the piece of traditional Land situated off Shantumbu Road in Kafue District, Lusaka Province, which property constitutes the subject matter of these proceedings.
- 2.3. That after the 1st and 2nd Defendants were served with the Writ of Summons and the Statement of Claim, the 1st Defendant filed his Defense in response.
- 2.4. The Deponent deposed that since filling and service of the Defense, the Plaintiff has not filed its reply nor have they shown any interest to

prosecute this matter to bring it to its conclusion by the Honourable Court. Further that due to the failure by the Plaintiff to file its Reply or Prosecute this matter to ensure that the matter is concluded, the 1st Defendant continues to suffer loss and damage.

2.5. The Deponent also deposed that since service and delivery of the Defense on the Plaintiff, the Plaintiff has not taken any necessary steps or further action to Prosecute this matter and to ensure that the matter is concluded by the Honourable Court.

2.6. The Deponent further deposed that the matter being a Land dispute, the 1st Defendant will continue to suffer irreparable damage if this Honourable Court does not dismiss this matter for want of prosecution, because the legal costs keep escalating.

3.0. **1ST DEFENDANTS SKELETON ARGUMENTS IN SUPPORT**

3.1. In support of the application, Counsel for the 1st Defendant submitted that this Court pursuant to **Order XXXI Rule 2 (2) of the High Court Rules Chapter 27 of the Laws of Zambia** has jurisdiction to entertain this application.

3.2. Counsel referred the Court to the case of **Hu Herong, Luo Feng and John Kapotwe and Another** ⁽¹⁾, wherein the Supreme Court held that the Court has inherent Jurisdiction to dismiss a matter for Want of Prosecution, and the Court further went on to cite the case of **Birkett v James** ⁽²⁾ in stating

that before the Court can dismiss a matter for Want of Prosecution it must ensure that:

“There has been prolonged or inordinate and inexcusable delay on the part of the Plaintiff or his Lawyers, and that such delay will give rise to a substantial risk that is not possible to have a fair trial of the issue in the action or is such as is likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between them and a third party.”

3.3. Counsel further referred the Court to **Paragraph 448 of Halsbury’s Laws of England, Vol.37, 4th Edition at Page 337** where the authors had the following to say on the principles the Courts should consider on dismissing matters for Want of Prosecution:

“The Court should take into account all circumstances of the case, including the nature of the delay and the extent to which it prejudiced the Defendant, as well as the conduct of all the parties and their lawyers.”

3.4. It was Counsel’s submission that the Plaintiff commenced this matter against the 1st and 2nd Defendants on 2nd January 2020, and the 1st Defendant filed in his Defense in response to the Plaintiffs Writ of Summons and Statement of Claim.

- 3.5. It was also Counsels submission that after filling and serving the Plaintiff the Defense, the Plaintiff has not filed its Reply nor have they shown any interest to Prosecute this matter further to bring it to its Conclusion.
- 3.6. Counsel further submitted that the dispute between the parties herein relates to Land, and if this matter is not dismissed for Want of Prosecution by this Honourable Court, the 1st Defendant will continue to suffer irreparable damage which cannot be atoned for by any amount of damages that the 1st Defendant may be granted.
- 3.7. It was Counsel's submission that the 1st Defendant will be prejudiced if the matter remains in abeyance indefinitely, in that the costs of defending this action will keep escalating due to inflation.
- 3.8. It was Counsels prayer that this matter be dismissed for Want of Prosecution.

4.0. **PLAINTIFFS AFFIDAVIT EVIDENCE IN OPPOSITION**

- 4.1. The Affidavit in Opposition was deposed to by Theresa Kuyangana Simushi, who deposed that she is the Director in the Plaintiff Company and by reason therefore competent to swear the Affidavit.
- 4.2. The Deponent deposed that contrary to the Defendants statement that the Plaintiff merely filed this matter and sat back, the Plaintiff avows that this matter was pending ruling and determination of an application by the 1st Defendant for misjoinder before Honourable T Katenekwa.
- 4.3. The Deponent also deposed that the Plaintiff is a Limited Company and the Defendants are fully aware of the demise of one Sean Mutawa

Mukelabai who was Instructing the lawyer on behalf of the Plaintiff Company.

- 4.4. That in the wake of the Demise of Mr. Mukelabai, the Deponent was out of Lusaka for most of the time and unable to pick up the pieces enough to establish contact with the lawyers as she was out for election petitions in Kasama and subsequently transferred to Mongu.
- 4.5. The Deponent further deposed that her transfer occasioned a further break-down in communication with the lawyers who equally were at loss to know how to proceed after the death of Mr. Mukelebai.
- 4.6. It was the Deponents deposition that the Plaintiff intends to prosecute this matter and had it not been for the delayed ruling on the 1st Defendants application for misjoinder, this matter would have been concluded.
- 4.7. Further, the Deponent deposed that she is advised by Counsel and verily believes the same to be true and correct that it is in the interest of Justice, that this Honourable Court must hear the parties before it and determine cases on merit rather than send away parties unheard by dismissing their Matters on technicality.

5.0. **PLAINTIFFS SKELETON ARGUMENTS IN OPPOSITION**

- 5.1. In opposing the application, Counsel for the Plaintiff admitted that Order **XXXI Rule 2 (2) of the High Court Rules Chapter 27 of the Laws of Zambia** gives this Court Jurisdiction to set aside a matter for Want of

Prosecution where it is apparent that there has been laxity on the part of the Plaintiff to prosecute the matter.

- 5.2. It was Counsel's submission that there has been no laxity on the part of the Plaintiff to prosecute the matter, because as the record will show this matter was and still is pending a Ruling on the 1st Defendant's application for misjoinder.
- 5.3. It was also Counsel's submission that it would be a disregard of the Courts authority to apply to dismiss the matter for want of Prosecution as suggested by the Defendants in the face of an application that is pending before Court.
- 5.4. It was Counsels submission that the Plaintiff cannot be accused of any inordinate delay as the matter was pending a Ruling. Further that as shown in the Affidavit, the Plaintiff was unable to issue instructions after the death of the instructing party.
- 5.5. It was Counsels submission that there is nothing in the Plaintiffs conduct in this matter that warrants the dismissal of this cause. That it would not be in the interest of Justice that these proceedings be dismissed for the reasons advanced by the Defendants.
- 5.6. In support of the above proposition, Counsel referred the Court to the Case of **Finance Bank Zambia vs Dimitrios Monkandilos and Filandraia Kouri** ⁽³⁾ that:

“The power to dismiss an action for want of prosecution is a draconian power which must be resorted to sparingly.

This is so because it deprives a party of his right to trial. And also denies a party the opportunity to remedy procedural defects or irregularities.”

And further that:

“Dismissal of actions should be limited to plain and obvious cases where there is really no point in having trial.”

6.0. **HEARING**

6.1. The matter came up for hearing on the 1st day of August 2024. At the hearing Counsel on both sides relied on the documents on record and briefly augmented their arguments, which were more less emphasizing the points in their documents on record.

7.0. **ISSUES FOR DETERMINATION**

7.1. From the above, the following issue has been framed for determination:

- i. **Whether or not the matter should be dismissed for Want of Prosecution?**

8.0. **ANALYSIS AND DECISION**

8.1. I have considered the affidavit evidence adduced by both parties and the competing skeleton arguments filed into Court.

- i. **Whether or not the matter should be dismissed for Want of Prosecution?**

8.2. The starting point in resolving the sole issue for determination as I see it is to discuss the principles governing dismissal of a matter for Want of Prosecution.

8.3. According to **Order XXXI Rule 2 (2) of the High Court Rules Chapter 27 of the Laws of Zambia:**

“Where the Plaintiff does not, within the period fixed under sub-rule (1), set action down for trial, the Defendant may set the action down for trial or may apply to the Court or a Judge to dismiss the action for Want of Prosecution, and on the hearing of any such application, the Court or a Judge may Order the action to be dismissed accordingly or may make such other order as the Court or a Judge may seem just” (emphasis mine)

8.4. From the above it is clear that where the Plaintiff does not apply to set the matter down for trial, the Defendant has a choice to apply to set it down for trial or to have the matter dismissed for want of prosecution. Where the Defendant chooses the latter option, the Judge has the discretion to dismiss the matter or make any such other Order as the Judge deems just.

8.5. As regards considerations to be followed, the Supreme Court in the case of **Hu Herong, Luo Feng and John Kapotwe and Another** ⁽¹⁾, endorsed the case of *Birkett v James* (1977) 2 ALL ER 801 and held that:

“Before the Court can dismiss a matter for Want of Prosecution it must ensure that there has been prolonged or inordinate and inexcusable delay on the part of the Plaintiff or his Lawyers, and that such delay will give rise to a substantial risk that is not possible to have a fair trial of the issue in the action or is such as is likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between them and a third party.”

8.6. The Supreme Court further guided in the case of **Finance Bank Zambia vs Dimitrios Monkandilos and Filandraia Kouri** ⁽³⁾ that:

“The power to dismiss an action for want of prosecution is a draconian power which must be resorted to sparingly. This is so because it deprives a party of his right to trial. And also denies a party the opportunity to remedy procedural defects or irregularities.”

And further that:

“Dismissal of actions should be limited to plain and obvious cases where there is really no point in having trial.”

8.7. Similar sentiments were expressed by the Court in the case of **Dipak Kumar Patel & Yakub Patel v David Kangwa Nkonde** ⁽⁴⁾ wherein it was held that:

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

- 8.8. From the above it is clear that the discretion to dismiss a matter for Want of Prosecution can only be exercised by the Judge in cases where the Plaintiff and his or her Advocates have shown lack of diligence in the prosecution of the matter. In other words, the Plaintiff should have acted in such a manner that it would be unjust to keep the Defendant in Court.
- 8.9. Looking at the facts at hand, the 1st Defendant argues that the Plaintiff has shown lack of diligence in the prosecution of the matter as it has taken no new steps from 2022. The Plaintiff on its end has maintained that the lack of progress on the matter is not without justification, in this vein, the Plaintiff has pointed out that the matter is pending Ruling on a misjoinder Application made by the very Defendant who has made this application. Secondly that they had challenges in issuing instructions to their Advocates following the demise of one Mr. Mukelebai.
- 8.10. From the foregoing facts the question that begs an answer is, is the lack of progress in this matter unjustified and attributed to the Plaintiff? A careful consideration of the Affidavit evidence before me shows that the delay and lack of progress is not attributable to the Plaintiff and in any event, it is justified.
- 8.11. Firstly, the 1st Defendant made an Application to be removed from the proceedings, therefore it would not be proper for the Plaintiff to apply to

set down the matter for trial when there has been no determination on application made by the 1st Defendant. The 1st Defendant cannot be heard to argue that the Plaintiff has not shown diligence when there is an application pending Ruling. On this premise I am inclined to dismiss the Application.

8.12. In view of the position, I have taken above, it would be academic to delve into issues of lack of instruction and whether same is a justifiable reason to warrant the Court to exercise its discretion in favour of the Plaintiff.

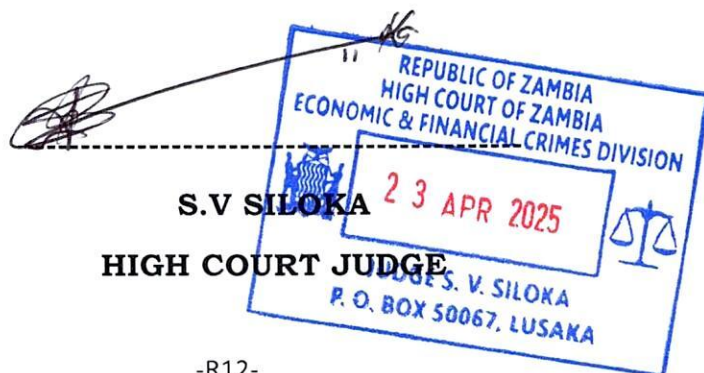
9.0. **CONCLUSION**

9.1. In conclusion I find no merit in the 1st Defendant's application for dismissal of the matter for Want of Prosecution. Accordingly, I dismiss it.

9.2. Seeing as there are two pending applications on record, one for misjoinder of a party and another for Interim Injunction, I will proceed to deal with the said applications and render a combined Ruling based on the documents filed on record.

9.3. Costs for this application shall be in the cause.

DELIVERED AT LUSAKA THIS 23RD OF APRIL, 2025



S.V SILOKA
HIGH COURT JUDGE