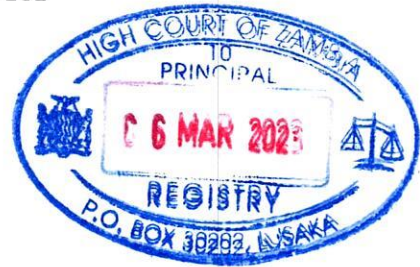


SCANNING

IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)

2017/HP/0413



BETWEEN:

MUKAMBI SAFARIS LODGES LIMITED

PLAINTIFF

AND

GETRUDE MWIBA

1<sup>ST</sup> DEFENDANT

W.D KAPULISA

2<sup>ND</sup> DEFENDANT

BEFORE HON. JUSTICE E. P. MWIKISA

FOR THE PLAINTIFF: MR. O. SAMBO OF MESSRS MWENYE & MWITWA  
ADVOCATES

FOR THE DEFENDANTS: MR. M. MUTEMWA OF MESSRS. MUTEMWA  
CHAMBERS.

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## RULING

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**Cases Referred To:**

1. *Zam Zam Halaal Beef Company Limited v Zambia Electricity Supply Corporation Limited (2013) Vol.1 ZR 378 (HC)*
2. *Christian Diedricks v Konkola Copper Mines PLC (2011) ZMHC 102*
3. *Birkett v James [1977] 2 ALL ER 801 805; [1978] AC 297*
4. *Mukuka Winstone Bwali Nkukwe v Zambia Development Agency Appeal No.170 of 2008*

5. *Allen v. Alfred McAlpine and Sons Limited (1968) 1 ALL ER 543*

**Legislation Referred To:**

1. *Order 3/5/12 of the Rules of the Supreme Court of England, 1999 Edition, White Book*
2. *Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia*

This is the defendants' application to dismiss matter for want of prosecution made pursuant to Order LIII Rule 10(10) of the High Court Rules of the High Court Act, Chapter 27 of the Laws of Zambia as read together with Order 3/5/12 of the Rules of the Supreme Court of England, 1999 Edition, White Book. The said application is dated 30<sup>th</sup> March, 2022, and is supported by an affidavit deposed to by one Wisper David Kapulisa, the 2<sup>nd</sup> Defendant herein.

It was deposed therein that on 15<sup>th</sup> March, 2017, the Plaintiff commenced these proceedings against the defendants and that since the said commencement of the proceedings, the Plaintiff has not taken any other steps to prosecute its case against the defendants. The 2<sup>nd</sup> defendant deposed that on 4<sup>th</sup> September, 2020, the defendants issued a notice of intention to proceed which was duly served on the Plaintiff but that the Plaintiff has still not taken steps to remedy the situation.

It was deposed that as a direct result of the Plaintiff's default or inaction, the 2<sup>nd</sup> defendant has greatly been prejudiced because of the burden of the court case that is hanging over his head with no end in sight. The 2<sup>nd</sup> defendant stated that the Plaintiff's conduct in this case is overtly deliberate, inordinate and inexcusable. Further that the Plaintiff herein has no cause of action against the defendants. That this Court can exercise its powers to dismiss the Plaintiff's default or inaction for want of prosecution. It was deposed that no prejudice is likely to be occasioned to the Plaintiff as the Plaintiff has elected to go quiet leaving the defendants to speculate.

On the other hand, the Plaintiff filed an affidavit in opposition dated 8<sup>th</sup> July, 2022, deposed to by one Luwi Shili, the Project Manager in the Plaintiff Company. It was deposed therein that the 2<sup>nd</sup> defendant's application to dismiss this matter for want of prosecution is improperly before this Court and ought to be dismissed for irregularity. It was deposed that the 2<sup>nd</sup> defendant's application is premised on an allegation that the Plaintiff has deliberately not taken any action in this matter despite his advocates filing and serving on the Plaintiff a notice of intention to proceed. That a litigant or party to proceedings who desires to

proceed in a matter that has been dormant for a period of one year must give a months' notice to the other party of his/her intention to proceed. Furthermore, that the defendants herein filed a notice of intention to proceed on this matter on 4<sup>th</sup> September, 2020, without taking any other action after 30 days as required by law. That the action remained dormant from the date of the notice of intention to proceed until 30<sup>th</sup> March, 2022, when the 2<sup>nd</sup> defendant filed this application, which was a period in excess of one year. It was deposed that in breach of the rules of procedure applicable in this Court, the 2<sup>nd</sup> defendant filed this application without giving the Court or indeed the Plaintiff at least 30 days' or one months' notice of his intention to proceed.

It was deposed that the failure of a party to proceedings to give notice of his intention to proceed as required by the law in a matter that has been dormant for a period of more than one year, takes away the jurisdiction of the court to hear or determine any application filed in the absence of such notice. That the 2<sup>nd</sup> defendant's application should therefore be dismissed for the reasons and facts set out herein.

It was also deposed that the 2<sup>nd</sup> defendant is not entitled to the relief being sought in this application. That this is because the

Plaintiff filed a reply on 13<sup>th</sup> January, 2021, after the defendants entered appearance and filed their respective defences on 5<sup>th</sup> March, 2020, and that these proceedings are at a stage where they are pending the issuance of orders for directions by the Court.

It was further deposed that these proceedings have been delayed largely by the defendants' frivolous application to set aside the writ of summons for irregularity which was filed in 23<sup>rd</sup> May, 2017, and subsequently stalled the progress of the matter. It was also stated that on 15<sup>th</sup> March, 2017, the Plaintiff had filed an application for an interim injunction and that the said application has to date not been heard by the Court as a result of the appeal and mix-up that emanated from the defendants' application.

It was deposed that the Plaintiff is still desirous of prosecuting this matter and that granting the 2<sup>nd</sup> defendant's application will be highly prejudicial to the Plaintiff as the issues in contention would not have been heard and determined on merit.

When the matter came up for hearing on 11<sup>th</sup> July, 2022, Counsel for the defendants submitted that he was not ready to proceed with the application as he was only served with the affidavit in opposition as well as the skeleton arguments on that same morning. Counsel applied for an adjournment to enable him get

further instructions from his client to enable him file a reply. Counsel for the Plaintiff did not object to the application. The Court allowed Counsel for the Plaintiff to file a reply. The said reply is however not on the record.

I have carefully considered the affidavit evidence as well as the skeleton arguments on record.

Counsel for the Plaintiff, in the skeleton arguments, submitted that the affidavit in support of summons to dismiss matter for want of prosecution revealed that the 2<sup>nd</sup> defendant's application was premised on an allegation by the 2<sup>nd</sup> defendant that the Plaintiff has deliberately not taken any action in this matter despite his advocates filing and serving on the Plaintiff a notice of intention to proceed. Counsel stated that the issue for determination, in the 2<sup>nd</sup> defendant's application, was therefore whether the 2<sup>nd</sup> defendant's application is properly before this Court considering the fact that the 2<sup>nd</sup> defendant did not give notice of his intention to proceed in this matter as required by law. Counsel cited Order 2 Rule 3 of the HCR as follows:

**“In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give one month's notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but notice of trial although**

**countermanded shall be deemed a proceeding within this rule.”**

Counsel also made reference to Order 3 Rule 6 of the RSC, White Book as follows:

***“Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month’s notice of his intention to proceed.”***

It was Counsel’s submission that where a party to proceedings desires to proceed in a matter which has been dormant for a period of 1 year, such a party is required by law to give notice to the other party and to the court of his or her intention to proceed. Counsel stated further that the 2<sup>nd</sup> defendant in paragraph 6 of the affidavit in support deposed that the defendants, on 4<sup>th</sup> September, 2020, issued a notice of intention to proceed and that a search conducted on the court record revealed that the matter had been dormant for a period in excess of one year since the last proceeding thereby the requirement for one to give notice. It was contended that the 2<sup>nd</sup> defendant’s failure to give notice before launching his application to dismiss this matter for want of prosecution takes away the court’s jurisdiction to hear and determine the application.

Further, Order 19/1/3 of the RSC provides inter alia that:

***“An application to dismiss the action is not a proceeding within O.3, r.6, which in certain cases requires a***

***month's notice of intention to proceed (Warnock v. Mann [1896] 2 I.R. 630)."***

In addition, in the case of **Zam Zam Halaal Beef Company Limited v Zambia Electricity Supply Corporation Limited (2013) Vol.1 ZR 378 (HC)<sup>1</sup>**, Kabuka J, as she then was stated as

follows on the subject:

**"In terms of wording of RSC O.3 r.6 as read with O.19/1/3, it is clear that an application to dismiss an action for want of prosecution is not a proceeding within the meaning of those Orders, and similarly I find within the meaning of O.2 r.3 of our High Court Rules Cap 27. For that reason, I further find, there is no obligation on the party applying for dismissal of action to give one months prior notice to his opponent of his intention to make such an application. In the event, I hold that the defendant in this matter was not obliged to comply with the provisions of Order 2, rule 3, of the High Court Rules before filing this application for dismissal of action for want of prosecution."**

It is clear from the authorities above that the rule on notice of intention to proceed does not apply to applications to dismiss matter for want of prosecution as is the case in casu. I am therefore of the considered view that the 2<sup>nd</sup> defendant's application is properly before this Court and that I have the jurisdiction to determine it.

Order 25/L/2 of the RSC provides that:

***"There are two distinct, though related, circumstances in which an action may be dismissed for want of prosecution, namely, (a) when a party has been guilty of***

*intentional and contumelious default, and (b), where there has been inordinate and inexcusable delay in the prosecution of the action.”*

In the case of **Christian Diedricks v Konkola Copper Mines PLC**

**(2011) ZMHC 102<sup>2</sup>** the Court stated as follows:

**“I have noted the two guiding principles to be considered for dismissal of matters for want of prosecution generally being:**

- (1) That the rules of the court, as well as rules of practice devised in the public interest are intended to promote the expeditious dispatch of litigation and must be observed.**
- (2) Ordinarily, the plaintiff should not be denied an adjudication of his claim on the merits by reason of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate....”**

In addition, the Learned Author Hon. Justice Patrick Matibini in his book **Zambian Civil Procedure Commentary and Cases** Vol.

1 at page 362 cited the case of **Birkett v James [1977] 2 ALL ER**

**801 805; [1978] AC 297<sup>3</sup>**, and stated that Lord Diplock therein

stated as follows:

**“The jurisdiction to dismiss an action for want of prosecution should only be exercised where the Court is satisfied that-**

- (a) the default has been intentional and contumelious, for example, disobedience to a peremptory order to the court or conduct amounting to an abuse of court;**
- (b) there has been inordinate and inexcusable delay on the plaintiff or his lawyers;**
- (c) such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issue of the action or is**

**such as is likely to cause or to have caused such serious prejudice to the defendant either between themselves, and the plaintiff or between them and a third party.”**

The record shows that this matter was commenced about five years ago, on 15<sup>th</sup> March, 2017, together with an application for an interim injunction. I note that the application for an interim injunction was not heard inter partes. In the Plaintiff's own words, the application for an interim injunction was not heard by the Court because of the appeal and mix-up that emanated from the Defendant's application.

The record also shows that a conditional memorandum of appearance was filed on 18<sup>th</sup> April, 2017, and the defendants then filed an application to set aside writ for irregularity on 23<sup>rd</sup> May, 2017, whose Ruling was delivered on 4<sup>th</sup> December, 2017. The Plaintiff filed a notice of appeal of the said Ruling on 11<sup>th</sup> December, 2017, and a Ruling to the appeal, was delivered on 6<sup>th</sup> June, 2019.

The Plaintiff also filed an application to restore the injunction application on 9<sup>th</sup> June, 2017. On 5<sup>th</sup> March, 2020, the defendants filed in their memorandum of appearance and respective defences. About six months after the said defences were filed, the defendants filed a notice of intention to proceed on 4<sup>th</sup> September, 2020. The

Plaintiff, a little over a month later, on 13<sup>th</sup> January, 2021, then filed in its Reply to the defences. The defendant's application was then filed on 30<sup>th</sup> March, 2022, about a year and two months after the Reply was filed.

Counsel for the Plaintiff has argued, in the skeleton arguments, that the pleadings in this matter closed on 13<sup>th</sup> January, 2021, and that these proceedings are at a stage where they are pending the issuance of orders for directions by the Court. Counsel cited the case of **Mukuka Winstone Bwali Nkukwe v Zambia Development Agency Appeal No.170 of 2008**<sup>4</sup> where the Supreme Court stated that:

***“Once litigants move the court of law, they subject themselves to the control of the court of law. They are no more at liberty to follow their own procedure or determine their own pace of prosecuting the case.”***

The case of **Allen v. Alfred McAlpine and Sons Limited (1968) 1**

**ALL ER 543**<sup>5</sup>, Salmon, LJ stated the following:

***“When delay in the conduct of action is prolonged or inordinate and is inexcusable and there is substantial risk by reason of the delay that a fair trial of the issues will no longer be possible, or that grave injustice will be done to one party or the other or to both parties, the court may in its discretion dismiss the action straight away, without giving the plaintiff opportunity to remedy the default, but leaving him to his remedy against his***

***solicitors for negligence... In order to exercise this discretion justly, the Court will consider the circumstances of the particular case.”***

Counsel stated that the Plaintiff filed its reply to the defendants' defence and that it followed every directive that has been issued by this Court since inception of the matter clearly showing that it has subjected itself to the control of this Court. That the Plaintiff is willing to follow every directive of this Court in the exercise of its control over the parties to this action. Counsel submitted that this was not a proper case for this Court to dismiss the action for want of prosecution on the consideration of the demands of justice.

I am of the considered view that the Plaintiff herein has slept on its rights as he has not shown eagerness or willingness to prosecute its matter for a period of over one year. I say so firstly because after the Ruling of this Court on 6<sup>th</sup> June, 2019, which Ruling was in its favour, the Plaintiff did not take any steps in prosecuting the matter. If the Plaintiff was eager to have its application for an injunction to be heard, considering the nature and urgency of such an application, it would have taken steps to get a date of hearing on the same or at least sought the indulgence of this Court on how to proceed at that point.

Secondly, even after the defendants filed their respective defences on 5<sup>th</sup> March, 2020, it took the Plaintiff about 10 months before replying to the said defences. This does not demonstrate willingness to prosecute the matter.

I note further that the Plaintiff has deposed that the proceedings are at a stage where they are pending the issuance of orders of directions by the Court. A perusal of the record has indeed revealed that there are no orders for directions and Order 29 of the HCR mandates the Court to issue orders for directions although I note that the accepted practice has been for the Plaintiff to prepare the same and for the Court to endorse them. I hold the view that the Plaintiff could have taken steps to try and find out from the Judge's Marshal why it was taking long to be given a date of hearing more so that the Learned Counsel did not file copies of the orders for directions for the court's endorsement as is normally the practice by litigants before the High Court Rules were amended by the onset of SI 58 of 2020. It would appear as though the Plaintiff herein was not serious about prosecuting its matter hence the defendants' application to dismiss matter for want of prosecution. I further find that the plaintiff has exhibited a title deed to the land he is seeking the various reliefs for serve for the application for an order of

interim injunction which the plaintiff failed to prosecute as stated above.

Further, an injunction is not a cause of action. The plaintiff having displayed its title deed which is evidence of ownership under section 33 of the Lands and Deeds Act, should have proceeded by way of Order 113 of the Rules of the Supreme Court 1999 edition (white book) which provides for summary possession upon evidence of ownership or the legal right to possession of Land more so that the defendants herein, who are alleged to have been allocating the plaintiff's land illegally, would be considered squatters and eligible to eviction. It does not make sense to seek a declaratory order of ownership to land which the plaintiff is already the owner of as shown by exhibit "LS/1", a true copy of the plaintiff's certificate of title attached to the plaintiff's affidavit in support of ex parte summons for an order of interim injunction, filed into court on 15<sup>th</sup> March, 2017.


I am therefore of the considered view that there has indeed been inordinate and contumelious delay occasioned by the plaintiff in prosecuting this matter to its conclusive end.

I accordingly dismiss this matter for want of prosecution.

I award costs to the defendants to be taxed in default of agreement.

Leave to appeal is granted.

Dated at Lusaka the .....6<sup>th</sup>..... day of .....March....., 2023

  
.....  
**ELITA PHIRI MWIKISA**  
**JUDGE**