

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

**2019/HP/0119
2020/HP/0072**

BETWEEN:

DR. BECK BANDA

AND

WORLD VISION ZAMBIA LIMITED

ATTORNEY GENERAL



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

**BEFORE THE HONOURABLE MR. JUSTICE S. V. SILOKA ON THIS
11TH DAY OF FEBRUARY 2025.**

For the Plaintiff: N/P

For the 1st Defendant: Mr. K. Chipulu, State Advocate.

RULING

CASES REFERRED TO:

1. *Allen Vs Sir Alfred Mc Alpine and sons Limited (1968) 2 QB 299;*
2. *Finance Bank Zambia Limited Vs Dimitrios Monokandilos and Another [2012] 1 ZR.484;*
3. *Hildah Lombanya (T/A Hilomu Travel and Car Hire) Vs Getrude Saviye Kayombo (T/A Ilanga Travel and Car Hire) Appeal No. 119/2021;*
4. *Elizabeth Catherine Cooke Vs Moses Mpundu (Appeal No. 207/2015);*

5. *Chibote Limited, Mazembe Tractor Company Limited, Minestone (Zambia) Limited, Minestone Estate Limited Vs Meridien Biao Bank Zambia Limited (in liquidation) SCZ No 11 of 2002;*
6. *Dipak Kumar Patel & Yakub Patel Vs David Kangwa Nkonde-selected Ruling No.33 of 2017; and*
7. *Hu Herong & Luo Feng Vs John Kapotwe & Kalwa Food Products Limited (2014) SC 55.*

LEGISLATION REFERRED TO:

1. *The High Court Rules Chapter 27 of the Laws of Zambia; and*
2. *The Constitution of Zambia Act No. 2 of 2016.*

OTHER WORKS REFERRED TO:

1. *The Rules of the Supreme Court of England 1965 edition (white book).*

1.0 INTRODUCTION

- 1.1 This application was commenced by the 1st Defendant on the 14th of June 2023 by summons accompanied by an Affidavit in support and skeleton arguments of even dates.

2.0 1ST DEFENDANT'S AFFIDAVIT EVIDENCE IN SUPPORT

- 2.1 The Affidavit in support was deposed to by Chikwashi Chitafu Chilufya who deposed that he is in the employee of the 1st Defendant as Assistant herein therefore duly competent to swear the affidavit from facts within his personal knowledge.

- 2.2 The Deponent deposed that by the Judgment of the Court of Appeal dated 20th August, 2021, Cause Number 2019/HP/0119 and Cause Number 2020/HP/0072 were consolidated and the record remitted back to the High Court to be determined by a different Judge.
- 2.3 The Deponent also deposed that on the 20th of October 2021 Mr. Justice C. Kafunda during a Status Conference ordered that new pleadings be filed while the documents already filed would suffice.
- 2.4 The Deponent further deposed that the Plaintiff has not filed any pleadings since 20th October, 2021, or made any progress in prosecuting his claim against the Defendants.

3.0 1ST DEFENDANT'S SKELETON ARGUMENTS IN SUPPORT

- 3.1 In support of the Application, Counsel for the Applicant submitted that **Order 30 Rule 11(a)** of the **High Court Rules Chapter 27** of the **Laws of Zambia** provides that the business to be disposed of in Chambers shall, in addition to the matters which under any other rule or by statute or by the law and practice for the time being observed in England and applicable to Zambia, consist of application for time to plead, for leave to amend pleadings, for

discovery and production of documents and generally all applications in relation to the conduct of any cause or matter.

- 3.2 Counsel further referred the Court to **Order 3 Rule 5 subrule 12** of the **Rules** of the **Supreme Court of England (white book)** which provides that:

“...rules of Court and the rules of practice devised in the public interest to promote the expeditious dispatch of litigation must be observed... cases involving procedural abuse or questionable tactics may call for special treatment as will cases of contumelious default or where a default is repeated or persisted in after a peremptory order.”

- 3.3 Counsel also referred the Court to **Order 25/L/1 of the Supreme Court Rules**, which states that:

“...the Court has inherent jurisdiction to dismiss an action for want of prosecution if there has been default in complying with the rules or excessive delay in the prosecution of the action.”

- 3.4 Further reference was made to the case of **Allen Vs Sir Alfred Mc Alpine and sons Limited**⁽¹⁾, wherein the Court established the instances when the power to dismiss a matter for want of prosecution was established:

“a) the default has been intentional and contumelious, that is to say, disobedient to a peremptory order of the court or conduct amounting to an abuse of the process of the court;

b) there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers or...”

3.5 It was Counsel’s submission that the records show that the Court gave orders for direction on the 20th of October, 2021, the Plaintiff however has not made any progress in prosecution his action since then. It was Counsel’s submission that the Plaintiff is therefore, guilty of inordinate delay and inexcusable delay in the prosecution of his case.

3.6 It was Counsel’s further submission that in exercising its judicial authority, this Honourable Court is required by **Article 118 (2) (b)** of the **Constitution of Zambia Act No. 2 of 2016** to ensure that justice is not delayed.

3.7 Counsel implored the Court to dismiss the Plaintiff’s action for want of prosecution with costs.

4.0 PLAINTIFF’S AFFIDAVIT IN OPPOSITION

4.1 The Affidavit in Opposition was deposed to by Dr. Beck Banda, who deposed that he is the Plaintiff in this matter hence competent

to depose to the Affidavit from the facts within his personal knowledge and belief.

- 4.2 The Deponent deposed that when the Matter was before Honourable Mr. Justice C. Kafunda, the Court intimated to issue Orders for Direction for the Parties. And the Court of Mr. C Kafunda did not issue Orders for Direction until the Matter was re-allocated to this Court.
- 4.3 The Deponent deposed that he is advised by Counsel that cause No. 2019/HP/0119 was commenced before the change of Court Rules while cause No. 2020/HP/0072 was commenced after the change of Court rules hence the need for Orders for Direction.
- 4.4 The Deponent also deposed that he is advised by Counsel and verily believes the same to be true that the Parties need clarity as to whether the Matter will proceed under the old rule or the new rules requiring witness statements.
- 4.5 The Deponent Further deposed that he is advised by Counsel and verily believes the same to be true that when this Matter later came up on 8th August, 2022 and 25th August, 2022, the Honourable Court could not issue the Orders for Direction as one of the files required for consolidation could not be located.

- 4.6 It was further deposed that the contents of paragraph 7 of the Affidavit in support are not true as the Honourable Court has not yet issued the said Order for Directions. And in the premise, it is unequitable and not in the interest of justice to dismiss the matter without hearing it on the merits.
- 4.7 It was the further deposition of the Deponent that as advised by Counsel and verily believes the same to be true that it is necessary for the Honourable Court to issue the said Order for Directions to enable the proper and orderly preparation of the matter before trial.
- 4.8 Further that a perusal of the Notices of hearing returnable on 28th June, 2023 and 28th September, 2023 reveal that the matters have not yet been consolidated by the Court as the Attorney General is omitted on both notices.
- 4.9 Further, the Deponent deposed that in the premise he has not defaulted against any Order or Rules of Court nor has he disobeyed any peremptory order of the Court.

5.0 PLAINTIFF'S SKELETON ARGUMENTS IN OPPOSITION

- 5.1 In opposing the Application, Counsel for the Plaintiff submitted that the inherent power to dismiss an action summarily without

permitting the Plaintiff to proceed to trial is a drastic power which should only be exercised with utmost caution, and only in exceptional cases.

- 5.2 To buttress his point Counsel referred the Court to the case of **Finance Bank Zambia Limited Vs Dimitrios Monokandilos and Another** ⁽²⁾ wherein the Court held 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, or its right to trial. And also denies a party the opportunity to remedy procedural defects or irregularities. As a result, dismissal of actions should be limited to plain and obvious cases where there is really no point in having a trial.”

- 5.3 Counsel submitted that this Honourable Court should put the above principle in consideration as the power to dismiss a matter for want of prosecution should be exercised sparingly and only in a plain and obvious case.
- 5.4 It was also Counsel’s submission that if the Court exercises its discretion to dismiss this Matter for want of prosecution its effect would be closing its door for the Plaintiff to have his recourse to justice.

- 5.5 It was Counsel's further submission that there is nothing in the present case to warrant dismissal of the matter. Further, that as shown in the Affidavit in Opposition, the Plaintiff has not defaulted against any order or rules of Court nor has he disobeyed any peremptory order of Court after the order by the Court of Appeal to consolidate the two matters.
- 5.6 It was Counsel's submission that Cause No. 2019/HP/0119 was commenced before the promulgation of **High Court (Amendment) Rules 2020 Statutory Instrument No. 58 of 2020** which repealed and replaced **Order XIX** and introduced pre-trial directions and conferences. While cause No. 202/HP/0072 was commenced after the amendment of the Rules.
- 5.7 It was also Counsels submission that it is inconceivable that the Court of Mr. Justice C Kafunda could have overlooked these rules. Further that, this Matter is no longer before the Court of Mr. Justice C. Kafunda as it was re-allocated to this Court.
- 5.8 Further, on the few occasions that this Matter has been called before this Court, the Honourable Court has been ready to issue the Order for Directions but for the missing file that was consolidated to this Matter.

5.9 It was also Counsel's further position that a perusal of the Notices of Hearing returnable on 28th June, 2023 and 28th September, 2023 reveal that the matters are yet to be consolidated by the Court as the Attorney General is omitted on both notices.

5.10 Further, Counsel submitted that it would be unequitable and not in the interest of Justice to dismiss this Matter without hearing it on the merits because the Plaintiff has not defaulted against any order or rules of the Court. Further that the Plaintiff has a meritorious case as such should not be deprived of his right to trial to prove his case.

6.0 ISSUES FOR DETERMINATION

6.1 The following issue has been framed for determination:

- i. Whether this application is properly before Court?*
- ii. Whether this is a fit and proper case for the Court to dismiss the matter for want of prosecution?*

7.0 ANALYSIS AND DECISION

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

- i. Whether the application is properly before Court?*

7.2 The Court of Appeal in the case of **Hildah Lombanya (T/A Hilomu Travel and Car Hire) Vs Getrude Saviye Kayombo (T/A Ilanga Travel and Car Hire)**⁽³⁾ stated that the High Court has inherent jurisdiction to dismiss a matter for want of prosecution on its volition or by application of a party.

7.3 The Supreme Court has addressed the rationale behind the High Court being granted the inherent Jurisdiction to dismiss a matter for want of prosecution in the case of **Elizabeth Catherine Cooke Vs Moses Mpundu**⁽⁴⁾ 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 opened to litigants who are willing to prosecute or defend their defense.”

7.4 It is on that premise that I find that this application is properly before Court.

i. Whether this is a fit and proper case for the Court to dismiss the matter for want of prosecution?

7.5 The Supreme Court in the case of **Chibote Limited, Mazembe Tractor Company Limited, Minestone (Zambia) Limited, Minestone Estate Limited Vs Meridien Biao Bank Zambia Limited (in liquidation)**⁽⁵⁾ stated that an action could be

dismissed for want of prosecution when a party has been guilty of intentional and contumelious default, and where there has been inordinate or inexcusable delay in the prosecution of his action.

7.6 This position was also stated in the case of **Dipak Kumar Patel & Yakub Patel v David Kangwa Nkonde**⁽⁶⁾ 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.” (emphasis mine)

7.7 It is the 1st Defendant’s position that this Honourable Court issued Order for Directions on 20th of October, 2021, following the consolidation of the matters by the Court of Appeal. However, the Plaintiff has not made any progress in prosecuting his action, as such the Plaintiff is guilty of inordinate and inexcusable delay.

7.8 While the Plaintiff argues that this Honourable Court is yet to give the Parties Orders for Direction for the consolidated Matter and when the Matter came up for hearing, the Court could not issue the Order for Directions as one of the files required for consolidation could not be located.

- 7.9 The question that begs to be answered at this point is whether the Plaintiff is guilty of intentional default and/or inordinate or inexcusable delay in prosecuting his action?
- 7.10 Looking at the facts at hand, the Order for Directions relied on by the 1st Defendant dated the 20th October, 2021, are Orders for Directions issued under cause No. 2020/HP/0072 not the consolidated cause. This is clearly shown from the cause number on the very document that only records one cause number and not two as is the practice once a matter is consolidated.
- 7.11 Having found that the Orders for Directions dated 20th October, 2021, were not for the consolidated cause, it is of essence to ascertain whether this Court issued any Orders for Direction under the consolidated matter, if so, has the Plaintiff intentionally defaulted to obey those Orders?
- 7.12 A perusal of the record reveals that when the Matter last came up for hearing on the 28th of September, 2022 and 29th September, 2022, the Honourable Court of Justice T. I. Katenekwa could not issue the Orders for Direction as one of the files required for consolidation could not be located.

- 7.13 The Record reveals that when the Matter later came up for hearing Counsel for the 2nd Defendant (the State) informed the Court that they were ready for Orders for Direction. However, the Court requested to have a look at a copy of the Court of Appeal Judgment which was not on record and adjourned the Matter to the 4th of November, 2022.
- 7.14 This goes to show that as at 4th November, 2022, the Court was yet to issue any Orders for Directions on the consolidated cause. A perusal of the Record reveals that no Orders for Direction have been issued till date. The Plaintiff has therefore not intentionally defaulted or disobeyed any Orders of the Court as the Court is yet to issue Orders for Directions to enable the Parties comply with.
- 7.15 I also find it difficult to find that the Plaintiff has inordinately or inexcusably delayed to prosecute his action, this is because the delay seems to have been caused by the Court, which is yet to give Orders for Direction.
- 7.16 I am fortified by the case of **Hu Herong & Luo Feng Vs John Kapotwe & Kalwa Food Products Limited**⁽⁷⁾ where the Supreme Court of Zambia held that:

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

7.17 It is on this premise that I find that there are no exceptional circumstances in the present case to warrant dismissal of this Matter for want of prosecution.

7.18 It is my considered view that since the Court is yet to issue Orders for Directions on the consolidated matter, and the Plaintiff has shown that they have been pursuing their cause by exhibiting the notices of hearing, there are no exceptional circumstances shown to warrant dismissal of the action.

8.0 CONCLUSION

8.1 For the foregoing analysis and for the avoidance of doubt the Application for want of prosecution fails for want of merit and is accordingly dismissed. The matter will proceed to trial. Costs are for the Plaintiff, to be taxed in default of agreement.

DELIVERED AT LUSAKA THIS 11TH OF FEBRUARY, 2025.

