

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

2022/HP/0785



BETWEEN:

SEPO TOWERA BANDA

PLAINTIFF

AND

FRASER MUSONDA

DEFENDANT

Before: The Hon. Mr. Justice Charles Zulu.

For the Plaintiff: Mr. T. Banda, of Messrs F.M. Nanguzgambo & Associates.

The Defendant: No Appearance.

R U L I N G

Case referred to:

- 1. Re Blenheim Leisure Restaurant Limited No. 3 (1999) The Times 9 November.***

Legislation referred to:

- 1. The High Court Rules Chapter 27 of the Laws of Zambia.***

1.0 INTRODUCTION

1.2 This ruling is in respect of an application at the instance of the Plaintiff for review of the order dated January 16, 2024, dismissing the Plaintiff's action for want of prosecution. The application was made pursuant to Order XXXIX rule 1 of the

High Court Rules Chapter 27 of the Laws of Zambia, which provides:

1.2.1 Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision:

2.0 BACKGROUND

- 2.1 On May 23, 2022, the Plaintiff, Sepo Towera Banda took out a writ of summons and statement of claim against the Defendant, Fraser Musonda. In the main, the Plaintiff's claim is for a declaration that she's the rightful owner of proposed Subdivision No. 317 of Subdivision 8 of Subdivision F of Farm 32a Chamba Valley, Lusaka.
- 2.2 Notwithstanding that the Defendant did not enter appearance and defence, and given the nature of the claims, to which judgment in default is generally untenable, an order for directions was issued. The Plaintiff complied with the order for directions. Eventually, the matter was cause listed for a status conference on January 16, 2024 to set down the matter trial, and agree on the date for trial. However, on the return date for a status conference, none of the parties were in attendance. Consequently, the matter was dismissed for want of prosecution.

3.0 THE PLAINTIFF'S AFFIDAVIT EVIDENCE AND ARGUMENTS IN SUPPORT OF THE APPLICATION

3.1 An affidavit in support of the application was deposed to by Elijah Siatwambo, the Plaintiff's advocate seized with the conduct of the matter. He stated the reason for his non-attendance on January 16, 2024. He stated that he failed to attend to the matter on the given date owing to another urgent matter that was pending before the Court of Appeal under Cause No. 238/2022-CAZ08/90/2022. And that he was unable to communicate the same to this Court because, he was only made aware of the Court of Appeal matter on the very day after he returned from industrial break (Christmas Vacation). A copy of the Cause List for the 2024 January Session was exhibited marked "ES1".

3.2 In support of the application Mr. Siatwambo in his written arguments submitted that the Plaintiff had demonstrated that she was desirous to prosecute her case, having complied with the order for directions. And that the failure to attend to a status conference was not deliberate or meant to disrespect the Court.

3.3 The Plaintiff's Counsel implored the Court to review the order dismissing the action for want of prosecution, by restoring the matter.

4.0 DETERMINATION

4.1 I have carefully considered the application, and the arguments advanced by Mr. Siatwambo. It is trite law that a review under

Order XXXIX HCR can be animated by several factors, other than the widely reputed factor, relating to the discovery of fresh evidence post judgment or order of the court, reasonably unavailable at the time of trial. In the case of **Re Blenheim Leisure Restaurant Limited No. 3 (1999) The Times 9 November**, Neuberger J., is reported to have elaborately itemized grounds upon which a court may exercise its discretion to amend, or vary its judgment via review, by listing them as follows:

- 4.1.1 ***a) where there was a plain mistake on the part of the court;***
b) where there was a failure of the parties to draw to the court's attention a fact or point of law that was plainly relevant;
c) where there was discovery of new facts subsequent to the judgment being given; or
d) where the party could argue that he was taken by surprise by a particular application from which the court ruled adversely to him and which he did not have a fair opportunity to consider. (see *Thynne v Thynne* [1955] 3 ALL ER 129).

- 4.2 The factors itemized above, are applicable to our Order XXXIX HRC. In this particular case, item number (b), which states that a review is applicable: *where there was a failure of a party to draw to the court's attention a material fact*. In the present case, it is satisfactory that the subject order is reviewable, because the fact and the reason of the Plaintiff's non-attendance when the matter was dismissed for want of prosecution were unbeknown to the Court. Unbeknown, because the Plaintiff's Counsel excusably failed to bring to the attention of the Court

that on that material date he was at the same time appearing before the Court of Appeal.

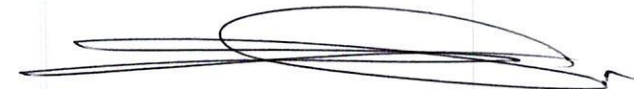
5.0 CONCLUSION

5.1 In the light of the foregoing, the application for review is granted. The order dated January 16, 2024, dismissing the Plaintiff's action for want of prosecution is hereby set aside, and the matter is restored to the active cause.

5.2 I make no order as to costs.

5.3 Leave to appeal is granted.

DATED THE 5TH DAY OF NOVEMBER 2024


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THE HON. MR. JUSTICE CHARLES ZULU