

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL NO. 105/2019

BETWEEN:

MOHAMMED JAB!

APPELLANT

AND

YAKUB FALIR MULLA
FAZILA MULLA ALLO
MWILA MUMBI JAB!

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

CORAM: *CHISANGA, JP, SICHINGA, AND NGULUBE, JJA.*
On 16th June and 24th August, 2020.

For the Appellant: Mr R. Pulusumali and Ms. M. Kapapula,
Messrs SLM Legal Practitioners

For the Respondents: Mr Mutemwa, SC, Messrs Mutemwa chambers,
and Mrs H. C. Musa, Messrs Milner and Paul
Advocates

JUDGMENT

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to:

- 1. Union Gold (Zambia) Limited vs The Attorney – General, SCZ Judgment Number 141 of 2016*
- 2. Costellow vs Somerset County Council (1993) 1 All ER 952*
- 3. Stanley Mwambazi vs Moreser Farms Limited (1977) Z.R. 108*
- 4. Birkett vs James (1978) AC 297*
- 5. Allen vs Sir Alfred Mc Alpine and Sons Limited (1968) 2 Q..B 229*
- 6. R.B. Policies At Lloyd's vs Butler (1950) 1 K.B. 76*

7. *Development Bank of Zambia and Mary Ncube (Receiver) vs Christopher Mwanza and 63 others (unreported)*
8. *Nahar Investments vs Grindlays Bank International (Zambia) Limited (1984) ZR 81*
9. *Henry Kapoko vs The People (2016) ZMCC 6*
10. *Munchinka Farm Limited vs Attorney - General and others (2018) ZMCA 297*
- ii. *Director of Public Prosecutions vs Margaret Whitehead (1977) ZR 181*
12. *Helen Mwambazi vs Chisha Mwambazi (1986) Z.R. 182*

Legislation referred to:

1. *The Rules of the Supreme Court, 1999 Edition*
2. *The Lands Tribunal Act, Number 39 of 2010*
3. *The High Court Rules Chapter 27 of the Laws of Zambia*
4. *The Constitution of Zambia (Amendment) Act Number 2 of 2016*

INTRODUCTION

1. This is an appeal against a Ruling of the High Court delivered by Musona, J on 28th November, 2018 in which the court found the appellant's application for adjournment destitute of merit and dismissed it for want of prosecution. The court went on to order that all the costs incurred by the respondents would be borne by the appellant.

BACKGROUND TO THE APPEAL

2. The matter was commenced by writ of summons on 24th December, 2012, as the appellant sought the following reliefs:
 - a) A declaratory order that the purported conveyance by the third respondent to the first and second respondents was null and void

as the third respondent lacked capacity and locus standi in the matter;

- b) The repossession of the property known as stand number F/369a/ 184 Makeni, Lusaka which legally belongs to the appellant;
- c) An order that the first and second respondents immediately vacate the aforementioned property;
- d) Mesne profits with effect from 31st January, 1999 to 31st December, 2012 in the sum of K1,560,000,000 (unrebased) thereof in respect of the property at stand number F/369 a /184 Makeni Lusaka which was occupied by the first and second respondents at a rent of K10,000,000 (unrebased) per month for a period of thirteen years;
- e) Damages for trespass by the first, second and third respondents in their continued illegal occupation of the said property under a void contract which does not justify their occupation;
- l) Interest at current bank rate on the sum of K1,560,000,000 (unrebased) with effect from 31st January, 1999 to date of payment.

- g) Interest on any other sums claimed with effect from when the amount became due and owing to date of payment.
 - h) Any other relief that the court may deem fit;
 - i) Costs.
3. The appellant, who was the plaintiff in the lower court later amended his writ of summons and sought the following reliefs-
- a) Repossession of the property known as stand number F/369a/ 184 Makeni, Lusaka whose bonafide purchaser is the plaintiff;
 - b) A declaratory order that the purported conveyance by the third defendant to the first and second defendants was null and void as the third defendant lacked capacity and locus standi in the matter.
 - c) A declaratory order that the plaintiff is the legitimate owner and as such statutory lessee of the above-mentioned property;
 - d) An order that the first and second defendants immediately vacate the aforementioned property;
 - e) Mesne profits with effect from 31st January, 1999 to 31st December, 2012 in the sum of K1,560,000,000 (unrebased) in

respect of the property at stand number F/369a/ 184 Makeni Lusaka which was occupied by the first and second defendants at a rate of K10,000,000 (unrebased) per month for a period of thirteen years;

- f) Damages for trespass by the first, second and third defendants for their continued illegal occupation of the said property under void contract which does not justify their occupation;
- g) Interest at current bank lending rate on the sum of K1,560,000,000 with effect from 31st January, 1999 to date of payment;
- h) Interest on any other sum claimed with effect from the date the amount became due;
- i) Costs.

4. In the amended statement of claim, the plaintiff averred that the first and second defendants as husband and wife purportedly bought property number F/396a/ 184 from the third defendant under an indenture of a lease registered on 17th January, 2001, between the third defendant and the first and second defendants, which conveyance was fraudulent. He averred that he was in Zimbabwe at

the time as he was deported from Zambia and that the third defendant acting and pretending to be his wife used a forged power of attorney which she fraudulently obtained. The plaintiff averred that the third defendant was not his wife and that she forged a marriage certificate which she obtained in 1986, and that this fact was established by the Police.

5. The plaintiff averred that he could not enter Zambia as his visa permit was denied by the immigration department and the third defendant took advantage of his absence in the country and sold his property using the forged power of attorney. The plaintiff further averred that on or about ^{5th} September, 2011, the first and second defendants acknowledged illegal occupancy of his property and tried to surrender a property situated in Chudleigh with an estimated value of US\$300,000 in exchange of the property on stand number F/369a/ 184 Makeni, whose market value was far above the offer.
6. The plaintiff averred that as a result of the purported sale of the aforesaid property by the third defendant to the first and second defendants, he has suffered damage including loss of mesne profits and use of the said property.

7. The first and second defendants filed a defence and averred that stand number F/369a/ 184 was legally acquired after the property was advertised in the public domain and consequently, the first and second defendants as innocent purchasers for value bought the property at a market overt. They further averred that due diligence was conducted through their lawyers and that all legal requirements were met and reasonable steps were taken to establish true ownership of the property. The first and second defendants stated that as legal owners, they were under no obligation to surrender the property to the plaintiff.
8. The first and second defendants subsequently raised a preliminary issue which was whether or not the Lands Tribunal did adjudicate to pronounce itself on how the first and second defendants purchased the property from the third defendant. The High Court dismissed the defendants' preliminary issue for lack of merit in a ruling delivered on ^{6th} November, 2015. The first and second defendants then filed a notice of motion to determine a point of law pursuant to Order 14A of the Rules of the Supreme Court, 1999 Edition'. The said notice of motion was dated 30th November, 2015

and the defendants sought a determination whether by virtue of Section 4(1) of the Lands Tribunal Act, Number 39 of ²⁰¹⁰², the High Court has jurisdiction to deal with disputes relating to land as sought by the plaintiff. The court found that the High Court has requisite jurisdiction and dismissed the preliminary issue that was raised by the ^{1st} and 2nd defendants.

9. The ^{1st} and ^{2nd} defendants were dissatisfied with the Ruling of the High Court and lodged an appeal to the Supreme Court which guided that in land matters, a party has a choice of forum and that the High Court has both original and appellate jurisdiction. The Supreme Court dismissed the defendants' appeal as its decision in the **Union Gold (Zambia) Limited vs The Attorney – General** case was still correct.
10. On ^{6th} November, 2018, the appellant's Advocates filed a notice of motion to adjourn pursuant to Order 33 Rule 1 of the High Court Rules Chapter 27 of the Laws of Zambia³. In the affidavit in support, the appellant's Counsel, Mr Nzonzo averred that the matter which was scheduled for hearing on ^{9th} November, 2018 would not proceed because the appellant had travelled out of jurisdiction to attend to a

matter relating to the administration of an estate in Kenya which he needed to secure. Counsel averred that the appellant would return to Zambia after January, 2019 and accordingly requested that the matter be adjourned to any date from 1st February, 2019.

LOWER COURT'S DECISION

11. The court was displeased with the notice of motion to adjourn as it was of the view that the appellant was not serious with the case and had shown disregard for the court as he was dictating time to the court. The matter was adjourned to 26th November, 2018 for hearing but on this day, the appellant was not in attendance and the court, being of the view that the appellant had failed to present his case over a period of six years declined to adjourn the matter. The court then dismissed it for want of prosecution, with costs to the respondents.

THE APPEAL TO THIS COURT AND THE GROUNDS OF APPEAL

12. Dissatisfied with the Ruling of the court, the appellant lodged an appeal, advancing the following grounds-

- 1. The court below misdirected itself in law and in fact when it dismissed the appellant's matter on grounds that the plaintiff**

was not desirous to proceed with the case, the net result being that the case had been pending for six years without considering the real reason for the six – year delay on record, largely attributed to preliminary issues that had previously been raised by the respondents; and

- 2. The court below misdirected itself in law and in fact when it dismissed the appellant's action without determining the matter on merit but merely on account of two legitimate adjournments requested by the appellant which requests did not occasion inexcusable and or inordinate delay in prosecuting the matter.**

APPELLANT'S ARGUMENTS

13. In arguing ground one, the court was referred to Order 3 Rule 5(12) of the Rules of the Supreme Court of England, 1999 Edition which provides a basis for dismissal of matters due to breach of rules of court and dereliction of duty on the part of the plaintiff responsible for the prosecution of its case.
14. The court was referred to the case of *Costellow vs Somerset County Council*¹² where the Court of Appeal guided that two principles ought

to be considered in an application to dismiss a matter for want of prosecution. Firstly, 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. The second principle is that a plaintiff should not in the ordinary way be denied an adjudication on his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate.

15. Counsel submitted that the respondent raised two preliminary issues which were dismissed by the lower court. The respondents also raised a third preliminary issue which gave rise to an appeal to the Supreme Court which was duly determined. Counsel submitted that the appellant was unable to present himself before court on 26th November, 2018 as he was awaiting a response to his visa application from the Department of Immigration.
16. The court was referred to Order 35 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia, which states that-

"If the plaintiff does not appear, the court shall, unless it sees good reason to the contrary, strike out

the cause, and make such order for costs, in favour of any defendant appearing, as seems fit."

17. The court was referred to Article 118 (2)(e) of the Constitution of Zambia (Amendment) Act Number 2 of 2016, which provides that-

"In exercising judicial authority, the courts shall be guided by the following principle... Justice shall be administered without undue regard to procedural technicalities."

18. Counsel submitted that the decision by the lower court to dismiss the appellant's action was a miscarriage of justice and that the appellant's case should be heard and determined on its merits so that the matter can be brought to finality. The court was referred to ***the case of Stanley Mwambazi vs Moreser Farms Limited***³, where the Supreme Court stated that-

"Where a party is in default, he may be ordered to pay costs, but It Is not In the Interest of justice to deny him the right to have his case heard."

19. On ground two, the court was referred to the case of ***Blrkett vs James***⁴, in which it was held that-

"inordinate means a period of time has lapsed which is materially longer than the time which is usually regarded by the court and the profession as an acceptable period of time."

Counsel submitted that in casu, the respondents did not demonstrate any substantial risk of grave injustice on their part in the matter being adjourned. It was contended that the request for an adjournment after the 17 days' adjournment from 9th November to 26th November, 2018 did not amount to inordinate delay.

20. The court was referred to the case of **Allen vs Sir Alfred Mc Alpine and sons Limited**⁵ where the court stated that a defendant may apply to have an action dismissed for want of prosecution where-
- (i) *There has been inordinate delay. What is not inordinate delay must depend on the facts of each particular case.*
 - (ii) *The inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.*
 - (iii) *That the defendants are likely to be seriously prejudiced by the delay.*

21. Counsel submitted that-

"Where the defendant establishes the three factors, the court in exercising its discretion must take into consideration the position of the plaintiff and strike a balance. If he is personally to blame for the delay, no difficulty arises. There can be no injustice in his bearing the consequences of his own fault."

22. Counsel submitted that the delay was not inordinate and that the reasons advanced by the appellant for non-attendance were logical and justifiable. It was contended that there has not been any serious prejudice on the part of the respondent as can be evidenced from the fact that there was no application by the respondents to dismiss the matter for want of prosecution.

23. It was submitted that the lower court misdirected itself in law and in fact when it dismissed the appellant's action without determining the matter on merit as there was no cause to justify the dismissal. Counsel urged the court to uphold the appeal and prayed that the matter reverts to the High Court for determination before another Judge.

RESPONDENT'S ARGUMENTS

24. The first and second respondents filed heads of argument responding to those of the appellant. In ground one, the first and second respondents argued that the court below was on firm ground when it dismissed the appellant's matter for want of prosecution as it dragged for six years without commencing, and that the delay was largely attributed to the appellant.
25. The respondents further referred to Order 3 Rule 5(12) of the Rules of the Supreme Court of England, 1999 Edition, which states in part that-

• two principles are to be considered, the first 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. The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merit because of procedural default

unless the default causes prejudice to his opponent for which an award of costs cannot compensate."

26. The first and second respondents also referred to the case of *Costellow vs Somerset County Council* (supra) in which Sir Thomas Bingham MR stated that-

"...The first principle is that rules of court and the associated rules of practice, devised in the public interest to promote expeditious dispatch of litigation must be observed."

27. The first and second respondents referred to the case of *R.B. Policies At Lloyd's vs Butler*⁶ in which it was held that-

"It is the policy of the litigation Act that those who go to sleep upon their claim should not be assisted by the court to recover their property, but another, and, I think, equal policy behind these acts is that there should be an end to litigation."

28. The court was referred to the case of *Development Bank of Zambia and Mary Ncube (Receiver) vs Christopher Mwanza and 63*

others⁷, where Mambilima Deputy Chief Justice, as she then was, observed that-

"There must be finality to litigation and a party who is clearly in default should reap the consequences of its inertia and cannot be allowed to roam the courts like a headless chicken keeping the other party in suspense more so that the party was represented by counsel."

29. The court was further referred to the case of ***Nahar Investments Vs Grindlays Bank International (Zambia) Limited***⁸ where the court stated inter alia that-

litigation must come to an end. It Is highly undesirable that respondents should be kept in suspense because of dilatory conduct on the part of the appellants."

It was submitted that the rules of court must be complied with to ensure order in the courts.

30. According to counsel, the appellant in his heads of argument contended that it was a serious miscarriage of justice for the court

below to dismiss the matter for want of prosecution and that instead, the court ought to have struck out the matter as per Order 35 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia which states that-

"If the plaintiff does not appear, the court shall, unless It sees good reason to the contrary, strike out the cause, and make such order to costs, in favour of any defendant appearing as seems just."

31. Counsel contended that the circumstances of this matter warranted its dismissal as the plaintiff exhibited a contumelious attitude as he left jurisdiction to attend to matter relating to the estate of his friend when he knew that this matter was set down for trial. It was argued that the plaintiff was not serious to prosecute his claim, hence the dismissal of the matter for want of prosecution. Counsel argued that the court below was faced with an adjournment of the matter on 26th November, 2018 because the plaintiff had allegedly applied for a visa and was awaiting a response but nothing had been exhibited to prove this. It was contended that the plaintiff's attitude showed a total disregard of court proceedings and lack of seriousness. We were

urged to uphold the decision of the court below as the appellant was given enough opportunity to prosecute his claims.

32. The court was referred to the case of **Henry Kapoko vs The People**⁹ in which Munalula JC stated that-

the principles laid out by the court on the meaning and application of Article 118 (2) (e) remains constant. The court's word is clear. Article 118 (2) (e) Is not intended to do away with existing principles, laws and procedure; even where the same constitutes technicalities. It Is intended to avoid a situation where manifest Injustice would be done by paying unjustifiable regard to a technicality."

33. Counsel contended that the appellant cannot rely on Article 118(2)(e) of the Constitution (Amendment) Act Number 2 of 2016 as there has been unreasonable delay of the matter and the conduct of the appellant in the lower court was improper.
34. The court was referred to the case of **Munchinka Farm Limited vs Attorney - General and others**¹⁰ where the court stated that-

"We find that the trial Judge did not pay undue regard to technicalities where in the absence of any plausible explanation he declined an attempt to revive a case after a period of 1 year 7 months. The decision cannot be described as being a "technicality" in breach of Article 118 (2) (e) of the Constitution (Amendment) Act Number 2 of 2016."

It was contended that the appellant's conduct in the court below showed a total disregard of court orders as he continually sought adjournments. We were urged to dismiss ground one of the appeal for lack of merit.

35. Responding to ground two, it was argued that the two adjournments referred to by the appellant were not legitimate. We were referred to ***the case of Director of Public Prosecutions vs Margaret Whitehead***" in which the Supreme Court held that-

"To adjourn a matter depends very much on the circumstance of the case in question."

It was submitted that the circumstances of this matter in the court below were that the appellant was not desirous to proceed with the

case because he did not attend court whenever the matter was scheduled for hearing. Regarding the reasons for seeking an adjournment, that the appellant was in Malawi enroute to Kenya to attend the estate of a friend, it was submitted that this shows that the appellant was not interested in prosecuting his claim as he was not keen to have the matter heard.

36. It was contended that the appellant had enough time, in a period of six years to organize himself and present his case. It was further submitted that the court below was on firm ground when it refused to grant the appellant an adjournment and dismissed the appellant's action for want of prosecution. The court was referred to the case of **Allen vs Sir Alfred Mc Alpine and sons Limited** (supra) where Salmon **LU stated that-**

"A defendant may apply to have an action dismissed for want of prosecution and must show that there has been inordinate delay and that the said inordinate delay is inexcusable and that the defendants are likely to be seriously prejudiced by the delay."

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37. Counsel submitted that the respondents had established all the considerations as laid down in the **Allen vs Sir Alfred MC Alpine and sons Limited** case. It was contended that there was an inordinate delay of six years, from ^{11th} December, 2012 when the matter was commenced to November, 2018, when it was dismissed for want of prosecution. It was further submitted that the inordinate delay was inexcusable as the various reasons that the appellant gave for adjourning the matter showed that he was not desirous of prosecuting his claims. It was Counsel's contention that the respondents will be seriously prejudiced if this court upholds the appeal and orders that the matter reverts to the High Court for determination before another Judge. The court was urged to uphold the decision of the court below, with costs to the first and second respondent.
38. At the hearing of the appeal, Mr. Musumali submitted that the appellant's advocates would rely on the combined list of authorities and skeleton arguments which were filed into court on 20th June, 2019. He also referred to the case of **Helen Mwambazi vs Chisha Mwambazi**¹² and submitted that before a matter is dismissed, it is

a legal requirement that it be struck out from the active cause list and that the plaintiff be given liberty to have the matter restored. Counsel contended that the trial court erred when it dismissed the matter without considering giving an unless order. He referred to Order 35(2) of the High Court Rules and submitted that he would rely on the heads of argument filed.

39. Mr. Mutemwa, SC submitted on behalf of the first and second respondents that he would rely on the heads of arguments that were filed. He submitted that the appellant's affidavit in support of the notice of motion to adjourn was that h was travelling from Malawi to Kenya to attend to the estate of his brother. Counsel contended that this demeaned the standing of the court and that the appellant did not provide any evidence to show that he was unable to attend court because he had purportedly applied for a visa from the immigration department. Counsel contended that the court must not allow flimsy excuses for parties not appearing at the hearing of their cases. He submitted that the appellant's conduct was improper and that the court below rightly exercised its discretion when it dismissed the matter.

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40. In reply, Ms Kapapula submitted on behalf of the appellant that the matter in the lower court was never struck out and prayed that the appeal be allowed.

DECISION OF THIS COURT

41. We have considered the grounds of appeal, the submissions filed by both parties and the record from the court below. The issue that is for determination is whether the court below was on firm ground when it dismissed the matter for want of prosecution without determining it on merit due to the adjournments that the appellant sought when he was out of jurisdiction.
42. The record from the court below shows that the learned trial Judge set ^{9th} November, 2018 as the date of trial. However, on this date, the court was faced with an application for a notice of motion to adjourn with a supporting affidavit in which the appellant averred that he was in Malawi and proceeding to Kenya to attend to the estate of his friend. The appellant averred that he was unable to attend court for the aforementioned reasons. The court was dissatisfied with the appellant's application for an adjournment and was of the view that the appellant was not serious and had shown disregard to

the court. The appellant averred that he would only be available for the hearing of the matter after January, 2019 and this made the court conclude that the appellant was dictating time to it. The matter was then adjourned to ^{26th} November, 2018 at 09:00 hours.

43. On the appointed date of 26th November, 2018, the court was informed that the appellant was unable to attend court because he was awaiting a response on his visa application. The court was not convinced that the reasons advanced by the appellant's non attendance were genuine and proceeded to dismiss the matter for want of prosecution. Order 35 Rule 2 of the High Court Rules provides that-

"If the plaintiff does not appear, the court shall, unless it sees good reason to the contrary, strike out the cause and make such order to costs in favour of any defendant appearing as it seems just."

44. The guidance given to courts in such situations as the one that the trial court faced is set out in Order 3 Rule 5(12) of the Rules of the Supreme Court which states that-

"Two principles are to be considered. The first 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. The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on the merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate. Neither principle is absolute but the court's practice has been to treat the existence of such prejudice as a crucial and often decisive factor. In the majority of cases, it will be appropriate for the court to hear both summonses together so that the case is viewed on the round. A rigid mechanistic approach is inappropriate. .

45. We are of the view that the lower court should have struck out the matter and issued an unless order regarding the restoration of the matter. We are further of the view that the arguments advanced by

State Counsel Mutemwa have not shown any prejudice that the first and second respondents will be caused if the matter is restored to the active cause list.

46. The main thrust of the argument is that the matter was pending hearing from 2012 to 2019 when it was dismissed for want of prosecution and that the delay in the hearing of the matter was caused by the appellant. However, the record from the court below shows that the appellant was deported and could not return to Zambia for sometime and was therefore unable to prosecute the matter.
47. The record further shows that the first and second respondents raised a number of preliminary issues in the High Court and even appealed to the Supreme Court on an interlocutory matter. We are of the view that the factors highlighted above show what contributed to the delay in the hearing of the matter. We are of the view that the lower court erred when it dismissed the matter for want of prosecution without striking it out first and issuing an unless order.

CONCLUSION

48. For the foregoing reasons, we find merit in the appeal and we allow it. The order dismissing the matter for want of prosecution is set aside and the matter is accordingly restored to the active cause list and sent back to the High Court for determination before another Judge. Costs will abide the final determination of the matter.

F. M. CHITSANGA
JUDGE PRESIDENT - COURT OF APPEAL

D.L. SIC JAGA
COURT OF APPEAL JUDGE

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P.C.M. NGULUBE
COURT OF APPEAL JUDGE

