



Republic of Malawi  
IN THE HIGH COURT OF MALAWI  
MZUZU DISTRICT REGISTRY  
Civil Cause No. 88 of 2018



Between:-

JOSEPH MWANYONGO.....CLAIMANT

-AND-

BERNARD MWAKAILEKE.....1<sup>ST</sup> DEFENDANT  
MPEKETUKA MKANDAWIRE.....2<sup>ND</sup> DEFENDANT

**CORAM**

Brian Sambo, Assistant Registrar (Ag)  
Mr. Chimwemwe Chithope-Mwale, of counsel for the Claimant  
Miss Chatupa, of Counsel for the Defendant (Now the Applicant)  
Henry Kachingwe; Official Interpreter

**RULING**

**INTRODUCTION**

This is an application filed by the Defendants under Order 12 r 54 of the Courts (High Court) (Civil Procedure) Rules, 2017; to dismiss this matter for want of prosecution. The basis of his application was that 18 months had passed since an order of injunction was granted and served upon the Defendants yet the Claimant had not taken any further steps to prosecute the matter.

**BACKGROUND**

The Plaintiff commenced this action against the Defendants on the 6<sup>th</sup> of January, 2016 seeking declaration for trespassing and an order for injunction. The Plaintiff then got an injunction in his favour on the 7<sup>th</sup> of January, 2016 restraining the Defendants, their agents, servants or whosoever from carrying out any developments on the said land.

**SUBMISSIONS TOWARDS/AGAINST THE APPLICATION TO DISMISS THE ACTION FOR WANT OF PROSECUTION**

Miss Chatupa submitted that since the commencement of these proceedings in January, 2016, the Plaintiff had not taken any steps to prosecute the Originating

Summons. She told the court that the Plaintiff had commenced these proceedings under the Rules of the Supreme Court, 1999 (RSC). She said the order of injunction was granted as an interlocutory order in these proceedings. That after filing the originating process and the order of injunction, the Plaintiff took no steps under that Order; Order 28 of the RSC to file a Notice of Hearing of the Originating Summons. She submitted that under Order 28 of the RSC, where a Defendant has not filed an affidavit in opposition, the next step is not to enter a judgment in default as if the matter was commenced by Writ of Summons (under the RSC), but that the next step is to file a Notice of Hearing of the Originating Summons, serve the same upon the Defendants, and that where the same is not attended by the Defendant, the court may proceed to enter a judgment in default in favour of the Plaintiff. She further submitted that she had noticed that it had been 18 months since the order of injunction was granted and the Plaintiff had not filed any Notice of Hearing of the Originating Summons. She prayed for the dismissal of the action for want of prosecution.

On the part of the Plaintiff, Mr. Chithope had vehemently objection to the application. He submitted that he obtained an order for injunction on behalf of the Plaintiff on the 12<sup>th</sup> of January, 2016, and had served the same upon the Defendants, and the Defendants had not filed any opposition to their Originating Summons. He said, he was surprised as to why the Defendants had chosen to file the present application when they knew that the next step was for the court to give the date of hearing of the Originating Summons; a task over which the Plaintiff had no control. Mr. Chithope was of the view that the Defendants' application was premature and was without merit because the Plaintiff had filed and served all relevant documents, and the court was yet to assign a date of hearing. He said, since it was over two years and two months without the Defendants filing an opposition to the Originating Summons, he prayed that judgment and all reliefs sought by the Plaintiff on the Originating Summons be given; under Order 25 r 1(h) of the Courts (High Court) (Civil Procedure) Rules. He said the court had jurisdiction to enter a judgment when there is a default to the Originating Summons. Mr. Chithope went on to submit that, in the event the court may want to find for the Defendant, it should take judicial notice that the Registry was being operated by a single judge for a long time, and it was difficult for parties to obtain dates of hearing. He said, in some instances, it took 4 years for parties to obtain a date of hearing. In conclusion, he prayed that the application to dismiss the action for want of prosecution be dismissed with costs, and instead, the Plaintiff should be given a time frame during which he should comply should there be a step to be taken by him. He said it was important for the court to do so because even the Defendants did not come with clean hands;



he said they were also in default because they did not comply with the rules to acknowledge service of the Originating Summons within 14 days. He further submitted that the Plaintiff was granted an offer to take the land in question and was duly paying ground rates. He said it was unheard of for someone to lose land rights duly guaranteed under section 28 of the Constitution simply because of failing to file a Notice of Hearing. He, finally, submitted that the Courts (High Court) (Civil Procedure) Rules, 2017 are to the effect that omission to take a step is a mere irregularity and does not warrant invalidation or dismissal of a matter.

### **DETERMINATION**

I have thoroughly and carefully analysed the submission given in support and in opposition to the application to dismiss the action for want of prosecution. I think, my ruling should not have much to say suffice it to say that both parties are in default in one way or the other. The Applicant herein is right to observe that the Plaintiff has not been prosecuting this matter. I have gone through the main record of the file and I have not come across any fresh filings to convince me that the case is being prosecuted. I agree with counsel Chithope that the Registry has been in the hands of a single judge but that was long time ago; more than a year ago. Now the Registry has two honourable judges and hence obtaining a date of hearing should not be a problem. I think those with 'discerning eyes' are able to see that matters run quite smoothly these days thanks to the two honourable judges. It is my considered view that 'prosecuting a matter' does not have the same meaning with 'filing a document and leave it in the hands of the court for years without going back to the court to push for court's action'. There should be clear manifestation of significant steps by the prosecuting party leaving the court without doubt that the party wants his or her case to move on. The court attends to thousands of cases, and hence it has to be moved to attend to a particular matter. There has been no such steps on this matter. The Plaintiff was supposed to file a Notice of Hearing of the Originating Summons. This has not been done, recently. We cannot be talking of a Notice of Hearing that was filed 18 months ago. The Plaintiff, willing to see progress of his matter, should have sought second/subsequent issues of the same.

This does not mean that the Defendants are innocent. Having been served with an order for injunction, they did not acknowledge service within 14 days as disposes the rules let alone file an opposition.

Thanks to the Courts (High Court) (Civil Procedure) Rules, 2017 which provide that failure by a party to comply with these rules of procedure shall be treated

as an irregularity. The effects of non-compliance with the new rules are enshrined under O. 2 r 1. The provision reads;

The failure to comply with these Rules or a direction of the Court shall be an irregularity.

I will now proceed to exercise my powers, in these circumstances, provided for under O. 2 r 3 of the rules. For the avoidance of doubt, these are what the rules say they are the powers;

Where there has been a failure to comply with these Rules or a direction of the Court, the Court may (a) set aside all or part of the proceeding; (b) set aside a step taken in the proceeding; (c) declare a document or a step taken to be ineffectual; (d) declare a document or a step taken to be effectual; (e) make an order as to costs; or (f) make any order that the Court may deem fit.

While dismissing this application, I order the Plaintiff to file a Notice of Hearing for the Originating Summons within 7 days from today. This matter commenced before the two honourable judges came to the Registry. It was before Hon Justice D.T.K. Madise. As such, there will be need for the Plaintiff to file Summons for Direction along with the notice above-mentioned, for purposes of re-assignment of the matter.

Each party to shoulder its own costs.

Made in chambers today the 6<sup>th</sup> of November, 2018.

Brian Sambo  
**Assistant Registrar (Ag)**

