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REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NO. 350 OF 2014

BETWEEN:

DALITSO YOHANE.....CLAIMANT

AND

SATEMWA TEA ESTATE.....DEFENDANT

CORAM

Mrs T. Soko : Assistant Registrar
Mr Kanyenda : Counsel for the claimant
Mr Banda : Counsel for the defendant
Mrs Munthali : Court Clerk

RULING

BACKGROUND

This is a ruling on dismissal of an action for want of prosecution following a summons obtained by the defendant on 24th July 2015. The affidavit sworn by Counsel Chibwe which was adopted by Counsel Banda expressed that the claimant took out writ of summons on 3rd April 2014 claiming damages for pain and suffering, damages for loss of amenities of life, damages for disfigurement, special damages and costs of the action. On 23rd September 2014 the matter was set down for mediation and on 16th October 2014 the

mediator issued a certificate of termination of mediation after the parties failed to resolve the matter. Counsel stated that since the issuance of the certificate of termination of mediation the claimant has not taken any steps to prosecute the matter. Counsel for the Claimant stated that ten months have elapsed without the plaintiff taking any steps to prosecute the matter and such a length of time is prolonged and inexcusable, highly prejudicial and has caused great injustice to the defendant in that the defendant being corporate entity is being affected financially as the existence of the matter is negatively affecting its balance sheet. Counsel added that the memory of the witnesses who the defendant wanted to parade as its witnesses to prove the fact that it was never negligent or in breach of its duty as alleged or at all and that the defendant acted reasonably within the circumstances is being greatly disabled as over 18 months have since elapsed since the action arose to an extent that the evidence that can be given will not be as cogent or complete as the evidence they would have been in a position to give if the trial had taken place at the date at which it could in the ordinary course have been expected to be listed.

Counsel for the claimant adopted an affidavit in opposition which states that the claimant commenced the instant proceedings in March 2014 and a defence was duly served by the defendant on 4th June 2014. Counsel added that the matter was thereafter referred for mediation but parties failed to reach a compromise during the mediation process. Afterwards the claimant advised the mediator to terminate the mediation to enable the claimant prosecute the matter further through trial. However, the mediator issued the certificate of termination of mediation on 17th February 2015 and the same way duly served on the defendant on the 26th February 2015. Counsel stated that the claimant forwarded the defendant a consent order for directions but the defendant declined to execute the order. The claimant then stated that the claimant has since filed summons for directions with the Court indicating its intention to prosecute the matter to its logical conclusion. Counsel for the claimant then concluded that in the circumstances it will be utterly unfair, unjust, unconscionable and oppressive to dismiss the instant action.

In reply Counsel for the defendant stated that when the claimant saw that the defendant declined to sign the consent order they should have taken a proactive step but he did not and they did not have a plausible explanation as to why they have sat on the case for all these years.

I must appreciate the authorities cited by Counsel for the defendant which I have used in this matter to arrive a proper decisions.

ISSUE

Whether to dismiss the action for want of prosecution.

THE LAW

In Allen v. Sir Alfred McAlpine & Sons [1968] 1 All ER 543, p 547, Lord Denning M.R. said:

> *The principle on which we go is clear: when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away, leaving the plaintiff to his remedy to his own solicitor who has brought him to this plight. Whenever a solicitor, by his inexcusable delay, deprives a client of his cause of action, the client can claim damages against him.*

Unyolo J. as he then was in ***Sabadia v. Dowset Engineering Ltd. 11 MLR 417 at page 420*** explicated the same principles when he stated that:

> *In deciding whether or not it is proper to dismiss an action for want of prosecution, the court asks itself a number of questions. First, has there been inordinate delay? Secondly, is the delay nevertheless excusable? And thirdly, has the inordinate delay in consequence been prejudicial to the other party.*

In the ***Allen*** case Diplock L.J. said:

> *The procedure of the English courts is based on the adversary system. The underlying principle of civil litigation is that the court takes no action in it on its motion but only on the application of one or other of the parties to the litigation, the assumption being that each will be regardful of his own interest and take whatever procedural steps are necessary to advance his cause. There are three stages between cause of action and trial: the first from cause of action to service of writ...; the second from service of writ to setting down for trial; the third from setting down to the trial to the trial itself. Each of these stages inevitably takes time. The plaintiff's solicitor has no control over the time taken before he is consulted or after the action has been set down for trial. The former depends on the client: the latter on the state of business of the courts. What the plaintiff's solicitor can control and should avoid is any delay between first being consulted and setting the action down for trial.*

Lord Diplock also stated that:

> *It must be remembered, however, that the evils of delay are cumulative, and even where there is active conduct by the defendant which would debar him from obtaining dismissal of the action for*

excessive delay by the plaintiff anterior to that conduct, the anterior delay will not be irrelevant if the plaintiff is subsequently guilty of further unreasonable delay.

DETERMINATION

In the matter at hand, I have looked at the Court record and it shows that the Claimant commenced the action against the defendant in April 2014. In June 2014 the defendant filed a defence and the matter went for mediation which according to the certificate of termination of mediation was terminated in February 2015. Summons for directions was filed before the Court in October 2015 where the Court granted 17th November 2015 as the date of hearing of summons for directions. On the date of hearing the summons was dismissed for not attendance by both parties. I expected the Claimant to make an application to restore the matter upon learning that it was dismissed for non-attendance. If the Claimant did not know that the application was dismissed for non-attendance it means he made no effort to follow up the matter up to the date when the hearing of summons to dismiss the action for want of prosecution took place. Counsel for the Claimant argued that the defendant also took no effort to prosecute the summons for dismissal of this action and if the Court is to make an order of dismissal then it has to be the dismissal of this application. The Court is unable to appreciate the argument of Counsel for the Claimant on the reason that the claimant never even took any step to make an application to dismiss the instant application. It is the claimant's case and just as counsel for the defendant stated, the claimant needed to take a proactive step to prosecute the matter. The actions of the claimant from the date he filed the summons for directions to this date show that the claimant is undesirous to prosecute the matter. The delay that the claimant has taken to prosecute this matter is prolonged and without excuse. As such I dismiss the matter at hand for want of prosecution with costs.

Pronounced in chamber on this 22nd day of June 2018.

T. SOKO

ASSISTANT REGISTRAR