

MZUZU DISTRICT REGISTRY
HIGH COURT OF MALAWI
21 AUG 2018
P.O. BOX 12, MZUZU



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HIGH COURT
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IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY

CIVIL CAUSE NUMBER 155 OF 2013

BETWEEN

ZOBA JERE.....PLAINTIFF

AND

ATTORNEY GENERAL..... 1ST DEFENDANT

(MIN. OF LOCAL GOVT AND RURAL DVPT)

MZIMBA DISTRICT COMMISSIONER.....2ND DEFENDANT

MASAMBANE JERE..... 3RD DEFENDANT

CORAM: A.J. BANDA, ASSISTANT REGISTRAR

Mr. B. Kondowe, of counsel, for the Plaintiff

Mr. L. Mbulo, of counsel for the Defendants

Mrs F.M. Luwe, Clerk/ Official Interpreter

BANDA, AR:

RULING

Background

The defendants brought this application asking the court to dismiss the matter for want of prosecution pursuant to Order 34 rule 2 of the Rules of the Supreme Court and the inherent jurisdiction of the court. The plaintiff opposes the application. A history of the matter is that

an application similar to this one was before the court for hearing on 3rd October, 2017. The parties on that day through counsel Godfrey Nyirenda, for the plaintiff, and counsel Chinkhuntha for the defendants, on brief for Mr. Mbulo agreed that the matter had to be withdrawn to pave way for fresh proceedings with a different plaintiff. This was as a result of the fact that the plaintiff died in the course of appealing the decision of the High Court to the Malawi Supreme Court of Appeal. In the end of that appeal, the Malawi Supreme Court of Appeal ordered a retrial of the matter before a different judge of the High Court. It is from that order of the Malawi Supreme Court of Appeal that the defendant believes that there has been an inordinate delay to prosecute the fresh trial, as the MSCA had given a period within 28 days after the perfection of its order.

Arguments

Mr. Mbulo argues that the plaintiff did not file any process to prosecute the matter despite the file being remitted to the High Court from the MSCA. He stated that 12 months had passed without the plaintiff moving the court since the order was made by the MSCA. He stated that as such this was an inordinate delay and the court ought to dismiss the proceeding for want of prosecution.

In response, Mr. Kondowe for the plaintiff told the court that remission of the file from MSCA to this court was not under the control of the plaintiff such that there was an attempt to file the process but it was frustrated by the fact that the file had not been remitted. He further said that when counsel was ready to file process for the fresh proceeding ordered by the MSCA, the plaintiff had died and efforts to trace relatives was futile. Counsel further states that his law firm has not been successful up to the date of the hearing to trace the relatives. Counsel argued that the suit need not be dismissed as there was good reason why the matter was not prosecuted.

Issue

Whether the proceeding should be dismissed for want of prosecution.

Determination

I would not want to belabor the parties at all with much discussion of law. It is clear that this matter cannot proceed as the plaintiff is no more, he passed on. There will not be as such any instructions on counsel at all. There are no longer rights in existence this being a matter for chieftaincy, which is personal to holder. Counsel cannot be expected to hop from one relative to another just to sustain the suit. Counsel must act from instructions from a client, not the other way round. The matter here is about the right person to inherit a chieftaincy. It is not a debt or any other like case in which an executor or administrator with letters to administer the estate of a deceased person would act on their behalf and ordinarily take over as a litigant. Any other rights that the plaintiff would have had in this case were extinguished at his death. This matter must be closed therefore.

If there is any other person who feels that his rights were breached by the Local Government Ministry, and they believe they are a rightful heir, and has a requisite locus standi can always move the court appropriately and independently. That person's rights to sue would obviously not rely on the sustenance of these proceedings. The earlier decision by counsel to withdraw the proceeding appeared to me to be wise. It was not carried by the plaintiff's counsel despite appearing to agree with the defendants' counsel. I therefore understand the predicament that the defendants were left in. For the reason that there is no plaintiff, and therefore they will never be instructions given to counsel and as such no prosecution of the matter, I dismiss the proceeding here-in.

I exercise the courts discretion on costs to order that each party will bear own costs.

Made this 28th day of May, 2018.



Austin Jesse Banda

ASSISTANT REGISTRAR