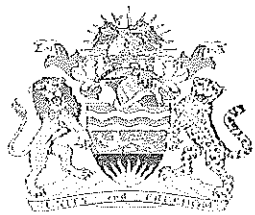


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REPUBLIC OF MALAWI
MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
PERSONAL INJURY CAUSE NO. 500 OF 2013

BETWEEN

MADALITSO MAHWAYO.....CLAIMANT

-AND-

GROUP 4 SECURITY SERVICES LIMITED.....DEFENDANT

Coram: Honourable Mr. Justice J. M. Chirwa

Mr. Alide of the Counsel for the Claimant

Mr. Mwandira of the Counsel for the Defendant

O. Chitatu Official Court Interpreter

RULING

Introduction:

There is before this Court an application made by the Defendant, **Group 4 Security Services Limited**, to dismiss an action for want of prosecution made under Order 12 Rule 54 of the Courts (High Court) (Civil Procedure) Rules, 2017 (hereinafter called “the CPR”) and the inherent jurisdiction of the Court. The application is supported by a sworn statement of **Emmanuel Mwandira**, of Counsel, and Skeleton Arguments.

The application is opposed by the Claimant, **Madalitso Mahwayo**. A sworn statement sworn by **Nuru Alide**, of Counsel, and Skeleton Arguments have been filed for the purpose.

Background:

The Claimant commenced these proceedings by a Specially Endorsed Writ of Summons issued on the 17th day of May, 2013. The Defendant filed its defence to the action on the 18th day of June 2013. A Summons for Directions was filed on the 9th day of December, 2013. The same was made returnable on the 7th day of January, 2014 at 9:00 hours but was dismissed for non-attendance. The Claimant filed his list of documents on the 6th of May, 2014 and the Defendant filed its list on the 23rd of May, 2014.

Rather surprisingly, the Claimant took out another Summons for Directions on the 22nd of May, 2014. The same was made returnable on the 7th of June, 2014 at 11:20 hours and was again dismissed due to the absence of both the parties. Then on the 15th of July, 2014, the Claimant filed with the Court the Bundle of Pleadings and proceeded to file his Trial Bundle on the 12th of June, 2015. The Claimant proceeded to serve his Trial Bundle on the Defendant on the 17th of June, 2015. It was only on the 27th day of May, 2017, that is to say, almost 2 years after the Claimant had filed his Trial Bundle, that the Defendant filed its Trial Bundle.

Now, come the 13th of June, 2018, the Defendant took out the present application, hence these proceedings.

Issue for determination:

The issue for determination is simply, whether or not the present action should be dismissed for want of prosecution.

The positions of the parties:

First, the Defendant's position;

It is the case of the Defendant that since the 12th of June, 2015 the Claimant has not taken any step to prosecute the action and a period of 3 years has since elapsed without any step being taken by the Claimant to do so. It is the Defendant's case further, that the failure by the Claimant to prosecute this action over a period of 3 years is a sign of intentional delay and a clear indication of unwillingness on his part to see the matter concluded.

It is now the contention of the Defendant that the delay on the part of the Claimant is contumelious, inordinate and inexcusable and that it has the potential of prejudicing its case in that it may be difficult to trace persons who could, otherwise, be witnesses for its case, hence the present application.

Secondly, the Claimant's position;

On the other hand, it is the case of the Claimant that it took the Defendant almost 2 years from the time it was served with his Trial Bundle to the time the Defendant filed its Trial Bundle. And that since under the Rules of the Supreme Court both parties had to lodge their respective trial bundles before the date of the trial, the Defendant thus contributed to the delay or even caused the delay in the prosecution of the action between June, 2015 and May, 2017.

It is the Claimant's case further, that the Defendant also failed to comply with the Order for Directions requiring the parties to exchange the witness' statements within a period of 14 days after discovery as a consequence of which the Claimant did not know the nature of the evidence the Defendant would lead at the trial. It is still further the case of the Claimant that it was only after being served with the Defendant's Trial Bundle in 2017 that it proceeded to file a notice of hearing which was never given a date of hearing because the case file could not be traced. It is still further the Claimant's case that thereafter it filed several notices of hearing in 2015, 2016 and 2017 but the same were not issued because the case file could still not be traced.

It is, in the premises, the contention of the Claimant that the delay to prosecute this action is not intentional but excusable. It is the further

contention of the Claimant that no prejudice will be occasioned to the Defendant's case since there is one witness for its case and there has been no indication that the said witness is untraceable or that he would refuse to testify.

It is otherwise, the Claimant's case that he is still desirous to prosecute this action and that it would be unfair and unjust on his part to be denied an opportunity to seek justice for the injuries he sustained.

The Law:

Order 12 Rule 54 of the CPR provides for the dismissal of proceedings for want of prosecution. Rule 54 provides as follows:

“(1) A defendant in a proceeding may apply to the Court for an order dismissing the proceeding for want of prosecution where the claimant is required to take a step in the proceeding under these Rules or to comply with an order of the Court, not later than the end of the period specified under these Rules or the order and he does not do what is required before the end of the period.

(2) The Court may dismiss the proceeding or make any order it considers appropriate.”

Determination:

It is apparent from the wording of Rule 54(2) of Order 12 of the CPR that the Court has a discretion as regards the nature of the order to make when faced with an application to dismiss an action for want of prosecution. The Court is not obligated to dismiss the action.

It is trite that the exercise by the Court of its discretion ought to be made on principles of law and not capriciously. The case of Allen v Sir Alfred McAlpine & Sons, Limited [1968] 1 All ER 543 has some guiding principles on the Court's exercise of its discretion. Diplock LJ at pages 555 and 556 had this to say:

“What then are the principles which the Court should apply in exercising its discretion to dismiss an action for want of prosecution on the defendant's application? The application is not usually made until the period of limitation for the plaintiff's cause of action has expired.

It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue. It is for the defendant to satisfy the Court that one or other of these two conditions is fulfilled. Disobedience to a peremptory order of the Court would be sufficient to satisfy the first condition. Whether the second alternative condition is satisfied will depend on the circumstances of the particular case; but the length of the delay may of itself suffice to satisfy this condition if the relevant issues would depend on the recollection of witnesses of events which happened long ago”.

Diplock L.J. at page 556 went further to state as follows:

“Since the power to dismiss an action for want of prosecution is only exercisable on the application of the defendant his previous conduct in the action is always relevant. So far as he himself has been responsible for any unnecessary delay, he obviously can not rely on it.” (emphasis supplied).

This Court has carefully considered the evidence before it but is constrained to hold that the default on the part of the Claimant to have the action set down for trial is intentional and contumelious. As a matter of fact, the evidence before this Court shows that while the Claimant filed his Trial Bundle on the 12th June, 2015 the Defendant did not do the same until the 27th May, 2017. Now, under the rules of procedure in practice then, when setting the action for trial, the party setting it down had to lodge with the Court two Trial (Court) Bundles, one for the plaintiff and the other for the defendant (vide Order 34 Rule 3 of the Rules of the Supreme Court). The Defendant having delayed in filing its Trial Bundle the Claimant could thus not have proceeded to have the action set down for trial before the 27th of

May, 2017. The delay in the prosecution of the action by the Claimant cannot thus be held to have been intentional and contumelious.

This Court has carefully also perused the court record pertaining to these proceedings and has found no evidence to show that the Claimant had previously been given an opportunity to remedy the default complained of by the Defendant herein. And as per the principle stated above, the Claimant ought first to be given an opportunity to remedy the default, if any, before the Court can proceed to exercise its discretion to dismiss his action. In the premises, this Court declines to grant the Defendant's application.

This Court concurs with the Claimant's contention that, as per the practice obtaining then, the delay by the Defendant in the filing of its Trial Bundle in the action for a period of about 2 years after being served with his Trial Bundle has contributed to the delay in the setting down of the action for trial herein. It is trite that the previous conduct of the defendant in the action is always relevant and that so far as he himself has been responsible for any unnecessary delay, he obviously cannot rely on it (vide **Diplock L.J.** at page 556). The Defendant can thus not be allowed to contend that the Claimant has delayed in the prosecution of this action. This Court would for the foregoing reason thus, again decline to grant the Defendant's application.


Conclusion:

In conclusion, this Court declines to dismiss the Claimant's within action for want of prosecution, as prayed for by the Defendant. Consequently, the Defendant's application is hereby dismissed.

The Costs:

The costs of any proceedings are in the discretion of the Court and normally follow the event. The Defendant's application, having been dismissed by this Court, the Claimant ought therefore, to be awarded the costs of this application. It is so ordered.

Dated this 16th day of May, 2019.


J. M. Chirwa
JUDGE