



IN THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
MZUZU REGISTRY: CIVIL REGISTRY
Civil Cause 121 of 2016

Between

Ruksana Gani Claimant

-and-

Mandinda Ng'oma Defendant

Coram:

Honourable Justice DeGabriele

Mr. M. Chinkuntha

Mr. W. Chibwe

Mr. A. Mhone

Mrs. J. N. Chirwa

Counsel for the Claimant

Counsel for the Defendant

Official Interpreter

Recording officer

DeGabriele, J

Order on Application to Strike Out Proceedings Pursuant to Order 12 rule 56 of Court (High Court) (Civil Procedure) Rules, 2017.

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1. The Defendant herein has filed an *inter partes* application to have this matter struck off for want of prosecution and due to inaction on the part of the Claimant, which inaction has caused inordinate delay. The Claimant has argued that there was no inaction on his part as he has been taking steps to prosecute the matter.
 2. A brief history of the matter shows that the Claimant filed originating summons on 18 December 2016, seeking a declaration that the Defendant had encroached and trespassed on her land, and order that he should vacate the land and the Claimant should repossess the land, among other things. Though the application for an

injunction is not on file and the endorsement of the Judge, the Claimant was granted an order of injunction, signed by the Assistant Registrar on 8 December 2016. On 12 January 2017, the Claimant was granted by Justice Chirwa an extension of the order for prohibitory injunction up to 18 January 2017. On 17 January 2017 The Defendant engaged the services of Messers John Tennyson and Associates to represent him and counsel filed notice to examine deponents on the same day.

3. On 20 August 2018, the Defendant filed an *inter partes* application to have the proceedings struck out pursuant to Order 12 rule 56 of Court (High Court) (Civil Procedure) Rules, 2017. On 30 August 2018, the Claimant filed notice of change of legal practitioners from Lameck and Company to Messrs Moses Chinkuntha Lawyers.

4. The Present Application

4.1. The Defendant has argued that the Claimant has not taken any substantive action to prosecute this matter. This Court agrees. Indeed, since the application to extend the interlocutory injunction was made on 12 January 2017, the Claimant has been not taken any action to prosecute the matter. The Court had ordered that the *inter partes* on continuation of the injunction be heard on 18 January 2017, but the Claimant did not file any process for this to happen. The only other action taken, which is procedural, was the filing of notice of change of legal practitioners.

4.2. The Claimant has argued that the delays in prosecuting the matter was not deliberate, because the Defendant had approached a Mr Andrew Chavula who was a driver working with Counsel Chinkuntha at Lameck and Associates, and informed the driver to arrange a meeting with Counsel Chinkuntha so that they discuss the matter and settle out of court. This discussion purportedly took place on 20 July 2017, before Counsel Chinkuntha was counsel on the record. He claims that the discussions went up to 30 August 2018. Counsel argues that the out of court settlement was the main reason the Claimant had not filed any *inter partes* process for continuation of the injunction, which was scheduled to be heard on 18 January 2017. This Court finds this statement to be untrue, because according to paragraph 9 of the affidavit of Counsel Chinkuntha filed

on 18 September 2018, the discussion started in July 2017. This means that in January 2017, there were no discussions to settle out of court. Furthermore, it on 17 January 2017 the Defendant had engaged legal counsel and that was on the court record.

4.3. Counsel Chinkuntha argues on paragraph 18 of his sworn affidavit that the Defendant did not take any action in terms of filing sworn statement or affidavits opposing the originating summons. In his view, this proves that the Defendant was willing to settle out of court. If that was not the case, the Claimant would have already applied to the Court to enter judgement against the Defendant. This Court is not satisfied by this argument. First the Defendant has sworn an affidavit stating that he already had legal representatives and there was no need for him to personally deal with a driver or the Claimant to attempt settlement out of Court. This is more believable, if one has to look at rules of procedure and management of court processes. The second reason for not believing Counsel for the Claimant that this matter was brought to Court by the Claimant and was subsisting before the Court. If indeed there was need for settlement out of court, such process would have been engaged into with the leave of the court by filing a consent order between the parties. As it is there is no consent order of parties agreeing to settle out of court. What is on file is once the injunction was obtained, Counsel and the Claimant were happy to leave matters as they were.

4.4. It seems to this Court that Counsel for the Claimant deliberately mismanaged and delayed this matter for his own benefit. This is clear from the fact that when the matter was with by Lameck and Company, Counsel Chinkuntha was handling the same. He now has his own law firm, and he is again engaged as Counsel on the record. It therefore seems that Counsel sat on this matter so that he can bring the client to himself. The delays therefore are aimed at benefiting Counsel, a fact which is unethical.

5. The Orders

5.1. The Claimant was granted an injunction on 9 December 2016. The order of injunction was extended to 18 January 2017, which is the date the order of injunction expired. Since there is no further action taken by the Claimant, that there is no subsisting matter on the record and there is no subsisting injunction.

It is hereby ordered that the injunction granted on 9 December 2016 and extended to 18 January 2017 **BE** and **IS HEREBY VACATED**.

5.2. It is further ordered that since the Claimant had not taken any substantive action to prosecute this matter for a period of over 12 months, these proceedings commenced by way of originating summons **BE** and **IS** hereby dismissed for lack of prosecution and is struck off pursuant to Order 12 rule 56 of court (High Court) (Civil Procedure) Rules, 2017.

5.3. The Claimant is condemned in costs for this hearing and from the time this matter was commenced, which is 8 December 2016. Costs will be assessed by the Registrar.

It is so ordered.

Made in Chambers At Mzuzu Registry this 26th day of February 2019


Honourable D.A. DeGabriele

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