THE HIGH COURT
(COMMERCIAL DIVISION)
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IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

BLANTYRE REGISTRY

Commercial Cause No. 157 of 2022

BETWEEN

SOUTHERN BOTTLERS LIMITED.....CLAIMANT

AND

NISSAN MALAWI/IMPERIAL MOTORS LTD..... DEFENDANT

Coram: **Manda, J**

Njobvu for the Claimant

Umali for the Defendant

M. Kachimanga Court Clerk/Interpreter

RULING

This was the defendant's application to strike out the action for want of prosecution. The application was taken out under Orders 10 r 1 and 12 r 56 of the Civil Procedure Rules, 2017. The claimant opposed the application.

The brief facts of this case are that the claimant commenced this action against the defendant seeking an order of specific performance of an agreement for the sale of 17 NP200 4x2 Single Cab Nissan motor vehicles at a total price of MK258, 378, 750. Alternatively, the claimant claimed for the reimbursement of the contract sum plus interest at the rate of 2% above the National Bank lending rate. The claimant also claimed for damages for loss of use of the vehicles.

The action was commenced on the 13th of May, 2022. On the 14th of June 2022, the defendant proceeded to file their defence. Since then there has been nothing on the file till the 12th of June 2023, when the defendants filed this application.

In response, the claimant stated that they did prepare an application for summary judgment in this matter as they were of the firm belief that there was no defence. The reality however is that that application was never filed so it is not relevant that it was prepared. Further, it was also the claimant's contention that there had been meetings and correspondence between the parties and that this lead to the refund of the purchase price and the defendant filed a defence denying liability.

It was further the claimant's response that following the filing of the defence, they did prepare an application to amend the summons and statement of case and that this was in July 2020. Counsel Njobvu exhibited the draft application as "DMN3". Counsel Njobvu also stated that he did not prepare a Mediation Bundle since the claimant instructed him to amend the claim first so that the issues to be discussed at the mediation should be aligned with the amended pleadings.

Again I must state that I did not find the relevance of Counsel Njobvu exhibiting a draft application which was not filed and telling the court what his clients had asked him to do. This is especially in view of the fact that this is an application which is stating that there has been no movement on the file for over 12 months! In fact, a perusal of the record does confirm the fact that the claimant did nothing on this file form the time the defence was filed to the time the defendant filed this application. I do not see then how telling the court what the claimant intended to do (but did not actually do) would prove or demonstrate that there has not been delay in prosecuting this case! It would seem that this is a clear case where the claimant "dropped the ball".

In terms of dropping the ball, the responses by the claimant in this in this instance were contained in a sworn statement, sworn by Counsel Njobvu. During the hearing Counsel Umali for the defendant pointed out to the court that that sworn statement was not properly commissioned in that

it was just signed and not stamped. Counsel Njobvu did not dispute this. All he could say was that the exhibits which were attached to the sworn statement were properly commissioned. The reality is however that the sworn statement was not properly commissioned as it was just signed but bore no stamp identifying the commissioning officer. Further, Counsel Umali also stated that they had not been given 2 clear days from the date of service of the sworn statement. In this regard, Counsel Umali raised and objection regarding the use of Mr. Njobvu's sworn statement. Counsel Umali sought to rely on Order 18 r 12 of the Civil Procedure Rules in asking the court to strike out the sworn statement.

Under Order 18 r 2, a sworn statement for use in a proceeding may be sworn before or after the commencement of the proceeding. Further, Order 18 r 3 provides that a sworn statement shall be sworn before a Judge, a magistrate, a commissioner for oaths, a notary public, a legal practitioner with a valid practicing licence, or an officer authorized to administer oaths under the provisions of any Act or subsidiary legislation. It is therefore a requirement for a sworn statemet to be sworn before an authorized person. The commissioning of a document entails that the same must signed and stamped by the commissioning officer. This was of course not the case with the sworn statement of Counsel Njobvu.

Curiously though, I have read the whole of Order 18 and nowhere does it state that if a sworn statement is not stamped or properly commissioned then it ought to be struck out. Order 18 r 12 which was relied on by Counsel Umali provides as follows:

> *Where a sworn statement is made by an illiterate or blind deponent and a certification under rule 8 does not appear on the sworn statement, the statement may not be used in a proceeding unless the Court is satisfied that the statement was read to the deponent and the deponent confirmed to understand it.*

Clearly then this does not state that a sworn statement should be struck out because it has not been stamped. In fact, Order 18 r 18 does state that *"unless the Court orders otherwise, a sworn statement may be filed despite any defects in form"*. Though Order 18 r 19 does state that *"a sworn statement shall not be used in a proceeding without the leave of the Court if it has not been filed or it has been filed in a defective form"*. This is seemingly a contradiction. This is especially considering the fact that we then have Order 18 r 20 which provides:

A party intending to use a sworn statement shall serve the statement on each interested party not later than 2 clear days or as the Court orders otherwise before the occasion for using the statement arises.

So here we have a situation where the Rules are saying that a defective sworn statement can be filed. However, for one to use that defective sworn statement, there must be leave of the court. This I believe does not provide for good case management since it would require the court to make a ruling on the defective sworn statement before proceeding with the substantive application. Further, from the reading of rule 19 it would seem that the court, with leave, can override rule 20 and allow a sworn statement which has not been filed (and clearly not been served) to be used in a proceeding. This perhaps needs a little more tidying up to make it clearer.

However, for purposes of this application it is my view that much as the sworn statement was not stamped, it would seem that the fact is curable since it was actually signed by an authorized officer, that is, a legal practitioner with a valid licence. Of course, it is obligatory that the other party be given two days before a sworn statement can be used. This was not the situation in this instance. However, the Rules have not provided for what should happen in such situations. The Rules seem to have left it to the court's discretion.

In exercising discretion in such instances, the primary consideration will always be whether the other party would be prejudiced by the use of the sworn statement. In this instance, having looked at the sworn statement and the current application, I do not think that the defendant would be prejudiced by the use of the Mr. Njobvu's sworn statement. The sworn statement does not dispute the fact that there has been no action taken on this matter for over 12 months and for me that constitutes inordinate and inexcusable delay.

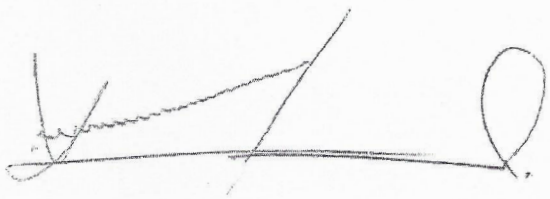
It is not excusable for the claimant to mention about the process they had intended to file when in fact they did file the same. That for me shows lack of interest in pursuing the action. In this regard, it must be borne in mind that under Order 12 r 56, the court is given discretion to strike out a proceeding without notice where no step has been taken for 12 months. Quite clearly this should be construed to mean that 12 months is inexcusable and inordinate delay. I must also add that the very existence of an action which the plaintiff has no interest in pursuing is intolerable. (See ***Grovit v Doctor*** [1997] 1 WLR 640)

Further, in ***Grovit v Doctor*** [1997] 1 WLR 640, the House of Lords had held that for a plaintiff to commence and to continue litigation which he had no intention to bring to a conclusion could constitute an abuse of process. In the context of this matter we have been told that the purchase price was refunded so the question would be what more is there for the claimant to pursue? If it is interest, then I would think that it would not be in the interest of justice and fair for the claimant to wait for 12 months and then pursue a claim for interest. The same would also apply for a claim for costs! Allowing claimant to accumulate interest and costs in such a manner would be vexatious to defendants and an abuse of the process. (***see Icebird Ltd v Winegardner (The Bahamas)*** [2009] UKPC 24 and ***Birkett v James*** [1978] AC 297 (per Lord Diplock, 318)).

Commercial matters, by the fact that they inevitably attract interest, must be treated with urgency. This applies to courts (by rendering judgments timely) and more importantly to the claimants. For claimants it must be borne in mind that claims against defendants are liabilities for which a defendant must make provisions for. It would therefore not be fair and just for a defendant to be kept in limbo for a considerable period of time.

In the present instance, it the considered view of this court that the claimant lost interest in this matter and that it is guilty of inexcusable and inordinate delay. On this note I must find that there are no good grounds for sustaining this action. The action is thus struck off with costs to the defendant.

Made in Chambers this.....13.... day of.....July.....2023



K.T. MANDA

JUDGE