James Masumbu (On his own behalf and on behalf of the vendors of Kachere Market) v Blantyre City Council Civil Cause No. 256 of 2017

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice Kenyatta Nyirenda
Cause Number:	Civil Cause No. 256 of 2017
Date of Judgment:	May 28, 2018
Bar:	Mr. Kapoto, Counsel for the Plaintiffs Mr. Mbale, Counsel for the Defendant

Head Notes

Civil Procedure - Striking out action – Inordinate delay – Whether claimant's failure to prosecute for over six months constitutes an abuse of court process.

Civil Procedure - Striking out action – Disobedience to rules – Whether application for leave to enter judgment under incorrect rules is a valid step in prosecution of a case.

Civil Procedure - Injunction – Want of prosecution – Obtaining an injunction and then sleeping on the claim for over six months is inordinate and inexcusable delay.

Civil Procedure - Dismissal for want of prosecution – Abuse of court process – The power to dismiss is derived from court's inherent jurisdiction.

Civil Procedure - Dismissal for want of prosecution – Public policy – The public interest in the administration of justice demands that litigation must come to an end.

Civil Procedure -Originating Summons – Rules of the Supreme Court (RSC) Order 19 does not apply to actions begun by originating summons, which are governed by RSC Order 28.

Summary

The Plaintiff, representing himself and vendors of Kachere Market, filed an originating summons in the High Court, Principal Registry, seeking declarations and orders against the Defendant, Blantyre City Council. The Plaintiff alleged that the Defendant's failure to provide sanitary facilities and the subsequent closure of the market were unconstitutional and unlawful. An interlocutory injunction was initially granted but lapsed after the parties failed to appear for an *inter-partes* hearing. Subsequently, the Defendant applied to have the action struck out for want of prosecution, arguing that the Plaintiff's failure to take any steps to advance the case for nearly nine months constituted inordinate and inexcusable delay and an abuse of court process.

The Court had to determine whether the Plaintiff's inaction warranted the dismissal of the suit. The Defendant's counsel argued that the delay was a clear abuse of the court's process, citing public policy that litigation should be brought to an end. The Plaintiff's counsel countered that a step had been taken by filing a summons for leave to enter judgment. However, upon reviewing the court file, the Court found no evidence that the Plaintiff had taken any steps to prosecute the case. The Court further noted that the Plaintiff's alleged summons for leave to enter judgment was

brought under the wrong procedural rules (Order 19 of the Rules of the Supreme Court, applicable to actions begun by writ of summons) instead of the correct rules for originating summonses (Order 28). The Court's disposal was to dismiss the action. The Court reasoned that the plaintiff’s conduct, in taking no steps to prosecute the case for an extended period, was an intolerable and inexcusable delay that constituted an abuse of court process and undermined the public interest in the speedy resolution of litigation. The Court also ordered the Plaintiff to pay the Defendant's costs.

Legislation Construed

Subsidiary Legislation

Courts (High Court) (Civil Procedure) Rules 2017 (O. 1, r. 5; O. 12, r. 54(1) & 56)

Rules of the Supreme Court (RSC) (O. 19, rr 6 & 7; O. 28)

Judgment

ORDER

This is the Defendant’s summons, brought under Order 12, r.54(I) of the Courts (High Court) (Civil Procedure) Rules [hereinafter referred to as “CPR”], whereby it seeks an order striking out this action.

It is desirable, before proceeding to consider the Defendant’s summons, to state so much of the facts as is necessary to make the summons intelligible. On 28th July 2017,

the Plaintiff filed with the Court an originating summons seeking the following orders and declarations:

"1. An order of the court declaring that the failure of the defendant to bring sanitary facilities at Kachere market is unconstitutional and infringes on the plaintiff constitutional rights.

2. An order of the court declaring that the closure of Kachere Market is unlawful and unfair.

3. A declaration that failure to bring sanitary facilities within the period promised by the defendant was against the plaintiffs right to legitimate expectation.

4. An order of the court directing the defendant to construct sanitary facilities within a reasonable time.

5. Any further order the court deems fit, just and proper.

6. Costs of this action."

At virtually the same time, the Plaintiff took out an ex-parte summons praying for an order of interlocutory injunction restraining the Defendant from closing Kachere Market or preventing the Plaintiffs from doing their business in Kachere Market pending the determination of the case herein or until a further order of the Court.

The ex-parte summons came before me and I granted an order of interlocutory injunction sought by the Plaintiff subject to an inter-partes hearing on 8 August 2017. On the set hearing date of 8 August 2017, neither party showed up. The *inter-partes* application for continuation of the order of interlocutory injunction, accordingly, lapsed automatically by effluxion of time.

A perusal of the Court file shows that neither party took any action until on 9th March 2018 when the Defendant took out the present summons to strike out the action. It is the case of the Defendant that the conduct of the Plaintiff in having the case unmoved for almost eight months is an abuse of the process of court. The relevant part of the Defendant's Skeleton Arguments read thus:

"*7.1. The Courts (High Court) (Civil Procedure) Rules 2017 came into force to facilitate fair and expeditious resolution of matters. The Rules further enjoin parties to assist the Court in furthering the overriding objective.*

7.2. It is evident that the Claimant is guilty of inordinate and inexcusable delay as he has failed and/or neglected to prosecute the matter. The Claimant has taken practically no step for over 6 months without any credible explanation whatsoever.

7.3. The law expects any party to a case to prosecute its action to the very end. It was therefore incumbent upon the Claimant herein to prosecute the matter to the very end.

7.4. We are of the firm view that good practice requires speedy resolution of matters especially where the injunction has been granted pending the determination of the substantive matter. To obtain an injunction and then go on to sleep on the claim for over 6 months is inordinate and inexcusable.

7.5. The Claimant's conduct is not only intolerable, but also an improper use of the machinery of the court and warrants the court's use of its powers to strike out action.

7.6. Further, we strongly contend that allowing further prosecution of the matter at this stage would be prejudicial to the interests of the Defendants and also an affront to the public policy that litigation must come to an end."

Counsel Mbale buttressed his submissions by citing the cases of Attorney General v. Msalika, MSCA Civil Appeal No. 38 of 2016, Alex Chingwale (suing for and on behalf of the Estate of Yvonne Chingwale) v. Electricity Supply Corporation of Malawi and Mphembedzu v. Nico General Insurance Company Limited, Civil Cause Number 822 of 2007 (unreported). He also placed reliance on Order 1, r.5, of the CPR.

Counsel Mbale also contended that for a party to commence and continue litigation with no intent to bring the same to a conclusion amounts to abuse of court process and, if established, an abuse of process is a ground for striking out an action under the court's inherent jurisdiction irrespective and independent of any question of delay. The contention is addressed in paragraphs 9, 10 and 11 of the Defendant's Skeleton Arguments. These paragraphs are couched in the following terms:

"9.0 The following are the relevant and material facts;

9.1. On 28th July 2017 the Claimant obtained an interlocutory injunction pending the determination of the substantive matter.

9.2. Since the 8th of August 2017, the Claimant has not filed and served any submission, notice or any court process nor have they taken any further steps in pursuance of the matter for over 6 months.

THE LAW

10.0. Based on the above material facts, the applicable law is as follows:

10.1 In ***Yiannakis t/a GPY Investments v Indebank Limited (Ruling) (Civil Cause No. 57 of 2016) 120161MWHC 596*** *the Court stated:*

The power of the court to dismiss an action for being an abuse of the process of the court is beyond question*. The power is derived from practice note 18/19/ 18 and also under its inherent jurisdiction.* ***It is said that the term abuse of the process of the court connotes that the process of the court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation****. There is a litany of cases on the subject among them* ***Castro v. Murray (1875) 10 Ex. 213 and Dawkins v. Prince Edward of Saxe Weimar.***

10.2. The court further stated:

The categories of conduct rendering a claim frivolous. vexatious or an abuse of process are not closed but depend on all the relevant circumstances and for this purpose considerations of public policy and the interests of justice may be very material. Some of the examples of conduct constituting abuse of court process cited by the commentators of the Rules of the Supreme Court in the practice notes under Order 18 are re-litigation, collateral purpose, spurious claim and hopeless proceedings. [Emphasis supplied]

10.3. In ***Alex Chingwale (suing for and on behalf of beneficiaries of the estate of Yvonne Chingwale) v Electricity Corporation of Malawi)*** *Kenyatta Nyirenda J had this to say:-*

Public policy requires that litigation must come to an end. There should be a point where matters should be closed. *The delay here is so prolonged that there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest in the administration of justice demands that the action should not be allowed to proceed. [Emphasis supplied]*

10.4. It is trite law that to commence and continue litigation with no intent to bring the same to a conclusion could amount to abuse of court process and an abuse of process if established is a ground for striking out under the Courts inherent jurisdiction irrespective and independent of any question of delay: ***Grovit vs Doctor (1997) 1 W.L.R 640:41997)2 All E.R.417.***

10.5. It is also trite law that delay in itself may amount to abuse of process and is then an issue to be considered independently of the question of prejudice to the defendant: ***Culbert vs. Stephen G Westwell & Co. Ltd (1993) P.I.O.R. 54; Yusuf Taibu and others v Blantyre City Council and Town and Country Planning Board Civil Cause Number 481 of 2015****.*

ANALYSIS

11.0. Upon the above expose of the law, it is clear that;

11.1. The law proscribes against abusing the machinery of the court process. The Claimant's conduct is an abuse of the process of the court.

11.2. The Claimant commenced the action with no intention to bring the same to an end. The Claimant has without any credible explanation failed and/or neglected to take any steps in pursuance of the matter for over 6 months. The Claimant has deliberately paid a blind eye to the matter.

11.3. The Claimant obtained the injunction pending the determination of the substantive matter while he has no intention to prosecute the substantive matter. This conduct is intolerable and inexcusable.

11.4. Consequently, these are hopeless proceedings used as a means of vexation and oppression in the process of litigation and the court should prevent abuse of its machinery by striking out the action."

The Plaintiff denies being guilty of want of prosecution. Counsel Kapoto submitted that the Defendant did not enter any defence to the originating summons within the required period and, as a result, the Plaintiff sought leave on 12 January 2018 to enter judgment but the application for leave was never given a date.

The way to approach such application is as was enunciated by Lord Denning M.R. in Allen v. Sir Alfred McAlpine & Sons [1968] 1 ALL ER 543, at p 547:

"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."

The principles enunciated by Lord Denning M.R. in Allen v. Sir Alfred McAlpine & Sons, supra, were elucidated by Unyolo J. as he then was, in Sabadia v. Dowset Engineering Ltd. 11 MLR 417 at page 420 as follows:

"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?"

See also ***Reserve Bank of Malawi v. Attorney General, Constitutional Cause Number 5 of 2010 (unreported)*** wherein Sikwese J. stated that the power to dismiss an action should be exercised only where the Court is satisfied either:

"1. that the default has been international and contumelious e.g disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court: or

2. (a). that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers; and

(b). that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as likely to cause or do have caused serious prejudice to the defendants either as between themselves and the Plaintiff or between them and a third party."

It is not uninteresting to note that the above-mentioned principles have now more or less been encapsulated in Order 12 of the CPR. Rules 54 (1) and 56 thereof are relevant and these read as follows:

"54. 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 period specified under these Rules or the order and he does not do what is required before the end of the period.

56. The Court may strike out proceeding without notice, if there has been no step taken in the proceeding for 12 months”

In the present case, it is the case of the Defendant that the Plaintiff has taken no steps to prosecute the originating summons for almost nine months. On the other hand, the Plaintiff claims that he took all steps required under Order 19, rr 6 and 7 of the RSC to obtain leave to enter judgement. Unfortunately, the claims by the Defendant are nothing more than bare assertions. I have meticulously gone through the Court file and I have searched in vain for evidence of the steps that the Plaintiff took in respect of the originating summons to further prosecute the case.

Further, the summons for leave to enter judgement was purportedly brought under Order 19, rr 6 and 7 of Rules of the Supreme Court (RSC). That Order applies to proceedings commenced by a writ of summons and not to actions, such as the present case, begun by originating summons: such actions are governed by Order 28 of RSC.

Furthermore, the filing of summons for leave to enter judgement was filed, if at all, on 12th January 2018. This was more than four months after the expiry of the period fixed for serving a defence. Public policy requires that litigation must come to an end. There should be a point where matters should be closed. The delay here is so prolonged that there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest in the administration of justice demands that the action should not be allowed to proceed.

In light of the foregoing, the Court had no hesitation in having the action herein dismissed, with costs to the Defendants.

Pronounced in Chambers this 28th day of May 2018 at Blantyre in the Republic of Malawi.