Yusuf Taibu and others v Blantyre City Council and Town and Country Planning Board, Civil Cause Number 481 of 2015

Judgment

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice Kenyatta Nyirenda
Cause Number:	Civil Cause Number 481 of 2015
Date of Judgment:	February 05, 2018
Bar:	Mr. Chipembere, for the Plaintiffs Mr. Mbale, for the Defendants

ORDER

This is the Defendants' Summons, brought under Order 12, r.54(1) of the Courts (High Court) (Civil Procedure) Rules [hereinafter referred to as "CPR"], whereby it seeks an order striking out this action on two grounds, namely, want of prosecution and that the action discloses no reasonable cause of action.

It is desirable, before proceeding to consider the Plaintiff's summons, to state so much of the facts as is necessary to make the summons intelligible. On 4th November 2015, the Plaintiff filed with the Court an originating summons seeking the following orders and declarations:

"1. A declaration that Plot No. BG/6/11 has an existent access road and the Plaintiffs have never blocked it;

2. A declaration that the Defendant is acting in bad faith and unconsciously in asking the Plaintiffs to vacate their business structures when they have not blocked the access road to plot No. BG/6/11;

3. A declaration that the Defendants should compensate the Plaintiffs for the damage caused;

4. A declaration that an Order for an Interlocutory Injunction be granted restraining the Defendant/ram exercising power of sale;

5. An order that the Defendants should bear the costs occasioned by these proceedings;

6. Further or other reliefs;

7. An Order for costs;

8. And that all necessary and consequential orders and declarations and directions given

At virtually the same time, the Plaintiffs took out an ex-parte summons praying for an order of interlocutory injunction restraining the Defendants by themselves, or their agents or their cronies or by whomsoever from demolishing the Plaintiffs alleged structures at Bangwe in the City of Blantyre.

The ex-parte summons came before me and I granted an order of interlocutory injunction sought by the Plaintiffs subject to an inter-partes hearing on 11 November 2015. Hearing did not take place on 11 November 2015 because both parties needed more time to prepare the necessary documents. The case was then adjourned to 18 January 2016.

On the set hearing date of 18th January 2016, neither party showed up. The inter-partes application for continuation of the order of interlocutory injunction was, accordingly, dismissed

Following an application by the Plaintiffs, the matter was restored to the cause list on 28th January 2016 and hearing of the inter-partes application for

continuation of the order of interlocutory injunction was set for 11th February 2016. On 11th February 2016, there was filed with the Court a notice of appointment of new lawyers for the Defendants, namely, M/s Excellence Law Partners. The Defendants then sought an adjournment to enable M/s Excellence Law Partners study the matter and take necessary action. The Court adjourned the case to 2nd March 2016.

The inter-partes hearing for continuation of the order of interlocutory injunction took place on 2nd March 2016. Counsel Chipembere argued for the continuation of the order of interlocutory injunction. He highlighted the fact that the Defendants had not filed any documents in opposition to the application. Counsel Matumbi stated that the Defendants had no objection to the application. The Court then granted an order for the continuation of the interlocutory injunction until the determination of the main case or a further order of the Court.

A perusal of the Court file shows that neither party took any action until on 5th April 2017 when the Defendants took out the present application to strike out the action by the Plaintiffs.

It is the case of the Defendants that that the conduct of the Plaintiff in having the case unmoved for almost two years is an abuse of the process of court and is also indicative of the lack of substance of the Plaintiffs claim. The point was put thus by Counsel Mbale:

As the record shows, the matter was commenced on 11 November 2015. The Plaintiff has failed to file any submission, any notice of hearing or take any further action in the matter since its commencement. This indicates that the Plaintiff has no desire to prosecute the matter. "

Counsel Mbale buttressed his submissions by citing two Malawian cases, namely, ***Mussa v. Electricity Supply Corporation of Malawi (ESCOM) Civil Cause Number 360 of 2011*** (unreported) and ***Mphembedzu v. Nico General Insurance Company Limited, Civil Cause Number 822 of 2007*** (unreported). He also placed reliance on three English cases of ***Allen v. McAlpine (1968) ALL E.R. 543 and Birkett v. James (1977) 2 ALLER 801.***

Counsel Mbale drew the Court's attention to the following passage in ***Mphembedzu v. Nico General Insurance Company Limited, supra:***

"What is reasonable period will depend on the circumstances of the case. In the case of **John G. Kawamba t/a Central Associates Limited -vs- W.T.C Freight Limited Civil Cause Number 541 and 5420 (1986)** it was held that six months delay after the default judgment had been entered was inexcusable."

Counsel Mbale also contended that for a party 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 court's inherent jurisdiction irrespective and independent of any

question of delay: see ***Grovit v. Doctor (1997) 1 W.L.R 640 and (1997)2 All E.R.417*** and ***Wallersteiner vs. Moir (1974) 1 W.L.R. 991***.

The Plaintiffs deny being guilty of want of prosecution. Counsel Chipembere submitted that the Plaintiffs have complied with everything that needs to be filed with the Court. He referred the Court to Order 28 of the Rules of the Supreme Court (RSC). Counsel Chipembere also questioned why the Defendants are blaming the Plaintiffs for failing to prosecute the matter when the Defendants have not filed any documents in opposition to the action.

The Plaintiffs have taken a similar line of argument with respect to the Defendants' contention that the Plaintiff's claim does not disclose a reasonable cause of action. Counsel Chipembere submitted that in so far as the Defendants have not filed any document in the opposition, they are not in a position to demonstrate how the Plaintiffs action "is not legitimate".

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 lo 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 as follows:

"...Power to dismiss 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 Defendants that the Plaintiffs have taken no steps to prosecute the case for almost two years. On the other hand, the

Plaintiffs claim that they took all steps required under Order 28 of the RSC to have the case set down for trial. 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 Plaintiffs took in respect of the originating summons. At no time did the Plaintiffs seek to obtain an appointment for the attendance of the parties before the Court for the hearing of the originating summons.

On the basis of the foregoing, it is my finding that the Plaintiffs took practically no steps whatsoever over a period of 23 months to prosecute the action. 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.

It the premises, it is my finding that the delay herein is clearly inordinate and inexcusable and allowing further prosecution of the action would be prejudicial not only to the interests of the Defendants but to the administration of justice as a whole. In short, the delay is intolerable. "They have lasted so long as to turn justice sour", to use the words of Lord Denning M.R. in Allen v. Sir Alfred McAlpine & Sons Ltd, supra.

In light of the foregoing, the Court had no hesitation in having the action herein dismissed, with costs to the Defendants, for want of prosecution and for being an abuse of court process.

Pronounced in Chambers this 5th day of February 2018 at Blantyre in the Republic of Malawi.