Energem Petroleum Limited v General Alliance Insurance Company Limited Commercial Cause Number 316 of 2018

Judgment

Court:	High Court of Malawi
Registry:	Commercial Division
Bench:	Honourable Justice M.T Msungama
Cause Number:	Commercial Cause Number 316 of 2018
Date of Judgment:	June 29, 2021
Bar:	Mr. Mpaka, For the Claimant Mr. Mbeta, for the Defendant

Preamble

1.This is an application by the Claimant for an order to restore the matter to the cause list. It is brought under Order 1 rule 5 (1) and (2) as read with Order 2 of the Courts (High Court) (Civil Procedure) Rules, 20I 7 ("CPR 2017") and under the inherent jurisdiction of the Court. The Claimant's application is supported by a sworn statement sworn by Counsel Nuru Alide. The application is opposed by the

Defendant. Counsel Partrick Gray Mpaka representing the Defendant, has filed his own sworn statement in opposition. Both parties also filed skeletal arguments in support of their respective positions. Both the sworn statements and the skeletal arguments were adopted in their entirety by the parties.

Background

2.The Claimant is a company that deals in petroleum products and the Defendant is an insurance company that provides various insurance services to the general public.

3.The Claimant and the Defendant entered into an insurance arrangement whereby the Defendant issued an insurance policy in favour of the Claimant covering risks including certain losses of fuel consignments in transit. It was the Claimant's case that within the period covered by the insurance policy, it lost petroleum products valued at MK197, 246,006.00. The Claimant is asserting that the Defendant was liable to indemnify it as an insured for this loss in line with the provisions of the policy of insurance. The Defendant denied liability.

4.The matter proceeded to mediation which was terminated by the Judge after the parties failed to reach a compromise. In line with the applicable mediation rules, the matter was transferred to a different judge before whom the parties appeared on a scheduling conference.

5.During the scheduling conference, the parties advised the Court that upon discussion, they had realized that there was only one issue which needed the determination of the Court. The issue was whether the loss incurred by the Claimant was covered by the insurance policy. The agreement was, therefore, that the matter be determined on a point of law.

6.Following the above submission by the parties, the Court proceeded to order the parties to file the relevant papers for the Court to hear the matter on a point of law.

7.On the 13th January, 2020 the parties filed a joint statement of facts and issues. Paragraph 9 of this joint statement was couched as follows:

"The parties seek leave of the court to make advance written submissions and

present oral arguments on these issues at a date to be set by the Court in aid of

summary disposal of the present case if it pleases the Court."

8.It is not clear from the record if the leave that was being sought by the parties in paragraph 9 was ever granted by the Court.

9.Then the Court issued out the following notice inviting the parties to appear before it:

"NOTICE OF APPOINTMENT FOR DISPOSE (SIC) OF CASE ON

POINT OF LAW

(under Ord12r.54 read with Or

LET ALL PARTIES CONCERNED attend the Judge in Chambers at the High Court Commercial Division on the 13th day of February 2020 at 10.30 O'clock in the forenoon on the hearing of an application for disposal of case upon the determination of the key legal issues identified in paragraph 8 of the Agreed Statememt of Facts and Legal Issues filed by the parties herein on the 13th of January, 2020. Any skeletal arguments in relation to the motion must be filed and served [ ]days before the above-mentioned return date.

Dated the 24'" day of January 2020

Signed

REGISTRAR"

10. When the parties dutifully presented themselves before the Court on the appointed date, the
following is what transpired:

"Mpaka

Pursuant to order issued on 15/5/19 we filed our skeleton arguments in support of the application to dispose matter on point of law

Alide

We entered into an agreed facts and issues. We are here today for leave to file written submissions to dispose the matter on a point of law

Mpaka

There is a notice of appointment to hear an application on disposal of matter on a point of law. The notice issued by the court was served on the parties on 27 and 28'" January. My point is that since the facts and issues are agreed I thought we should not waste the Court's time today and we be allowed to argue our cases and file written submissions afterwards

Court

It is a fair proposal. Let us proceed to hear the arguments for the application. Parties can file final written submissions afterwards and before judgment

Alide

I am at a disadvantage because I did not prepare my skeleton arguments. I am not prepared to proceed today.

Court

The notice of hearing is very clear on what we were meant to do today. The parties were put on notice on the nature of today's proceedings. It is abuse of the process of the court to claim that you are not prepared when the notice is very clear. The Claimant is not serious in prosecuting the matter. The Claimant is not considerate of the constrained resources of the court and adjourning the matter would not be in aid of the objectives of (Order2) which are on effective and efficient use of court resources taking into consideration other parties who also wish and are waiting/or their day in court. The action is dismissed for lack of prosecution."

11.On the 18th day of February, 2020, the Court signed a formal (perfected) order dismissing the action for want of prosecution and awarded costs to the Defendant.

12. The Claimant filed the present application on the 11th day of March, 2020.

Arguments by the Parties

13.The Claimant has argued that its failure to proceed with argument on the matter when it came for determination on a point of law was a mere irregularity which is curable at law. It states that this claim involves a lot of money and the only effective remedy available to it is for it to be allowed to pursue this action against the Defendant. The Claimant reminded me that the court's primary responsibility and concern when it comes to litigation should be to do justice between the parties with the aim of adjudicating the matter on the merits. The following cases were cited by the Claimant in support of this position: Jones v. Telford and Wrekin Council (1991) The Times, 29 July 1999,, Chilton v. Survey County Council [1999] CPLR 525, Lackson Chimangeni Khamalatha and 26 Others. v. The Secretary General of Malawi Congress Party, The Director of Elections of MCP and Malawi Congress Party Civil Cause No. 1347 of 2015, Council of the University of Malawi v. CCASU Others Civil Cause No. 2159 of 2007, H Msoji v. The Peoples Trading Centre and Attorney General, Civil Cause No. 1929 of 1996.

14.The Claimant further argued that there was no application by the Defendant for dismissal of the matter and as such, when the parties presented themselves before the Court on the 13th day of February, 2020, they were coming to seek leave of the Court to file advance submissions in line with the provision of the joint statement of facts and issue referred to in paragraph 7 above but that the Court insisted on the hearing of the matter on a point of law which, in the opinion of the Claimant, was not possible because the Claimant had not yet presented and filed its skeleton arguments on which it could rely. What comes out of this argument is that the Claimant is saying that in the absence of an application for

dismissal of the action for want of prosecution, the court had no business proceeding to dismiss the matter as if before it there was an application for dismissal for want of prosecution.

15.On the issue of jurisdiction, the Claimant argues that this Court has jurisdiction to hear this application being one for an order restoring the matter to the cause list rather than one envisaged by Order 12 rule 55 as the dismissal of the action was not made under Order 12 rule 54 (1).

16.As indicated above, the application is opposed by the Defendant. The Defendant's opposition is on the following grounds:

(a).This Court has no jurisdiction to entertain this application. It is June/us officio. The Defendant bases its argument on the wording of Order 12 rule 55 (1) of CPR. The Defendant contended that the order dismissing the action, having been made by the Court in the presence of the Claimant, the only remedy available is an appeal to the Supreme Court of Appeal. Alternatively, the Claimant would have to secure the consent of the Defendant to have the order set aside. The cases of Malawi Hotel and conference Centre Ltd (previously known as Eclipse Limited) v. Blantyre City Council Land Cause No. 110 of 2015 (Kenyatta Nyirenda, J) and Chinyama Taumbe Phiri v Martina Kachere Civil Cause No. 282 of 2016 (Kenyatta Nyirenda, J) were cited in support of this position. The Defendant's Counsel told the Court that he does not have any instructions from the Defendant to consent to an order setting aside the order of the Court dismissing the action

(b).Even if this Court were to hold the view that it has jurisdiction to entertain the application, then it should still proceed to have the same dismissed because, this being a commercial matter, delay and failure in the prosecution and conclusion thereof is prejudicial to business. The order of dismissal having been duly entered, it would be prejudicial to the very administration of justice to restore and keep the claim hanging over the affairs of a business when an opportunity to prosecute the same was availed but neglected in spite of the indulgency of the court. The case of James Masumbu v Blantyre City Council Land Cause No. 110 of 2015 (Kenyatta Nyirenda, J) Civil Cause No. 256 of2017 was cited on this point.

(c).The Defendant further argues that it would be prejudicial to other court users if one litigant who had all the chance to access the Court and without any sensible explanation never utilized such a chance and only came back three months after the court had closed him out and seek to restart a case before the same court that exercised its final authority to close out the litigant for want of prosecution. The case of Mikes Trading v NBS Bank Commercial Cause No. 78 of 2014 was referred to in support of this stand.

Issues

17.The issues for the detennination of this Court are:

(a).Whether this Court has jurisdiction to restore the action.

(b).If the Court detennines that it has such jurisdiction, whether it should proceed to have the action restored.

The Law

18.Order 12 rules 54 and 55 are couched in the following terms:

"54-(1) A defendant in proceedings 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 that 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 other order it considers appropriate.

55-(1) An order dismissing a proceeding/or want of prosecution may be set aside on appeal or where the parties agree that the order be set aside.

(2) Notwithstanding sub rule (1), the Court may amend or set aside an order dismissing the proceeding for want of prosecution that has been made in the absence of the Claimant without the need for appeal."

19.Under the discarded Rules of the Supreme Court ("RSC"), an application to have a matter restored to the cause list was different from an application to set aside an order dismissing action. Order 35 rule 1,("If, when the trial of an action is called on, neither party appears, the action may be struck off of the cause list, without prejudice, however, lo the restoration thereof. on the direction of the judge.") of the said discarded Rules provided that if a matter was called for trial and none of the parties attended, the court had the powers to strike out the action out of the cause list. This, in the view of this Court meant removal of the matter from the list of matters to be tried. This power was subject to the power of the court to order restoration of the matter to the cause list. In such cases, where a court made an on order striking out a matter out of the cause list, it was up to the plaintiff to apply for a further order of the court setting down the matter, in other words to have it restored to the cause list. Failure by the plaintiff to do so entitled the defendant to apply for an order dismissing the action (See RSC Note 35/1/1) This clearly meant that an action that was struck out of the cause list was not necessarily dismissed. It was merely taken out of the list of matters to be tried. For the matter to be dismissed it required a separate application by the defendant to have the matter dismissed on account of the plaintiff's failure to apply for an order setting it down. That was then.

20.In relation to the new rules as contained in CPR 2017 the provision that somehow resembles Order 35 rule 1 is Order 16 rule 7 which provides that when

a matter is called for trial, the court may proceed with the trial in the absence of a party (Order 16 rule (I) CPR2017) Where the absent party is the claimant, the court may strike out the claim and any defence to counter-claim (see Order 16 rule 7 (I) (a) CPR 2017) Where the absent party is the defendant, the court may strike out the defence and dismiss the counterclaim (see Order 16 rule 7 {l)(a) CPR 2017) The rule continues to provide that where a court strikes out a proceeding or any part of it under the rule, it may, on application of a party, subsequently restore the proceeding, or that part of the proceeding that was struck out (Order 16 rule 7 (2) CPR 2017) Further, where the Court gives judgment or order against a party who is absent, such a party is liberty to apply for the judgment or order to be set aside. It is important to observe that, like Order 35 rule 1 RSC, Order 16 rule 7 CPR 2017 only relates to matters coming for trial. A court in such a matter would retain its powers to restore the claim on application by the claimant. The court would not become functus officio in such a case because the rule specifically gives the power to the court to retain jurisdiction over the matter by empowering it to order restoration. The matter before this court had not yet reached a trial stage. Therefore, the provisions of Order 16 rule 7 CPR 2017 are not applicable.

Disposal

21.It is important that we first dispose of the issue of jurisdiction because if the Court finds that it has no jurisdiction to deal with this application, that will effectively be the end of the matter and the application would have to be dismissed on the basis that the court is *functus officio*. However, if the Court concludes that it has jurisdiction, then it will move on to deal with the other

aspects of the application including the other arguments for and against the application.

22.On the face of it, the Claimant's application seems to seek an order of the Court to restore the matter to the cause list and not an order to set aside its earlier order dismissing the action for want of prosecution. It is important that I remind myself that the application that I am dealing with has been made under Order 1 rule 5 CPR 2017 (which deals with the overriding objective of the rules) as read with Order 2 CPR 2017 (this rule deals with the effect of non-compliance with the rules) and the inherent jurisdiction of the court. Had the Claimant brought its application under Order 12 rule 55 (2) CPR 2017 seeking an order to set aside its earlier order dismissing the action for want of prosecution, this Court would straight away have simply said it had no jurisdiction. The Court would have said so because, having dismissed the action for want of prosecution in the presence of the Claimant, the only remedy would have been an appeal or a consent order of the parties. The Claimant obviously saw that danger and avoided the use of Order 12 rule 55 (2) CPR 2017 in its application. However, the effect of this court granting the Claimant the order it is seeking, would effectively be same as if the order which was made by the court dismissing the action were set aside. That certainly would be a circumvention of the provisions of Order 12 rule 55 (1) CPR 2017 which clearly says that an order dismissing action for want of prosecution can only be set aside on appeal or by consent. This is qualified by Order 12 rule 55 (2) which says that if the order dismissing the action for want of prosecution is made in the absence of the claimant, then the court retains its jurisdiction to set aside the order. A finding by this court that it has jurisdiction to restore the matter would produce an absurdity in that although there is a clear provision that provides that for one set aside an order dismissing an action for

want of prosecution one needs to appeal or seek the consent of the other party, I would effectively be saying that there is a third alternative, that is, to make an application to bring back the action to life by invoking the inherent jurisdiction of the court. That cannot be. If the court lost jurisdiction, there is no way it can come back and say because an application to bring back the action to life is clothed in a different garb rather than the Order 12 rule 55 CPR 2017, then it has jurisdiction. This Court lost its jurisdiction over this matter when it dismissed the action for want of prosecution in the presence of the Claimant. The Claimant had either to appeal or have the order set aside by consent. In the circumstances, I find that this court is *functus officio*. The application is therefore dismissed with costs to the Defendant.

Delivered in Chambers at the High Court of Malawi, Commercial Division, Blantyre Registry

This 29th day of June, 2021.