Malawi Hotel and conference Centre Ltd (previously known as Eclipse Limited) v. Blantyre City Council Land Cause No. 110 of 2015

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice Kenyatta Nyirenda
Cause Number:	Land Cause No. 110 of 2015
Date of Judgment:	March 26, 2019
Bar:	Mr. Gondwe, Counsel for the Claimant Mr. Matumbi, Counsel for the Defendants

Head Notes

Civil Procedure - Want of Prosecution – An order dismissing a proceeding for want of prosecution may be set aside by the Supreme Court on appeal or by agreement between the parties.

Civil Procedure - High Court Rules – Order 12, rule 55(1) of the Courts (High Court) (Civil Procedure) Rules does not vest the High Court with power to set aside its own order dismissing a proceeding for want of prosecution.

Civil Procedure - High Court Rules – Order 21 of the Courts (High Court) (Civil Procedure) Rules applies only to appeals from subordinate courts to the High Court

and not appeals from the High Court to the Supreme Court of Appeal.

Summary

The Claimant, formerly known as Eclipse Limited, sought an application for a stay of a ruling in the High Court, Principal Registry, which had dismissed its action for want of prosecution. The application was brought under Order 10, Order 12, rule 55(1), and Order 21 of the Courts (High Court) (Civil Procedure) Rules. The Claimant's representative argued that the delay in prosecuting the matter was due to protracted negotiations for an amicable settlement and the Court's failure to assign a judge to the case for a significant period. The Claimant contended that the dismissal was prejudicial, as it stood to lose property valued at over K194 million for a mere K4.5 million, a sum the Second Defendant would acquire. The Defendants opposed the application, asserting that settlement negotiations had broken down in 2016 and the Claimant had failed to take any further steps. They argued that the appeal's chances of success were non-existent and a stay would only serve to deprive them of the fruits of their litigation.

The principal legal question before the Court was whether the application for a stay was properly grounded under the cited provisions of the Courts (High Court) (Civil Procedure) Rules. The Court dismissed the application, holding that it was incompetent. The Court reasoned that Order 12, rule 55(1) does not grant the High Court the power to set aside its own order dismissing a proceeding for want of prosecution, as this power is reposed in the Supreme Court of Appeal. Furthermore, the Court clarified that Order 21 governs appeals from subordinate courts to the High Court, not appeals from the High Court to the Supreme Court of Appeal. Consequently, the application was found to be improperly grounded and was dismissed with costs.

Legislation Construed

Subsidiary legislation

Courts (High Court) (Civil Procedure) Rules (Order 10, Order 12, rule 55(1), Order 21)

Judgment

On 28th September 2018, the action herein was dismissed for want of prosecution. This is the Claimant's application for stay of the ruling of the Court (Ruling). The application is brought under Order 10, Order 12 rule 55(1) and Order 21 of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as "CPR"].

The application is supported by a statement sworn by Mr. Shiraz Yusuf and the material part thereof reads as follows:

"***2. PROTRACTED NEGOTIATIONS TO SETTLE MATTER AMICABLY***

2.1. After the injunction was discharged therein, quite against the advice of our lawyers, we decided to attempt to settle the matter amicably. We had no desire to go to trial due to our family values. We believe in peace.

2.2. We had several meetings which Counsel for the Defendants, Mr. Bruno Matumbi attended to amicably settle. A cheque was even issued to the said Mr. Matumbi for his agreed party and party costs. There is now produced and shown to me marked SY 1 a copy of the stub to that effect.

2.3. During the negotiations, the Claimant sought equitable settlement. However the Defendants were not willing to amicably settle this matter on what they thought were their legitimate rights.

2.4. Consequently, the Claimant requested the Defendant's Counsel to allow the Claimant to meet the 1st Defendant to resolve this matter amicably. The Claimant suggested, and the Defendant's Counsel agreed, that the Claimant and the 1st Defendant should meet in the absence of respective Counsel and strike a compromise.

2.5. I arranged and met with the 1st Defendant's Chief Executive Officer, One Dr. Alfred Chanza. He undertook to revert to me which he did not. Dr. Chanza advised me that it was their preference not to be confrontational and I was therefore confident that the matter would be resolved amicably out of Court.

2.6. When I sensed that there was no final response from the 1st Defendant's Chief Executive Officer, I approached Honourable Atupele Austin Muluzi, [who was the Minister of Lands, Housing and Urban Development] for

guidance on how the matter could be resolved amicably. There is now produced and shown to me SY 2 a copy of a letter to Honourable Muluzi to that effect.

2.7. Honourable Muluzi consulted with the 1st Defendant to settle the matter amicably to no avail.

2.8. It is only after the Claimant had fully exhausted all efforts for an amicable settlement that the Claimant decided to proceed with litigation in or around February, 2018.

3. ***EFFORT TO OBTAIN DATE OF HEARING***

3.1. The Claimant's lawyers kept advising the Defendant that there was slow progress on this matter simply because the Registrar was yet to assign the matter to a Judge, the previous judge having been transferred to the Criminal Division of the High Court.

3.2. The Claimant's lawyers have explained to me that all matters that needed the Judge's attention herein could not be heard because there was no judge assigned to this matter. Only proceedings before the Registrar could be heard.

3.3. In fact, even applications by the Defendants themselves could not be heard by a judge for the same reason.

3.4. In fact, all the delay in this matter is simply because, a part from our exhaustive efforts for amicably settlement, the Registrar could not assign the matter to a judge until the Claimants wrote a letter of complaint to the Registrar.

3.5. We did not get a date of hearing.

4. PREJUDICE TO THE PARTIES

4.1. The delay could not in any way prejudice any of the Defendants. Evidence is documented. Most of its dates back to less than 5 years ago. Most of it is already court record as part of the interlocutory applications that were argued before the Court. There is no risk let alone substantial risk to fair trial herein.

4.2. On the other hand, the delay and especially resultant dismissal of action is prejudicial to the Claimant in that:-

4.2.1. The Claimant has been condemned unheard for no fault of its own because:-

4.2.1.1. The Claimant, in good faith, entertained and out of Court Settlement; and

4.2.1.2. The Court could not assign the matter to a Judge for a long time and once the judge has been assigned, the matter has not been heard.

4.3. The Consequences of dismissal is the grossly unfair and unjust travesty whereby:

4.3.1. The Claimant will lose property which is as at February, 2015 was valued at over and around MK194 million only [a valuation report for the same was exhibited and marked EXP24 in the Claimant's application for interlocutory injunction dated December 17, 2015]; while

4.3.1. The 2nd Defendant, Hon Gowelo, will have taken such property of such value for the sum of MK4.5 million by virtue of his position as Minister of Local Government and Urban Development at the time the 1st Defendant forfeited/cancelled the Claimant's lease and assigned the same to Hon Gowelo.

5. PRAYER

5.1. I pray that the Court should stay the Ruling herein pending the eventual hearing and determination of the Claimants' appeal; and

5.2. For the avoidance of doubt, all proceedings before the High Court be stayed pending eventual determination of the appeal; and

5.3 Costs be for the Claimant."

The application is opposed by the Defendants and there is, in that regard, a statement, sworn by Mr. Bruno Matumbi, which states:

"2. The parties in the case attempted amicable out of Court settlement negotiations in the year 2016. By the end of the year 2016, there were no further settlement negotiations as the attempts had clearly failed to yield any fruit.

3. Since the breakdown of the settlement negotiations, the Claimant never took any further steps in the prosecution of the case.

4. Based on the above it is clear that the chances of success of the appeal are nonexistent and that the stay shall only serve to deprive the successful litigant the fruits of its litigation."

Before considering, if at all, the submissions by the parties, I have first of all to address what in my view constitutes the threshold question, namely, whether or not the application is properly grounded.

As already mentioned, the application is said to be brought under Order 10, Order 12 rule 55(1) and Order 21 of CPR.

Order 10 of CPR governs the bringing and conduct of applications in proceedings. Order 12, rule 55(1), of CPR provides as follows:

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

Order 12, rule 55(1), of CPR envisages two situations. Firstly, there is the straight forward case where parties agree to have an order dismissing proceedings for want of proceedings set aside. That is not the position in the present case in that there is no proof of such an agreement. Secondly, such an order may be set aside on appeal. To my mind, the power to set aside the order is reposed not in this Court but in the Supreme Court of Appeal.

Order 21 of CPR is couched in the following terms:

"APPEALS

(1) An appeal from a subordinate court or other tribunal and other judicial and quasi-judicial bodies shall, with the necessary adaptation, be governed by Order XXXIII of the Subordinate Court Rules where there is no appellate procedure governing an appeal from that court or tribunal.

(2) On receipt of the copies of a Record of Appeal from a subordinate court or other tribunal and other judicial and quasi- judicial bodies, the Registrar shall-

(a) give notice to the Appellant of the hearing fees payable in respect of the Appeal and demand payment; and

(b) serve the Respondent with the copy of the Record of Appeal.

(3) The Registrar shall, upon payment of hearing fees, enter the appeal and fix a date for the hearing thereof and shall give notice to the parties of the date so fixed."

It is clear that Order 21 of CPR is concerned with appeals from subordinate courts to the High Court. It has nothing to do with appeals, intended or otherwise, from the High Court to the Supreme Court of Appeal.

In view of the foregoing and by reason thereof, the application by the Claimant is incompetent and it is, accordingly, dismissed with costs.

Pronounced in Chambers this 26th day of March 2019 at Blantyre in the Republic of Malawi.