IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2014/HP/1859

IN THE MATTER OF: THE REMAINING EXTENT OF FARM No 396a/A/3/22

BETWEEN:

LINDSAY GORDON PIERCE **PLAINTIFF**
(Suing as executor of the estate of Johannes Hendrix Young)

AND

JOHANNESS DANIEL YOUNG **DEFENDANT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 5th DAY OF SEPTEMBER, 2017

For the Plaintiff : *Mr T. Chali, H.H. Ndholvu and Company*

For the Defendant : *Mrs V. Sichone, Theotis, Mataka and Sampa Legal Practitioners*

RULING

LEGISLATION REFERRED TO:

1. ***The High Court Rules, Chapter 27 of the Laws of Zambia***
2. ***The Rules of the Supreme Court, 1999 edition***

This is a ruling on an application made by the Defendant to set aside the ex-parte order restoring the matter to the active cause list, made pursuant to Order 35 Rule 6 of the High Court Act, Chapter 27 of the Laws of Zambia as read with Practice Direction No 11 dated 12th January, 1968, and Order 32 Rule 6 of the Rules of the Supreme Court,

1999 edition. Counsel relied on the affidavit filed in support of the application, as well as the skeleton arguments and list of authorities, filed on 27th July, 2017.

Counsel for the Plaintiff in response stated that the gist of their opposition was that the Defendant had not shown what prejudice would be suffered as a result of the matter having been restored. He added that it was the Defendant's submission that the ex-parte order to restore the matter that had been obtained by the Plaintiff had circumvented the order for costs, but their argument was that costs are an order of the court. That in this case the court did not any order for the payment of costs when it struck out the matter or make an order granting costs which were a condition precedent to the restoration.

Counsel went further to submit that this is a 2014 matter where trial had not commenced, largely because of the delaying tactics implored by the Defendant. Therefore the matter having been restored, it should proceed to trial, as this application was an attempt to have it removed from the active cause list. It was also Counsel's submission that this court was on terra firma when it restored the matter, and that there a number of authorities, as well as Article 118 of the Constitution which state that matters must be heard on their merits, and not on procedural technicalities.

Further in the submissions, Counsel stated that the ex-parte order restoring the matter should not be set aside as it was properly ordered by the court, and that the court had the power to hear the application inter partes but did not see the need to do so. That this could not be challenged.

In reply, Counsel for the Defendant submitted that prejudice is not a requirement that needs to be demonstrated when applying to set aside such an order. That in this case the application had been occasioned by the fact that the Plaintiff had not complied with the rules of the court. It was also Counsel's submission that the letter from the Judiciary stated that matters scheduled for 16th June, 2017 were to proceed, except those where Counsel were attending the seminar.

That in this case Counsel for the Plaintiff did not communicate that he was attending the seminar, and even if he had, he should have applied to adjourn the matter by filing the requisite notice, or alternatively should have communicated with Counsel for the Defendant, so that they could have applied to adjourn the matter.

Counsel stated that the law does not envision restoration of a matter ex-parte, and therefore such an application should not have been made by the Plaintiff. Counsel further noted that the affidavit in opposition to the application erroneously states that orders are made at the court's discretion, either ex-parte or inter partes. However their argument was that orders are made according to the law, and the ex-parte order should be set aside. She further stated that they did not object to the restoration of the matter, but asked for costs of the matter having been struck out, and associated with the restoration.

Counsel went on to state that this application is not aimed at preventing the matter from being restored, but that the procedure should be followed, and the costs paid for the irregularly restored order. That if the order is set aside, the Plaintiff will be at liberty to apply to restore the matter, and the matter will not be defeated by technicalities, as Counsel

can make the application inter partes. It was prayed that the application be granted with costs.

I have considered the application. Order 35 Rule 6 of the High Court Rules, Chapter 27 of the laws of Zambia state that;

> ***"Any civil cause struck out may, by leave of the Court, be replaced on the cause list, on such terms as to the Court may seem fit".***

Practice Direction No 11 dated 12th January, 1968 states that;

The attention of practitioners is invited to the following practice and procedure to be adopted when issuing ex-applications:

1. ***All ex-parte applications which would, if made in england, be made at the Queen's Bench Division, shall be made in accordance with the practice and procedure at present in force in England (See Supreme Court Practice, 1967, Volume 1- Order 32, Rules 1-6)***
2. ***The affidavit of facts, etc, supporting the application (be it a Judge at chambers or to a Registrar) shall be left with the Assistant Registrar (Civil), or in his absence with the Officer in Charge of the Principal Civil or District Registry in which the action is proceeding.*** *There will be no need for the applicant to attend unless a Judge or Registrar otherwise directs.*
3. ***The Judge's or Registrar's decision will be endorsed on the affidavit and the applicant shall draw up the requisite Order, unless a formal Order is not required.***
4. ***Where circumstances require it to be so, the Judge or Registrar may direct that a summons be issued.***

Practice Direction dated 14th November, 1960 and appearing at page 73 of the Selected Judgments of Northern Rhodesia, 1960, is hereby revoked.

Order 32 Rule 6 of the Rules of the Supreme Court, 1999 edition provides that;

> ***"The Court may set aside an order made ex parte".***

My understanding of the Practice Direction is that any application made ex-parte must be in line with the provisions of Order 32 Rules 1 to 6 of the Rules of the Supreme Court of England, which is what the Defendant argued.

Order 32 Rule 1 of the said Rules of the Supreme Court, 1999 edition provides that;

> ***"Except as provided by Order 25, rule 7, every application in Chambers not made ex parte must be made by summons".***

Order 25 Rule 7 of the Rules of the Supreme Court, 1999 edition on the hand states that;

> ***"7. (1) Any party to whom the summons for directions is addressed must so far as practicable apply at the hearing of the summons for any order or directions which he may desire as to any matter capable of being dealt with on an interlocutory application in the action and must, not less than seven days before the hearing of the summons, serve on the other parties a notice specifying those orders and directions in so far as they differ from the orders and directions asked for by the summons.***
>
> ***(2) If the hearing of the summons for directions is adjourned and any party to the proceedings desires to apply at the***

resumed hearing for any order or directions not asked for by the summons or in any notice given under paragraph (1) he must, not less than seven days before the resumed hearing of the summons, serve on the other parties a notice specifying those orders and directions in so far as they differ from the orders and directions asked for by the summons or in any such notice as aforesaid.

(3) Any application subsequent to the summons for directions and before judgment as to any matter capable of being dealt with on an interlocutory application in the action must be made under the summons by two clear days' notice to the other party stating the grounds of the application".

The Defendant in the skeleton arguments made reference to Order 32/6/5 of the Rules of the Supreme Court which provides for instances in which applications may be made ex-parte. It states that;

"The following are the most ordinary ex parte applications made in Chambers without a summons:

To the Judge -

(a) for injunctions (O.29, r.1, and the S.C.A. 1981, s.37 (1)).

(b) for appointment of a receiver other than a receiver by way of equitable execution (O.30, r.1, and the S.C.A. 1981, s.37 (1)).

(c) for leave to make application for judicial review (O.53, r.3).

(d) for writ of habeas corpus (O.54, r.1).

(e) for leave to a solicitor to commence an action to recover his costs before the expiry of one month from the delivery of his bill (Solicitors Act 1974, s.69 (1) proviso (Vol. 2, Section 15).

For the practice see Part B of the Practice Direction at para. 32/6/9 below.

To the Master -

(a)for leave to issue and serve a writ, concurrent writ, originating summons or concurrent originating summons, out of the jurisdiction (O.6, rr.6 and 7, and O.11).

(b) for renewal of writ (O.6, r.8).

(c) for service of writ for possession of vacant premises (O.10, r.4).

(d) for service out of the jurisdiction of any summons, notice or order (O.11, r.9 (4)).

(e) for leave to give late acknowledgment of service (O.12, r.6).

(f) to join causes of action (O.15, r.1).

(g) for leave to add as a party the personal representative of a deceased party or the trustee of a bankrupt party, etc. and to carry on the proceedings (O.15, r.7).

(h) for leave to defend an action for possession of land by a person in possession (O.15, r.10).

(i) for leave to issue a third party notice (O.16, r.2) or a fourth or subsequent party notice (O.16, r.9).

(j) to amend a writ or originating summons before service where leave is required (O.20, rr.1, 5).

(k) to file a defective affidavit (O.41, r.4).

(l) for leave to issue a writ of possession, except in mortgage actions (O.45, r.3).

(m) for leave to issue a writ of specific delivery of goods where the judgment or order is for the delivery of the goods or payment of their assessed value (O.45, r.4 (2)(b)).

(n) for leave to issue a writ of fi.fa. in certain specified cases, e.g. after six years from date of judgment (O.46, r.2).

(o) for leave to issue a writ of execution in aid of another writ of execution (O.46, r.3).

(p) for examination of judgment debtor (O.48, r.1).

(q) for garnishee order nisi (O.49, r.2).

(r) for a charging order nisi on a beneficial interest (O.50, r.1).

(s) for a charging order nisi on securities (O.50, rr.1 (3), (c), (5)).

(t) for a charging order nisi on an interest held by a trustee (O.50, r.3).

(u) for appointment of receiver to enforce a charging order on land (O.50, r.9) or by way of equitable execution (O.51).

(v) for an injunction which is ancillary or incidental to a charging order on a beneficial interest, or on an interest held by a trustee (O.50, r.9) or to an appointment of a receiver by way of equitable execution (O.51, r.2).

(w) for substituted service of a writ and other proceedings (O.65, r.4).

(x) for examination of a witness or the production of documents and for other classes of orders pursuant to a request for the purposes of civil proceedings instituted or contemplated in a foreign Court or a Court of another part of the U.K.

(y) for registration of a foreign judgment (O.71, r.2).

(z) for registration of a foreign award as a judgment (O.73, r.8).

(aa) for registration of an arbitration award (O.73, r.10).

(bb) for rectification of register of deeds of arrangement (O.94, r.4).

(cc) for registration of a bill of sale after time has expired (O.95, r.1).

(dd) for entry of satisfaction of a bill of sale (O.95, r.2).

(ee) for extending the period for making an application for recording a charge under s.1 (5) of the Industrial and Provident Societies Act 1967, or for rectifying any omission or mis-statement in such application (O.95, r.5).

(ff) for a charging order for solicitors costs for property recovered or preserved pending the hearing of a summons for such charge (O.106, r.2, and Solicitors Act 1974, s.73).

(gg) for inspection of bankers' books (Bankers' Books Evidence Act 1879, s.7).

(hh) for directions relating to funds in Court which are being administered by a Master for the benefit of minors.

There is nowhere in this provision that it is stated that these instances are exhaustive on when applications may be made ex-parte, or that the court where such applications are made ex-parte cannot order that they be heard inter partes. Therefore in my view the court retains discretion to hear certain applications ex-parte going by Order 32/6/2 of the Rules of the Supreme Court, 1999 edition which provides that;

"Rule 1 determines the modes in which applications in Chambers may be made, namely, in one of three ways, ex parte, or by summons, or by notice under the summons for directions. In exceptional cases in the QBD applications may be made on an ex parte summons, e.g. for further directions

for re-investment of minors' funds in Court or upon directions for such investment by the trial Judge.....

The Court has power to direct that an application made ex parte should be made by summons, in order to give the other party an opportunity of being heard. (This power is not expressly contained in the rules as it was under the former O.54, r.2). Of course this power is not exercised where the ex parte order is itself in the nature of an order nisi directed to the other party to show cause or where there is no other party affected until the ex parte order is served upon him".

In light of the above, unless the law provides that an application shall be made ex-parte, in which case the court has no jurisdiction to order that it be heard inter partes, an ex-parte application may be made, but the court retains the power to order that it be heard inter partes.

In this case the Plaintiff made an ex-parte application to restore the matter which I heard ex-parte and granted the order of restoration. As rightly argued by Counsel for the Plaintiff, this was well within my powers as set out in Order 32/6/2 of the Rules of the Supreme Court, 1999 edition. I therefore do not agree with Counsel for the Defendant's argument that the ex-parte order restoring the matter was done outside the law. When I made the order striking out the matter from the active cause list on 16th June, 2017, it was with liberty to restore within thirty days, failure to which the matter would be dismissed for want of prosecution, with costs to the Defendant.

Counsel for the Plaintiff applied ex-parte to restore the matter on 6th July, 2017, which order I granted. Counsel for the Defendant in the

affidavit filed in support of the application to set aside the ex-parte order to restore the matter in paragraph 11 deposes that she was surprised that a notice of hearing was furnished to her by a legal assistant after the matter was struck off the active cause list, hence her discovery that the matter was restored ex-parte.

That this had shocked her, as Counsel for the Plaintiff had written to her seeking agreement that the matter be restored by consent, and they had responded that they were amenable to execution of the order provided that the Plaintiff bore the costs of the restoration. That it was Counsel's belief that the ex-parte order to restore the matter was an attempt to circumvent the payment of costs to the Defendant, and it should be set aside, as it was irregularly made.

I have already stated that law empowers the court to hear an application ex-parte in certain circumstances. This entails that the court retains discretion to decide in what circumstances this can be done. In this case it was redundant for me to hear the Plaintiff's application to restore the matter inter-partes, as I gave conditions for restoration of the matter, in line with Order 35 Rule 6 of the High Court Rules, Chapter 27 of the Laws of Zambia.

These conditions were that the restoration be made within 30 days of the matter being struck out, and this order was complied with. The costs that were awarded to the Defendant were not ordered to be paid as a condition of restoration. Order 62 Rule 8 of the Rules of the Supreme Court, 1999 edition provides that;

> ***"(1) Subject to paragraph (2), the costs of any proceedings shall not be taxed until the conclusion of the cause or matter in which the proceedings arise.***

(2) If it appears to the Court when making an order for costs that all or any part of the costs ought to be taxed at an earlier stage it may, except in a case to which paragraph (3) applies, order accordingly.

(3) No order may be made under paragraph (2) in a case where the person against whom the order for costs is made is an assisted person within the meaning of the statutory provisions relating to legal aid".

Therefore going by the above provision, the costs that I awarded to the Defendant when I struck out the matter can only be recovered at the end of the proceedings, and there was therefore no basis for the Defendant to make the application currently before me. I accordingly dismiss the application for want of merit, with costs to the Plaintiff. This matter is scheduled to come up for trial tomorrow the 6th of September, 2017 for trial at 09:00 hours. However in view of the fact that the ruling may not have been uplifted by the parties in advance of the scheduled hearing date, I direct that the matter shall come up on Monday 20th November, 2017 at 09:00 hours for trial.

DATED THE 5th DAY OF SEPTEMBER, 2017.

Skaunda

S. KAUNDA NEWA
HIGH COURT JUDGE