

GEORGE STEPHEN FUMIA
versus
ESTATE OF THE LATE ETTORE PIETRO FUMIA
and
MELINA MATSHIYA N.O
and
ISABEL FUMIA
and
LUIGINO FUMIA
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 28 and 11 September and 18 October 2021

Pre-Trial Conference

A Mutsiwa, for the plaintiff
C Tachiona, for 1st and 2nd defendants
P Nyeperai, for 3rd and 4th defendants
5th defendant in default

TAGU J: On the 18th October 2021 I dismissed the Plaintiff's case. By letter from the Registrar I have been requested to furnish reasons for purposes of appeal. These are they.

To put the Supreme Court into proper perspective I have to give the Historical background of this matter which led me to dismiss the Plaintiff's case.

On the 28th September 2021 the file was placed before me for purposes of holding a Pre-trial Conference (P.T.C.). On that date the Plaintiff and his legal practitioners did not attend. Present were counsels for 1st, 2nd, 3rd and 4th defendants. The defendants' counsels applied for the dismissal of the Plaintiff's case for failure to attend the Pre-trial conference. Having perused the file I noted that there was no proof of service or notice of set down served on the Plaintiff. I refused to dismiss the Plaintiff's case and directed my clerk that the Plaintiff or his legal practitioners be served with a fresh notice of set down. I then postponed the matter to the 11th October 2021. On the 11th October 2021 again my clerk indicated that he had dismissed the defendants' counsels after advising them that there was no proof of service and that the matter would be reset for the 18th October 2021.

On the 18th of October 2021 Mr *A Mutsiwa* appeared for the Plaintiff. He made brief submissions that he had just been instructed by the Plaintiff to represent him. For that reason they had not filed Pre-trial conference (P.T.C.) papers as his client got to know of the Pre-trial conference yesterday on a Sunday.

Mr *C Tachiona* then indicated that he was opposed to the postponement. He proposed that the case be dismissed.

Mr *P Nyeperai* made lengthy submissions. He submitted that he too opposed the postponement. He said in any case the counsel for the Plaintiff had not filed assumption of agency. That Mr *A Musiwa* had no right of audience. *P Nyeperai* said he would have appreciated if the new counsel for the Plaintiff was asking for indulgence. This he did not do. It could not be granted by mere asking. He said the renunciation of agency was done in 2020. The first Notice of set down was served on Godlinton and Gerrans. They sought authority to reserve. Service was refused and it had happened on numerous occasions. Letters were written on several occasions but the Plaintiff had been delaying because he is in occupation of the property. He said this was another attempt to delay the matter. He said further that the defendants filed their Pre-trial conference papers since September 2018. The papers were served on the Plaintiff but since then the Plaintiff had not taken any initiative. According to him the Plaintiff is not prosecuting his case to finality. He referred the court to p 78 of the record where the Registrar wrote that the Plaintiff pays costs but Plaintiff has not done so. The defendants had to pay the Sheriff's costs.

Mr *P Nyeperai* then submitted that no one can be faulted if one concludes that Plaintiff is not interested because the Plaintiff is driving a benefit not due to him. He said Mr *Musiwa* was not even seeking to pay wasted costs. No explanation has been explained why P.T.C. papers have not been filed. Series of letters were written to Plaintiff's erstwhile legal practitioners back dating to March 2019 requesting for round table conference but Plaintiff did not attend. He ignored them.

He further said this resulted in the 3rd and 4th Respondents writing letters to Plaintiff complaining about his conduct. This matter was set down before the round table conference had been held. He read one of the letters to that effect. But to date no Plaintiff's bundle of papers has been filed. He said on the 1st of December 2020 the arrogant legal practitioners refused to accept serve. This is the behavior which is now being exhibited. The plaintiff should play an active role and that has not happened.

He submitted that the request by the current Plaintiff's legal practitioner cannot be granted. He disputed the suggestion that Plaintiff came to know of the P.T.C. a day before. His contention being that this matter was served on the 11th October 2021 and no attempt has been taken to resolve the matter. He referred the court to the cases of *Xtreme Oils Private Ltd v Shahadat* HH 21/18, *Archiford Dube v Leeroy Reece* HH 321/18.

It was his further view that by the time of P.T.C. all papers should have been filed. He said he cannot blame Plaintiff's current legal practitioners. His colleague has no clue of what has been happening. The Plaintiff created the mess. The Plaintiff is not interested in the matter. He said it is trite law that sins of a legal practitioner may have to visit client why he has not filed papers since 2018.

Mr *P Nyeperai* concluded by saying the application for postponement is not justified. The application for postponement must be dismissed with costs. The Plaintiff's case must be dismissed with costs. If he is serious he has a recourse. This is a 2017 matter and it is almost 5 years now. To make matters worse the Plaintiff's current counsel has not even filed assumption of agency. In terms of R49 (a) (b) ARW 49 (12) (b) this court should dismiss Plaintiff's case right now.

In response to the defendants' submissions Mr *Mutsiwa* said he could not go into the merits of the case. He said he was to regularize his appearance in court that day. He maintained that service was done on Sunday, a day before the hearing. His application for postponement was to regularize the case. He said the Plaintiff has constitutional rights.

In dismissing the application for postponement and the Plaintiff's case the court said that it did not blame the current legal practitioner for the Plaintiff. The History of this matter as articulated by Mr *Nyeperai* clearly showed that the previous legal practitioners are to blame as well as the Plaintiff who has shown no interest in prosecuting the case.

In the result, IT BE AND IS HEREBY OREDERED THAT:

1. The Plaintiff's case is dismissed with costs for failure to comply with the Rules relating to conducting of P.T.C.

Zuze law chambers, plaintiff's legal practitioners
Wilmot and Bennet, 1st and 2nd defendants' legal practitioners
Costa and Madzonga, 3rd and 4th defendants' legal practitioners