IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
MISC. CIVIL CASE NO. 98 OF 2006

BETWEEN

THE STATE ……. RESPONDENT

-AND-

COUNCIL FOR UNIVERSITY OF MALAWI
EX-PARTE ALLAN CHIHANA AND STEVE MUSOPOLE ..... APPLICANT

CORAM : CHOMBO, J.

: Kita, Counsel for the Applicant
: Kanyenda, Counsel for the Respondent
: Baziliyo, Court Interpreter

RULING

This is an application by the respondents to discharge an injunction obtained by the applicants on 6th December 2006.

The grounds for the application are that:

1. The injunction was granted wrongly because of suppression of material facts.
2. The applicants are guilty of inordinate delay in prosecuting the matter.

The respondents' application was supported by affidavits sworn by Mr. Phaso, Professor Kanyama Phiri and counsel and skeletal arguments.

The applicants, apposing the application, filed an affidavit and skeletal arguments.

The submission of the respondent was that the applicants had, at the time of their application for an injunction, suppressed or misrepresented material facts on the bases of which the honourable judge granted them the injunction. The respondent submitted that the applicants had alleged that they had not been given sufficient time to respond to the charges against them and that they were not given an opportunity to cross-examine witnesses. The evidence on record is that the respondent, on 20th and 26th October 2006 wrote letters to the applicants asking them to submit written reports on two allegations made against them. The 2nd applicant submitted his written report dated 25th and the 1st applicant failed or refused to submit a report. According to exhibit JP6(b) the 1st applicant stated that he failed to submit a written report because he was writing examinations.

By their letter of 30th October 2006, the respondent once again penned the applicants informing them that disciplinary hearing had been scheduled to take place on 2nd November 2006 and this stated the charges, the venue of the hearing and time. The applicants were further advised to bring witnesses if they had any. One of the points raised by the applicants is that they were not accorded adequate time for them to make their defence.

What is adequate time is a matter of evidence. If one were to consider the time lapse from the time that the applicants were first notified about the allegations against them to the time they responded or were supposed to regard in writing to the time of hearing of the matter the applicants had between 12 and 6 days of

notice. Within this same period the 2nd applicant was able to make a submission in writing and 1st applicant decided not to make any submission. In case of injunctions, two days is considered to be adequate time for effecting service, the 12 to 6 days was therefore adequate notice. The applicants alleged that they were not afforded time, however the same was not raised at the hearing. And, with the respondent's evidence on record I must find to the contrary that there was adequate notice given to the students of the disciplinary hearing. The fact that the letters were delivered does not in my opinion, flout any procedure. There is no specification of who is supposed or not supposed to serve the letters. In any event the applicants had a right at that time to inform the disciplinary committee about the short notice or lodge any complainant about the process. The same was not done. The applicants deponed that they were not allowed to cross-examine the respondents' witnesses.

According to exhibits JP7 and JP8 it is stated on page 2 of each exhibit that there was cross-examination after which the Disciplinary Committee found the two applicants guilty of the charges proferred against them. It is not known who was being cross-examined or who was cross-examining who in this respect. Suffice to say that with or without an opportunity being granted to the two applicants they admitted having the opportunity to be heard ---

The applicant's application to Court did not disclose these facts to Court, which I would strongly presume would have afforded the Judge an opportunity to assess the facts widely. The non-disclosure, in my view did constitute material representation of the facts.

When the injunction was granted on 6th December, 2006 it was specifically stated that the applicants were to be readmitted into College pending the determination of the hearing of the judicial review. It was submitted by the respondents that since the granting of the said injunction the applicants have not moved the Court to prosecute the matter. The applicants contend that all efforts to prosecute the matter have been frustrated by the Court.

After the said order of 6th December 2006 there was an application by the respondent to vacate the charges as follows: Committing some of the offences that they were charged with; and on those bases the suspensions were based. At the end of the day therefore the question that one should ask is *"If indeed there was no cross-examination of the respondent's witnesses by the applicants, was there miscarriage of justice?"* With the applicant's admissions I would say: The applicants submitted that they were not even allowed to listen to the evidence of the respondent's witnesses. There is evidence on p7 of the JP4 that the students were paraded one by one into the room and all the witnesses testified as to what part each student played. There is no evidence to the contrary that the witnesses testified in the absence of all the students involved and what part each student had played. I have difficulties therefore appreciating the applicants' submission that the witnesses testified in their absence.

With the applicant's admissions I would say that the answer to this question should be in the negative. Further as observed by Mtambo, J. quoted in the case

of Herring v Templeman (1973) 3 All ER 569 with append in Masupayi and Others –vs- Council for the University of Malawi Civil Cause No. 392 of 1994 (unreported),

> *" --- the hearing before the Committed was not a full legal trial. It was neither a law suit nor a legal arbitration. Its sole or chief purpose having been to give the applicants a fair chance to each explain his side of the story on the charges".* (Underlining supplied for emphasis).

On any ex-parte application before the Court, the applicants have a duty to *"make full and frank disclosure of all material facts"* in accordance with Order 29/1A/24 of the Rules of the Supreme Court. As observed by Chitty J. in Schmitten v Faulkes {1893} W.N. 64, this is because the Court is being asked to grant a relief without the person against whom the relief is sought. The injunction of 16th January 2007. It is apparent from the Court record that there was no hearing of the matter on the scheduled date of 22nd January 2007. Thereafter the applicants filed an application for leave to apply for judicial review dated 24th January 2007. Again there is evidence that the same was not heard by Court. After that there are several notices of adjournment dated 11th October 2007, 16th November 2007 and 11th January 2008 as evidence that there were several adjournments to the matter. According to evidence on record all there notices were filed by the respondents who were desirous of vacating the injunction and not the applicants on their intended motion for judicial review. It cannot be said therefore that applicant's efforts to prosecute the judicial review have been frustrated by Court. On the contrary it is the respondents' efforts, for one reason or another, that have been frustrated. The reasons for the adjournments are not entirely Court based.

On one occasion the application could not be heard because the applicant's counsel was in Blantyre attending to and her case, as per letter of 17 October 2007. It can only be accepted, as submitted by the respondents, that the applicants have not taken steps to prosecute the matter expeditiously as ordered by Court. In my view, even evidence of the steps taken by them to prosecute the matter, without the matter being prosecuted would have been adequate to indicate that the applicants have decided to let the matter pass quietly. An injunction, it is Trite law, is only an interim relief. By failing to prosecute the matter from 24th January 2007, the date on which leave to apply for judicial review was first granted, the applicants have shown inordinate delay in prosecuting the same.

In the circumstances before me therefore I must grant the respondents' application to vacate the injunction as prayed herein.

MADE in Chambers this 25th of April 2008.

E.J. Chombo
J U D G E