



**JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY PERSONAL INJURY  
CAUSE NO. 691 OF 2014**

**BETWEEN**

**ALEX CHINGWALE (Suing for and on behalf of  
Beneficiaries of the Estate of YVONNE CHINGWALE.....PLAINTIFF**

**-AND-**

**ELECTRICITY SUPPLY CORPORATION  
OF MALAWI.....DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

Mr. Mickeus, of Counsel, for the Plaintiff

Mr. Kaluwa, of Counsel, for the Defendant

Mr. O. Chitatu, Court Clerk

**RULING**

*Kenyatta Nyirenda, J.*

This is the Court's ruling on the Plaintiffs summons to dismiss the Defendant's appeal herein for want of prosecution.

The summons is supported by an affidavit sworn by Luciano M. Mickeus, of counsel, and the substantive part thereof reads as follows:

- "3. THAT on the 2<sup>nd</sup> day of June, 2015, the Defendant's application to dismiss the Plaintiff's action herein which is a claim inter alia for loss of dependency, loss of expectation of life resulting from the death of one Yvonne Changwale was dismissed by Honourable Kacheche.*
- 4. THAT on the 5<sup>th</sup> day of June, 2015, the Defendant appealed against the decision of Honourable Kacheche. I attach and exhibit hereto a copy of the notice of appeal marked "LM".*

5. *THAT it is now close to two years, the Defendant has not prosecuted her appeal. There is not action since 2015 to ensure that the appeal is heard and concluded.*
6. *THAT the Plaintiff cannot proceed with the prosecution of the matter as the process awaits the conclusion of the appeal.*
7. *THAT this court aims at disposing of matters quickly and ensuring justice dispensation as soon as possible. Appeals should not act as spanners to that wheel of justice.*
8. *THAT the Plaintiff is suffering as he cannot access justice because of the defendant's action. ”*

Counsel Mickeus submitted that since 2015 when the Defendant filed the notice of appeal, the Defendant has not taken any action to prosecute the same. He contended that more than 1 year and 7 months have elapsed without the Defendant doing anything with respect to the prosecution of the appeal. Counsel Mickeus argued that the delay is inordinate and unjustifiable and had actually occasioned prejudice on the part of the Plaintiff.

Counsel Mickeus buttressed his submissions by citing three Malawian cases, namely, **John Kamwamba t/a Central Association Limited v. WTC Freight Limited**, HC/PR Civil Cause No. 541 of 1986 (unreported), **Sabadia v. Dowsett Engineering Ltd** 11 MLR 417 and **Crispo Keleya v. Evance Pullu**, Civil Cause No. 37 of 1986 (unreported). He also placed reliance on three English cases of **William C Parker Ltd v. FJ Ham & Son Ltd** (1972) 3 ALL ER 1051, **Sweeney v. Sir Alfred McAlpine & Sons Ltd** [1974] 1 All ER 474 and **Birkett v. James** (1977) 2 ALLER 801

The Defendant is opposed to the summons and it accordingly filed an affidavit in opposition, sworn by Bernadette Mnyanga, of counsel. The affidavit is also brief and the relevant part thereof will be quoted in full. It is in the following terms:

- “3. *THAT the plaintiff commenced this action on 10<sup>th</sup> July, 2014 seeking damages in respect of death which occurred on or about 1<sup>st</sup> November 2008.*
4. *THAT after mediation, the defendant took out a summons to dismiss the action for being statute barred.*
5. *THAT the summons came before the Registrar, who decided in favour of the plaintiff on 2<sup>nd</sup> June, 2015.*
6. *THAT the defendant appealed against the ruling on 5<sup>th</sup> June, 2015. The appeal was scheduled for 11<sup>th</sup> January, 2016 before Justice Chirwa.*

7. *THAT on 11<sup>th</sup> January, 2016 the plaintiff sought an adjournment of the hearing of the appeal on the basis that they were not ready. The court ordered that the plaintiff (respondent) files skeleton arguments within 3 days and the defendant (appellant) responds and that thereafter either party could file notice of adjournment.*
8. *THAT the defendant (Appellant) had already filed their arguments in November, 2015. The Plaintiff then filed the arguments on 14<sup>th</sup> January 2016*
9. *THAT the defendant then filed a notice of adjournment which is yet to be granted a date of hearing.*
10. *THAT in the circumstances, it is not the appellant's fault that the appeal is yet to be heard. The plaintiff's action ought to be dismissed. "*

Counsel Kaluwa submitted that the affidavit evidence on behalf of the Defendant shows that the Defendant has at all material times been keen to prosecute its appeal. He referred the Court to the fact that when the appeal came up for hearing on 11<sup>th</sup> January 2016, it is the Plaintiff who sought an adjournment which was objected to by the Defendant. Nevertheless, hearing of the appeal was adjourned to a date to be fixed.

Counsel Kaluwa asked the Court to take judicial notice of the fact that the Judge seised of the case, Justice Chirwa, was also handling cases in Mzuzu. Accordingly, the Defendant believed that failure to be assigned a hearing date for the appeal was due to the tight schedule of Justice Chirwa. Counsel Kaluwa concluded by praying that the appeal should not be dismissed since it is not the Defendant who is the cause of the delay.

The way to approach such application is as was enunciated by Lord Denning M.R. in **Allen v. Sir Alfred McAlpine & Sons [1968] 1 ALL ER 543**, at p 547:

*"The principle on which we go is clear: when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away, leaving the plaintiff to his remedy to his own solicitor who has brought him to this plight. Whenever a solicitor, by his inexcusable delay, deprives a client of his cause of action, the client can claim damages against him. "*

The principles enunciated by Lord Denning M.R. in **Allen v. Sir Alfred McAlpine & Sons**, supra, were elucidated by Unyolo J. as he then was, in **Sabadia v. Dowset Engineering Ltd. 11 MLR 417** at page 420 as follows:

*"In deciding whether or not it is proper to dismiss an action for want of prosecution, the court asks itself a number of questions. First, has there been inordinate delay? Secondly, is the delay nevertheless excusable? And thirdly, has the inordinate delay in consequence been prejudicial to the other party? "*

See also **Reserve Bank of Malawi v. Attorney General, Constitutional Cause Number 5 of 2010 (unreported)** wherein Sikwese J. stated as follows:

*“...Power to dismiss action should be exercised only where the Court is satisfied either*

- 1. that the default has been international and contumelious e.g disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court: or*
- 2. (a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers; and*  
*(b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as likely to cause or do have caused serious prejudice to the defendants either as between themselves and the Plaintiff or between them and a third party. ”*

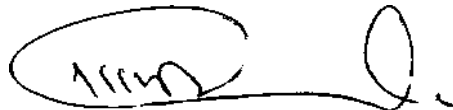
In the present case, it is the case of the Plaintiff that the Defendant has taken no steps to prosecute the appeal following the adjournment that was granted by Justice Chirwa on 11<sup>th</sup> January 2016. On the other hand, the Defendant claims that it took steps to have the appeal heard by filing with the Court a draft Notice of Adjournment and following up on the Notice on a number of occasions. Unfortunately, the claims by the Defendant are nothing more than bare assertions. I have meticulously gone through the Court file and I have searched in vain for the draft Notice of Adjournment or a letter from the Defendant seeking a fresh date of hearing or complaining about the delay or at all. I am also not persuaded by the

argument that the appeal was delayed due to the absence of Justice Chirwa. Soon after Justice Chirwa was transferred to Mzuzu Registry, this matter was assigned to the undersigned Judge.

On the basis of the foregoing, it is my finding that the Defendant took practically no steps whatsoever over a period of 18 months to prosecute the appeal. Public policy requires that litigation must come to an end. There should be a point where matters should be closed. The delay here is so prolonged that there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest in the administration of justice demands that the action should not be allowed to proceed.

It the premises, it is my finding that the delay herein is clearly inordinate and inexcusable and allowing further prosecution of the appeal would be prejudicial to the interests of the Plaintiff. In short, the delay is intolerable. *“They have lasted so long as to turn justice sour”*, to use the words of Lord Denning M.R. in **Allen v. Sir Alfred McAlpine & Sons Ltd**, supra. The appeal is, therefore, dismissed for want of prosecution with costs.

Pronounced in Court this 7<sup>th</sup> September 2017 at Blantyre in the Republic of Malawi.

A handwritten signature in black ink, appearing to read 'Kenyatta Nyirenda', with a large, stylized flourish extending to the right.

**Kenyatta Nyirenda**  
**JUDGE**