JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
JUDICIAL REVIEW CAUSE NO. 26 OF 2016

BETWEEN:

THE STATE

-AND-

ZOMBA CITY COUNCIL ..... 1ST RESPONDENT

ROADS AUTHORITY ..... 2ND RESPONDENT

EX PARTE:

SAJID HABIB MOHAMED t/a GRAND

PRIX MOTORS ..... APPLICANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Gondwe, of Counsel, for the Applicant
Dr. Madise, of Counsel, for the 1st Respondent
Mr. Sitima, of Counsel, for the 2nd Respondent
Mrs. Jessie Chilimapunga, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is my ruling on the 2nd Respondent's application to dispose the proceedings herein on a point of law. The application is brought under Order 10, r.1, of the Court (High Court) (Civil Procedure) Rules [Hereinafter referred to as "CPR"].

The background to the application is of the simplest. The Applicant commenced these proceedings by obtaining *ex parte* an order granting leave to apply for judicial review against the decision of the 2nd Respondent not to provide access route to the Applicant's Filling Station (leave). The said Leave was granted by this

Court on 23rd March 2016. Thereafter, the matter was held in abeyance until on 23rd May 2017 when the Applicant commenced the substantive judicial review proceedings by filing with this court a Notice of Originating Motion for Judicial Review.

Hearing of the Originating Motion was set for 5th July 2017. There is nothing on Court file to show that service was effected on the Respondents. On the set hearing date, Counsel Gondwe appeared before the Court and sought an adjournment. For reasons which will become clear later in this ruling, I quote Counsel Gondwe's own words:

> *"I seek an adjournment for about 21 days. There are matters to be determined for consideration before coming again to court."*

The Court granted an adjournment to a date to be fixed. On 5th July 2017, the Applicant filed with the Court a Notice of Adjournment and 18th August 2017 was appointed for hearing of the Originating Motion. Hearing did not take place on 18th August 2017 and the matter was adjourned to 2nd October 2017.

On 26th September, 2017, the Applicant filed with the Court the Applicant's witness statement. The witness statement is unsigned and undated. Meanwhile, on 29th September 2017, M/s Barnet and James filed a Notice of Appointment of Legal Practitioners to the effect that they had been appointed by the 1st Respondent. The Notice of Appointment was accompanied by an Affidavit in Opposition.

Time to revert to the application before the Court. It is the case of the 2nd Defendant that the leave that was granted herein on 23rd March 2016 expired by effluxion of time and that, consequently, these proceedings are null and void on the ground that the Applicant failed to file the Notice of Originating Motion within 14 days from 23rd March 2016.

The application is supported by Skeleton Arguments and the same are relatively brief and concise. It might not be out of order to reproduce the Skeleton Arguments in full:

> *"1. The Applicant's application for leave for judicial review was made under Order 53 of the Rules of Supreme Court.*
>
> *2. Order 53 rule 5 provides for the mode of applying for judicial review. Rule 2 provides that unless the court directs otherwise, the application shall be made by originating motion to a judge sitting in open court.*
>
> *3. Order 53 rule 5 provides that the (originating) motion must be entered for hearing within 14 days after the grant of leave.*

4. *Under Order 53/14/72, on what is involved on entry for hearing, it is stated as follows;*

> *"This is the process whereby the substantive application for judicial review is entered in the records of the Crown Office. In order to enter a case for hearing the applicant must, in each case, within 14 days of the date of grant of leave:-*
>
> *(i) File with the crown court an affidavit of service (r,5(6)). The affidavit of service must (a) give the names and addresses of, and the places and dates of service on, all persons who have been served with the notice of motion or summons; and (b) if any person who ought to be served under r, 5(3) has not been served, state that fact and the reason for it.*
>
> *(ii) Lodge with the office by way of entry for hearing a copy of the notice of motion (or presumably, the summons, if the court has directed that the application be made by originating summons). See r.5(5).*

5. *The Long and short of it all is that the substantive judicial review proceedings must be commenced within 14 days from the date the leave is granted.*

6. *In the matter herein leave was granted on 23rd March 2016. The Applicant had until 7th April 2016 to commence the substantive judicial review proceedings. However, the Applicant commenced the substantive proceedings on 23rd May 2017. More than 13 and a half months after the last date on which the substantive proceedings were supposed to be commenced.*

7. *What then is the effect of this non-compliance? The Supreme Court (Chikopa JA) recently considered a similar matter in MSCA Civil Appeal Number 59 of 2017 between The State v Lilongwe Water Board, Minister of Agriculture, Irrigation and Water Development, the Director of Environmental Affairs, The Minister of Natural Resources, Energy and Mining, Khato Civils Proprietary Ltd(Interested Party) Ex Parte Malawi Law Society.*

8. *In this matter, the Malawi Law Society obtained leave for judicial review on 21st April 2017. They did not file the originating motion until 29th September 2017. The Respondents contended that the leave granted on 21st April 2017 expired on 5th May 2017 and that post that date, there were no proceedings before the parties. The Court agreed with the respondents and put it this way at page 4;*

> *"Speaking specifically about leave the rules of engagement are clear enough. The society was supposed to file the substantive motion before the close of court business on May 5, 2017. Because the motion was not so filed the leave granted on April 21, 2017 lapsed/expired. The effect thereof*

was that there was now before the High Court no recognisable proceedings between the parties herein."

9. *The court thus held that post 5th May 2017, the proceedings between the parties were a nullity as the court had lost the jurisdiction to preside over the matter upon the expiry of the leave.*

10. *We are advancing the same argument in this matter. The Applicant in this matter was supposed to file the Originating Motion within 14 days from 23rd March 2016. He filed the Motion 14 months from 23rd March 2016. The leave thus expired when the Applicant failed to file the substantive motion within 14 days from 23rd March 2016. After the expiry of the leave these proceedings became null and void.*

11. *We thus pray that these proceedings be dismissed with costs for being null and void."*

The Applicant is opposed to the application and there is, in that regard, a sworn statement by Mr. Lusungu Gondwe, a legal practitioner in the firm of M/s. Ritz Attorneys at Law Company [Hereinafter referred to as the "Applicant's sworn statement"]. The substantive part of the sworn statement in opposition is worded thus:

"4. I refer to the 2nd Respondent's sworn statement in support of its herein Application, made by ***CHIKUMBUTSO NICHODEMUS SITIMA****, and respond as follows;*

5. I refer to paragraph 1 and 2 of the sworn statement and make no comment to the contents thereof.

Order for Leave

6. I refer to paragraphs ***3,4,5,6*** *and state that on* ***21st day of March, 2016,*** *the Applicant, through Messrs Ritz Attorneys at Law [us and/or we] applied for Leave to apply for Judicial Review.*

6.1 Messrs Ritz Attorney at Law filed the application and were informed by the Court Clerk that the same was assigned to the Honourable Justice Kenyatta Nyirenda who at the time was outside the country.

6.2 Subsequently, the Applicant constantly asked us to check with High Court Registry on the status of my application and whether the Honourable Judge had returned home from abroad.

6.3 On one occasion the applicant even suggested that the application be assigned to another judge considering time was of the essence.

6.4 Amidst our [Messrs Ritz Attorney at Law] efforts to have the application taken before another Judge, the Honourable Judge returned home and attended to the Claimant's application and granted the Applicant leave to

apply for Judicial Review. This was on 15th June, 2016. The court record will indicate an amendment on the dates by the Registrar with a pen when he was issuing the Order, having been filed on 21st March, 2016.

6.5 *When the said Order was granted and issued accordingly, the Court did not communicate. We were waiting to hear from the Court but to no avail. It took us to check with the Court to realize that the Court has already granted leave.*

6.6 *Messrs Ritz Attorney at Law immediately after collecting the Court documents on 19th May 2017, commenced the substantive judicial review proceedings by filing a Notice of Originating Motion for Judicial review on 23rd May 2017.*

6.7 *By a letter dated, we updated the applicant of the foregoing and advised the way forward. There is now produce and shown to me marked* ***LG 1*** *a copy of the said letter.*

6.7.1 *The delay to file Notice of Originating Motion for Judicial Review was not a choice of Ritz Attorneys at Law nor was it their fault.*

6.7.2 *At the pain of repetition, we were waiting to hear from Court. The Court never communicated.*

6.7.3 *We made several follow-ups to no avail*

6.7.4 *Upon getting hold of the, we immediately filed a notice of originating motion for judicial review*

6.8 *Furthermore, the 2nd Respondent have not showed or mentioned if they suffered any prejudice from the said delay if at all.*

6.9 *In any event, the delay is an irregularity and should not necessitate rendering the applicant's proceedings and/or claim a nullity.*

7. ***WHEREFORE*** *I humbly pray to this Honourable Court that the 2nd Respondent's Application to dismiss matter on point of Law herein be dismissed in its entirety with costs."* – Emphasis by underlining supplied

LG1 is a letter dated 1st June 2017 written by M/s Ritz Attorneys at Law addressed to the Applicant. The body of the letter reads as follows:

"We refer to the above mentioned matter.

Be informed that we applied for Judicial Review as long ago as March, 2016. The files was allocated to Justice Kenyatta Nyirenda who at the time was out of the country and only attended to our application upon his return into the Republic.

We were not informed by the court as to the outcome and we persistently sought advice from the Court until recently that we managed to appreciate the Court file and the Judge's notes that stated that the Leave to move for Judicial Review was granted

To this end we immediately filed a notice of originating motion for Judicial Review so that we can resuscitate the matter herein and make steady progress for the time lost. A copy of all the court process is enclosed herein for your appreciation and records.

Be guided accordingly.

Thank you for your usual cooperation."

I momentarily pause to observe that the most of the averments in the sworn statement and LG1 are palpably false. As will be noted from the background information, leave was granted on 23rd March 2016. In the premises, I totally fail to understand what it is that the Applicant was following-up. Further, for the sake of setting the record straight, I was at all material times within the jurisdiction of Malawi and duly executing my duties as a Judge. This is evidenced by the fact that I am the one who attended to the application for leave on 23rd March 2016.

The Applicant's sworn statement is supported by Skeleton Arguments which read as follows:

"2. ***THE LEGAL ISSUES***

2.1 The sole legal issue herein is whether the leave to apply for Judicial Review earlier granted herein ought to be dismissed for delay to file notice of originating motion for judicial review.

3. The law Applicable

3.1 The 2nd Respondent's Application to dispose matter herein on point of law

3.2 The 2nd Respondent have now knocked on the doors of the Court to dispose the herein matter on point of law. The main ground the 2nd Respondent is advancing is that of delay to file the substantive judicial review proceedings.

3.3. The 2nd Respondent further prays that the whole proceedings be dismissed with costs for the said delay. The said delay is curable by way of extension of time and does not necessitate dismissing the entire proceedings.

3.4 ***Order 1 rule 5 of the Courts (High Court) (Civil Procedure) Rule, 2017*** *stipulates that overriding objectives of these rules, which include among others to ensure that the parties are on equal footing.*

3.5 ***Order 2 rule 1 of the Courts (High Court) (Civil Procedure) Rule, 2017*** *states that the failure to comply with these rules or direction of the Court shall be an irregularity.*

3.6 ***Order 2 rule 2 of the above – said Rules*** *further states that:*

Notwithstanding rule 1, an irregularity in a proceeding, or a document, or a step taken, or order made in proceeding, shall not render a proceeding, document or step taken or order a nullity."

3.7 ***Extension of time (O.3, r.5) of the Rule of the Supreme Court***

3.7.1 *Order 3, rule 5 sub rule 1 and states that:*

"the Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings….

The court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period…"

3.7.2 *The objection of this rule is to give the Court discretion to extend with a view to the avoidance of injustice to the parties.*

3.7.3 *In Finnegan v Parkside HA [1998] 1 WLR 411, the Court of Appeal held that:-*

"The absence of good reason for delay was not sufficient reason for the Court to refuse to exercise its discretion to extend time"

3.7.4 *Pursuant to the provisions of the Rules of the Supreme Court, the Courts (High Court) (Civil Procedure Rules) under* ***Order 10*** *thereof also allows a party to make an interlocutory application at any stage during the proceedings and that nothing shall prevent a party to a proceeding from making an oral application during the proceeding.*

4. Arguendo

4.1 *The Applicant, in the sworn statement of Lusungu Gondwe, maintains that the delay was not their making.*

4.2 *It was simply the lapse in communication from the Court itself and therefore they should not be punished considering that such delays, where there is justification they can be cured and/or remedied by the Court by*

way of extension of time considering it's a mere irregularity in the proceedings not enough to warrant to dispose of matter on point of law and dismiss the whole proceedings and/ or declare the same a nullity.

4.3 The 2nd Respondent have not showed if they have suffered any prejudice by the delay. In any event, they have not suffered any prejudice.

5. SUBMISSION

5.0 The Applicant prays that the 2nd Respondent's application to dispose matter on point of laws on grounds that the Applicant delayed to file substantive judicial review proceedings be dismissed."

Having considered the parties' respective evidence, as set out in sworn statements, and submissions by both Counsel, I fully agree with Counsel Sitima that as a result of the Applicant failing to file the Notice of Originating Motion within 14 days from 23rd March 2016, the leave expired by effluxion of time. The Applicant does not dispute that he failed to file the Notice of Originating Motion within the prescribed 14 days. In the premises, the Court has no hesitation in formally discharging the leave. The words "formally discharging" are advisedly used in that the leave expired immediately the 14 days lapsed without the Applicant filing the said Notice.

Further, it will be recalled that that once leave has been obtained, service must be effected very promptly thereafter, because the case has to be entered for hearing within 14 days of the grant of leave: see r.5(5) and para. 53/1-14/41. The case cannot be entered for hearing unless service has been effected and an affidavit of service lodged with the Court. In the present case, the Applicant also breached the requirement regarding service in that it took him more than 18 months to effect service.

Furthermore, and independently of effluxion of time ground, there has been inordinate delay in prosecuting this case. The approach to take in such a case 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."*
> – Emphasis by underlining supplied

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."*

It is not uninteresting to note that the above-mentioned principles have now more or less been encapsulated in Order 12 of the CPR. Rules 54 (1) and 56 thereof are relevant and these read as follows:

> *"54. A defendant in a proceeding may apply to the Court for an order dismissing the proceeding for want of prosecution where the claimant is required to take a step in the proceeding under these Rules or to comply with an order of the Court, not later than the end period specified under these Rules or the order and he does not do what is required before the end of the period.*
>
> *56. The Court may strike out proceeding without notice, if there has been no step taken in the proceeding for 12 months"*

In the present case, it is the case of the Respondents that the Applicant had taken no steps to prosecute the case for almost fourteen months. On the other hand, the Applicant claims that, despite the said delay, the Respondents have not suffered any prejudice. I do not subscribe to such a claim. It is important to remember that

these are judicial review proceedings. Such proceedings require speedy handling. This explains why judicial review proceedings are required to be brought within three months of the complained decision.

In relation to delays, the starting point is laid out in the case of **O'Reilly v. Mackman (1983) 2 AC 237** where Lord Diplock said:

> *"The public interest, in good administration, requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in the purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the persons affected by the decision."*

On the basis of the foregoing, it is my finding that the Applicant took practically no steps whatsoever over a period of almost 14 months to prosecute the action. 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 action would be prejudicial not only to the interests of the Respondents but it would also be detrimental to good administration in general and to good administration of justice in particular: see **R. v. Dairy Produce Quota for Tribunal for England and Wales, ex p. Caswelll [1989] 1 W.L.R 1089**. In short, the delay herein 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.

In light of the foregoing, the Court had no hesitation in allowing the application by the 2nd Respondent. As regards costs, these normally follow the event, and since the Respondents have succeeded, I order that the costs of these proceedings be borne by the Applicant.

Before resting, a word or two on the Applicant's sworn statement and LG1might not be out of place. As already mentioned herein before, these two documents contain some falsehood in so far as the explanations for the delay herein are concerned.

It might be that falsehood was being employed in a desperate attempt to salvage the Applicant's case. Such conduct, however, must be deprecated in the strongest

terms. A legal practitioner has a duty to use only tactics that are legal, honest and respectful. This duty is often referred to as the duty of condour. In the apt observation by the learned authors (John H. Tinney and Robert A. Lockhart) of the publication "The Duty of Candor: Where were the Lawyers and Why Didn't They Come Forward?" at page 8:

> *"An attorney owes his first duty to the court. He assumed his obligations towards it before he ever had a client. His oath requires him to be absolutely honest even though his client's interest may seem to require a contrary course. The [lawyer] cannot serve two masters and the one [the lawyer has] undertaken to serve primarily the court.*
>
> *In fulfilling ethical duties, the lawyer has an ethical obligation to avoid misleading the court and to take steps to protect the court from misrepresentations by others, even if the misrepresentations would aid the lawyer's client. While some who criticize a lawyer's underhanded tactics may also protest when those same tactics are not used in their behalf, the public's confidence in the legal system and its practitioners will be bolstered by observing the duty of candor. Strict compliance with this and other ethical obligations will allow one to achieve the lawyer's mission of zealous representation within the bounds of the law."* – Emphasis by underling supplied

Needless to say, a legal practitioner also owes his or her client a duty of candour. Legal practitioners have to be truthful to their clients. They cannot afford to be economical with the truth. In this regard, a legal practitioner who has messed up conduct of a case must not conceal this fact from his or her client: see **Jones Lazaro Kanthomba v. Speedy's Limited, HC/PR Civil Cause 2854 of 2006 (unreported)**. I am not amused at all at the spurious claim by M/s Ritz Attorneys at Law that the delay herein was caused by the Court. To the contrary, it is M/s Ritz Attorneys at Law that are fully to blame for the inordinate and inexcusable delay: they slumbered on the job.

Pronounced in Court this 16th day of March 2018 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE