

**REPUBLIC OF MALAWI**  
**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**

Land Cause Number 74 of 2016

**BETWEEN:**

**BONIFACE TITO MVULA.....CLAIMANT**

**AND**

**AUBREY MVULA.....DEFENDANT**

**CORAM: Ms.CM MANDALA: ASSISTANT REGISTRAR**

Mr Y Domasi: Counsel for the Plaintiff of Messrs YD Attorneys

Mr Nthewa: Counsel for the Defendant of Messrs JB Suzi & Company

Ms. G Mkandawire: Court Clerk

**ORDER ON STRIKING OUT ACTION FOR WANT OF PROSECUTION**

**INTRODUCTION AND BACKGROUND**

This was the Defendant's application to strike out the action for want of prosecution.

The Plaintiff commenced the present action on 5<sup>th</sup> May 2016 by way of Originating Summons pursuant to Order 7 rule 2 of the **Rules of the Supreme Court (RSC)**. The Plaintiff was seeking the following declarations and orders:

1. A declaration that the decision of the Administrator General contained in Ref. AG 57738 is invalid the same having been made without letters of administration.
2. A declaration that the Plaintiffs are the lawful owners of property contained on plot number BG6/23 and BG6/187 in Bangwe Township having stayed on the land for decades.

The Defendant filed his acknowledgment of service with the court on 20<sup>th</sup> June 2016. And on 8<sup>th</sup> September 2016 the Defendant filed an Affidavit in Opposition to the Affidavit in Support of the Originating Summons. As well as a Notice of Appointment of Legal Practitioners filed on 9<sup>th</sup> September 2016.

The next document to be filed was a Summons on Application to Strike out Action for Want of Prosecution duly filed on 26<sup>th</sup> September 2017 by the Defendant's Legal Practitioners.

Counsel for the Plaintiff filed an Affidavit in Opposition and a Notice of Preliminary Objection supported by a Sworn Statement in Support of Application for Preliminary Objection. These documents were filed on 23<sup>rd</sup> October 2017, one day before the date of the hearing. The documents were not filed within the requisite time frames, two clear days before the hearing, so the court did not consider them nor did the court allow Counsel to adopt or submit based on these documents.

**SUBMISSIONS BY COUNSEL**

Counsel for the Plaintiff adopted the content of an affidavit sworn by Charles Martin Mhone. It stated:

"I, **CHARLES MARTIN MHONE**, a Legal Practitioner in the firm of Messrs JB Suzi & Company, PO Box 30783, Chichiri, Blantyre 3, in the Republic of Malawi **MAKE OATH** and **SAY** as follows:-

1. **THAT** Messrs JB Suzi & Company has conduct of this matter on behalf of the Defendant and I am seized with the conduct hereof by reason of which I have the due authority to swear this affidavit.
2. **THAT** the matters of fact I depone to in this affidavit have come to my knowledge by the said reason of my conduct of this matter on behalf of the Defendant and the truth of which matters I verily believe in.
3. **THAT** this action was commenced by the Plaintiff by way of Originating Summons on the 6<sup>th</sup> day of May 2016 seeking, inter alia, the declaration that he is the lawful owner of the property contained on plot numbers BG6/23 and BG6/187 in Bangwe Township.
4. **THAT** on the 8<sup>th</sup> day of September 2016, the Defendant filed his affidavit in opposition to the Plaintiff's action and also lodged a counterclaim against the Plaintiff and which process was served on the Plaintiff on the 12<sup>th</sup> September 2016. Attached hereto and marked is exhibit "CMM1" is the said served copy.
5. **THAT** upon the said service, the matter became ready for hearing and it was incumbent upon the Plaintiff to obtain an appointment for the attendance of the parties before the Court for the hearing of the summons.
6. **THAT** however, from the aforementioned day t date, no any further step whatsoever has been taken by the Plaintiff to have the matter heard or otherwise disposed by this Honourable Court.
7. **THAT** in the premise, the Plaintiff has been guilty of inordinate and inexcusable delay in prosecuting this matter by particularly failing to take any necessary steps howsoever to have the matter concluded.
8. **THAT** this indolent conduct on the part of the Plaintiff in the circumstances clearly evinces that there is no abiding interest in pursuing the claim to its conclusion and indeed renders it unlikely that the Defendant will get a fair trial and is also likely to plunge the Defendant into further prejudice of being exposed to additional liability in trying to have the matter concluded.
9. **THAT** the Defendant has not in any way contributed to this abeyant state of affairs in this matter but the continuance thereof continues to thrust the substantial risk that the trial will be unfair in respect of the Defendant.
10. **THAT** by reason of the foregoing matters, it is in the interests of justice to have the Plaintiff's claim struck out with costs, including costs of this application, for want of prosecution and to have judgment entered in favour of the Defendant in respect of the counter-claim.

**WHEREFORE** I humbly pray to this Honourable Court for an Order that the Plaintiff's action be struck out for want of prosecution with costs, including costs of this application and for an Order that judgment be entered in favour of the Defendant in respect of the counter-claim.

**SWORN** by the said deponent at Blantyre this 14<sup>th</sup> day of August 2017. (signed)"

In his oral submissions before the court, Counsel Nthewa added that from the conduct of the Plaintiff it is a clear indication that the Plaintiff is not desirous to further prosecute the matter because it has been a year since the Plaintiff's last step and the delay is unjustifiable.

In response, Counsel Domasi told the Court that he could not respond to the application as no law was cited in support of the same. Mention was made of an Order 28 as read with rule 2 but with no mention of the Statute. Counsel for the Plaintiff averred that a Registrar does not have power to sit under the Court's inherent jurisdiction. In closing, Counsel Domasi asked the court if it wouldn't be fair for unless order to be entered in order to give the Plaintiff one last chance to dispose of the matter.

In response, Counsel Nthewa informed the court that the summons were filed on 24<sup>th</sup> August 2017 and at the time the law in operation was the **Rules of the Supreme Court** also known as the White Book. Therefore, by saying Order 28 rule 2 as read with rule 10, reference is being made to the **Rules of the Supreme Court**. Counsel believed that the omission is curable and will cause no injustice to the Plaintiff. Counsel, concluded by stating that inherent jurisdiction is in the High Court and that this application was being heard by the High Court. Counsel maintained his prayer as initially stated.

### THE LAW

Order 28 of the **Rules of the Supreme Court** provides for Originating Summons Procedure. Rule 2 is set out as follows:

- 1) *In the case of an originating summons which is in Form No 8 in Appendix A, the plaintiff must, within one month of the expiry of the time within which copies of the affidavit of evidence must be served under rule 1A, obtain an appointment for the attendance of the parties before the Court for the hearing of the summons, and a day and time for their appearance shall be fixed by a notice (in Form No.12 in Appendix A) sealed with the seal of the District Registry (if any) in which the cause or matter is proceeding and, where the cause or matter is not proceeding in such a registry sealed with the seal –*
  - a) *Of the central office, where the cause or matter is assigned to the Queen's Bench Division;*
  - b) *Of the Chancery Chambers, where the cause or matter is assigned to the Chancery Division;*
  - c) *Of the principal registry of the Family Division, where the cause or matter is assigned to the Family Division.*
- (2) *A day and time for the attendance of the parties before the Court for the hearing of an originating summons which is in Form No. 10 in Appendix A, or for the hearing of an ex parte originating summons, may be fixed on the application of the plaintiff or applicant, as the case may be and, the case of a summons which is required to be served, the time limited for acknowledging service shall, where appropriate, be abridged so as to expire on the next day but one before the day so fixed, and the time limits for lodging affidavits under rule 1A(2) and (3) shall, where appropriate, be abridged so as to expire, respectively, on the fifth day before, and the next day but one before, the day so fixed.*
- (3) *Where a plaintiff fails to apply for an appointment under paragraph (1) any defendant may, with the leave of the Court, obtain an appointment in accordance with that paragraph that he has acknowledged service of the originating summons.*

Counsel for the Plaintiff stated that Order 28 be read with Order 10 of the **Rules of the Supreme Court** provides for service of originating process.

Currently, the law in operation is the **Courts (High Court) (Civil Procedure) Rules** (also known as the Civil Procedure Rules) having come into operation on 3<sup>rd</sup> October 2017. Although, the law in operation at the time this application was filed was the **Rules of the Supreme Court**, reference will still be made to the current Rules for consideration.

Order 54 of the **Courts (High Court) (Civil Procedure) Rules** provides for dismissal for want of prosecution. It states:

- (1) *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 of the period*

*specified under these Rules or the order and he does not do what is required before the end of the period.*

*(2) The Court may dismiss the proceeding or make any other order it considers appropriate.*

### DISCUSSION

The chronology of events is condensed as follows:

- 5<sup>th</sup> May 2016 – Plaintiff commences matter by way of Originating Summons
- 20<sup>th</sup> June 2016 - Defendant's acknowledgment of service
- 8<sup>th</sup> September 2016 - Defendant's Affidavit in Opposition to the Affidavit in Support of the Originating Summons.
- 9<sup>th</sup> September 2016 – Defendant's Notice of Appointment of Legal Practitioners
- 20<sup>th</sup> September 2017 – Defendant's Application to Strike out Action for Want of Prosecution
- 23<sup>rd</sup> October 2017 – Plaintiff's Affidavit in Opposition and Notice of Preliminary Objection supported by a Sworn Statement in Support of Application for Preliminary Objection

It is clear that after the Plaintiff commenced the present action, they sat down and did nothing more until they were prompted into action by the Defendant. The matter was commenced on 5<sup>th</sup> May 2016 after which the Plaintiff did nothing until 23<sup>rd</sup> October when he filed the documents in opposition to the Defendant's Application to Strike out Action for Want of Prosecution. The Plaintiff was supposed to have "*within one month of the expiry of the time within which copies of the affidavit of evidence must be served under rule 1A, obtain an appointment for the attendance of the parties before the Court for the hearing of the summons, and a day and time for their appearance shall be fixed by a notice.*" – Order 28 rule 2(1) of the **Rules of the Supreme Court**. But as evidenced herein the Plaintiff did absolutely nothing.

This court finds that the Plaintiff has shown laxity in prosecuting the matter, with a period of 17 months (1 year 5 months) having elapsed before the Plaintiff took any steps in prosecuting the matter. Counsel for the Plaintiff prayed for one last chance to prosecute the matter and the court will reluctantly grant that prayer to prompt Counsel into action and remind Counsel that matters must be prosecuted and concluded within reasonable time.

This court will allow Counsel seven (7) days, to elapse on 19<sup>th</sup> January 2018, to continue the process, failing which the matter will stand dismissed for want of prosecution.

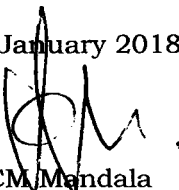
### DISPOSAL

The Plaintiff is hereby **ORDERED** to file a notice for hearing of the summons within seven (7) days to expire on 19<sup>th</sup> January 2018 failing which this action **WILL** stand dismissed for want of prosecution.

Costs for this application are awarded to the Plaintiff, to be taxed by the Registrar.

Each party is at liberty to appeal to the Supreme Court of Appeal within the requisite time frames.

Ordered in Chambers on the 10<sup>th</sup> day of January 2018 at the Chichiri Courthouse, Blantyre



CM Mandala

**ASSISTANT REGISTRAR**