Library

REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 625 OF 2013

BETWEEN

SIDWELL MAMBO.....PLAINTIFF

AND

NBS BANK LTD.....1ST DEFENDANT

ATTORNEY GENERAL (MALAWI POLICE SERVICE)

DIRECTOR OF PUBLIC PROSECUTIONS).....2ND DEFENDANT

Coram: **WYSON CHAMDIMBA NKHATA** (ASSISTANT REGISTRAR)

Mr. Kumwenda - of Counsel for the Plaintiff

Mrs. Mkandawire- Court Clerk and Official Interpreter

RULING

This matter was commenced by writ of summons issued on the 28th of November 2013. The plaintiff is claiming damages for false imprisonment, malicious prosecution, defamation and costs of this action. The defendants filed their defence on the 17th of December 2013. The defendant is now making an application to have the action dismissed for want of prosecution under O.12 r.54(1) of the Courts (High Court) (Civil Procedure) Rules 2017 hence this ruling.

The hearing of this application came before this court on the 17th of April 2018. The plaintiff did not attend the hearing. The court proceeded to hear the defendants. Counsel for the defendants put before the court that there was a sworn statement in support of the application and as well as Skeletal Arguments. In short the sworn statement by Counsel Kumwenda is to the effect that the plaintiff commenced the present proceedings against the 1st defendant by way of writ of summons issued by the court on the 28th of November 2013 claiming damages for false imprisonment, malicious prosecution and special damages. On the 24th of February, 2014 the matter herein went for mediation and was subsequently adjourned to the 9th of April 2014. He exhibits the notices of adjournment marked "MM1" and "MM2" respectively. He avers that it was incumbent on the plaintiff to pursue the matter after mediation as he was the one suing the Bank. He further states that four years have since elapsed and the plaintiff has failed and/or neglected to take further action to prosecute the matter herein and the plaintiff's delay in prosecuting the matter is inordinately long and inexcusable and prejudicial to the 1st defendant. It is his prayer that the matter be dismissed for want of prosecution.

The application is premised on O.12 r.54(1) of the CPR which provides as follows:

> 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.

From the reading of the said order, it is clear that this court has discretion to dismiss an action if the claimant fails to take a step in the proceedings. It would appear however that there are guidelines that this court ought to follow in the exercise of this discretion. In **Allen v. Sir Alfred McAlpine & Sons** [1968] 1 All ER 543, p 547, Lord Denning M.R. said:

> 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 same principles were elucidated by Unyolo J. as he then was in **Sabadia v. Dowset Engineering Ltd.** 11 MLR 417 at page 420 when he said:

> 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?

The present action had reached the stage of mediation. The same was arranged for twice but it never took place. This was in the year 2012. The defendant avers that the plaintiff having sued the Bank was duty bound to pursue the issue. Fours have gone by and the plaintiff has not taken any step to pursue the same. In my view, the four years period is indeed inordinate. There are cases where just a year of inaction by a party expected to take a further step has been deemed inordinate. I have in mind the case of **Council of University of Malawi v Flywell Banda and Others** Civil Cause 616 of 2013.

On the basis of the foregoing, it is my finding that the plaintiff took no steps whatsoever over a period sufficient for the matter to be dismissed for want of prosecution. In the case of **Alex Kachingwe v Electricity Supply Corporation of Malawi** Personal Injury Case No.691 of 2014 (unrep) Justice Kenyatta Nyirenda stated as follows:

> 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 the matter to proceed would be prejudicial to the interests of the defendant. In short, the delay is intolerable. The matter is, therefore, dismissed for want of prosecution with costs.

MADE IN CHAMBERS THIS 21ST DAY OF MAY 2018.

WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR