



**JUDICIARY  
IN THE HIGH COURT OF MALAWI  
CIVIL DIVISION  
PRINCIPAL REGISTRY  
LAND CAUSE NUMBER 48 OF 2015**

**BETWEEN:**

**NOEL FOLE..... CLAIMANT**

**-AND-**

**MALAWI HOUSING CORPORATION..... DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE JACK N'RIVA**

Mr. P. Kalanda, of Counsel for the Claimant.

Mr. B. Matumbi, of Counsel for the Defendant

Mrs. D Mtegha, Court Clerk

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**RULING**

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This is an application by the defendant to strike out the proceedings. This application is under Order 12 rule 56 of the Court (High Court) (Civil Procedure) Rules, 2017 and the court's inherent jurisdiction.

According to the notice of the application, the claimant commenced this case in September, 2015. From 20<sup>th</sup> of July 2016, the claimant has not filed any notice, submission or any court process.

The defendant argues that the claimant is guilty of delay that may prejudice the defendant. Counsel argued that the claimant obtained an injunction after which they have not prosecuted the

case.

The Claimant contested the application. First, counsel argued that there was no notice of appointment for counsel to present the defendant. Counsel argued that this

is an irregularity that is a nullity. Counsel cited the Supreme Court in *Mfiti v. Nico* Civil Appeal No. 66 of 2009.

Secondly, Counsel argued that the defendant had to apply for the application under Order 12 rule 56 and not rule 54 of the Procedure Rules. Counsel argued that rule 56 is about the Court on its own motion dismissing a case for want of prosecution. Rule 54 is where a party applies to court to dismiss a case for failure to carry out steps in the rules or comply with the direction of the court. Counsel argued that the defendant did not specify the step the claimant did not take on a direction of the court they did not comply with.

Counsel for the claimant further said that his understanding of the new rules is that the matter had to be assigned to a new Judge with a fresh initial direction (Order 5 rule 19) he argued that the case was not assigned in that matter. Counsel further said that the Court has powers to issue an “unless order”

Thirdly, the claimant counter-accused the defendant of delay. The Claimant argued that the defendant filed their defence late. Further, they did not respond to the claimant’s proposal for mediation under the repealed Court’s (Mandatory Mediation) Rules.

Let me start with the issue of filing of notice of appointment of counsel. I do not believe I have to deal with this issue in a great detail. This is because much as the paperwork, for the injunction that was before Kamwambe J, I was prepared and filed by Ms. Felister Dossi, Mr Matumbi appeared during the hearing. Of course, he said he was holding a brief from Ms Dossi. There is indeed no notice of appointment for Mr. Matumbi as Lawyers for the defendant. However, the claimant did not raise this issue in their response to the defendant’s application to strike out this action.

In that connection, I do not believe the irregularity on the part of defence is a nullity.

Order 2 Rule 1 provides that failure to comply with the rules or a direction of the court is an irregularity. Rule 2 states that an irregularity does not render a proceeding a nullity. Under rule 3 a party may apply to the court where then court may set aside a proceeding or its part for non-compliance. Alternatively, the court can set aside a step in the proceeding or declare a step as ineffectual or effectual. But, most importantly the court can make any other order as it deems fit. The rules require a party applying to the Court to invoke Order 2 rule 3 to make such an application within a reasonable time. The party making the application must do so before he, she or it takes a fresh step upon becoming aware of the irregularity. In this matter, the claimant raised the irregularity during the hearing of the application after responding to the notice of the application. It would have been a different had the claimant raised the issue at an earlier stage.

I therefore dismiss the objection by the claimant on the point that the defence counsel did not file notice of appointment.

The next question is whether or not the claimant has failed to take steps to proceed with the case.

Listening to the parties, I am convinced that the claimant did not take steps to have the matter set down for hearing. The claimant had to take steps to ensure that the matter was set down for the next step. The claimant raised an issue that the defendant did not pin-point the step that the claimant did not had to take. Further, the claimant argued that the defendant failed to respond to a proposal for a mediator. However, the claimant did not state what steps he took after that. In my view, the claimant had to take steps from that point. Counsel for the claimant suggested that the Judge-in-Charge had to assign the proceeding to a new Judge. Counsel quoted Order 5 rule 19 of the Civil Procedure Rules.

That rule, however, is applicable once a summon has been issued. It is at the start of a proceeding. I believe the applicable rule in cases of this nature had to be the Order 35 Civil Procedure Rules. As the case was yet to undergo mediation, the matter had to proceed under the new rules at the mediation stage. I do not believe that the matter had to start from an initial direction stage. Therefore, I find that the claimant failed to take a new step in these proceedings. Whether under the Courts own invocation, or on an application, Courts have to deal with matters that have taken long. We have dismissed cases that have been dormant. I do not find anything compelling in this case to date this court from dismissing this proceeding.

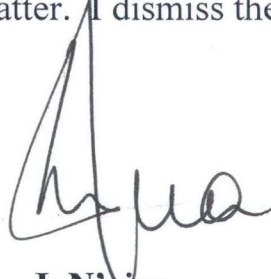
In *Godwin Mbendera v. Carlsberg Malawi Limited* Civil Cause No. 216 of 2015, the plaintiff commenced the cause of action on 29<sup>th</sup> May, 2015, through an interlocutory injunction. On the date of hearing, counsel for the defendant informed the Court that the summons had been overtaken by events. The parties intended to undergo mediation. The mediation did not materialise. On 26<sup>th</sup> August, 2016, there was filed on court record certificate of termination of the mediation session. The Court observed that from that date none of the parties took any further steps in the proceedings. The court said: -

*“In the present proceedings, more than 21 months have elapsed without the plaintiff taking steps to prosecute this case. This is clearly an abuse of court process. I have no option but to strike out the proceedings herein.”*

In this matter, more 31 months elapsed without the claimant taking steps to prosecute this matter.

Just like in *Goodwin Mbendera v. Carlsberg Malawi Limited*, I have no option but to strike out the proceedings in this matter. I dismiss the proceedings with costs.

Made the 24<sup>th</sup> day of January, 2019



**J. N'kiva.**

**JUDGE**