



**JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 568 OF 2009**

BETWEEN:

MR. G. H. BANDAWE (Trading as KAKA MOTEL) CLAIMANT

AND

MZUZU CITY ASSEMBLY 1ST DEFENDANT

KESALE AUCTIONEERS AND ESTATE AGENTS 2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Makono, of Counsel, for the Claimant

Mr. Chiwaya, of Counsel, for the Defendant

Mr. D. K. Itai, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is this Court ruling on an application by M/s Makolego and Company (Applicant) for an extension of time for filing of client's own cost. The application is brought under Order 31, rule 12, of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as "CPR"].

The application is supported by a statement sworn by Counsel Roderick Chikadzakuwani Makono [Hereinafter referred to as the "Claimant's sworn statement"] and the same states as follows:

- “2. **THAT** since the year 2006 to the 1st day of November, 2018 when my firm was served with a notice of change of legal practitioners as per copy thereof hereto exhibited marked “RCMI”.
3. **THAT** party and party bill costs were filed and taxed in the year 2016.
4. **THAT** I did not file the clients own bill of costs simultaneously during the same as the party and party costs because our client Mr. Bandawe instructed my firm to

continue representing him in a related claim for damages for loss of business against the same defendant Mzuzu City Assembly.

5. ***THAT*** *in view of the matters stated at paragraph 4 above, I failed to file client's own bill of legal costs within 3 months as required by the procedure rules.*
6. ***THAT*** *since July, 2018, our client then collected from our firm our file for his referencing and has not returned it making it further difficult for my firm to file the client's own bill of costs in time.*

WHEREFORE, *I pray to the Honourable Court to order that time for filling the client's own bill of legal costs be extended and that the Honourable Court do proceed to assess the bill."*

The Claimant (Respondent) filed a sworn statement in response and it reads:

- “3. ***THAT*** *I have read Mr. Rodrick Chakadzakuwani Makono's sworn statement and I wish to reply to it herein.*
4. ***THAT*** *indeed in 2006, I engaged Messrs Makolego & Company to handle my matter against the 1st and 2nd Defendants herein. The matter was initially commenced in the High Court, Mzuzu District Registry under Civil Cause No. 63 of 2006. Then the matter went for interlocutory appeal to Malawi Supreme Court but it was referred back to the High Court and then it was at the High Court, Lilongwe District Registry under Civil Cause No. 568 of 2009.*
5. ***THAT*** *still in reference to paragraph 2 of Mr. Makono's sworn statement and state that, I have decided to change my lawyers after I had discovered that Mr. Makono had received the sum of K27,000,000.00 (Twenty-Seven Million Kwacha) from the 1st Defendant herein which was not remitted to me as it is required.*
6. ***THAT*** *in reference to paragraph 3 of Mr. Makono's sworn statement I state that am not aware that Messrs Makolego & company in 2016 filed party and party bill costs. I came to know that Messrs Makolego & company had received the said sum of K27,000,000.00 in February, 2018.*
7. ***THAT*** *reference is made to paragraph 4 of Mr. Makono's sworn statement and state that Messrs Makolego & company were paid in full and the last bill was K800,000.00 which was paid in two equal instalments.*
8. ***THAT*** *I refer to paragraph 5 of Mr. Makono's sworn statement and state that Messrs Makolego & company did not file the said bill of legal costs within 3 months as required by the procedure rules because they knew that I paid them in full. The fact is Mr. Makono has been forced to file this application because after I have discovered that he had received the said K27,000,000.00 which was not remitted to me, I wrote him through my new lawyers claiming the same.*

9. ***THAT*** reference is made to paragraph 6 of Mr. Makono’s sworn statement and state that it was soon after the matter in the Commercial Court, he voluntarily asked me to collect the file and I sent my son, Mr. German Singini to collect it on my behalf. Therefore, it is not true that he had difficulties to draw the said bill yet he had a file all along.
10. ***THAT*** I make this response conscientiously believing the contents hereof to be true to the best of my knowledge, information and belief.
11. ***THAT*** I understand that the same shall be used in the proceeding and I acknowledge that if I make a false statement I may commit perjury and therefore be liable to a substantial penalty.”

The application was accompanied by the following skeleton arguments:

“1.0 INTRODUCTION

1.1 This is the hearing of the application for extension of time for filling of clients own bill of costs for the Plaintiff’s original legal representation Messrs Makolego and Company

1.2 The Application is supported by the Sworn statement of **RODERICK CHIKADZAKUWANI MAKONO**

2.0 ISSUES FOR DETERMINATION

2.1 Whether or not the court should extend time for filing of clients own bill of costs.

3.0 APPLICABLE LEGAL PRINCIPLES

3.1 Order 31 Rule 12 (1) (2) of the Courts (High Court) (Civil Procedure) Rules, 2017 hereinafter called Civil Procedure Rules provided that:

“A bill of costs shall be filled with the court for assessment within 3 days from the date of the costs order and the bill at the conclusion of the whole proceeding unless the court orders otherwise.”

Order 31 Rule 12 (1) (2) of the Civil Procedure Rules provides as follows.

“A party may apply to the court to file a bill of costs before the conclusion of a proceeding or for an extension of time for filing of the bill under sub rule 1.”

4.0 ASSESSEMENT

4.1 In terms of the evidence herein Messrs. Makolego and Company (Lawyers) were the legal representatives of the Plaintiff. Following the discharge of Messrs. Makolego and Company (Lawyers) and appointment

of Messrs. Chunga and Saidi Associate. Messrs. Makolego and Company (Lawyers) are now applying to this honourable court to make an extension of time for filing of client's own bill of costs.

5.0 PRAYER

5.1 In light of the foregoing we humbly pray to the court for an extension of time for filing of client's own bill of costs."

Counsel Chiwaya advanced three main grounds in opposition to the application. Firstly, he drew the Court's attention to the fact that the Respondent paid all the amount of money that he had been invoiced, that is, K800,000.00. He, therefore, questioned the wisdom of having the Respondent taxed again, particularly when regard is had to the unchallenged fact that the Applicant was paid K27,000,000.00 as party and party costs which sum has yet to be remitted to the Respondent.

Secondly, Counsel Chiwaya argued that the reason given for the delay in having the bill of costs taxed lacks merit. He asked the Court to note that the only other case by the Respondent was pursued in the Commercial Division: it was very much unrelated to the case that had been handled by the Applicant. Thirdly, he wondered as to how the Applicant could have opted to voluntarily give back the file to the Respondent if indeed the Applicant was being owed money by the Respondent.

In his reply, Counsel Makono insisted that the file was released by the Applicant on trust and on the understanding that the Respondent would take the file back to the Applicant.

Under Order 31, r.12(2), of CPR, the Court may, for sufficient reasons, extend the time prescribed under sub-rule (1). What constitutes "sufficient reason" is left to the Court's discretion. In this context, the Court will accept either a reason that prevented an applicant taking the essential step in time or other reasons why the application should be allowed to proceed though out of time.

It is important to observe that the Court's discretion arises, as a matter of practical application and good jurisprudence, only after "sufficient reason" for extension of time, has been established. Therefore, to that extent, the Court's discretion in an application to extend time is not unlimited.

In the exercise of its discretion, the Court is, among other things, guided by the following matters:

- (a) the rationale behind the rule providing for extension of time is to avoid causing injustice to the parties: see **Schafer v Blyth (1920) 3 KB 143, Saunders v Pawley (1855) 14 QBD 234**, p 237;
- (b) in cases where delay may be compensated for by payment of cost, the application ought to be allowed;
- (c) times prescribed by the rules or orders or directions of the Court have to be observed, and if long delay occurs without any explanation being offered, the Court is entitled, in the exercise of its discretion, to refuse the extension of time, even if the delay could be compensated for by costs and no injustice would be done to the other party. **Revici v. Prentice Hall Inc. (1969) 1 All ER 722, CA**;
- (d) it must be noted that a provision of a chronological list of events leading to delay, which omits any explanation for the delay, will not justify an extension of time: see **Smith v. Secretary of State for the Environment, The Times, July 6 1987, CA**;
- (e) it is not just any explanation that will justify an extension of time: a party who has failed to act within the prescribed period, who now seeks an extension of time, must offer to the satisfaction of the Court, reasonable explanation for the delay and as to whether costs would remedy the resulting injustice to the other party: see **Phireti v. Motors Limited 10 MLR 37**;
- (f) where irreparable mischief would be done by acceding to a tardy application, it being a departure from ordinary practice, the person who has failed to act within proper time ought to be the sufferer: see **Ateood v. Chichester (1878) 3 QBD 722**; and
- (g) it is a question of fact whether the applicant has in a particular case offered a reasonable explanation for the delay to justify the Court granting an order for extension of time.

Turning back to the present case, I have carefully considered the sworn statements and the submissions made by Counsel. The arguments given by the Applicant for not filing its bill of costs within the prescribed time are not convincing at all. Matters have not been helped by the fact that the Applicant seeks to rely on a sworn statement that is very bare. I have grave doubts that much thought had gone into preparing the sworn statement and the skeleton arguments.

It is also not uninteresting to observe that the Applicant decided not to file any sworn statement to challenge the damning matters in the Claimant's sworn statement. For example, going by the Applicant's claim that it was indeed instructed to handle another case for the Claimant, I would have expected the Applicant to at least give particulars of this other case, its relationship to the case whose "*party and party bill costs were filed and taxed in the year 2016*" and the steps it took in prosecuting this other case. There is no such information before the Court.

In any case, as already alluded to hereinbefore, extension of time cannot be had as a matter of course or right. Grant of either of them is subject to the discretion of the Court and such discretion is exercised having in mind the interests of justice, which include the respective interests of the parties to the particular case and all other litigants. It is important that delay or prejudice must not only be assessed from the point of view of a particular party to the case but also taking into account the effect it can have on other litigants who are wishing to have their cases heard and to the due administration of civil justice in general. Further, prejudice caused by delay must not be looked at from a perspective of only money since justice cannot not always be measured in terms of money : see **Mike's Trading Group Ltd v. NBS Bank Ltd and Attorney General, Commercial Cause No. 78 of 2014 (unreported)** and **Chishty Coveney & Co. (a firm) v. Raja [1998] 2 ALL ER 181**.

It is on the strength of the foregoing that I find that the Applicant has failed to establish sufficient reasons, as required by Order 31, r.12(2), of CPR, to warrant me exercise my discretion and extend time to file bills of costs as per the prayer by the Applicant. The application is, accordingly, dismissed with costs. It is so ordered.

Pronounced in Court this 9th day of April 2019 at Lilongwe in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE