



**IN THE REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
MZUZU REGISTRY: CIVIL REGISTRY  
Miscellaneous Application Case No 101 of 2016**

Between

Lyson Kamanga.....Appellant

-and-

Mr. Whiteman Kaunda.....Respondent

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**Coram:**

**Honourable Justice DeGabriele**

Mr. B.B.C. Kondowe, on Brief

Mr. C. Ghambi

Mr. A. Mhone

Mrs. R. Luhanga

Counsel for the Claimant

Counsel for the Defendant

Official Interpreter

Recording officer

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***DeGabriele, J***

**Order on Application to Strike Out Proceedings**

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1. The Defendant herein has filed an application to have the matter struck off because of inaction on the part of the Claimant, which inaction has caused delay in finalising this matter. The Claimant has argued that there was no inaction on his part as he has been taking steps to prosecute the matter.
2. A brief history of the matter shows that the Claimant filed an expedited originating summons on 13 October 2016, seeking a declaration that the demand by the Defendant that the Claimant hands over land he had been using for 33 years was illegal and unconstitutional. He also sought an order quashing the decision by Traditional Authority Chindi that had been made in favour of the Defendant, stating

that the land belonged to the Defendant. The Claimant sought a permanent injunction restraining the defendant and his agents from taking possessions of the said land.

3. On the same day, 13 October 2016 the Claimant filed an *ex parte* application for an injunction pursuant to order 29 of the Rules of the Supreme Court. An interim order of injunction was granted by Justice Madise on condition that the Claimant files *inter partes* summons with 7 days, the hearing of the said summons should be in 14 days, and he also had to deposit MK 150,000 into court. The record shows that the Claimant filed an *inter partes* application on 27 October 2016 for the continuation of the injunction, but no date was assigned, save an endorsement by the then Assistant Registrar on 7 November 2016.
4. On 13 December 2016 an *ex parte* summons for an order of leave to move for contempt of court under order 52 rule 1 and 2 of the RSC was filed. This application was brought before this Court on 20 December 2016 and the Court ordered that the *inter partes* summons as order by Justice Madise on 14 October 2016 had to be heard first within 21 days before leave for contempt of court proceedings could be considered.
5. The Claimant filed a notice of withdrawal for the application for leave to commence contempt of court proceedings on 21 April 2017. Next on file as an initial Direction filed by Counsel for the Defendants on 31 August 2108, signed by Justice Ligowe who assigned the matter to my Court. On the same day the Defendant filed *inter partes* summons to strike out proceedings without notice. The summons were served on Counsel for the Claimant, who acknowledged receipt on 17 December 2018.

## 6. The present application

6.1.As stated above, the Defendant is seeking to have this matter struck off due to delays in prosecution. Counsel for the Claimant states in his affidavits that they have been active in ensuring that the matter is prosecuted. He claims that they filed initial directions which were misplaced in the Registry. Counsel has not given evidence of the filing of this particular initial direction, nor the date it was purportedly filed with the court registry. The court record has copies of initial directions filed on 17 January 2019, which counsel claims he has been waiting

for the Court to assign a judge to the matter. It is the view of this Court that the filing of initial direction on 17 January 2019 is not substantive action taken towards prosecuting the matter, bearing in mind that the initial direction filed by the Defendant was served, and service was acknowledged by the Claimant's counsel on 31 August 2018. In any event, as of 20 December 2016, this Court was seized with the matter and there was no need to seek any other initial direction.

6.2. The excuse by the Claimant that delays are due to filing of initial direction is not satisfactory. Indeed management of cases management of cases after the coming into force of the Court (High Court) (Procedure) Rules on 3 October 2017 requires that an initial direction be filed, to assign a matter to a specific judge who would remain ceased with the matter until is determined or until it is transferred to another judge in accordance to the rules. The matter herein is not new, having commenced the matter by expedited originating summons in October 2016. As stated above, the matter was and is subsisting in this Court and there were very clear directions given on 20 December 2016 by this Court on what next action needed to be taken. Those direction were to be complied with within 21 days, at least by the end of January 2017. The Claimant failed to comply with these orders and he has caused delays in the conclusion of this matter.

6.3. Again, the filing of the notice of withdrawal by the Claimant in April 2017 does not constitute meaningful action to get the matter moved forward. There is nothing on this file that the Claimant has done since April 2017 to move this matter forward for trial and determination of the matter. This shows that the Claimant has not taken any action whatsoever to prosecute the matter for a period of about 22 months.

6.4. The delay is indeed inordinate, bearing in mind that the Claimant had filed an expedited originating summons. This Court is in agreement with the observation made by the Defendant's Counsel that the Claimant was only interested to assume the use of land thorough an order of injunction. It must be remembered that an interim order of injunction is not an end in itself. It is a time-bound interim order that needs to be extended by the court if it is just to do so. The conditions set in this case at the granting of the interim order of injunction on 13 October

2016 had to be obeyed. Failure to do so meant that the interim order of injunction would no longer valid at the end of the 21 days. In this matter the Claimant did file an *inter partes* notice for continuation of the interlocutory injunction on 27 October 2016, but instead of pursuing the same, the Claimant made an application for leave to commence contempt of court proceedings on 13 December 2016. The order by this Court that the Claimant comply with the conditions set on 13 December 2016, meant that the life of the interim injunction was extended to at least the end of January 2017.

6.5. Following on the above observation, it is the finding of this Court that the Claimant has failed to prosecute the matter. It is ordered that the interim order of injunction granted by Justice Madise on 13 October 2016 **BE and IS HEREBY VACATED**. Consequently the Claimant must indemnify the Defendant for any loss he may have suffered due to, or which may have been caused by the interim order of injunction.

6.6. It is further ordered that the matter herein, commenced on an expedited originating summons **BE and IS** hereby dismissed for lack of prosecution and is struck off pursuant to Order 12 rule 56 of court (High Court) (Civil Procedure) Rules, 2017.

6.7. The Claimant is condemned in costs for this hearing and from the time this matter was commenced, which is 13 October 2016. Costs will be assessed by the Registrar.

It is so ordered.

**Made in Chambers At Mzuzu Registry this 15th Day of February 2019**

  
Honourable D. A. DeGabriele

**J U D G E**