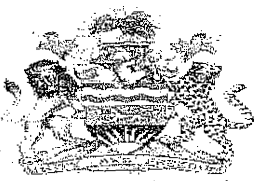




Peter Chasweka & Lukasi Boti v. Andrea Kalisoni Mankhuwiri

Kenyatta Nyirenda, J.



**JUDICIARY  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)  
CIVIL CAUSE NO. 214 OF 2016**

**BETWEEN**

**PETER CHASWEKA ..... 1<sup>ST</sup> CLAIMANT**

**LUKASI BOSI ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**ANDREA KALISONI MANKHUWIRI ..... DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

- Mr. Agagi, Counsel for the Claimants
- Mr. Khonyongwa, Counsel for the Defendant
- Mr. Henry Kachingwe, Court Clerk

**RULING**

*Kenyatta Nyirenda, J.*

There is before me an application by the Defendant for an order dismissing the matter herein for want of prosecution. The application has been brought under Order 12, rule 54, of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as the "CPR"].

There is a statement in support of the application, sworn by Defendant, wherein he contends that after the Claimants filed their affidavits in reply to the affidavits in opposition on 27<sup>th</sup> October 2016, the Claimant has not performed any further action in the prosecution of the main case. It might be helpful to set out the relevant part of the sworn statement by the Defendant:

"3. *THAT the Claimant commenced the present action by Originating Summons supported by affidavits on or about the 27<sup>th</sup> October, 2016.*

4. *THAT on or about 29<sup>th</sup> of September, 2016 the Claimant obtained an Order of Injunction restraining the Defendant, his agents, servants or whosoever from occupying, using or otherwise having possession of about 11 hectares piece of commercial agricultural land situated at Chonongeko Village, Traditional Authority Mlonyeni in Mchinji District, which land belongs to the Defendant.*
5. *THAT I filed an affidavit in opposition and defence on or about the 11<sup>th</sup> October, 2016 and the claimants filed a reply to the affidavit in opposition on the 27<sup>th</sup> October 2016.*
6. *THAT by an order of the court dated the 2<sup>nd</sup> day of February 2017, the matter herein was transferred from Mzuzu Registry of the High Court to the Lilongwe Registry. On taking out the said order the Judge also ordered the Claimants to take a date of hearing of the inter-parties summons for an injunction within 30 days of the order. I attach a copy of the order and I mark it "AKM 1".*
7. *THAT however, the Claimants failed to comply with the order of the court and accordingly a Certificate of non compliance was filed on the 6<sup>th</sup> of November 2017 and was duly acknowledged by the Claimants' legal practitioners. I attach a copy of the said certificate of non-compliance and I mark it "AKM 2".*
8. *THAT actually since the Claimants' filing the affidavits in reply to the affidavits in opposition on 27<sup>th</sup> October 2016, the Claimants have not taken any action whatsoever to prosecute the matter herein in terms of both the Rules of the Supreme Court as they were previously used in the High Court, as well as the new High Court (Civil Procedure) Rules.*
9. *THAT the conduct of the Claimants' in not taking any step to prosecute the matter herein has occasioned serious prejudice to me since I have been halted from farming on my agricultural commercial land thereby denying me the right to economic activity.*
10. *THAT meanwhile, the Claimants are currently using my land although the Order of Injunction has expired by reason of the certificate of non-compliance attached hereto and marked AKM 2.*
11. *THAT the Claimants delay in prosecuting the matter is inexcusable and inordinate and is aimed at frustrating me and my interests. If indeed the Claimants' have a genuine claim against me they ought to have prosecuted the matter herein with the requisite speed."*

The Claimant is opposed to the application and prays for its dismissal. There is in that regard a statement in opposition, sworn by Counsel Davis Agagi, and the same states as follows:

- “3. *THAT I have read the sworn statement of **ANDREA KALISONI MAKHUWIRI** in support of the application herein and I respond thereto as I do hereunder.*

4. *THAT the Claimants did indeed commence these proceedings by way of writ of summons in the High Court of Mzuzu and the 29<sup>th</sup> day of September 2016, the claimants obtained an order of injunction as particularized in the Defendant's sworn statement.*
5. *THAT on the second day of February 2017, the Court in Mzuzu made an order transferring the matter to the Lilongwe District Registry of the High Court of Malawi on application by the Defendant.*
6. *THAT the Claimants took steps in prosecuting the matter herein but they have been told by the court clerks that the file was not yet in Lilongwe. Until the date of filing this statement, the Claimants do not know the case number of this transferred file. To evidence this assertion, there is no case number even on the application made by the Defendant. Attached is the exhibited copy of the application marked "DA 1".*
7. *THAT further, the transfer being sought by the Defendant, the Claimants expected the Defendant to notify the claimants as to whether the file has de facto been transferred to Lilongwe registry.*
8. *THAT neither the court nor the Defendant communicated to the Claimants that the court record is now in the confines of Lilongwe Registry and it has been assigned the new number as per the practice.*
9. *THAT the Claimants admit that there has been delay in prosecuting this matter. However, that delay is excusable on the reason that there has been no record to the High Court of Malawi Lilongwe Registry for the claimants to file notice of hearing.*
10. *THAT I therefore pray that the court dismisses this application and makes proper directions on this matter as the delay was never occasioned by the Claimants who are willing to prosecute this matter."*

The main issue for determination is whether or not the action herein should be dismissed for want of prosecution? Put differently, the question is whether or not that there was inordinate delay on the part of the Claimants in prosecuting its case?

The way to approach the present application is as was enunciated by Lord Denning M.R. in **Allen v. Sir Alfred McAlpine & Sons [1968] 1 ALL ER 543**, at p 547:

*"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 principles enunciated by Lord Denning M.R. in **Allen v. Sir Alfred McAlpine & Sons**, supra, were elucidated by Unyolo J. as he then was, in **Sabadia v. Dowset Engineering Ltd. 11 MLR 417** at page 420 as follows:

*"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?"*

See also **Reserve Bank of Malawi v. Attorney General, Constitutional Cause Number 5 of 2010 (unreported)** wherein Sikwese J. stated that the power to dismiss an action should be exercised only where the Court is satisfied either:

1. *that the default has been international and contumelious e.g disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court: or*
2. (a) *that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers; and*  
(b) *that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as likely to cause or do have caused serious prejudice to the defendants either as between themselves and the Plaintiff or between them and a third party."*

In the present proceedings, it is the case of the Defendant that the Claimants have taken no steps to prosecute the main for almost 4 years and 4 months. On the other hand, the Claimants claim that they took steps to prosecute the matter herein but the Court file was not yet in Lilongwe: see paragraph 6 of the sworn statement by Counsel Agagi. With due respect to Counsel Agagi, his claims are nothing more than bare assertions for the following reasons.

Firstly, it will be recalled that this Court became seised of the present case by way of an order granted on 17<sup>th</sup> January 2017 by the Mzuzu District Registry of the High Court which ordered and directed as follows:

1. ***THAT*** *the matter herein be and is hereby transferred to the Lilongwe District Registry of the High Court of Malawi from the Mzuzu Registry of the High Court of Malawi.*
2. ***THAT*** *unless the plaintiffs file within 30 days from the date hereof a notice of hearing of the inter-partes summons for an injunction or take out a date of hearing of the inter-partes summons for an injunction the order of injunction which was granted ex-parte shall be automatically discharged and cease to be of any effect.*
3. ***THAT*** *costs be in the cause."*

If indeed the Claimants had taken any further steps to prosecute this case, the least that I expected the Claimant to do would have been to attach and exhibit to the sworn statement by Counsel Agagi the file copies of the documents that the Claimant alleges were prepared in compliance with the Court order. The sworn statement does not make any mention of the preparation of such documents nor the filing with the Court of such documents. In these circumstances, the Court is entitled conclude that the Claimant took no steps whatsoever to prosecute the main case herein.

Secondly, Counsel Agagi claims that he was told by court clerks that the file was not yet in Lilongwe. The generality of the claim is quite astonishing. In the first place, the identity of the court clerks is not stated. In the second place, the time or times when the court clerks are alleged to have said what he claims is also not stated. In the third place, there is no mention of the Claimants ever making a follow up with the court clerks or the office of the Registrar regarding this matter within the last four years. To my mind, if the Claimants were serious about prosecuting their case they would have lodged a complaint in writing regarding the alleged missing of the Court file.

The lack of action on the part of the Claimants to prosecute this case amounts to abuse of the process of the Court: see **Lonrho v. Fayed (No.5) [1993] 1 W.L.R. 1489**. The term "*abuse of the process of the Court*" connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation: see **Castro v. Murray (1875) 10 Ex. 213**.

The Court has an inherent jurisdiction to stay all proceedings before it which are obviously an abuse of its process: see **Reichel v. Magrath (1889) 14 App. Cas. 665**. In such cases, the Court will dismiss before the hearing actions which it holds to be an abuse of the Court process: **Metropolitan Bank v. Pooley (1885) 10 App. Cas. 210**, **Boaler v. Power [1910] 2 K.B. 229** and **Grovit v. Doctor [1997] 1 W.L.R. 640**.

In the present case, allowing further prosecution of the action would be prejudicial not only to the interests of the Defendant but it would also be detrimental to good administration in general and to good administration of justice in particular: see **R. v. Dairy Produce Quota for Tribunal for England and Wales, ex p. Caswell [1989] 1 W.L.R 1089**. In short, the delay herein is intolerable. "*They have lasted so long as to turn justice sour*", to use the words of Lord Denning M.R. in **Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 1 ALL ER 543**.

The common law position is now backed by statutory law: see Order 12, r.56, of the CPR which is couched in the following terms:

*"The Court may strike out a proceeding without notice, if there has been no step taken in the proceedings for 12 months."*

In the present proceedings, as already mentioned, more than five years have elapsed without the Claimants taking steps to prosecute this case. This is clearly an abuse of court process. In the premises, I have no option but to allow the application by the Defendant to have this matter dismissed for want of prosecution with costs to the Defendant. It is so ordered.

I wish to conclude by stating that until there is a real change in the culture in which civil litigation is conducted by legal practitioners in Malawi, it is unlikely that the regime introduced by the CPR will be applied differently. The new ethos of litigation require a party and his or her legal practitioner to be vigilant. The Claimants and their legal practitioners have terribly failed in this respect.

Pronounced in Chambers this 9<sup>th</sup> day of March 2022 at Lilongwe in the Republic of Malawi.

  
Kenyatta Nyirenda  
**JUDGE**