appellant. Where no specific time is stipulated for any transaction prudence would dictate that the transaction be concluded within a reasonable time. What amounts to reasonable time will depend on the facts of the case, and the practice in such transactions.

Indeed the transaction opened in April, 2001. The appellant deposed that he resold the property to Mr Phekani in 2005, notified the respondent in 2008 by then, in 2007, the property had been transferred to a Mr Mulli by a Mr Katopola. The court below was of the view that such a "sale" was occasioned, first, by the delay by the appellant to effect the transfer of title, and secondly, by the default of the adjudicating officer in registering the charge. The court below found that while the adjudicating officer complied with Section 6 of the Adjudication of Title Act, that is, issuing of notice of the adjudication section, he failed to comply with Section 16(1) (c) of the Act, to register the charge over the property that the respondent had. Is such a finding supported by the evidence.?

The evidence of the respondent clearly shows that it did not register the charge on the land. According to Exhibit MM1(a), it was the adjudication officer who noted that there was default on the part of the respondent and sent it the claim forms. Further, according to Exhibit MM1(b), the respondent after filling the said claim forms forwarded them to the Principal Adjudicating Officers without title deeds or copies thereof. It informed the Principal Adjudicating Officer that the title deeds were with it's lawyers then, Messrs Saidi and Company, and directed the Principal Adjudicating Officer to get in contact with it's lawyers directly. There was no instruction or directive to Messrs Saidi and Company on this issue. Further there was no evidence that Messrs Saidi and Company, their agent, submitted or made copies of the title deeds for the Principal Adjudicating Officer or, indeed, that the respondent or Messrs Saidi and Company appeared before the Adjudicating or Records Officer in terms of Section 8 of the Act to lay their claim. Further there is no evidence that, during the adjudication period or indeed after, when the notice of the completion of the exercise was published in the Gazette, the respondent or their lawyers verified the records for accuracy in terms of their interests. We find as a fact, that the respondent never verified the record. Had it done so it would have discovered that the charge was not recorded and would have objected or appealed within the stipulated period in accordance with Section 20 and 23 of the Act. We bear in mind that the adjucating exercise was in 1992, eleven years before the sale of the land to the appellant and 15 years before a

IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL APPEAL NUMBER 28 OF 2010

(Being High Court Civil Cause No. 773 of 2002)

BETWEEN

FINCOM LIMITED---------- APPELLANT

-AND-

NU-TREAD LIMITED---------- RESPONDENT

CORAM: HON. JUSTICE SINGINI, SC, JA

: Gondwe of counsel for the Appellant

: Theu and Majamanda, of counsel for the Respondent

: Balakasi, Court Interpreter

RULING

SINGINI, SC, JA

The respondent sued the appellant in the High Court at Lilongwe claiming a sum of money amounting to K576, 515.97 which the respondent claimed was overcharged as interest on the respondent's account with the appellant. The matter was heard by Honourable Justice Mrs. Chombo and in her judgment delivered on 9th January, 2007, she upheld the respondent's claim. The appellant was dissatisfied with the judgment and, few days later on 17th January, 2007, filed a notice of intention to appeal to this Court. The record of appeal was settled by mutual consent of the parties and the consent order was filed in the High Court on 10th September, 2007. However, in the ensuing period the appeal was not filed with this Court and this prompted the respondent in June 2010, some three years later, to apply by summons for an order of this Court to dismiss the appeal for failure by the appellant to prosecute the appeal.

The respondent's application was heard by Honourable Justice Nyirenda, SC, JA, sitting as a single member of this Court. In a reasoned ruling he held that there was clear manifestation of abandonment and failure to prosecute the appeal on the part of the appellant. Crucially the learned Justice of Appeal states in his ruling that "At the hearing of this application the appellant had no explanation to offer. There was no affidavit in response to the respondent's affidavit in support of the application.". He granted the respondent's application and thus dismissed the appeal for want of prosecution. The appellant seeks to appeal to the full membership of this Court against the ruling of Nyirenda, JA, and has made this application seeking an order for extension of time within which to appeal against that ruling and an order for leave to appeal should extension of time be granted. The respondent opposes this application.

I heard the application in chambers yesterday morning, 2nd December, 2010. At the hearing the respondent was represented by legal counsel Majamanda upon taking a brief from Mr. Theu who has been seized of this matter as legal counsel for the respondent. The appellant/applicant continued to be represented by legal counsel Gondwe.

The reason extension of time is being sought is that the ruling by Nyirenda, JA, though undated, was delivered on 21st July, 2010, going by the date stamp of this Court appearing on the first page of the ruling. Counsel for the appellant claims in the affidavit and in skeleton arguments in support of the application that he became aware of the ruling only on 10th August but feared being already out of time when filing the application for leave to appeal on 16th September, 2010, and the need therefore to apply for an order of this Court for extension of time.

I note, and both counsel also acknowledged in their oral submissions, that no period has been prescribed in the Act (Supreme Court of Appeal Act, Cap. 3:02) or in the Supreme Court of Appeal Rules made under the Act for appeals from decisions of a single member of this Court. However, neither counsel provided me with a comparable rule of practice which obtains in England that we can otherwise apply as provided by rule 34 of Order III of the Supreme Court of Appeal Rules. Counsel for the appellant submitted that as there is no time limit for appeals from a decision of a single member of this Court, this application for extension of time was being made *ex abundanti cautela* (out of abundance of caution) and not as a requirement under the Rules but that it was reasonable to assume that the law would require such appeals to be lodged within limits of time that are reasonable.

I would say that although no period has been prescribed under the Rules for lodging appeals from a decision of a single member of this Court, it is obvious that the period cannot be an open-ended one and, in my judgment, the same periods as are prescribed in section 23 of the Supreme Court of Appeal Act for appeals from the High Court, being fourteen days in

interlocutory matters as in this case and indeed in all cases since all matters before a single member are of an interlocutory nature, do provide a basis for considering a period of fourteen days to be reasonable within which to appeal from a decision of a single member of this Court. I will therefore hold the appellant to that position as being procedurally correct and that the appellant's appeal has indeed been delayed, requiring this Court's order extending time to appeal. By extension I will adopt the principles in rule 4 of Order III of the Supreme Court of Appeal Rules that the application for extension of time must show good and substantial reasons for failure to appeal within a reasonable time and must also present grounds of appeal which *prima facie* show a good cause why the appeal should be heard.

There are two grounds of appeal against the ruling of Nyirenda, JA, outlined in the affidavit of counsel for the appellant in support of the application. The first ground is in effect that the learned Justice of Appeal erred in interpreting rule 9 of Order III of the Rules as placing the responsibility for the preparation of the record of appeal from the High Court on an appellant in the pursuit to have the appeal set down for hearing by this Court. The second ground is that the learned Justice of Appeal erred in dismissing the appeal as there was no appeal entered in this Court in that the appeal from the judgment of Justice Combo in the High Court had not reached this Court and was therefore not in the hands of this Court to dismiss.

It is fair to observe that in both of those grounds of appeal counsel for the appellant has relied on the decision of Tambala, SC, JA, sitting as a single member of this Court in *Electoral Commission and Billy Kaunda v. Harry Mkandawire*, MSC Civil Appeal Number 67 of 2009, unreported, on a similar application to this Court to dismiss the appeal for want of prosecution. In the skeleton arguments counsel for the appellant sums up these two grounds, in explaining why the appeal against the ruling by Nyirenda, JA, should be heard, by stating that "**The Ruling of Justice Nyirenda SC JA is directly opposed to that of Justice Tambala SC JA in a similar application... As such the appeal herein is most likely to succeed. It has a real chance of success.**". On both points raised in those two grounds of appeal Tambala, JA, held to contrary that the appeal in that case could not be dismissed as it had not been entered in this Court and also that rule 9 of Order III placed the duty not on the appellant but on the High Court Registry to prepare the record of appeal and forward it to the Registry of this Court. Indeed in his ruling Tambala, JA, referred to the ruling of Nyirenda, JA, on which the appellants in the matter before him relied and the learned Justice of Appeal categorically criticized the interpretation provided by Nyirenda, JA, placing the duty to pursue the processing of appeals to this Court on an appellant.

Regarding rule 9 of Order III on the preparation of the record of appeal, the interpretation of which has been at the centre of apparent disagreement or lack of concurrence

between my two most eminent brother Justices of Appeal in their recent rulings, I would like to reproduce some of its central provisions, beginning with subrule (1):

> **"(1) The appellant shall be responsible for the preparation of the record which shall be certified as correct by the Registrar of the Court below.**
>
> **(2) The preparation of the record shall be subject to the supervision of the Court below and the parties may submit any disputed question to the decision of a Judge of the Court below in chambers who shall give such directions thereon as the justice of the case may require.**
>
> **(3) The Registrar of the Court shall direct the number of copies of the record which shall be prepared.**
>
> **(4) The record, which shall incorporate the notice of appeal, shall be printed or clearly typed or cyclostyled, double-spaced, upon thick paper and shall be bound and indexed.**
>
> **(5)The Registrar of the Court below, as well as the parties and their legal representatives, shall endeavour to exclude from the record all documents (more particularly such as are purely formal) that are not relevant to the subject matter of the appeal and generally to reduce the bulk of the record as far as practicable, and to avoid the production of unnecessary exhibits, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be copies shall be enumerated in a list to be placed after the index or at the end of the record.**
>
> **...**
>
> **(7) The cost of preparing the record shall be paid by the appellant in the first instance but shall, unless the Court otherwise directs, be included in the costs in the appeal...**
>
> **...**
>
> **(10) The Registrar of the Court below shall file the record in the Court when ready, together with—**
>
> **(a) a certificate of service of the notice of appeal;**
>
> **(b) four copies of the record for the use of the Court;**
>
> **(c) the docket or file of the case in the Court below containing all papers or documents filed by the parties in connection therewith.".**

In essence rule 9 places a degree of shared responsibility on both the High Court and the appellant for processing the record of appeal with the involvement as necessary of the respondent. However, from the reading of subrule (1) which categorically and in plain words provides that the appellant shall be responsible for the preparation of the record; the requirement in subrule (4) for incorporation of the notice of appeal; the detailed requirements of subrule (5); and the initial responsibility for costs being on the appellant as provided by subrule (7), it is clear that primary responsibility rests with the appellant. It must perforce be the appellant who sets the agenda of the appeal which then dictates or guides the selection of which documents or exhibits to include or not to include in the record. This cannot be an idle role for the appellant. I would also think that as the party with primary interest in having the appeal prosecuted, it should ever remain the duty of the appellant not to sit back and deride in the court's delay to perform its part of the process and to make no effort at all to draw the court's attention to such delay. I would add that where, for example, an appellant has obtained a stay of judgment pending appeal, which serves as beneficial relief to the appellant, it would clearly be unjust and unfair for the law to let the respondent wait endlessly before getting the benefit of the judgment that is in his favour. Indeed, this Court must be wary that in some circumstances such inept or idle conduct of the appellant may amount to manipulation or outright abuse of the appeal process to the prejudice of the successful party, likely to be the respondent.

I have reflected on the need to have the clarity of this Court in a decision of the full panel of this Court on the differing legal positions in the separate rulings of the two eminent Justices of Appeal as I have referred to. However, I do not consider such need to be a proper ground to grant the application that is before me for extension of time to appeal. The fact of the subsequent ruling by Tambala, JA, differing or contradicting with the ruling by Nyirenda, JA, could not in the first place have been the reason for the delay in appealing against that ruling by Nyirenda, JA.

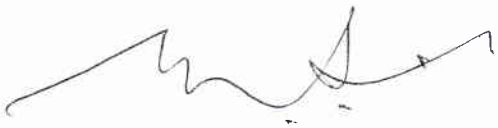
I should also bear in mind the observation by Nyirenda, JA, in his ruling that at the hearing of the application to dismiss the appeal counsel for the appellant offered no explanation about the stagnation of the appeal process and did not file an affidavit in opposition to the application to dismiss the appeal. It is pertinent to observe that counsel for the respondent in the application before Nyirenda, JA, were the counsel for the appellants in the application before Tambala, JA. It would seem to me that the decision to appeal against the ruling by Nyirenda, JA, may have come as an afterthought prompted perhaps by the subsequent ruling by Tambala, JA. Otherwise the appellant, as respondent in the application before Nyirenda, JA, appears to have accepted his ruling, resulting in the passage of time without taking steps to appeal and it is due to that passage of time that an order of extension of time is now being sought by this application.

I hold it as futile for the appellant to be submitting at this stage the reasons for the inordinate delay in prosecuting the appeal from the High Court that were not explained before Nyirenda, JA. Courts have the inherent duty to bring litigation to closure and it is a legitimate exercise of judicial discretion for an appellate court to dismiss an appeal pending before such court on the ground of unexplained failure to prosecute the appeal. The term "prosecution", with reference to civil litigation, is used to include every step in the action, from its commencement to its final determination: See *Black's Law Dictionary, Sixth Edition.* Clearly in this matter the appellant's appeal against the High Court judgment has been pending before this Court from the time the appellant filed the notice of appeal on 17th January, 2007. That adds up to a period of over three years to the time the application to dismiss the appeal for want of prosecution came before Nyirenda, JA, and I would think that it was within the inherent judicial discretion of the learned Justice of Appeal whether or not to grant the application to dismiss the appeal for want of prosecution. Judicial discretion must, of course, be exercised in the interests of justice in the matter, a principle which also calls for consideration of factors that may occasion injustice or prejudice to the other party.

In the circumstances, I have not found the delay by the appellant in appealing against the ruling by Nyirenda, JA, to have been for good and substantial reasons and I decline to exercise my judicial discretion to grant the application for extension of time to appeal. I accordingly dismiss the application.

This application was brought by *ex parte* summons. It was on my direction that I heard both parties and that factor prompts me, in exercising my judicial discretion on costs, not to award costs against the appellant for the respondent's appearance in these proceedings. I therefore order that each party shall bear its own costs.

MADE in chambers at Blantyre this 3rd day of December, 2010.



HON. JUSTICE E.M. SINGINI, SC. JA