MALAWI JUDICIARY

IN THE SUPREME COURT OF APPEAL

MSCA CIVIL APPEAL NO. 55 OF 2013

(Being High Court Principal Registry Civil Appeal No. 11 of 2012)

BETWEEN

GRANT BVUMBWE..... APPELLANT

AND

AFRICA LEAF (MALAWI) LIMITED.....RESPONDENT

CORAM: THE HON. JUSTICE DR. JM ANSAH SC JA
THE HON. MR JUSTICE FE KAPANDA JA
THE HON. MR JUSTICE AD KAMANGA SC JA

Kubwalo of Counsel for the Appellant
Mlauzi and Maele of Counsel for the Respondent
Chimtande (Mrs) Court Clerk

Dates of Hearing of Appeal: 2 November 2015 and 19 November 2015

Date of Judgment: 20 March 2018

RULING

Kapanda JA: (with Justices of Appeal Dr JM Ansah SC and A Kamanga, SC concurring):

INTRODUCTION

On the first day this matter was called for hearing, on 2 November 2015, there were two issues that the appellant wanted us to deal with. These were whether or not this Court should allow further evidence and whether or not we should grant leave to the appellant to file skeleton arguments as well as appeal out of time. The application to offer further evidence was duly withdrawn and accepted by this Court. Accordingly, at the resumed hearing of the application before us, on 19 November 2015, we were then left with one question. This was whether the appellants should be granted leave to file skeleton arguments and appeal out of time.

Thus, my Lady and my Lord, before us is an appeal against the decision of the court a quo dismissing the appellant's appeal from the Industrial Relations Court. The court a quo in the main dismissed the said appeal on the ground that it had been filed out of time. As I understand it, the appellant, Grant Bvumbwe, does not deny that he should have applied for extension of time before filing the appeal out of time.

The Appellant sued the Respondent for unfair dismissal in the Industrial Relations Court but his claim was unsuccessful. He appealed to the High Court but his appeal was dismissed on account of it being filed out of time. Thus, he applied for leave to appeal out of time in the court a quo but his application was refused. It is now the wish of the Appellant that this Court should grant him such leave. The application has come by way of an appeal to this Court. It is therefore a rehearing of the application for leave to appeal out of time that was in the court a quo before Justice Mbendera SC (then sitting as a High Court Judge).

BACKGROUND FACTS

This is an appeal by one Grant Bvumbwe, who is seeking leave from this Court to file a Notice of Appeal out of time. The brief facts leading to this appeal are that sometime in 2011, the Applicant commenced an action against the now Respondent herein for unlawful dismissal. Her Honour the Deputy Chairperson D.A. DeGabriele, on or about the 10 October 2011 dismissed the Appellant's claim in its entirety and accorded the Appellant the right to appeal to the High Court within 30 day statutory period.

The Appellant however failed to file his appeal within the 30 day period that was given to him by the Industrial Relations Court. The Appellant alleges that he was not aware that the Industrial Relations Court had delivered its judgement. He subsequently applied for leave to file the Notice of Appeal out of time and the Industrial Relations Court graciously extended the time in which he was now required to file the appeal within 14 days from the 9 January, 2014.

Yet again, the Appellant failed to file the Notice of Appeal within the new 14 day period that the Industrial Relations Court had accorded him. From the evidence on record, it appears that the Appellant only filed his Notice of Appeal dated 15 April 2012 on the 19 April 2012. According to the Appellant, he attributed his failure to file the Notice of Appeal within the 14 days by reason of the industrial action that had taken place in the Judiciary. However, it was established at the bar that the industrial action had actually ended on the 26 March 2012.

As a result of the Appellant's Notice of Appeal that was filed out of time, the Respondents raised a preliminary objection; which objections were sustained by the lower Court leading to the entire appeal being subsequently dismissed.

This Court is now being asked to determine whether the lower Court erred in law in holding that the Appellant's Notice of Appeal was filed out of time. This is a case we believe, borders on the specific provisions of the law that invites the Court to exercise its discretion; where the Appellant seeking the relief of extension of time has not complied with the statutory time limits or the specific time ordered by the Court.

The reasons advanced by the Appellant for failing to file the Notice of Appeal on both occasions are interesting to note. The Industrial Relations Court initially gave the Appellant the statutory 30 day period in which he was to file the Notice of Appeal. The Appellant alleged that he was not

aware of the judgement and as a result the 30 day period elapsed. The Industrial Relations Court, being a Court of substantial justice granted him another 14 days in which he was required to file the Notice of Appeal; and yet again the Appellant failed to do so alleging that the judiciary staff had gone on strike.

However, it appears that the Court below took judicial notice of the fact that the industrial action had ended on the 26 March 2012 while the Notice of Appeal dated 15 April 2012 was only filed on the 19 April 2012. There has been no explanation from the Appellant nor his counsel as to why the Notice of Appeal could not be filed immediately after the industrial action had ended.

This is an application where this Court has been passionately requested to exercise its discretion for an order that the Appellant's Notice of appeal be filed out of time and in doing this, we shall examine what the law has provided in this regard.

This Court has had the occasion to consider the evidence on record. We note that the Appellant has not come before this Court with clean hands and his passive persuasion to this Court that it exercises its discretion in his favour is flawed. Firstly, it is evident on record that while it may be or may be not true that the Appellant was not aware of the Industrial Relations Court's judgement, we commend the Industrial Relations Court that it graciously extended the time to another 14 days in which he was required to file his Notice of Appeal. The Appellant did not so; and this time around he blames the industrial action which took place at the judiciary, which action in fact ended on or about the 26th March 2012. Surely, the Appellant should have been more vigilant in prosecuting his appeal this time around, having had the experience of missing the initial statutory 30 days that was given to him by the Industrial Relations Court. We find this very surprising.

Furthermore, this Court notes with dismay that there are no reasons advanced by the Appellant nor his Counsel for having filed the Notice of Appeal way too late after the industrial action had come to an end. It was undisputed from the evidence on record and judicially noted by the lower Court that the industrial action that had taken place in the judiciary had in fact come to an end on the 26th March 2012. Justice Mbendera SC dismissed the application on the ground that it lacked any were not satisfied. It was the finding and conclusion of the court a quo that the appellants failed to show good cause why they should be allowed to appeal out of time. The court a quo reviewed the case of Mwakalinga v Tratsel Supplies Limited that discusses the law on appeals out of time and

aptly commented thus at pages 9-11 of its unreported judgment. Indeed, this is what the court below aptly observed at pages 25 -26 of the Record of this Appeal:

> "It is now agreed at the bar that the industrial section started on 9th January, 2012. I accept that Counsel was presented from filing the appeal doing the time when the courts were closed due to this Industrial action. That period runs to the end of March. The courts opened on Monday 26th March, 2012. Counsel concedes that the Notice of Appeal is dated 15th April, 2012 and was only filed on 19th April, 2012. Counsel has not accounted for the delay that occurred between the reopening of Courts and the filing of the Notice of Appeal.
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> The respondent served a Notice of Preliminary Objections to the hearing of the appeal. It is dated 13th July, 2012. The Notice was served on the Appellant's counsel on 17th July, 2012. Among the premises raised s the issue that appeal was filed out of time and therefore should be dismissed.
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> I have been pressed by the Appellant's Counsel to exercise discretion and allow a further extension. But there is no application for this. I have no reason to allow for an oral application in Court, in circumstances where the part was aware of this differently and close not to take a formal application...I have discretion to extend time in an appropriate case. But it is a discretion that must be exercised judiciary. The Appellant has not shown any grounds upon which this discretion should be exercised. He appealed to me to exercise discretion on the bases that the lapses committed in this matter in the prosecution of the intended appeal happened purely out of in adventure. In the Mwakilanga case, Justice Munlo declined to allow an extension. It relied on cases they cited which are to the effects that in inadvertence is never a good ground for extending time. The reasons for extension must be good and sufficient. In any case, the appeal not only was it filed out extended time, but dawning, it also dated out of time." [Sic.]

An attempt to file the Notice of Appeal was only made on the 19th April 2012. The Appellant nor his Counsel have not advanced substantial or good reasons to this Court nor to the lower Court as to why the Notice of Appeal was not filed on the 26th March 2012 when the industrial action came to an end or reasonably immediately thereafter. Counsel has merely and orally for that matter, attributed that to mere inadvertence.

This Court sympathises with the Appellant; but unfortunately the Appellant has not come with persuasive grounds to sway this Court to exercise its discretion in the Appellant's favour. The Appellant himself has not given us the good and substantial grounds that would ordinarily compel this Court to exercise the inherent jurisdiction that this Court has. Therefore this Court cannot be left to speculate. Inadvertence therefore is and cannot be a good and substantial ground to compel this Court to make an order to file the Notice of Appeal out of time.

In light of the cited authorities and the reasons advanced above, this appeal cannot succeed and must fail. The Appeal is therefore dismissed in its entirety with costs to the Respondents.

The court a quo made its decision on 1 August 2012. The appellants are dissatisfied with the legal basis upon which the lower court declined to grant them leave to appeal out of time.

GROUNDS OF APPEAL

As stated above, the appellants are dissatisfied and accordingly appealed to this Court against the refusal to grant them leave to appeal out of time. This Court is now being asked to determine whether the lower Court erred in law in holding that the Appellant's Notice of Appeal was filed out of time. This is a case we believe, borders on the specific provisions of the law that invites the Court to exercise its discretion; where the Appellant seeking the relief of extension of time has not complied with the statutory time limits or the specific time ordered by the Court.

As will be shown below, this Court agrees with the respondent that the finding and conclusion of the court a quo should not be disturbed as there has been no explanation given as to why the applicants failed to lodge their appeal in time. Further, no good reason has been given as to anything that hindered the applicant from appealing on time. In sum, the applicants have not explained their delay in lodging their appeal. As this Court understands it, the Court was also right in concluding that that the appellants should have given good and sufficient reasons why they ought to have been allowed to lodge their appeal out of time. The appellant did not even given any good reason to explain the delay except to argue it was unintentional.

THE LAW RELATING TO APPEALING OUT OF TIME; THE ISSUES AND THE COURT'S CONSIDERATION THEREOF

The law relating to appealing out of time

The first principle of law relating to appealing out of time is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be light heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to disregard the delay and admit the appeal. As has been observed by this Court in **Chiume v The Attorney-General**[1] and **Mwaungulu v Malawi News and others,**[2] this discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice.

However, it is necessary to emphasize that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the Court. If sufficient cause is not proved nothing further has to be done; the application for excusing delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration.

Far away from home but in a jurisdiction like ours, a common law jurisdiction, there is a case authority that is instructive on what a court user should do where there has been a delay before such delay is condoned. Thus, in **Union of India v. Tata Yodogawa Ltd.,**[3] the Court while granting some latitude to the Government of India in relation to condonation of delay, still held that there must be some way or attempt to explain the cause for such delay. And, as there was no

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[1] [2000–2001] MLR 102

[2] [1995] 2 MLR 549

[3] [1988] (38) Excise Law Times 739 (SC); similarly, in the case of Collector of Central Excise, Madras v. A.MD. Bilal & Co., [1999 (108) Excise Law Times 331 (SC)], the Supreme Court declined to condone the delay of 502 days in filing the appeal because there was no satisfactory or reasonable explanation rendered for condonation of delay.

hint to explain what legal problems occurred in filing the Special Leave Petition, the application for condonation of delay was therefore dismissed.

In Malawi, the condonation of delay has been the subject matter of judicial scrutiny for considerable time now. Sometimes the courts have taken a view that delay should be condoned with a liberal attitude, while on certain occasions the courts have taken a stricter view and wherever the explanation was not satisfactory, have dismissed the application for condonation of delay. Thus, it is evident that it is difficult to state any straight-jacket formula which can uniformly be applied to all cases without reference to the peculiar facts and circumstances of a given case. It must be kept in mind though that whenever a law is enacted by the legislature, it is intended to be enforced in its proper perspective. It is an equally settled principle of law that the provisions of a statute, including every word, have to be given full effect, keeping the legislative intent in mind, in order to ensure that the projected object is achieved. In other words, no provisions can be treated to have been enacted purposelessly.

Thus, this Court accepts that there can be instances where the Court should tolerate a delay; equally there would be cases where the Court must exercise its discretion against an applicant for want of any of these ingredients or where it does not reflect "good cause" as understood in law.[4] It is the understanding of this Court that the expression "for good cause" implies the presence of legal and adequate reasons. And, the word means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The "good cause" should be such as it would persuade the Court, in exercise of its judicial discretion, to treat the delay as an excusable one. This give the Courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting a law does not stand frustrated. This Court finds it unnecessary to discuss the instances which would fall under either of these classes of cases. The person applying for leave to appeal out of time should show that besides acting bona fide, the applicant had taken all possible steps within his/ her power and control and had approached the Court without any unnecessary delay. The test is whether or not a cause is good enough that it could not have been avoided by the person by the exercise of due care and attention.

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[4] P. Ramanatha Aiyar, Advanced Law Lexicon, 2nd Edition, 1997

This Court is of the view that above are the principles which should control the exercise of judicial discretion vested in the Court. As it were, where the periods of limitation have elapsed the explained delay should be clearly understood in contradistinction to unexplained delay. Indeed, delay is just one of the ingredients which has to be considered by the Court. In addition to this, the Court must also take into account the conduct of the applicant as well as the other party to the proceedings, bona fide reasons for condonation of delay and whether such delay could easily have been avoided by the applicant acting with normal care and caution. The statutory provision dictates that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing an appeal on record, should be rejected unless good reason is shown for condonation of delay.

The High Court as well as this Court has consistently followed the above principles and have either allowed or declined to tolerate the delay in filing such appeals. Thus, it is the requirement of law that these applications should not be allowed as a matter of right and even in a habitual manner. An appellant and/ or applicant must essentially satisfy the above stated ingredients; then alone the Court would be inclined to excuse the delay. As this Court understands it the applicants have not even given any reason to explain this delay. It is as if the applicants think that appealing out of time is a matter of routine. Thus, the applicants having failed to give any good reasons for the delay in lodging their appeal within the prescribed time, this Court cannot entertain this application. Accordingly, this Court too would dismiss the application for leave to appeal out of time.

I wish to add that the above decision is informed by what this Court put as principles of law in some civil matters which principles of law are similarly instructive in this appeal. Unyolo JA, as he then was, had this to say in **Mwaungulu v Malawi News and others**[5] which is enlightening:

> "Order III, rule 4 cited above, stipulates that this Court has a discretion to grant an extension of time for filing a notice of appeal, provided there are: (a) good and substantial reasons for the failure to appeal within the prescribed period, and (b) grounds of appeal which, prima facie, show good cause why the appeal should be heard. In this context, it is trite that what would constitute "good and substantial reasons" is a question of fact, and the phrase must be construed literally and the words given their ordinary meaning. It is trite further

[5] [1995] 2 MLR 549 (SCA)

that as regards point (b) above, the essential consideration is whether, on the grounds of appeal presented, there are prospects of the appeal succeeding if the period for appealing was extended; frivolous and vexatious grounds of appeal will not do. See Karim v AMI Rennie Press (Malawi) MSCA Civil Appeal No. 10 of 1993 (unreported), and see also Tratsel Supplies Ltd v Mwakalinga MSCA Civil Appeal No. 19 of 1988 (unreported).

And as I understand it, even where there are "good and substantial reasons" for the failure to appeal within time and even where the grounds of appeal are good, the court would be perfectly entitled in its discretion to refuse to grant an extension if the delay in filing the notice of appeal is excessive or inordinate. See Mbewe v ADMARC MSCA Civil Appeal No. 10 of 1993 (unreported). In this context, one could imagine a situation, for example, where a respondent was likely to suffer prejudice or injustice in his case by reason of the court granting an extension after such excessive delay. Indeed, as has been observed time and again, if a person chooses to lie by disregarding to take action when he ought to do so, the maxim vigilantibus non dormientibus jura subveniunt normally applies....I have indicated that one of the requirements for an application for leave to appeal out of time to succeed is that the applicant must show good and substantial reasons for the failure to appeal within the permitted time...."[6] (Emphasis supplied by me)

And, this Court agrees with Unyolo JA on his observations in this dictum. In particular, it adopts the remarks to the effect that where there are "good and substantial reasons" for the failure to appeal within time and even where the grounds of appeal are good, the court would be perfectly entitled in its discretion to refuse to grant an extension if the delay in filing the notice of appeal is excessive or inordinate.

In addition, in **Chiume v The Attorney-General**[7] Kalaile JA, as he then was, had this to say which is also instructive:

> "Counsel cited the case of Revici v Prentice Hall [1969] 1 WLR 157 as authority for stating that the Rules of the Supreme Court regarding time had to be observed since substantial delay had occurred without any satisfactory explanation so that the trial Judge was entitled,

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[6] Ibid. 551 - 554

[7] [2000–2001] MLR 102 (SCA)

in his discretion, to refuse an extension of time. In the Revici case, the Court of Appeal was considering an appeal against a refusal to extend time by a judge in chambers. The plaintiff had issued a writ against a third defendant for libel. The court ordered that the order of the Registrar giving leave to serve the third defendant out of the jurisdiction was to be set aside, and the plaintiff was given eleven weeks within which to appeal. The notice of appeal was however, served out of time and upon an application for an extension of time being made, it was refused by the court.

It was also argued by Counsel for the Attorney-General that the cases of Atwood v Chichester [1878] 41 Vic 722 and Eaton v Stover [1883] 22 ChD 91, which established that the extension of time should be allowed unless there was excessive delay, were distinguished in the Revici case wherein Denning LJ observed at 159 of the judgment that:

"Nowadays we regard time very differently from the way they did in the nineteenth century. We insist on the rules as to time being observed. We have had occasion recently to dismiss many cases when people have not kept rules as to time,"

Another pertinent case cited by Counsel for the Attorney-General is Ratram v Cumarasamy [1965] 1 WLR 8 which was decided by the Privy Council. In that case, the appellant entered an appeal against judgment. The court record was supposed to be filed within six weeks after entry of the appeal. The prescribed period expired and the appellant applied for an extension of time.

The appellant's affidavit stated that the filing could not be done within time because the appellant's solicitors had indicated that since they were instructed a day before the expiry period, it was not possible to file within the prescribed time. The appellant had also deposed that, all along, he had hoped that some compromise would be reached.

On appeal to the Privy Council, it was held that rules of the court must be obeyed and that, to justify an extension of time for the filing of record; "there must be material upon which the court could exercise its discretion for otherwise a party would have unqualified right to an extension which would defeat the purpose of the rule," which was to provide a timetable for litigation. The Privy Council further held that the appellant's affidavit did not constitute material upon which they could exercise their discretion in the appellant's favour and opined that: "Their Lordships are satisfied that the Court of Appeal was entitled to take the

view that this did not constitute material upon which they could exercise their discretion in favour of the appellant. In these circumstances, their Lordships find it impossible to say that the discretion of the Court of Appeal was exercised upon any wrong principle." Per Lord Guest at 12.

It was argued by Counsel that the appellant's affidavit did not contain sufficient and acceptable reasons for the delay and, that being the position, there was no material fact upon which the court could exercise its discretion in favour of the appellant.

The appellant's application was brought almost two years after the ruling was made and it is perfectly clear that the appellant undertook to be present in Malawi by his letter dated 15 May, 1994. This point is supported by paragraphs 34-36 of his affidavit which state:

"34. THAT while I was in Umtata, Transkei in the Republic of South Africa on 2 May, 1994, I met one Mr Sikwese who came from Malawi and informed me he had heard from some other person that the government of Malawi might have issued some kind of proceedings against me but he was not sure whether the information was correct."

35. THAT on the same day, I wrote a letter to the Attorney-General expressing to him what I had heard and stating to him if the information was correct as Malawi was rife with rumours. I did request the Attorney-General that if it is true, he should please pend the proceedings as I intended to return home before 15 May, 1994 and that I intended to defend any proceedings they may have in mind.

36. THAT I did intimate to the Attorney-General that whatever the case, I will be returning home and, in the interest of justice, he should wait for me. I undertook to get in touch immediately I was in the country. The second letter of 2 May, 1994 is attached hereto and marked "HMM C XII."

According to Counsel for the Attorney-General, the cited affidavit does not disclose the date when the appellant returned to Malawi in order to throw light on whether the appellant was indeed outside Malawi at the material time. It was demonstrated that the letter dated 2 May, 1994, which the appellant purportedly wrote whilst in the Republic of South Africa, had a Malawi stamp and bore a Malawi postal frank.

> In concluding his arguments regarding the first ground of appeal, Counsel for the Attorney-General stated that the appellant, in his skeleton arguments, contended that the instructions to set aside judgment were given to his lawyers promptly upon his return from the Republic of South Africa in November 1994 (although this fact is not stated in the affidavit). Although Counsel for the appellant argued that the application was delayed because the appellant's office had been closed, and the relevant documents were stored away in a small room making it difficult to access them, this explanation is not acceptable because the appellant had prior knowledge of the proceedings against him as far back as May 1994 as evidenced by paragraphs 34 and 35 of his affidavit.
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> As between the arguments of both Counsel we find that the arguments by Counsel for the Attorney-General have merit and not those for Counsel for the appellant, especially since the application was brought almost two years later, that is to say in 1996, without any plausible explanation. The first ground of appeal cannot, therefore, succeed."[8]

It will be seen that the new jurisprudence emerging is that the time within which an aggrieved person is called upon to appeal is of essence. Thus, if there is no plausible explanation for a delay in filing or prosecuting an appeal the courts will almost invariably dismiss an application to extend time within which to appeal. Indeed, where you have a permissive statutory provision allowing condonation of delay the way to interpret such statutory provision is to read it as dictating that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing an appeal on record, should be rejected unless good reason is shown for condonation of delay.

The issues and the court's consideration

As stated earlier, this appeal is about the court a quo's denial to allow the appellants to appeal out of time. Thus, as I understand it, there was only one issue before the court a quo as well as this Court. This is namely whether or not the court a quo misconstrued any law regulating appeals out of time or whether the court a quo erred at law in refusing to allow the application by the appellants to appeal out of time.

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[8] Ibid. 105 - 106

There was no argument that the court a quo failed to exercise its discretion properly. This Court will not disturb the exercise of discretion by the court below. Indeed, this Court has it on good authority that notwithstanding that there could be "good and substantial reasons" for the failure to appeal within time and even where the grounds of appeal are good, a court would still be perfectly entitled in its discretion to refuse to grant an extension if the delay in filing the notice of appeal is excessive or inordinate.[9] In this regard, it is well to remember that in the matter before this Court as well as the court a quo it is common cause that the appellants did not state any reasons for the delay to lodge an appeal against except to say that it was inadvertent. This is not good enough and is no persuasive reason to excuse the delay.

As this Court understands it, the position at law is that any person applying for leave to appeal out of time should show that besides acting sincerely, the applicant had taken all possible steps within his/ her power and control and had approached the Court without any unnecessary delay. The test is whether or not a cause is good enough that it could not have been avoided by the person by the exercise of due care and attention. Further, it is the understanding of this Court that where an appellant can show good cause of why he/ she did not file an appeal on time, then the applicant can file a late appeal. However, it is well to put it here that good cause reasons for filing late are judged on a case-by-case basis, so there is no complete list of acceptable reasons for filing an appeal late. If you think you have a good reason for not appealing on time, then file in your application to appeal out of time with a clear explanation of why your appeal is late. Else, the application and the intended appeal deserves to be thrown out.

This Court is of the view that above are the principles which should control the exercise of judicial discretion vested in the Court to extend the time of appeal. As it were, where the periods of limitation prescribed have elapsed the explained delay should be clearly understood by contrasting the different qualities of two things with regard to inordinate unexplained delay. Indeed, delay is just one of the ingredients which has to be considered by the Court. In addition to this, the Court must also take into account the conduct of the applicant as well as the other party to the proceedings, bona fide reasons for condonation of delay and whether such delay could easily have been avoided by the applicant acting with normal care and caution.

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[9] Mbewe v ADMARC MSCA Civil Appeal No. 10 of 1993 (unreported).

We have seen that the appellant is making the mere contention that he inadvertently failed to file the appeal in good time. This Court sympathises with the Appellant; but unfortunately the Appellant has not come with persuasive grounds to sway this Court to exercise its discretion in the Appellant's favour. The Appellant himself has not given us the good and substantial grounds that would ordinarily compel this Court to exercise the inherent jurisdiction that this Court has. As a result, this Court cannot be left to speculate. Laxity therefore is and cannot be a good and substantial ground to compel this Court to make an order to file the Notice of Appeal out of time. Indeed, we note that the appellant has however fallen into the error by not giving a good reason why there was this inordinate unexplained delay. This Court finds and concludes that the court a quo applied the law and exercised its discretion properly by refusing to allow the application. This Court too dismisses the application for leave to appeal out of time. There has been an unacceptable reason for the delay to file an appeal within the statutory period

It is well to remember that the Her Honour the Deputy chairperson D.A. DeGabriele, on or about the 10th October, 2011 dismissed the Appellant's claim in its entirety and accorded the Appellant the right to appeal to the High Court within 30 day statutory period.

The Appellant however failed to file his appeal within the 30 day period that was given to him by the Industrial Relations Court. Further, it is well to commonplace that the Appellant alleges that he was not aware that the Industrial Relations Court had delivered its judgement. The Appellant then subsequently applied for leave to file the Notice of Appeal out time and the Industrial Relations Court kindly extended the time in which the Appellant was then required to file the appeal. It was to be within 14 days from the 9 January 2012.

Nevertheless, the Appellant failed to file the Notice of Appeal within the new 14 day period that the Industrial Relations Court had allowed him. It is in evidence that the Appellant only filed his Notice of Appeal on 19 April 2012. According to the Appellant, he attributed his failure to file the Notice of Appeal within the 14 days by the industrial action that had taken place in the Judiciary. However, it was established at the bar that the industrial action had actually ended on 26 March 2012.

It is trite that the Appellant's Notice of Appeal was filed out of time. As a result, the Respondents raised a preliminary objection; which objections were sustained by the lower Court leading to the entire appeal being subsequently dismissed.

We are now being asked to determine whether the lower Court erred in law in holding that the Appellant's Notice of Appeal was filed out of time. This is a case which we believe borders on the specific provisions of the law that invites the Court to exercise its discretion; where the Appellant seeking the relief of extension of time has not complied with the statutory time limits or the specific time ordered by the Court.

The reasons being advanced by the Appellant for failing to file the Notice of Appeal on both occasions are interesting to note. The Industrial Relations Court initially gave the Appellant the statutory 30 day period within which he was to file the Notice of Appeal. The Appellant alleged that he was not aware of the judgement and as a result the 30 day period elapsed. It is observed that the Industrial Relations Court, being a Court of substantial justice, granted him another 14 days within which he was required to file the Notice of Appeal but again the Appellant failed to do so alleging that the judiciary staff had gone on strike. Nonetheless, it appears that the lower Court took judicial notice of the fact that the industrial action had ended on 26 March 2012 whereas the Notice of Appeal, dated 15 April 2012 was only filed on the 19 April 2012. Sadly, there has been no explanation from neither the Appellant nor his counsel as to why the Notice of Appeal could not be filed immediately after the industrial action had ended.

This therefore is an application where this Court has been passionately requested to exercise its discretion for an order that the Appellant's Notice of appeal be filed out of time and in doing this, we need to examine what the law has provided in this regard. Thus, the decision on whether to extend the time within which to appeal has to be informed by that law. There are a plethora of Malawian cases which we have seen above that have been decided on this issue and it is trite law that it is within this Court's power to exercise discretion where it has been called upon to do so. But it is must pointed out from the outset that this discretion that this Court has to exercise must be reasonable and justify the circumstances.

Over and above the cases we have seen above, in the case of ***Mbewe vs. Agricultural Development and Marketing Corporation*** **(1993) 16 (1) MLR 301 SCA,** this Court had to deal with the issue of extension of time. There are basically two provisions in our laws that guide this Court. These

provisions were dealt with by the Court in the forementioned case and that is; when should an appeal out of time be entertained by the Court. Section 23(2) of the Supreme Court of Appeal Act gives the power to the Supreme Court to extend the time for giving the notice of intention to appeal after the prescribed period has expired. The other provision is Order 3 Rule 4 of the Rules of the Supreme Court of Appeal which requires that an application for enlargement of time within which to give notice of intention to appeal must be supported by an affidavit showing good and substantial reasons for failure to appeal within the prescribed period and by grounds of appeal which prima facie, show a good cause why the appeal should be heard.

Although the issue that the two provisions may be pointing at may be direct appeals from the High Court to the Supreme Court, the rationale behind application for extension of time is basically the same. In this jurisdiction, there are two imminent authorities that have been decided on this point by this Court. This Court retaliated its position in the Mbewe case supra; (following the earlier decision of Tratsel Supplies Ltd v Mwakalinga MSCA Civil Appeal No. 19 of 1987, unreported) that substantial reasons must be shown for failure to comply with time limits in addition to the prima facie case for success of appeal being established by the Appellant.

In the **Tratsel** case; the Court in construing Order 3, rule 4 stated that this court has a discretion to grant or refuse an extension of time for filing notice of appeal provided there are (a) good and substantial reasons for the failure to appeal within the prescribed period and (b) grounds of appeal which prima facie show a good cause why the appeal should be heard. And, in elaborating point (a) above the Court stated that what would be "good and substantial reasons" is a factual matter. It continued to say that the phrase must be construed literally and the words given their ordinary meaning. In the Court's view, the reasons advanced to explain the delay must be good and substantial – sound or satisfactory. With regard to point (b) above, the Court's view was that the essential consideration is, whether upon the grounds of appeal presented, there are prospects of the intended appeal succeeding if the time for appealing is extended. According to this decision, the grounds of appeal must not, to use a familiar expression, be frivolous or vexatious.

Finally, the Court had to clarify when the amount of time delayed would be deemed to be inordinate or excessive. On this, the Court stated that the time being inordinate or excessive will only be answered to, only if the first two points (a) & (b) above, are answered in the affirmative in the applicant's favour, failing which; the issue will not be considered at all by the Court.

This Court has had the occasion to consider the evidence on record. We note that the Appellant has not come before this Court with clean hands and his passive persuasion to this Court that it exercises its discretion in his favour is flawed. We find and conclude thus for a number of reasons Firstly, it is evident on record that while it may be or may be not true that the Appellant was not aware of the Industrial Relations Court's judgement, we commend the Industrial Relations Court that it graciously extended the time to another 14 days whithin which he was required to file his Notice of Appeal. The Appellant did not so; and this time around he blames the industrial action which took place at the judiciary, which action in fact ended on or about the 26th March 2012. Surely, the Appellant should have been more vigilant in prosecuting his appeal this time around having had the experience of missing the initial statutory 30 days that was given to him by the Industrial Relations Court. We find this very surprising.

Furthermore, this Court notes with consternation that there are no reasons advanced by neither the Appellant nor his Counsel for having filed the Notice of Appeal way too late after the industrial action had come to an end. It was undisputed from the evidence on record and judicially noted by the lower Court that the industrial action that had taken place in the judiciary had in fact come to an end on 26 March 2012. There was an attempt by the Appellant to file the Notice of Appeal. This was only made on 19 April 2012. Again, neither the Appellant nor his Counsel have advanced substantial or good reasons to this Court nor to the lower Court as to why the Notice of Appeal was not filed on 26 March 2012 when the industrial action came to an end or reasonably immediately thereafter. Counsel has merely and orally for that matter, attributed that to mere inadvertence.

This Court sympathises with the Appellant; but unfortunately the Appellant has not come with persuasive grounds to sway us to exercise our discretion in the Appellant's favour. The Appellant himself has not given us the good and substantial grounds that would ordinarily compel this Court to exercise the inherent jurisdiction that this Court has. Accordingly, this Court cannot be left to speculate. Inadvertence therefore is not and cannot be a good and substantial ground to compel this Court to make an order to file the Notice of Appeal out of time.

In light of the cited authorities and the reasons advanced above, this appeal cannot succeed and must fail. The Appeal is therefore dismissed in its entirety with costs to the Respondents.

CONCLUSION AND DISPOSITION

As stated in the introduction to this judgment, before us was an appeal against the decision of the court a quo dismissing the appellant's appeal from the Industrial Relations Court. The court a quo in the main dismissed the said appeal on the ground that it had been filed out of time. As I understand it, the appellant, Grant Bvumbwe, does not deny that he should have applied for extension of time before filing the appeal out of time. However, the appellant is seeking the following reliefs from this Court on this appeal: firstly, a finding that the lower Court erred in law in holding that the Appellant's Notice of Appeal was filed out of time. This is a case we believe, borders on the specific provisions of the law that invites the Court to exercise its discretion; where the Appellant seeking the relief of extension of time has not complied with the statutory time limits or the specific time ordered by the Court. Secondly, and lastly, an order that the appellants be allowed to appeal out of time.

This Court has established above that the High Court did not fall into any error or at all. It was therefore right in refusing to grant the appellant's prayer. Accordingly, the High Court's decision declining to grant the appellant leave to appeal out of time is sustained.

For the avoidance of any doubt, this Court hereby orders that the application for leave to appeal out of time is without merit on account of it showing no good reasons for the delay in filing the appeal. The appeal is consequently dismissed. So, the appellant having failed to give any valid reasons for the delay in lodging his appeal within the prescribed time, the court a quo was right in not entertaining his application.

Judgement delivered by Justice of Appeal Dr. JM Ansah SC.

Having had the privilege to read before now the judgment just read by my learned brother Justice of Appeal FE Kapanda, I am in entire agreement with him that this appeal be and is hereby dismissed. Accordingly, it is dismissed with cost here and below payable by the Appellants.

Judgement Delivered by Justice of Appeal AD Kamanga SC.

I have had the opportunity to read in advance the judgment of my Lord Justice of Appeal F.E. Kapanda just delivered in this matter with which I agree. I respectfully adopt all his reasoning as mine and I also dismiss the appeal. I confirm the judgment of the Court below. I abide by the order for costs contained in the aforesaid judgment.

DELIVERED in Open Court at the Supreme Court of Appeal, sitting at Blantyre on 20 March 2018.

Signed: .....

HONOURABLE JUSTICE JM ANSAH SC, JA

Signed: .....

HONOURABLE JUSTICE FE KAPANDA, JA

Signed: .....

HONOURABLE JUSTICE AD KAMANGA SC, JA