REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 2341 OF 2006

BETWEEN

YAMIKANI SONDO.....PLAINTIFF

AND

NICO GENERAL INSURANCE LTD.....1ST DEFENDANT

ESCOM.....2ND DEFENDANT

Coram: **WYSON CHAMDIMBA NKHATA** (ASSISTANT REGISTRAR)

Mr. Pakulantanda - of Counsel on brief for Counsel Masanje for the Plaintiff

Mr. Chitatu- Court Clerk and Official Interpreter

RULING

This matter was commenced by writ of summons issued on the 21st of August 2006. The plaintiff is claiming damages for repair costs for a damaged vehicle, indemnity of collection charges incurred by the plaintiff and costs of this action. Subsequently, the plaintiff obtained a default judgment and the defendant applied to set it aside. The defendants filed their defence on the 1st of February 2010. The defendant is now making an application to have the action dismissed for want of prosecution under the inherent jurisdiction of the court.

The hearing of this application came before this court on the 3rd of July 2018. The plaintiff did not attend the hearing. The court proceeded to hear the defendants upon furnishing the court with proof that the plaintiff had been duly served of the hearing herein. Counsel for the defendants put before the court that there was an affidavit in support of the application sworn by Mr. Masanje of Counsel which he adopted. The affidavit is to the effect that the plaintiff commenced the present proceedings against the defendants by way of writ of summons on the 15th of August 2013. He further avers that the plaintiff obtained a default judgment and defendant applied to set it aside. Since the court order dated 15th of June 2007 setting aside judgment and service of the defendant's defence on the 18th of February 2010 the plaintiff has failed or has neglected to take any further course of action towards the prosecution of this matter.

In his oral submission Counsel Pakulantanda contended that this application was not coming for the first time. The hearing had been failing to take place and despite that the plaintiff still failed to prosecute their matter. He therefore argued that the delay has been inordinate and inexcusable. It is his prayer that the matter be dismissed for want of prosecution.

This court is aware that it has discretion to dismiss an action if the plaintiff fails to take a step in the proceedings. However that there are guidelines that this court ought to follow in the exercise of this discretion. In **Allen v. Sir Alfred McAlpine & Sons** [1968] 1 All ER 543, p 547, Lord Denning M.R. said:

> 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 same principles were elucidated by Unyolo J. as he then was in **Sabadia v. Dowset Engineering Ltd.** 11 MLR 417 at page 420 when he said:

> 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?

The matter herein was commenced in the year 2006. A default judgment was obtained and subsequently set aside. The defendant filed a defence on the 18th of February 2010. It goes without saying that from there the plaintiff was duty bound to take a step further to facilitate prosecution of this matter. Apparently, about seven years have gone by and the plaintiff has not taken any step to prosecute the matter. In my view, the seven years period is undoubtedly inordinate. There are cases where just a year or two of inaction by a party expected to take a further step has been deemed inordinate. I have in mind the case of **Council of University of Malawi v Flywell Banda and Others** Civil Cause 616 of 2013. Observably, there is nothing on the record by the plaintiff to possibly justify the prolonged inaction albeit being aware of the present application. I shall therefore spare no reservation to hold that the delay is also inexcusable. In the case of **Alex Kachingwe v Electricity Supply Corporation of Malawi** Personal Injury Case No.691 of 2014 (unrep) Justice Kenyatta Nyirenda stated as follows:

> Public policy requires that litigation must come to an end. There should be a point where matters should be closed. The delay here is so prolonged that there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest in the administration of justice demands that the action should not be allowed to proceed.

It the premises, it is my finding that the delay herein is clearly inordinate and inexcusable and allowing the matter to proceed would be prejudicial to the interests of the defendant. In short, the delay is intolerable. The matter is, therefore, dismissed for want of prosecution with costs.

MADE IN CHAMBERS THIS 9th DAY OF JULY 2018.

WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR