

# **Attorney General v Msalika, MSCA Civil Appeal**

## **No. 38 of 2016**

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<b>Court:</b>	Supreme Court Of Appeal
<b>Bench:</b>	The Honourable Justice AD Kamanga SC JA
<b>Cause Number:</b>	MSCA Civil Appeal No. 38 of 2016 (Being High Court - Lilongwe District Registry - Misc Civil Cause No. 357 of 2008)
<b>Date of Judgment:</b>	August 23, 2016
<b>Bar:</b>	Ms Itimu, for the Appellant Ms Ngwira, for the Respondent

### **Head Notes**

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**Civil Procedure** - Appeal - Want of prosecution - Inordinate delay in setting down appeal constitutes want of prosecution.

**Civil Procedure** - Appeal - Want of prosecution - Court has inherent jurisdiction to dismiss appeal for inordinate and inexcusable delay.

**Civil Procedure** - Appeal - Want of prosecution - Prejudice to respondent is a key factor in determining whether to dismiss an appeal.

**Civil Procedure** - Appeal - Want of prosecution - The right to be heard does not outweigh serious prejudice caused by inexcusable delay.

## Summary

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The Respondent, in a matter originating from the High Court, Lilongwe District Registry, sought to have the Appellant's appeal dismissed for failure to set it down and for want of prosecution. The dispute arose from a default judgment obtained by the Respondent against the Appellant for damages suffered due to atrocities committed by State agents between 1972 and 1994. After the Appellant's attempts to set aside the default judgment failed, the matter proceeded to an assessment of damages, where a second assessment awarded the Respondent K6,500,000 plus costs. Dissatisfied with this award, the Appellant filed a notice of intention to appeal on 13 July 2015. However, nearly a year later, the Appellant had not taken any action to advance the appeal. Consequently, the Respondent applied to have the appeal dismissed, citing inordinate and inexcusable delay that prejudiced him, an elderly man being deprived of the fruits of his litigation.

The principal legal question before the Court was whether the Appellant's delay in prosecuting the appeal was inordinate and inexcusable and whether it had caused serious prejudice to the Respondent, thereby justifying the appeal's dismissal. The Appellant argued against dismissal, citing a constitutional right of access to justice and claiming the delay was due to difficulties in obtaining a date for settling the record of appeal from the High Court Registry. The Appellant also contended that since the judgment had not been stayed, the Respondent could have executed it, and therefore was not prejudiced. The Court rejected the Appellant's arguments. It found the Appellant's explanation for the delay was not credible and noted that the Appellant only took action to settle the record after the Respondent's application to dismiss the appeal was filed. The Court concluded that the delay was both inordinate and inexcusable. The Court held that the Respondent, an elderly man who had waited a long time for compensation, had been seriously prejudiced by the delay. The Court

also held that while the Appellant had a right to be heard, this right did not outweigh the serious prejudice caused to the Respondent. Accordingly, the Court granted the Respondent's application, dismissing the appeal for want of prosecution and condemning the Appellant to pay the costs of the application.

## **Legislation Construed**

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Statutes

Constitution of the Republic of Malawi (1994) (s 41(2))

Courts Act (Cap. 04:01) (s 23)

Subsidiary legislation

Rules of the Supreme Court (RSC) (1991) (Order 59/5/1, Order 59/5/23)

Supreme Court of Appeal Rules (O.III r 7, O.III r 9)

## **Judgment**

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## 1. Introduction

1.1. On 4th July, 2016, the Respondent filed summons for an application to dismiss or to strike out an appeal by the Attorney General on account of failure by the Attorney General to set down the appeal, and for want of prosecution. The hearing of the application was set down for 12th July, 2016.

1.2. When the Respondent's application came before me on 12th July, 2016, the hearing of the application could not proceed principally because Counsel for the Attorney General who appeared before me on that day sought an adjournment. The request for an adjournment was supported by a letter reference number AG/788/9659 dated 11th July, 2016, from the Attorney General and addressed to the Registrar of this Court. The letter was received by the Registrar on 12th July, 2016.

1.3. The basis of the request for an adjournment of the hearing of the application, as outlined in the letter from the Attorney General, was as follows:

*".... We received summons to dismiss the appeal herein on Friday, 81h July,2016. Considering that the proceedings are in Blantyre, we have realized that this is too short a notice for us to respond and file our response to the application. In addition, we have failed to arrange for logistics within this short time to enable us travel to Blantyre to attend to these proceedings. For these reasons, we humbly pray for an adjournment to a later date to allow us [to] file our response so that we may be heard..."*

1.4. After hearing of the submissions made on behalf of both parties in relation to request for an adjournment of the hearing of the Respondent's application, and taking into account that the Attorney General was served with process on 8th July, 2016, and may, therefore, not have had sufficient time to prepare and file a response to the Respondent's application, I granted the Attorney General's request for an adjournment and set down the matter for hearing on 26th July, 2016. I also ordered that the Attorney General shall file a response to the Respondent's application within 7 days.

## 2. Background.

2.1. In 2008, the Respondent sued the Attorney General in the High Court - Lilongwe District Registry- claiming compensation for alleged atrocities which he suffered at the hands of State agents between 1972 and 1994, and obtained a judgment in default of defence against the Attorney General on 19th August, 2008. The attempts by the Attorney General to set aside the judgment in default failed. The Attorney General filed a notice of appeal against the dismissal of the summons to set aside the default judgment, but the application was dismissed. Consequently, the matter proceeded to assessment of damages, and the Respondent was awarded damages in the sum of K 1,700,000.

2.2. The Respondent appealed against the assessment of damages, and Justice Muhara quashed the assessment and ordered that a fresh assessment be done, taking into account the submissions on behalf of the Respondent. In the subsequent assessment, on 6th May, 2015, the Respondent was awarded damages in the sum of K6,500,000 plus costs.

2.3. The Attorney General, being dissatisfied with the assessed damages, on 13th July, 2015, filed a notice of intention to appeal. However, almost one year after filing the notice of intention to appeal, the Attorney General has taken no action to ensure that the appeal is set down for trial or to prosecute the appeal.

3. Respondent's application to dismiss or strike out Appellant's appeal for failure to set it down and for want of prosecution

3.1. In an affidavit filed on 4th July, 2016, in support of his application, the Respondent faults the Attorney General for not "setting down" or prosecuting the appeal. The Respondent argues and submits that there has been inordinate and inexcusable delay, or lack of interest, on the part of the Attorney General in prosecuting the appeal. This inordinate and inexcusable delay or lack of interest, the Respondent claims, has highly prejudiced the Respondent who is being deprived of the fruits of his litigation. Consequently, the Respondent seeks to have the Attorney General's appeal dismissed or struck out on account of inordinate and inexcusable delay in prosecuting the appeal, or for want of prosecution.

3.2. In support of the application, the Respondent, in skeleton arguments filed on 4th July, 2016, and adopted during the hearing of the application, cited the case of *Escom v Emran Wilson Ngulinga* MSCA Civil Appeal 27 of 2011 and *Allen v Sir Alfred McAlpine & Sons [1968] 1 ALL ER 543*, as well as Order 59/5/23 of the RSC. The Respondent argues and submits that-

3.2.1. in *Escom v Emran Wilson Ngulinga* it was held that "for a court to dismiss a matter for want of prosecution there must be an inordinate and inexcusable delay which results in high degree of prejudice to the defendant";

3.2.2. in *Allen v Sir Alfred McAlpine & Sons* [1968] 1 ALL ER 543 it was held that "where there is delay of justice and in order to put right the wrong, the court will if need be strike out actions where the delay is excessive "; and

3.2.3. Order 59/5/23 of the RSC in effect provides that "where an appellant having filed and served a notice of appeal has failed to have the appeal set down, the respondent should apply by summons for the notice of appeal to be struck out for failure to set it down and for his costs".

#### 4. Appellant's response to Respondent's application to dismiss or strike out Appellant's appeal for failure to set it down and for want of prosecution

4.1. The Attorney General opposes the Respondent's application to dismiss or strike out his appeal. In an affidavit in opposition to the Respondent's application, filed on 19th July, 2016, the Attorney General claims to "have tried to obtain a date for the settlement of the record[s] with the Lilongwe High Court Registry, but it proved difficult to obtain one.". The Attorney General states that he "finally managed to obtain a date for the settlement of the record[s] in the matter herein on 11th July, 2016", and that the "settlement of the record in this matter will take place on 20th

July, 2016 before the Assistant Registrar of the High Court Lilongwe District Registry". For these reasons the Attorney General strongly opposes the Respondent's application, and reconfirms his desire to have the appeal heard.

4.2. In his skeleton arguments filed on 19th July, 2016, and adopted during the hearing of this application, the Attorney General asserts the right to be heard on the appeal; the Attorney General and cites section 41 (2) of the Constitution which provides that "every person shall have the right of access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues". The Attorney General seems to argue that his appeal should be determined on its merits, and should not be dismissed or struck out on account of failure to set it down, or for want of prosecution, as argued by the Respondent.

4.2.1. In relation to the determination of the appeal on its merits, the Attorney General cites the case of *Costellow v Somerset County Council* [1993] 1WLR 256 in which Lord Bingham at p.263 observed that-

"...A party should not in the ordinary way be denied an adjudication of his claim on merits because of procedural default, unless the default causes prejudice to the opponent for which an award for costs cannot not compensate..."

4.2.2. The Attorney General also cites the case of *Evans v Bart/am* (1937) 2 ALL ER 646 in which at p.650 Lord Atkins observed as follows-

"... The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure..."

4.3. The Attorney General further argues that his appeal is premised on several points of law with which he is dissatisfied and on which he wants to be heard ; that it is a cardinal legal principle that in all legal proceedings substantive justice must be done over undue technicality; that the alleged delay in processing the appeal was not caused by him; that it is the court below which decides when a particular matter should be heard; that the delay was, therefore, beyond his control; and that, in any event, the matter is currently being prosecuted and settlement of the record will take place on 20th July, 2016; and therefore, the subject matter of the application is no longer there.

4.4. It is worth noting that the Assistant Registrar of the High Court - Lilongwe District Registry apparently, on 20th July, 2016 refused to hear the Attorney General's application to settle the documents to be included the record on account of the proceedings in this Court.

4.5. In the affidavit in opposition to the Respondent's application to dismiss or strike out the appeal, filed on 19th July, 2016, the Attorney General also argues that he has not stayed the decision which is being appealed against. Furthermore, in the skeleton arguments filed on 19th July, 2016, and adopted at the hearing of this application, the Attorney General refers to section 23 of the Courts Act and argues and submits that

since no stay of the judgment was obtained, the Respondent has always had a remedy of execution of the judgment, which the Respondent has opted not to do. Consequently, the Attorney General argues and submits that it is not true that the Respondent is being denied the fruits of his litigation. This argument is, as I understand it, advanced to oppose the Respondent's application to dismiss or strike out the appeal for want of prosecution.

5. Respondent's reply to the Appellant's affidavit in opposition to the Respondent's application

5.1. On 26th July, 2016, before the commencement of the hearing of the Respondent's application, the Respondent filed an affidavit in reply to the Attorney General's affidavit in opposition to the Respondent's application to dismiss or strike out the appeal.

5.2. In the affidavit in reply, the Respondent asserts that the Attorney General's summons for the settlement of the record in the court below was only filed on 11th July, 2016, after the Attorney General had been served with the Respondent's application to dismiss the appeal for want of prosecution; that the deponent of the Attorney General's affidavit in opposition lacks sincerity and was misleading this Court in claiming that the Attorney General was not prosecuting the appeal because it had been difficult to secure a date for the settlement of the record ; and that since the filing of the notice of intention to appeal on 13th July, 2015, the Attorney General never did anything to set down the appeal, and was only spurred on to do so by the Respondent's application to dismiss or strike out the appeal for want of prosecution.

5.3. The Respondent thus reasserts that there has been inordinate and inexcusable delay on the part of the Attorney General in prosecuting the appeal; that the explanations given by the Attorney General as to the cause for the delay is punctuated with untruthfulness; and that this court should not, therefore, entertain the explanation for the delay.

5.4. In the reply to the Attorney General's affidavit in opposition, in relation to the stay of the judgment of the court below, the Respondent argues and submits that the fact that there is no stay of execution of the judgment being appealed against, does not bar the Respondent from pursuing the application to dismiss or strike out the appeal for want of prosecution , and that the issue of whether or not there is a stay of the judgment of the court below is not related to the Respondent's application.

## 6. Consideration of the Respondent's application to strike out Appellant's appeal for failure to set it down and for want of prosecution

6.1. The Respondent's application to strike out the Attorney General's appeal is based on two principal grounds, namely, failure to set down the appeal, and want of prosecution of the appeal.

### 6.2. Setting down of appeal

6.2.1. The Respondent contends that the Attorney General has "failed to set down the appeal" and cites Order 59/5/23 of the RSC as the basis of arguing that the Attorney General's appeal should be struck out. Order 59/5 of the RSC (199 1) in part provides as follows-

"5 (1) Within 7 days after the later of (1) the date on which service of the notice of appeal was effected, or (is) the date on which the judgment or order of the court below was sealed or otherwise perfected, the applicant must set down his appeal by lodging with the Registrar-

(a) a copy of the said judgment or order, and

(b) two copies of the notice of appeal, one of which shall be indorsed with the amount of the fee paid, and the other indorsed with a certificate of the date of service.

(2) Upon the said documents being so lodged, the Registrar shall cause the appeal to be entered in the records of the Court and assigned to the appropriate list of appeals..."

6.2.2. Order 59/5 of the RSC distinguishes between "setting down", which is the responsibility of an appellant, and the entry of the appeal in the Court of Appeal records and its assignment to the appropriate list of appeals, which is the responsibility of the Registrar. "Setting down" an appeal does not mean the same as

"setting down an action for trial "Columbus Dixon Ltd v Dingle Bells (Ormskirk) Ltd (1987) The Times June 10 (CA). Setting down an appeal means instituting the appeal by lodging with the civil appeals registry the fee and documents required by Order 59/5 of the RSC; it does not mean that the appeal is ready for hearing. In order to set down an appeal it is necessary to pay the fee and lodge a copy of the judgment or order of the court below and lodge two copies of the notice of appeal.

6.2.3. Order 59/5/23 of the RSC which has been cited on behalf of the Respondent should thus be considered in the context of Order 59/5/1. Order 59/5/23 of the RSC may be invoked only where an appellant has failed "to set down" an appeal as required by Order 59/5/ 1 of the RSC; and in that only circumstance may a respondent apply to strike out an appeal - Webb v Mansel 1877 2QB 117.

6.2.4. I note that the Attorney General's notice of intention to appeal was filed on 13th July 2015 in the High Court - Lilongwe District Registry, and was served on the Respondent. I also note that documents filed by the Attorney General are exempt from payment of filing fees. It, therefore, does not appear to me that there was any failure on the part of the Attorney General to "set down" the appeal within the meaning or in the context of Order 59/5/ 1 of the RSC to warrant the striking out of the appeal pursuant to Order 59/5/23 of the RSC. What is clear though is that the Attorney General did not, after "settling the appeal", initiate the process of settling the record of appeal. The Attorney General only acted in this regard on 11th July, 2016, after this application to strike out or dismiss his appeal had been filed by the Respondent.

### 6.3. Want of prosecution.

6.3.1. The importance of ensuring that proceedings in our courts are brought to trial expeditiously cannot be over emphasized. In *Fitzpatrick v Batger* [1967] 2 ALL ER 657 at p.659 Salmon LJ observed as follows-

"... It is of the greatest importance in the interests of justice that ... actions should be brought to trial with reasonable expedition. It is not only in the interests of defendants that this should be done, but it is perhaps even more in the interests of plaintiffs themselves.....".

6.3.2. In relation to the circumstances in which an action may be dismissed for want of prosecution, Salmon LJ in *Allen v Sir Alfred McAlpine & Sons* at p 561 observed as follows-

"... A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the Rules of the Supreme Court or (b) under the court's inherent jurisdiction. In my view, it matters not whether the application comes under limb (a) or (b); the same principles apply. They are as follows. In order for an application to succeed, the defendant must show:

(i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other side. What is or is not inordinate delay must depend on the facts of a particular case. These vary infinitely from case to case, but it

should not be difficult to recognize inordinate delay when it occurs.

(ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out the natural inference would be that it is inexcusable.

(iii) that the [defendant is] likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues..... In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a general rule, the longer the delay, the greater the likelihood of serious prejudice .....

If the defendant establishes the three factors to which I have referred, the court, in exercising its discretion, must take into consideration the position of the plaintiff himself and strike a balance .... "

6.3.3. In my considered view the principles enumerated by Salmon LJ in *Allen v Sir Alfred McAlpine & Sons* apply equally to a plaintiff who applies for the dismissal of a defendant's appeal for want of prosecution. Thus, in the present case, the Respondent must show that there has been inordinate delay on the part of the Attorney General in prosecuting his appeal; that the delay is inexcusable; and that the Respondent has been, or is likely to be, seriously prejudiced by the delay in prosecuting the appeal.

6.3.4. In this matter the Attorney General had the primary responsibility to initiate action, in accordance with O.III r 7 and r 9 of the Supreme Court of Appeal Rules, namely, the preparation of summons for the settlement of documents to be included in the record of appeal and the actual preparation of the record of appeal. The record

of appeal could not be processed, and the appeal could not be set down for hearing, until the Attorney General took action in accordance with O.III r 7 and r 9 of the Supreme Court of Appeal Rules.

6.4.1. The Attorney General concedes that there has been a delay in the prosecution of his appeal, but has sought to explain the delay on his part to take appropriate action by claiming to "have tried to obtain a date for the settlement of the record[s] with the Lilongwe High Court Registry, but it proved difficult to obtain one". However, the Attorney General only acted on 11th July 2016, after this application to strike out or dismiss his appeal had been filed by the Respondent, by filing in the court below summons for settlement of documents to be included in the settlement of the record. The Attorney General has not indicated when, or on how many previous occasions, before 11th July, 2016, he tried, but failed to get a date for the settlement of documents to be include in the record, nor has the Attorney General provided any documentary evidence of previous summons fi led in court below for the settlement of documents to be included in record of appeal.

6.4.2. In my view, the Attorney General has not provided a credible explanation for the delay on his part to initiate action, in accordance with O.III r 7 and r 9 of the Supreme Court of Appeal Rules. In the absence of a credible explanation, the logical inference can only be that the delay is inexcusable, and I so find. I am also of the firm view that, having regard to the fact that it took the Attorney General almost one year to prepare and file summons for the settlement of the record in court below, and further that the Attorney General's action in that regard was most probably prompted by the Respondent's application to dismiss or strike out the appeal, the delay was inordinate.

6.4.3. It is asserted, on behalf of the Respondent, that the inordinate and inexcusable delay by the Attorney General in prosecuting his appeal has seriously prejudiced the Respondent; that the action against the Attorney General was commenced in 2008 and that the Respondent, who is around 80 years old, is being deprived of the fruits of his litigation by the delay in the prosecution of the appeal.

6.4.4. The Attorney General disputes that the Respondent has been prejudiced by the delay in prosecuting the appeal, and further that the Respondent is being denied the fruits of his litigation. The Attorney General instead argues that the judgment award of the court below has not been stayed, and the Respondent is at liberty to enforce the judgment award. The position taken by the Attorney General in this regard, while technically correct, appears to me to be quite extraordinary- at least to the extent that the Attorney General inadvertently seems to be encouraging the Respondent to incur more legal expense in this matter, and to my mind, such position has little regard, if any, for the proper use of scarce public resources.

6.4.5. On the available evidence in this matter, including the fact that the action was commenced in 2008 for atrocities committed between 1972 and 1994, and the Respondent is an old man who has waited a long time to be compensated, I am of the firm view that the Respondent has been seriously prejudiced by the inordinate and inexcusable delay by the Attorney General in prosecuting his appeal.

## 6.5. Merits of the Appellant's appeal

6.5.1. As indicated earlier on in paragraph 4.3, during the hearing of this application, the Attorney General asserted the right to be heard on the appeal, and cited section 41 (2) of the Constitution. The Attorney General argued that his appeal should be determined on its merits, and should not be dismissed or struck out on account of failure to set it down, or for want of prosecution, as argued by the Respondent. In relation to the determination of the appeal on its merits, the Attorney General cited the case of *Castellow v Somerset County Council* and the case of *Evans v Bartlam*. The Attorney General further argued that his appeal is premised on several points of law with which he is dissatisfied and on which he wants to be heard; and that it is a cardinal legal principle that in all legal proceedings substantive justice must be done over undue technicality.

6.5.2. I have carefully considered the arguments and submissions of the Attorney General regarding the merits of his appeal; and I have reminded myself that my duty in these proceedings is not to consider and determine the merits of the Attorney General's appeal, but consider and determine whether the Respondent has made out a case for the dismissal or striking out of the Attorney General's appeal for want of prosecution.

6.5.3. In my considered view, the arguments and submissions of the Attorney General in relation to the right to heard, sound as they may appear, do not mitigate or outweigh the serious prejudice to the Respondent as a result of the inordinate and inexcusable delay on the part of the Attorney General in prosecuting his appeal. In any event, if the Attorney General was genuinely dissatisfied with the process of the determination of the judgment award of the court below, and wished to be heard on points of law in relation to the process of the determination of the judgment award, he

should have prosecuted his appeal expeditiously.

**7. Conclusion**

7.1. I, accordingly, grant the Respondent's application to dismiss or strike out the Attorney General's notice of intention to appeal filed on 13th July, 2015, for want of prosecution, and I so order.

7.2. The Attorney General is condemned with the costs of this application.

Pronounced in Chambers this 23rd day of August, 2016 at Blantyre.