

# Chinyama Taumbe Phiri v Martina Kachere

## Civil Cause No. 282 of 2016

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<b>Court:</b>	High Court of Malawi
<b>Registry:</b>	Civil Division
<b>Bench:</b>	Honourable Justice Kenyatta Nyirenda
<b>Cause Number:</b>	Civil Cause No. 282 of 2016
<b>Date of Judgment:</b>	May 14, 2018
<b>Bar:</b>	Messrs. Gondwe and Theu, Counsel for the Claimant Mr. Banda, Counsel for the Defendant

### Head Notes

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**Civil Procedure** - Dismissal for want of prosecution - Striking out for non-action - Court may strike out a proceeding where no step has been taken for 12 months.

**Civil Procedure** - Pleadings - Sworn statement - Falsehoods in sworn statement deprecated - Duty of candour to the court.

**Civil Procedure** - Legal Practitioners - Duty of candour - A legal practitioner must be truthful to the court and to their client.

**Civil Procedure** - Remedies - Legal Practitioner Liability - A claimant's remedy for a struck-out action lies against their legal practitioner.

### Summary

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The Claimant sought an order to dispense with mediation and for further directions in a claim for a declaration of a resulting trust over a property. The proceedings were initiated in July 2016 with a specially endorsed writ of summons and an ex-parte application for an interlocutory injunction. An injunction was granted, but the Claimant was required to file an inter-partes summons for its continuation within seven days. While the inter-partes summons was filed, no further steps were taken to prosecute the matter. The Claimant's subsequent application to dispense with mediation, filed nearly 20 months later, asserted that the parties had already exchanged and filed statements of their cases, a claim the Court found to be factually false.

The Court had to decide whether to grant the Claimant's application for directions and to dispense with mediation. The Court found that there had been no action in the case for over 12 months, which constituted an abuse of court process and was an intolerable delay. Relying on the principle that litigation must come to an end, the Court held that the prolonged and inexcusable delay risked a fair trial and prejudiced the Defendant. The Court also expressed strong disapproval of the falsehood contained in the Claimant's sworn statement, emphasising the legal practitioner's duty of candour to the court.

The Court dismissed the proceedings by striking them out under Order 12, r. 56 of the Courts (High Court) (Civil Procedure) Rules, and held that the Claimant's remedy for the loss of their case lay against their legal practitioner for professional negligence. The Court ordered the Registrar to take notice of the matter under Order 12, r. 58 of the CPR

## **Legislation Construed**

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## Subsidiary Legislation

Courts (High Court) (Civil Procedure) Rules (O. 10, r. 1; O. 12, r. 56; O. 12, r. 58; O. 13, r. 1(2)(d))

## Judgment

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### ORDER

There is before this Court an application in proceeding brought by the Claimant under Order 10, r.1 and Order 13, r.1(2)(d) of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as "CPR"] and the Court's inherent jurisdiction.

The application was filed with the Court on 1st June 2018 and the Claimant seeks the following:

"1. An order dispensing with mediation herein.

2. Directions for the further conduct of the matter as follows:-

a. That each party discloses documents and information in terms  
of 0.15 of the HCCP Rules, 2017 within 7 days.

b. That inspection of documents be within 7 days of disclosure.

c. That the parties exchange and file trial check lists within 7  
days of disclosure.

d. That a scheduling conference be held within 14 days of filing  
trial checklists on a date to be fixed by the Court.

TAKE NOTICE that the sworn statement of BRIGHT THEU of counsel shall be  
read in support of the application.

Any sworn statement in opposition must be filed and served at  
least.....days before the above-mentioned return date. "

The sworn statement referred to in the application is couched in the following terms:

"3. In the substantive matter, the Claimant essentially claims a transfer of property title number Plot No. 1 at Lunzu Market in Blantyre District on a resulting trust.

4. The substantive claims permit of two main possibilities only regarding ownership of the property: either the property belongs to the claimant on resulting trust or the defendant on claim this was a gift out and out

5. The parties exchanged and filed statement of their respective cases and the matter is supposed to come for mediation both in terms of the previous and current rules of practice and procedure.

6. The relationship between the claimant on one hand and the Defendant and her son who dealt with the property on the defendant's behalf before the injunction has gone so stale because of the latter's conduct. The Claimant is vexed and troubled by the conduct of the defendant's son acting on behalf of or on instructions from the defendant in trying to divest the claimant of ownership of the property and the only source of reasonable means for his and his family's living. The Claimant has no interest or strength to engage in any negotiations or mediation with the Defendant. With the question for determination being principally whether the property legally belongs to him or to the defendant by inherence, and considering the stale relationship between the parties, the claimant considers that any negotiations will only be a waste of time and serve any practical purpose. The claimant who is old and frail health is desirous of having the matter proceed to

trial and

concluded as soon as possible.

7. By reason of the matters stated at paragraphs 5 and 6 hereof, I verily believe that mediation would be only a waste of effort and resources including time.

8. I know that this statement will be used in support of the application in this proceeding and I acknowledge that I may be liable to substantial penalty for perjury if I knowingly state something false in it.

**WHEREFORE** I humbly pray that the Honourable Court do exercise the discretion to order that mediation be dispensed with herein and for the further directions as outlined in the application. ”- Emphasis by underlining supplied

The background to the application can be briefly stated. The proceedings herein were commenced on 19th July 2016 by a specially endorsed writ of summons. The Claimants claims, among other orders, a declaration that he is entitled to exclusive proprietary interest over Plot No.1 at Lunzu Market in the District of Blantyre and all the developments on it (property in dispute).

The Applicant also filed with the Court on the same day, that is, 19th July 2016, an ex-parte summons for an order of interlocutory injunction (a) restraining the Defendant by herself or whomsoever from disposing of the property in dispute in anyway whatsoever (b) restraining the Defendant by herself or whomsoever from dealing with

anyone concerning tenancy over the property in dispute without the involvement of the Claimant and (c) compelling the Defendant or whomsoever acts or may act on her behalf in whatever capacity to remit 100% of the rentals of the property in dispute or alternatively to instruct any sitting tenant for the property in writing to remit rentals to the plaintiff for his and family's upkeep and/or for him to deal with it as he deems fit.

The ex-parte summons came before Mbvundula J who granted an order of interlocutory injunction subject to the Plaintiff filing an inter-partes summons for continuation of the same within 7 days from 20th July 2016.

On 20 July 2016, the Claimant filed with the Court an inter-partes summons for continuation of the interlocutory injunction and hearing of the summons was scheduled for 29th July 2016.

Meanwhile, on 28 July 2016, M/s Banda & Associates gave notice to the effect that the firm had been appointed to act for the Defendant. M/s Banda & Associates proceeded to immediately file a Certificate of Non-Compliance to the effect that the Claimant had not taken out an inter-partes application for interlocutory injunction within 7 days as ordered by the Court.

On 29th July 2016, following agreement by Counsel Gondwe and Counsel Banda, the Court adjourned the hearing of the inter-partes summons for continuation of the interlocutory injunction to a date to be fixed.

On 13th April 2017, the Claimant filed with the Court a Notice of Adjournment in respect of the inter-partes hearing of the application for continuation of the interlocutory injunction.

This is the record of this case as gleaned from the Court record. What comes out clearly is that since the commencement of the action on 19th July 2016, neither the Claimant nor the Defendant has taken any step to prosecute the proceedings. It would be appear the Claimant was satisfied with the obtaining of the interlocutory injunction.

Order 12, r.56, of the Court (High Court) (Civil Procedure) Rules [Hereinafter referred to as "CPR"] comes into play where there is such non-action. The provision is couched in the following terms:

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

In the present proceedings, more than 20 months have elapsed without the Claimant taking steps to prosecute this case. This is clearly an abuse of court process. 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.



Allowing further prosecution of the action would be prejudicial not only to the interests of the Defendant but it would also be detrimental to good administration in general and to good administration of justice in particular: see R. v. Dairy Produce Quota for Tribunal for England and Wales, ex p. Caswell [1989] 1 W.L.R 1089. In short, the delay herein is intolerable. "They have lasted so long as to turn justice sour", to use the words of Lord Denning M.R. in Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 1 ALL ER 543. In the premises, I have no option but to strike out the proceedings herein. It is so ordered.

When a case is dismissed in such circumstances, the claimant's remedy lies against his or her legal practitioner. In the words of Lord Denning M.R. in Allen v. Sir Alfred McAlpine & Sons, supra, at p 547:

*"The principle on which we go is clear: when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away, leaving the plaintiff to his remedy to his own solicitor who has brought him to this plight. Whenever a solicitor, by his inexcusable delay, deprives a client of his cause of action, the client can claim damages against him. "* —  
Emphasis by underlining supplied

Before concluding, I wish to observe that the claim in paragraph 5 of the sworn statement that *"The parties exchanged and filed statement of their respective cases "* has no factual basis. In short, paragraph 5 of the sworn statement contains falsehood.

It might be that falsehood was being employed in a desperate attempt to salvage the Claimant's case. Such conduct, however, must be deprecated in the strongest terms. A legal practitioner has a duty to use only tactics that are legal, honest and respectful. This duty is often referred to as the duty of candour. In the apt observation by the learned authors (John H. Tinney and Robert A. Lockhart) of the publication "The Duty of Candor: Where were the Lawyers and Why Didn't They Come Forward?" at page 8:

*"An attorney owes his first duty to the court. He assumed his obligations towards it before he ever had a client. His oath requires him to be absolutely honest even though his client's interest may seem to require a contrary course. The [lawyer] cannot serve two masters and the one [the lawyer has] undertaken to serve primarily the court.*

*In fulfilling ethical duties, the lawyer has an ethical obligation to avoid misleading the court and to take steps to protect the court from misrepresentations by others, even if the misrepresentations would aid the lawyer's client. While some who criticize a lawyer's underhanded tactics may also protest when those same tactics are not used in their behalf the public's confidence in the legal system and its practitioners will be bolstered by observing the duty of candor. Strict compliance with this and other ethical obligations will allow one to achieve the lawyer's mission of zealous representation within the bounds of the law. " -*

Emphasis by underling supplied

To sum up on the issue of candour, legal practitioners have to be truthful to their clients. They cannot afford to be economical with the truth. In this regard, a legal

practitioner who has messed up conduct of a case must not conceal this fact from his or her client: see **Jones Lazaro Kanthomba v. Speedy's Limited, HC/PR Civil Cause 2854 of 2006** ("unreported").

In light of the foregoing and by reason thereof, the Registrar's attention is drawn to Order 12, r.58, of CPR.

Pronounced in Chambers this 14th day of May 2018 at Blantyre in the Republic of Malawi.