



THE MALAWI JUDICIARY  
**IN THE INDUSTRIAL RELATIONS COURT**  
PRINCIPAL REGISTRY  
**MATTER NO. IRC 142 OF 2022**

In the dispute between:

**MOSES MASACHE.....APPLICANT**

**-AND-**

**FDH MONEY BUREAU.....RESPONDENT**

|               |                          |                              |
|---------------|--------------------------|------------------------------|
| <b>CORAM:</b> | <b>TAMANDA C. NYIMBA</b> | : Acting Chairperson         |
|               | Zimba                    | : Counsel for the Applicant  |
|               | Emmanuel C. Banda        | : Counsel for the Respondent |
|               | Mike Chipembere          | : Court Clerk                |

## **RULING**

### **1 PRELIMINARIES**

- 1.1 Before this Court is the respondent's Notice of Motion, anchored on Rule 16(1) of the Industrial Relations Court (Procedure) Rules, through which the respondent seeks an order dismissing the present action for want of prosecution.
- 1.2 The motion is supported by an affidavit sworn by Kirby Chinsinsi Kasinja, a legal practitioner in the firm of Messrs. J.B. Suzi & Company, legal representatives for the respondent. The motion is opposed by the applicant, who deposed to an affidavit in opposition on his own behalf. Both parties subsequently filed written skeleton arguments and submissions in support of their respective positions.
- 1.3 At the hearing of the motion, the parties' sworn papers were formally adopted and Counsel presented oral submissions to expand upon their written arguments. During the proceedings, upon noting certain arguments in the applicant's papers, I specifically directed both parties to address whether the application was properly brought under Rule 16(1) of the IRC (Procedure) Rules. This directive was prompted by the applicant's contention that the respondent's motion ought to have

been brought pursuant to the rules of procedure applicable to the High Court, by virtue of Order 1 Rule 2 of the Subordinate Courts Rules.

## **2 THE FACTUAL MATRIX**

- 2.1 By way of an IRC Form 1 issued on 22 February 2022, the applicant commenced proceedings against the respondent claiming compensation for unfair dismissal. The statement of claim was prepared and filed by Messrs. H.S.K. Twea & Associates, whom the applicant had instructed as his legal practitioners.
- 2.2 On 14 March 2022, the respondent filed its Notice of Appointment of Legal Practitioners and a response to the statement of claim (IRC Form 2), having previously applied for and obtained leave to be represented by a legal practitioner on the same day. The notice of appointment and IRC Form 2 were duly served on the applicant's legal representatives on 17 March 2022. Following this service, the applicant took no further procedural steps to advance the prosecution of the suit. Consequently, the action remained entirely dormant for a period exceeding sixteen months.
- 2.3 In accounting for this prolonged period of inactivity, the applicant states that he had instructed Messrs. H.S.K. Twea & Associates through their Limbe branch and was advised by Counsel to await further communication regarding court hearing dates. The applicant deposes that upon visiting the Limbe office in August 2024, he discovered that it had been closed due to the illness of the managing practitioner, whose telephone numbers had also become unreachable.
- 2.4 In July 2025, the applicant traveled to Zomba to visit the firm's principal office only to find it similarly closed. Subsequently, he encountered a former process server of the firm who informed him that the firm's practice had been suspended owing to licensing issues with the Malawi Law Society. Upon inquiring about the status of his file, the process server directed him to this Court where the applicant discovered the respondent's pending motion to dismiss the action for want of prosecution.
- 2.5 The applicant maintains that the failure to prosecute the suit was neither deliberate nor of his own making; rather, it was entirely attributable to the default and unexpected closure of his former legal representatives' practice. He affirms that he

remains desirous of prosecuting his claim and has now secured alternative legal representation.

2.6 This concludes the factual background pertinent to the present application.

### 3 SUMMARY OF THE PARTIES' ARGUMENTS

3.1 Learned Counsel, Mr. Emmanuel Banda, appearing for the respondent, submitted that the motion is properly brought under Rule 16(1) of the IRC (Procedure) Rules which governs interlocutory and incidental applications not specifically provided for within the Rules. On the merits, Counsel contended that the applicant's failure to take any procedural step for over sixteen months constitutes an inordinate and inexcusable delay.

3.2 Relying on the classic principles enunciated in *Allen v Sir Alfred McAlpine & Sons Ltd*<sup>1</sup> and *Birkett v James*<sup>2</sup> as well as the local High Court decision in *Sabadia v Dowsett Engineering Ltd*<sup>3</sup>, Counsel argued that a delay of sixteen months in employment litigation is patently inordinate. Furthermore, Counsel submitted that default by a party's legal practitioner does not render the delay excusable as against the opposing party. In advancing this point, he relied on Lord Denning's dictum in *Allen*<sup>4</sup> that the aggrieved litigant's primary remedy lies against his own solicitor.

3.3 Finally, citing the cases of *Oscar Thomson v Karla Fernandes*<sup>5</sup>, *Alex Kachingwe v ESCOM*<sup>6</sup> and *Fitzpatrick v Batger & Co. Ltd*<sup>7</sup>, Counsel submitted that keeping the respondent under the threat of unresolved litigation for over a year causes inherent legal prejudice. Such a delay, he argued, offends the public policy principle that litigation must eventually come to an end.

3.4 Counsel Zimba, appearing on brief for Counsel Mphepo who had recently been retained by the applicant, first addressed the procedural aspect of the motion. He submitted that the respondent's application was brought under the wrong procedural rule. He argued that under section 110(2) of the Constitution of the Republic of Malawi, the Industrial Relations Court is a subordinate court.

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<sup>1</sup> [1968] 1 All ER 543.

<sup>2</sup> [1977] 2 All ER 801.

<sup>3</sup> 11 MLR 417

<sup>4</sup> n.1 above.

<sup>5</sup> Misc. Civil Cause No. 94 of 2005.

<sup>6</sup> Personal Injury Case No. 691 of 2014.

<sup>7</sup> [1967] 2 All ER 657.

Therefore, pursuant to Order 1 Rule 2 of the Subordinate Courts Rules, he contended that the respondent ought to have invoked Order 2 or Order 14 Rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017 with the necessary modifications, rather than relying on Rule 16(1) of the IRC (Procedure) Rules.

3.5 Addressing the substantive merits of the application, Mr. Zimba submitted that the delay was neither intentional nor contumelious but was rather caused entirely by the unforeseen closure of the applicant's former legal practitioners, Messrs. H.S.K. Twea & Associates, due to practitioner illness and licensing issues with the Malawi Law Society. Citing *Reserve Bank of Malawi v Finance Bank of Malawi Ltd & Attorney General*<sup>8</sup> and relying further on *Allen*<sup>9</sup>, Counsel argued that dismissing the suit would amount to a denial of justice, penalizing the applicant for a fault that lay entirely with his former legal practitioners. It was further asserted that the respondent has suffered no actual prejudice and a prayer was made that the motion be dismissed to allow the matter to proceed to trial.

3.6 I commend Counsel for both parties for their comprehensive and well-researched submissions. I assure them that I have meticulously evaluated all arguments canvassed before me. Accordingly, the absence of an express reference to any specific submission or authority in this ruling should by no means be construed as a failure by this Court to have considered it.

#### 4 ISSUES FOR DETERMINATION

4.1 Having carefully considered the motion, the supporting and opposing affidavits, and the written and oral submissions of Counsel, I have distilled the following issues for the Court's determination:

- (a) *Whether the respondent's motion is properly brought under Rule 16(1) of the IRC (Procedure) Rules or whether the respondent ought to have brought the motion pursuant to Order 1 Rule 2 of the Subordinate Courts Rules as read with the relevant provisions of the Courts (High Court) (Civil Procedure) Rules, 2017;*

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<sup>8</sup> Constitutional Cause No. 5 of 2010.

<sup>9</sup> n.1 above.

- (b) *Whether there has been an inordinate and inexcusable delay by the applicant in prosecuting this matter and whether such delay is prejudicial to the respondent and contrary to public policy; and*
- (c) *Whether the action herein ought to be wholly and permanently dismissed for want of prosecution.*

## 5 THE APPLICABLE LAW

5.1 Rule 16(1) of the IRC (Procedure) Rules governs interlocutory applications and procedural matters not explicitly provided for under the Labour Relations Act or the IRC (Procedure) Rules.

5.2 Order 1 Rule 2 of the Subordinate Courts Rules provides as follows:

*“In any matter of practice or procedure not provided for in these rules the court may apply any appropriate provision thereof by construing the same with such modification not affecting the substance as may be necessary or proper to adapt the same to the matter before it”.*

5.3 The legal principles governing the dismissal of an action for want of prosecution are firmly established in the landmark authorities of *Allen*<sup>10</sup> and *Birkett*<sup>11</sup>. Under this well-settled tripartite framework, a court may strike out an action for want of prosecution where it is satisfied that:

- (a) *There has been inordinate delay in prosecuting the action;*
- (b) *The inordinate delay is legally inexcusable; and*
- (c) *Such delay is likely to cause serious prejudice to the defendant or gives rise to a substantial risk that a fair trial of the issues is no longer possible.*

5.4 These principles have been consistently reaffirmed and applied in our jurisdiction in cases such as *Sabadia*<sup>12</sup>, *Flora Nyalo (Suing on her own behalf and as the*

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<sup>10</sup> n.1 above.

<sup>11</sup> n.2 above.

<sup>12</sup> n.3 above.

*administrator of the Estate of Felistas Nyalo) v. Elizabeth Piyesi*<sup>13</sup>, *Oscar Thomson*<sup>14</sup> and *Alex Kachingwe*<sup>15</sup>.

5.5 In the interests of brevity, I shall not enumerate the remainder of the applicable statutory and case law here. Instead, I undertake to cite and contextualize them where relevant in the “*Analysis and Disposal*” segment of this ruling.

## **6 ANALYSIS AND DISPOSAL**

6.1 This Court eschews the practice of placing parties in what it terms “gratuitous suspense” regarding its decisions. Consequently, I state from the outset that, for the reasons detailed below, the respondent’s motion must succeed.

*(1) Whether the respondent’s motion is properly brought under Rule 16(1) of the IRC (Procedure) Rules or whether the respondent ought to have brought the motion pursuant to Order 1 Rule 2 of the Subordinate Courts Rules as read with the relevant provisions of the Courts (High Court) (Civil Procedure) Rules, 2017;*

6.2 The applicant has raised what is, to all practical intents and purposes, a preliminary procedural objection. The contention is that because section 110(2) of the Constitution classifies the Industrial Relations Court as a subordinate court, the respondent was required to invoke Order 1 Rule 2 of the Subordinate Courts Rules to import Order 2 or Order 14 Rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017 rather than relying on Rule 16(1) of the IRC (Procedure) Rules.

6.3 Having carefully considered the statutory and constitutional scheme, I find the applicant’s proposition to be legally unmeritorious and misdirected. I agree entirely with the legal posture advanced by the respondent.

6.4 Section 110(2) of the Constitution provides that the Industrial Relations Court shall have “such composition and procedure as may be specified in an Act of Parliament.” Pursuant to this constitutional mandate, Parliament enacted the Labour Relations Act under which the IRC (Procedure) Rules were promulgated.

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<sup>13</sup> HC Civil Cause No. 1756 of 2009.

<sup>14</sup> n.5 above.

<sup>15</sup> n.6 above.

6.5 Rule 16(1) of the IRC (Procedure) Rules explicitly provides:

*“An interlocutory application or other application incidental to any proceedings pending before the Court in respect of which no procedure has been provided for by the Act or by these Rules shall be brought by a party on notice of motion which shall, as near as possible, be in the form set out in IRC Form 3.”*

6.6 In this Court’s considered view, Rule 16(1) is a mandatory statutory mechanism created specifically to address procedural lacunae in applications pending before this Court. Put differently, Rule 16(1) is a self-contained statutory gateway established exclusively for the Industrial Relations Court to handle interlocutory applications where no express procedure is otherwise articulated in the IRC Rules. Because an application to dismiss for want of prosecution is an interlocutory motion incidental to pending proceedings and because the IRC (Procedure) Rules contain no specialized, standalone rule titled “dismissal for want of prosecution,” Rule 16(1) provides the direct and primary procedural vehicle for bringing such a motion before this Court.

6.7 As was correctly noted in *Hera v Malawi Savings Bank Limited*<sup>16</sup>, affirming the sentiments of Dr. Kachale, J. in *Rev MacDonald Sembereka (CANON) v Network for Religious Leaders Living With HIV/AIDS Ltd*<sup>17</sup>, Rule 16 of the IRC (Procedure) Rules indicates clearly the expansive jurisdiction which the law and the rules have conferred on the IRC in handling labour disputes. It is beyond doubt, therefore, that compliance with Rule 16(1) is the essential procedural foundation through which this Court exercises its jurisdiction to entertain interlocutory applications addressing procedural gaps.

6.8 Furthermore, the applicant’s argument ignores the fundamental canon of statutory construction captured in the maxim *generalalia specialibus non derogant* – that specific provisions prevail over general ones. As affirmed by the High Court in *Carlsberg Malawi Limited v Mpira*<sup>18</sup> and *The State (on the application of Chikhulupiliro Zidana) v The President of the Republic of Malawi*<sup>19</sup>, where a

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<sup>16</sup> [2016] MWHC 584.

<sup>17</sup> Civil Cause NO. 19 Of 2016 (Lilongwe District Registry).

<sup>18</sup> Civil Appeal No. 8 of 2018.

<sup>19</sup> Judicial Review Case No. 33 of 2022.

specialized statute or rule governs a tribunal, its provisions take precedence over general procedural rules applicable across all subordinate courts.

- 6.9 Applying this principle, the IRC (Procedure) Rules constitute a specific procedural code for the Industrial Relations Court whereas the Subordinate Courts Rules represent a general procedural regime. The Subordinate Courts Rules do not apply automatically in the Industrial Relations Court merely because it is constitutionally categorized as a subordinate court. Rather, as demonstrated by Rule 27 of the IRC Rules (which expressly incorporates Order XXXI of the Subordinate Courts Rules for appeals), provisions of the Subordinate Courts Rules apply in this Court only where they are expressly incorporated by the IRC (Procedure) Rules.
- 6.10 There is no provision in the IRC (Procedure) Rules incorporating Order 1 Rule 2 of the Subordinate Courts Rules. Because Rule 16(1) of the IRC (Procedure) Rules directly and comprehensively addresses procedural lacunae by prescribing a Notice of Motion in IRC Form 3, there is clearly no jurisdictional justification for resorting to the Subordinate Courts Rules to import the Courts (High Court) (Civil Procedure) Rules, 2017. Neither a party nor this Court can circumvent the express statutory command of Rule 16(1).
- 6.11 I therefore hold that the respondent's application was properly, validly and exclusively brought under Rule 16(1) of the IRC (Procedure) Rules. The applicant's preliminary objection fails and the first issue is resolved in favour of the respondent.

*(2) Whether there has been an inordinate and inexcusable delay by the applicant in prosecuting this matter and whether such delay is prejudicial to the respondent and contrary to public policy;*

- 6.12 In resolving this issue, this Court must first evaluate whether the delay in prosecuting this action satisfies the twin criteria of being both inordinate and inexcusable.
- 6.13 On the question of whether the delay is inordinate, the guidance of the High Court in *Sabadia*<sup>20</sup> is highly instructive. It was observed therein that "inordinate" means

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<sup>20</sup> n.3 above.

“materially longer than the time usually regarded by the profession and courts as an acceptable period.” While what constitutes an inordinate delay depends on the unique circumstances of each case, it must be underscored that employment disputes, by their very nature and statutory design, demand expeditious resolution.

6.14 In the present matter, the record shows that following the service of the respondent’s response (IRC Form 2) on 17 March 2022, the applicant took no procedural step whatsoever for over sixteen months. In *Flora Nyalo*<sup>21</sup>, the High Court held that a period of inactivity lasting fourteen months after the close of pleadings was inordinate and justified striking out the suit. A total failure to take any step for over sixteen months in an industrial tribunal, where expeditious dispute settlement is one of the governing statutory ethos, is unquestionably inordinate. The delay far exceeds any acceptable standard of professional diligence.

6.15 The pivotal inquiry then becomes whether this inordinate delay is legally excusable. As Unyolo J. (as he then was) stated in *Sabadia*<sup>22</sup>, the question of whether a delay is excusable must be viewed objectively and primarily from the respondent’s perspective. The applicant’s sole explanation for the sixteen-month dormancy is that his former legal practitioners, Messrs. H.S.K. Twea & Associates, defaulted in their professional duties, closed their offices due to illness and licensing disputes with the Malawi Law Society and failed to communicate with him.

6.16 While this Court sympathizes with a litigant who experiences such profound difficulty with his chosen counsel, the law remains uncompromisingly clear on this point. Default or failure by a party’s own legal practitioner does not constitute a valid legal excuse as against the opposing party. This fundamental principle was authoritatively settled by Lord Denning, M.R., in the seminal case of *Allen*<sup>23</sup>, where his Lordship articulated:

*“The delay of justice is a denial of justice [....] To no one will we delay or deny the right to justice[...]. To put right this wrong, we will in this Court do all in our power to enforce expedition: and, if need be, we will strike out actions when there has been excessive delay. This is a stern measure. [...] The principle upon*

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<sup>21</sup> n.13 above.

<sup>22</sup> n.3 above.

<sup>23</sup> n.1 above.

*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 remedy 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;[...]*”

6.17 The applicant entrusted the conduct of his litigation to his appointed legal practitioners. A respondent who has dutifully complied with court processes cannot be held hostage indefinitely, nor subjected to perpetual prejudice, merely because the applicant’s chosen counsel encountered administrative or licensing tribulations. As the authorities establish, where prolonged delay is caused by the default of a legal practitioner, the court will not force the innocent respondent to bear the burden of that default; rather, the action must be dismissed leaving the applicant to seek his remedy against the legal practitioner who brought him to that plight<sup>24</sup>.

6.18 I next turn to whether the delay is prejudicial to the respondent and contrary to public policy.

6.19 Public policy strictly militates against allowing stale actions to linger indefinitely on the Court’s registers. In *Alex Kachingwe*<sup>25</sup>, Kenyatta Nyirenda J., emphasized:

*“Public policy requires that litigation must come to an end. There should be a point where matters should be closed. The delay herein 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.”*

6.20 Similarly, in *Fitzpatrick*<sup>26</sup>, Lord Denning M.R. famously declared that:

*“Public policy demands that the business of the courts should be conducted with expedition.”*

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<sup>24</sup> *Lamy v Malawi Distilleries Limited* (Civil Cause No. 385 of 1998).

<sup>25</sup> n.6 above.

<sup>26</sup> n.7 above.

6.21 The administration of justice hinges upon the prompt resolution of disputes. Allowing a case to remain completely stagnant for over sixteen months without valid justification offends the public interest and compromises the statutory mandate of this Court. Accordingly, I hold that the delay of over sixteen months is both inordinate and legally inexcusable as well as inherently prejudicial to the respondent and contrary to public policy.

*(3) Whether the action herein ought to be wholly and permanently dismissed for want of prosecution.*

6.22 Having determined that the motion is properly brought under Rule 16(1) of the IRC (Procedure) Rules, that the delay of sixteen months is inordinate and legally inexcusable and that such delay causes inherent prejudice to the respondent while violating public policy, it follows that all branches of the established legal test for striking out an action have been satisfied.

6.23 To allow this action to remain alive under these circumstances would be to condone an abuse of the court process and to undermine the overriding objective of expeditious labour justice alluded to earlier. Consequently, the action herein must be brought to a final and permanent conclusion. I so hold.

## **7 CONCLUSION**

7.1 In light of the factual matrix, the applicable legal principles and the preceding analysis, the respondent's motion succeeds. The applicant's action is hereby wholly and permanently dismissed for want of prosecution.

8 As this is a court of first instance, any party aggrieved by this ruling, which stands as a final determination of the matter in this Court, is at liberty to exercise their right of appeal to the High Court in accordance with the dictates and time limits prescribed by section 65(2) of the Labour Relations Act.

8.1 It is so ordered.

**Pronounced** this 25<sup>th</sup> September 2026 at IRC, **PRINCIPAL REGISTRY**



*Tamanda Chris Nyimba*  
**ACTING CHAIRPERSON**