



**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY**

**JUDICIAL REVIEW CAUSE NO. 56 OF 2011**

**THE STATE**

**AND**

**THE COMMISSIONER GENERAL**

**OF THE MALAWI REVENUE AUTHORITY ..... RESPONDENT**

***EX-PARTE:***

**EVELYTE CIVIL ENGINEERING ..... APPLICANT**

**CORAM: HON. JUSTICE R. MBVUNDULA**

Kita, Counsel for the Applicant

Mangwela, Counsel for the Respondent

Mpasu, Official Interpreter

**RULING**

***Scope of the within application***

The application before this court is brought by the respondent who seeks an order striking out the applicant's action for want of prosecution and discharging leave which was granted to the applicant to apply for judicial review.

***Facts***

The following facts are not in dispute. The applicant obtained the leave and an order of stay of the respondent's decision to seize the applicant's motor vehicle, registered as EVELYTE 1, for alleged fraudulent clearance thereof. The respondent was also

ordered to release the vehicle to the applicant. The order is dated 12<sup>th</sup> December 2011. Since the making of the order the applicant has not taken any further step in the action.

### ***The respondent's case***

It is the respondent's case that the neglect by the applicant to have the main matter prosecuted is causing unnecessary hardship on the part of the respondent as the respondent cannot collect the outstanding customs duty payable in respect of the vehicle, in view of the order aforesaid, and yet the applicant continues to enjoy use of the vehicle. The respondent opines that the applicant's main interest was to obtain temporary relief and maintain it as a final order and a means of avoiding paying customs duty in respect of the vehicle, and that it was not their intention to prosecute the judicial review.

It is the further position of the respondent that the inordinate delay herein cannot be compensated for as whilst the government is losing revenue the applicant is enjoying the fruits of the order of 2011.

### ***The applicant's case***

Unlike the respondent, the applicant filed neither an affidavit in opposition nor skeleton arguments, as would ordinarily be expected. In addressing the court counsel for the respondent initially sought an adjournment of the matter and an unless order, but the prayer was disallowed. The reasons for seeking the adjournment are the same as those advanced in respect of the substantive application herein. They are that counsel and his client find themselves in some predicament namely that the applicant's case file which is/was in the custody of Messrs Ralph and Arnold, owned by Mr Ralph Kasambara SC, who is now in custody, cannot be retrieved. The court is informed that the files which were being handled by the firm were placed in the custody of Mr Kasambara's brother and the applicant's file, specifically, has not been located, hence counsel Kita who appeared for the plaintiff has difficulty putting things together in order to prosecute the matter herein.

### ***The respondent's reply***

Counsel for the respondent countered the foregoing by pointing out that the events referred to as occasioning the alleged predicament occurred within the last nine months. Further, it was stated, the matter was at all material times, and in particular when the relevant period for prosecuting judicial review matters was running, being handled by Mr Kita himself who was then at Ralph and Arnold. It was submitted

therefore that the applicant and his counsel have no reason now to justify the delay as the relevant period expired more than four years ago. Mr Kita would not dispute these facts.

### ***The legal position***

#### *i) Regarding judicial review*

Under Order 53 rule 5(2) as read with rule 5(6), and Practice Note 53/14/5, of the Rules of the Supreme Court (RSC) an application for judicial review must be made by originating motion (or summons), and served together with the statement lodged with the application for leave, on all persons directly affected. The applicant must then the application to be entered for hearing, all within 14 days after the granting of leave.

#### *ii) Regarding inordinate and inexcusable delay*

A matter may be dismissed or struck out for want of prosecution if there has been inordinate or inexcusable delay in prosecuting it, on the part of the party concerned or his or her lawyers, and such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused prejudice to the other party or parties. See Practice Note 25/L/4 RSC. In *Mhango and others v University Council of Malawi* [1993] 16(2) MLR 605, a judicial review matter, it was held that a delay of four years in commencing judicial review proceedings was inordinate and unjustifiable and therefore the applicants' application would be, and was, dismissed. In *Mbewe v Agricultural Development and Marketing Corporation* [1993] 16(1) MLR 301 a delay of three months in bringing an application for enlargement of time, after the statutory period had expired, was held inordinate. It was further held that even where substantial and good causes are shown, an application may still be refused where delay is inordinate.

### ***Findings and decision***

1. The applicant ought to have instituted the judicial review pursuant to Order 53 rule 5 and served the material documents on all persons directly affected, and caused the application to be entered for hearing by 27<sup>th</sup> December 2011, i.e. within 14 days after the granting of leave. He did not do so and has not done so to-date.
2. The applicant has not advanced any substantial and good causes justifying the delay. As stated by counsel for the respondent and not disputed, the facts giving rise to the alleged predicament on the part of the applicant, only arose

within the past nine months. No reasons have been advanced for the applicant's failure to prosecute the judicial review during the previous five years or so. It is now six years since the judicial review should have been instituted after leave was granted.

3. This court accepts the respondent's submission and finds that the delay is causing prejudice to the respondent in that the customs duty which it will have collected but for the leave and stay granted by the court is held up with the applicant on account of the orders of the court in that connection.
4. The court therefore finds the delay herein to be both inordinate and inexcusable.

### ***Order***

On account of the applicant's inordinate and inexcusable delay in prosecuting the judicial review, this court orders that the applicant's action be, and is hereby, struck out for want of prosecution. The leave to apply for judicial review is discharged together with the interim reliefs granted therewith.

Made in chambers at Blantyre this 10<sup>th</sup> day of May 2017.

  
R Mvundula  
**JUDGE**