REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI PRINCIPAL REGISTRY

CIVIL DIVISION

CIVIL CAUSE No. 218 OF 2020

(BEFORE JUSTICE JEAN KAYIRA)

BETWEEN:

SWOOP SECURITY LIMITED ..... APPLICANT

AND

ISHMAEL LORGAT ..... RESPONDENT

CORAM: THE HONOURABLE JUSTICE JEAN KAYIRA

Counsel C. Chayekha of Counsel for the Applicant

Counsel P. Maliwa of Counsel for the Respondent

Christina Kazembe Court Clerk and Official Interpreter

RULING

Kayira J

BACKGROUND

This matter commenced in 2020 when the Claimant now the Respondent sought a number of remedies from the Court against the Defendant now the Applicant. The matter went before Honorable Justice N'riva in 2021 for mediation purposes. The parties failed to agree and the Mediator terminated the mediation. Thereafter, the matter was assigned to this Court for scheduling conference and trial. The record of the Court shows that there has not been any progress since the mediation was terminated. As such, the Defendant through Counsel filed the present application to dismiss the proceedings for want of prosecution. The application is supported by a sworn statement

of Counsel and skeleton arguments. The Claimant is opposing the application and he through Counsel filed sworn statement in opposition and skeleton arguments as well.

On the day of hearing, Counsel for the Applicant submitted that the application is made pursuant to Order 12 rule 54 of the Court (High Court) (Civil Procedure) Rules, 2017-CPR so that this Court should dismiss the matter for want of prosecution. Counsel adopted his Sworn Statement where it is shown that there is no step taken by the Respondent since the mediation terminated in 2021. Counsel submitted that the Claimant did not make efforts to follow the date for scheduling conference and that it has been over two years since mediated terminated and the case has not been set down for scheduling conference in readiness of trial. Counsel Chayekha argued that the Respondent has failed to prosecute the case in line with the CPR which provides that matters must be prosecuted expeditiously. The delay in prosecuting this matter has prejudiced the Applicant who has waited for a long time for completion of the case. It is Counsel's submission that the delay is unreasonable, inordinate and inexcusable. He therefore prayed that this Court should dismiss the case for want of prosecution.

In response, Counsel Maliwa adopted the filed skeleton arguments and sworn statement in opposition. Counsel noted that the basis of the present application is failure to have the case set down for the Scheduling Conference. This being the case, he infirmed the Court that he had two things to explain. Firstly, if one is to be clear, Order 14 Rule 2 of the CPR, states that the Judge has the obligation to set down the case for scheduling conference after mediation has been terminated. It is Counsel's submission that Order 14 Rule 3 of the CPR requires parties to file list of issues and notice of adjournment in order for the Court to assign a date for scheduling conference. Counsel submitted that such an obligation of assigning dates is not on the parties. As such, he submitted that the foundation of this application is legally wrong. Secondly, Counsel Maliwa argued that after the mediation was terminated the Claimant duly filed, the notice and checklist which is before this application. It his argument that after filing the first set of documents, they went missing from the Court file. This compelled him to file a second set which seems not to be on the file. He attached the said notices and checklist for perusal by the Court. As such, Counsel submitted that the argument that he failed to file the required documents is not correct. In terms of the present file, Counsel argued that it was before another Judge and was re-assigned to this Court after mediation was terminated.

It was his further argument that the Applicant is duty bound to demonstrate that the case cannot be set down for hearing which prejudices the other party. However, Counsel Maliwa submits that the Applicant's application has not met this requirement because if the Court sets down the case today, there will be a checklist from the Respondent. Therefore, on the part of prejudice, Counsel for the Respondent was of the firm view that there was none. As such, this Court should have this at the back of its mind when dealing with this application. Counsel

further submitted that even if the prejudice is there, it can be cured either by an order of costs or an unless order. Considering all the circumstances, Counsel stated that this Court will see that justice must weigh in their favor.

In his final address, Counsel Chayekha submitted that before filing this application, he checked the Court file and he was informed that there is none. Having received such feedback, Counsel then made the present application. It is at that moment that the Respondent through Counsel brought to his attention the fact that there was a notice of adjournment and check list in preparation for the scheduling conference. It is his argument that the CPR requires that parties should be proactive. In this case, the party that filed the notice for a scheduling conference should have liaised with the Court to get a date so that a case is prosecuted. This has not been done in the present. Counsel thus maintained his application that the case should be dismissed for want of prosecution because the Respondent who is the Claimant in this matter is not interested.

After hearing the application, this Court adjourned the ruling on the application to 25th July, 2024 @12 noon for a ruling and this is the said ruling.

REASONED ANALYSIS OF THE COURT

This Court took time to examine its record to fully appreciate the sequence of event. A thorough examination of the Court file shows that the last action on the file was the order of the Mediating Judge terminating mediation in this case. This order was made in 2021 which is almost three (3) years by now. The Applicant also used the said Court record in order to make the present application. It is for this reason that the Applicant submitted that the matter is dormant. Order 12 rule 54 of the CPR is the basis for the present application. The said order stated that a defendant in a proceeding may apply to the Court for an order dismissing the proceeding for want of prosecution where the claimant is required to take a step in the proceeding under these Rules or to comply with an order of the Court, not later than the end of the period specified under these Rules or the order and he does not do what is required before the end of the period. Order 14 rule 2 (1) of the CPR states that where a defendant files a defence in a proceeding, the Judge shall set a date for a scheduling conference and shall inform the parties the date set for the conference, unless a date for the hearing of an application in a case has previously been fixed, in which case the conference shall take place on that date. In the present case, after mediation was terminated, the Respondent was duty bound to file checklist and notice in order for the Applicant to file their checklist and for the Court to set down the matter for scheduling conference which would later lead to trial. Premised on the Court file, this step can be said to be pending. As such, just considering the Court record, one would be compelled to conclude that indeed the file has been dormant inordinately. This compelled this Court to also consider the submissions from the Respondent.

The sworn statement shows that the Respondent filed a notice of scheduling conference and trial checklist. Although these documents were not in the Court file at the time this application was made, this Court has no doubt in terms of the authenticity of the documents as well as the explanation offered under oath by Counsel. It is clear that the failure to progress is due to Court officials not properly handling the documents in the Registry. It is Counsel's submission that the first set of these documents went missing in the Registry. When he realized that this is what happened, he filed a second set. It is that set which has neither been processed at the Registry not been brought to the attention of this Court. This Court totally agreed with Counsel for the Applicant that the Respondent was duty bound to make all efforts both orally and in writing in order to have the scheduling conference. Surely, the record has no written reminder or follow-up from Counsel for the Respondent as to the progress of this matter. This means that they are actually conceding that they have not done much in terms of ensuring that the present matter is prosecuted with speed as is required in the CPR. This Court has been making orders for directions for matters that were due to scheduling conference years after the present matter. This means that by now a date of trial should have been assigned to this case and actually the trial should have been either at advanced stage or concluded. The totality of the events in this case means that the Respondent did not make much efforts in following up on the progress of the matter in Court. Since this Court acknowledges failure on the part of the court officials to diligently handle the present file, especially the failure to have a scheduling conference, it is only right and proper to conclude that the failure to make progress in this case cannot be wholly blamed on the Respondent.

Order 12 rule 54 (2) of the CPR provides that the Court may dismiss the proceeding or make any other order it considers appropriate. Having considered the sequence of events in the present matter, this Court is at pains to agree with the Applicant on dismissing the case for want of prosecution. As such, the parties are hereby directed to appear virtually through email for scheduling conference on **8th August, 2024@3pm.** The Respondent has to make a submission of the proposed directions through an email which will be copied to the Registrar and Clerk of this Court. The Applicant should thereafter respond to the same. Once that is done, this Court will issue directions the following day.

Costs for the present application are in the cause.

It is so ordered.

PRONOUNCED IN CHAMBERS ON 25th JULY, 2024 @12:00PM.

HONORABLE (MRS.) JEAN ROSEMARY KAYIRA

JUDGE