

Annie Nyirenda v Proto Feeds Commercial

Cause 385 of 2022

Court:	High Court of Malawi
Registry:	Commercial Division
Bench:	Honourable Justice Trouble Kalua
Cause Number:	Commercial Cause 385 of 2022
Date of Judgment:	February 06, 2025
Bar:	For the Claimant: B. Nkhunda and on brief of Counsel Phombeya For the Defendant: J. Kara and P. Kalulu

Head Notes

Civil Procedure - Practice Management - Counsel's Practising Licence - Legal Education and Legal Practitioners Act - Dismissal for want of prosecution where counsel failed to renew the licence

Civil Procedure - Adjournment - Counsel's unavailability - Adjournment refused where counsel failed to discharge duty to inform client in good time

Summary

The Claimant commenced proceedings against the Defendant to recover various sums, including loss of profit, expenses incurred, loan repayment, and other associated costs. Following a scheduling conference on 2nd December 2024, the matter was set for trial on 6th February 2025. On the eve of the trial, the Claimant's legal practitioners wrote to the Court seeking an adjournment on the grounds that their counsel, Ronald Henry Phombeya, had not renewed his practising licence. On the date set for trial, counsel Blessings Nkhunda appeared, holding a brief, but advised that he was not prepared to conduct the trial since he was not conversant with the matter.

The Court, considering the matter, emphasised that renewal of a practising licence is a statutory obligation under the Legal Education and Legal Practitioners Act and not an unforeseen event. The Court held that it was the duty of counsel to inform their client well in advance to enable the client to either appear in person or appoint alternative counsel, in compliance with section 31(5) of the Act. The Court found that counsel's last-minute notification was inadequate and that this failure of duty prejudiced the Claimant. Moreover, it was noted that the same excuse had been previously used to seek adjournment in February 2023, resulting in costs awarded against the Claimant.

In light of these factors, the Court refused the adjournment request, found that the Claimant could not prosecute the matter, and dismissed the Claimant's case for want of prosecution with costs to the Defendant.

Legislation Construed

Legal Education and Legal Practitioners Act (Cap. 3:04) – Sections 30(2) and (3), 31(5)

Judgment

1. The Claimant commenced the present proceedings against the Defendant, claiming the sum of K21,900,000.00 as loss of profit, the sum of K4,367,900.00 being expenses incurred, the sum of K4,818,269.04 being loan from NEEF, the sum of K200,000.00 being cost of buying chickens, interest on the above sums at 10% above the bank lending rate from the 21st January 2022 until date of full settlement and costs of the action. The Defendant denies being liable to the Claimant as claimed or at all.
2. The matter was set down for a scheduling conference on 2nd December 2024. At that hearing directions for the further conduct of the matter were agreed upon. A trial date was set. 6th February 2025. Two calendar months from the scheduling conference. A formal notice of hearing was issued by the Court on 4th December 2024. And we were on course to conduct the hearing of the matter as scheduled until the 5th February, right on the eve of trial, when a letter was delivered to the Court. It was from the Claimant's legal practitioners and it read:

Reference is made to the above matter.

We write to advise that our counsel Ronald Henry Phombeya who is seized of this matter shall not be able to attend Court on the 6th day of February, 2025 as he is yet to renew his practice licence. We therefore seek an adjournment.

Yours faithfully,

3. On 6th February 2025 when the case was called counsel Blessings Nkhunda appeared, apparently on brief from counsel Phombeya, the counsel on record for the Claimant. Counsel Nkhunda's instructions were to seek an adjournment on the basis that counsel on record was yet to renew his practicing licence. When asked why he wasn't instructed to conduct the matter himself, he advised the Court that he had just been briefed and had not had time to study the file. He would, therefore not be able to competently prosecute the matter. We took the liberty to enquire from the Claimant, who was available in Court, as to whether she was aware that her Counsel would not be attending Court. The Claimant confirmed that she went to her counsel's office this very morning on her way to Court where she was informed that counsel would not be coming to Court. We can only assume, in light of counsel Nkhunda's address, that she was probably told to just appear as the matter would be adjourned anyway. One thing we must mention, from the outset, is that the power to adjourn proceedings is with the Court and not the parties and up to this point, the trial had not been adjourned by the Court. It is a discretionary power of the Court which must always be exercised judiciously.

4. For a legal practitioner, renewal of a practicing licence is not a "sudden event" akin to some unforeseen natural disaster, unleashed without warning or mercy on some unsuspecting human kind by mother nature, no. Its occurrence is scripted in the law. In black and white. It really ought to take no lawyer by surprise, in all fairness. Every licence to practice expires on 31st January next following the date of its issue, and every legal practitioner desirous of practicing thereafter has to renew his licence. A

legal practitioner shall not be entitled to practice unless he has had issued to him a valid licence to practice. (see s30(2) and (3) of the Legal Education and Legal Practitioners Act, Cap 3:04 of the Laws of Malawi) [the LELPA]. The detailed and laborious process that is required to renew the practicing licence is also clearly spelt out in the law, including the performance by a legal practitioner of some specified amount of mandatory pro bono work within the relevant practice year, attainment of the minimum number of units for continuing legal education, payments to the Malawi Law Society of annual subscription fees and contribution to the Fidelity Fund as required by statute and the clearance of applicable taxes under the Taxation Act with the Malawi Revenue Authority. This is known to all legal practitioners from the date they are admitted to the bar. The process of licence renewal is an on-going annual process. It is never a one-day event. In the ordinary course of events, the taxes would have been incurred, accumulated and subsequently paid off long before. The pro bono work would have been collected from the Legal Aid Bureau or the Malawi Law Society and attended to long before. The units for continuing legal education would have been painstakingly collected and accumulated long before. 31st January is simply the cut-off point. Never the starting point.

5. It is important to note that at no point does Court business stop in order to allow legal practitioners time to renew their practicing licenses. The judicial calendar does not provide for a break for this purpose. Matters do not stop being set down or being attended to by the Court merely because they fall on 31st January or any day soon thereafter or simply because there might be expired practicing licences within the general membership at the bar. We note also, that whilst the legal practitioner is busy renewing his practicing licence, the litigant does not lose his right to appear on his own behalf before any Court in proceedings to which he is a party. (s31(5) of the LELPA).

6. So, in the unfortunate event that counsel's licence is not renewed in time despite the fact that the timelines will have been known to counsel long before the expiry date, what would counsel's obligations be? Well, for starters and perhaps most importantly in our view, is the obligation on counsel to inform the client of this fact. In good time too. So that the client is able to make a decision whether to proceed with the matter in person or to seek help elsewhere. Imbedded in there is the duty to help the client so that the client is not prejudiced. To help the client make the best choice in the circumstances. For, how can a litigant exercise his or her right under s31(5) of the LELPA or indeed the right to appoint another, properly licenced counsel, in place of the original counsel unless he/she has been informed, by the original counsel, that his original counsel does not possess a valid practicing licence, in time. In our view, the duty to inform the client and to help him/her find alternative legal representation falls squarely on the original unlicensed counsel. We believe, the alternative obligation on counsel would be the duty to help the client appoint another competent barrister to take care of the client's interest in his stead. Again, that can only be done without prejudicing the client's rights in the matter if it is done in good time. In our view, a letter, in the terms reproduced above, delivered to the Court, on the eve of the trial falls short of discharging the aforementioned duties. We find it grossly inadequate a basis for seeking an adjournment. It portrays a worrying lack of seriousness in the conduct of Court business on the part of counsel. And similarly, informing the client on the morning of the trial that counsel will not be attending Court is a total failure of duty on the part of counsel to protect the client's interest. We refuse exercise our discretion and entertain the prayer for an adjournment brought to our attention in that manner.

7. Did counsel inform the client in good time that he would not be attending Court today so that the client can find alternative counsel? No. Did the client, with counsel advise and help, appoint another legal practitioner to prosecute the matter in his stead? Clearly not, as confirmed by counsel Nkhunda, whose brief it was merely to adjourn the matter. The further question exercising our mind is: would an unlicensed practitioner be capable of giving another a brief, strictly speaking, in the first place? Probably not. The actual position would be for the client to appoint another lawyer to appear on their behalf in Court. And, as already pointed out, all this can happen if the client is informed in time, and not on the day of the trial. In our view, the duties we would have expected counsel to discharge in the circumstances have not been performed. Whatever the case is, counsel will have to do some explaining to the client. The matter proceeds in counsel's absence. And since the counsel appearing on brief is unable to prosecute the matter himself, the case has to fail for want of prosecution.

8. On a related point, reading through the Court file herein, we note that this is not the first time that counsel has used this excuse in order to seek an adjournment of the matter. On 23rd February 2023, on the scheduled hearing of the Claimant's own application for summary judgment, counsel Phombeya appearing for the Claimant, informed counsel for the Defendant at 9:38am of that morning that he had not yet renewed his practicing licence and therefore he would not be able to prosecute the matter. The application was coming for hearing at 10:00am. On that day the Court adjourned the matter but condemned the Claimant to costs occasioned by the adjournment, to be paid before the next date of hearing. Whether these costs were actually paid is a different enquiry altogether. You would have thought counsel would have learnt his lesson. Well, apparently, not. Not even an adverse order as to costs would drive the message home.

10. We have no choice, in the circumstances, but to dismiss the Claimant's case for want of prosecution with costs to the Defendant. We so order.

Pronounced at Lilongwe in open Court this 6th day of February 2025.