



**THE REPUBLIC OF MALAWI**  
**IN THE HIGH COURT OF MALAWI**  
**LILONGWE DISTRICT REGISTRY (CIVIL REGISTRY)**  
**JUDICIAL REVIEW NO.33 OF 2020**

BETWEEN

THE STATE (On the Application of the Human Rights  
 Defenders Coalition Limited.....1<sup>st</sup> Applicant  
 Association of Magistrates in Malawi.....2<sup>nd</sup> Applicant

AND

THE PRESIDENT OF THE REPUBLIC OF MALAWI  
 Professor Arthur Mutharika (personally).....1<sup>st</sup> Respondent  
 SECRETARY TO THE CABINET  
 (Justice Lloyd Muhara- Personally).....2<sup>nd</sup> Respondent

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<b>CORAM:</b>	<i>Madalitso Khoswe Chimwaza</i>	<b>ASSISTANT REGISTRAR</b>
	C. Mhango	Counsel for 2 <sup>nd</sup> Respondent
	M. Banda	Counsel for 1 <sup>st</sup> Respondent
	K.B. Soko	Counsel for 1 <sup>st</sup> and 2 <sup>nd</sup> Applicant
	B. Theu	Counsel for 1 <sup>st</sup> and 2 <sup>nd</sup> Applicant
	C. Zude	Court Clerk

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**RULING**

This matter was set down to assess costs filed by the 1<sup>st</sup> and 2<sup>nd</sup> applicant on 9<sup>th</sup> September, 2021 following an order awarding costs made in the judgement of the Court on 22<sup>nd</sup> March, 2021 the court having dismissed the respondent’s application for stay of execution of an assessment order of costs.

The 2<sup>nd</sup> Respondent filed an application to set aside and dismiss the notice for assessment of costs on the grounds that it is filed out of time, pursuant to Order 10 Rule 1 as read with Order 31 Rule 12 of the Court (High Court) Civil Procedure Rules, 2017.

For orderly conduct of proceedings the court directed that the application to set aside notice of assessment of costs should be heard first.

#### **Brief Facts:**

The gist of the application is that on or about the 22<sup>nd</sup> day of March, 2021 the Court awarded costs to the 1<sup>st</sup> and 2<sup>nd</sup> applicant on an application brought by the Respondent for an order of stay of execution of the order for costs dated 20<sup>th</sup> November, 2020 pending the hearing of a review. The Court denied to grant the stay of execution and the application was dismissed with costs awarded to the applicant on 22<sup>nd</sup> March 2021.

Consequently the 1<sup>st</sup> and 2<sup>nd</sup> applicant proceeded to execute the order of assessment of costs and final payment was made on 5<sup>th</sup> May 2021 as evidenced by exhibit 'CCM'. After the order of 22<sup>nd</sup> March, 2021 the respondents application for review was heard and judgment was delivered on 2<sup>nd</sup> September, 2021 where it was also dismissed with costs that were awarded summarily by the Court.

After the conclusion of these review proceedings on 2<sup>nd</sup> September, 2021, then on 9<sup>th</sup> September, that was when the 1<sup>st</sup> and 2<sup>nd</sup> applicant filed for assessment of costs that were awarded on 22<sup>nd</sup> March 2021. The 2<sup>nd</sup> Respondents claim that the notice for assessment of costs is filed out of time as it is done five months after the award was made. The notice is time barred as per Order 31 Rule 12 which gives a minimum period of three within which a successful party is to file for assessment of costs.

The 1<sup>st</sup> and 2<sup>nd</sup> applicant have opposed the application citing that it has not been premised on the correct provisions of the law in that Order 10 Rule 1 and Order 31 Rule 12 of the CPR which has been cited does not provide for setting aside of a notice for assessment of costs. They further argued that the notice for assessment of costs was brought within the timeframe because after the Court order that awarded them costs on 22<sup>nd</sup> March, there were proceedings for Review continuing before Court which only came to an end on 2<sup>nd</sup> September, 2021. Therefore the bill of costs was filed brought at the conclusion of the whole proceedings in September, therefore three months had not yet elapsed. The 1<sup>st</sup> and 2<sup>nd</sup> applicants persuaded the court to dismiss the respondents application basing on the two grounds and prayed to be awarded costs amounting to K5,000,000.00.

#### **Issue for Determination**

Whether the proceedings should be dismissed for being filed using the wrong provision of the rules?

Whether the notice for assessment is time barred as per Order 31 R.12 of the CPR

#### **THE LAW**

Whether the proceedings should be dismissed for being commenced without citing the correct rules.

Under Order 2 rule 1 of the CPR the rules are clear that failure to comply with rules or a direction of the Court shall be an irregularity.

Order 2 rule 2 further states the effect of the irregularity in the following terms:

An irregularity in a proceeding, or a document, or a step taken or order made in a proceeding shall not render a proceeding, document, or step taken or order a nullity.

The rules have provided the Court with options of remedies in the event of an irregularity which does not go to the root of an action.

The irregularity in the present case is with regard to the provision cited for the application to set aside the notice for assessment of costs. The reading of Order 10 indicates that it is meant to facilitate interlocutory applications which the present proceeding qualifies as one. This is a proceeding within proceedings and it qualifies to be brought under Order 10 Rule 1 of the Rules. The fact that Order 31 Rule does not provide for setting aside of a notice for assessment of costs does not mean the respondent should be left without a remedy. The irregularity as pointed out is curable and therefore does not render the proceeding a nullity.

The issue of time limitation is clear under Order 31 Rule 12 which states that :

12(1) A bill of costs *shall* be filed with the Court for assessment within 3 months from the date of the costs order and the bill shall be filed at the conclusion of the whole proceeding unless the Court orders otherwise.

(2) A party may apply to the Court to file a bill of costs before the conclusion of a proceeding or for an extension of time for filing of the bill under sub rule (1)

Looking at the two provisions it is clear that the Rules envisaged a scenario where there would be multiple proceedings. The rules envisaged a scenario where one proceeding would be concluded while another is continuing. The rules made a way for such things to happen while at the same time the filing of the bill being done within the three months timeframe.

Order 31 rule 12 (2) of the CPR is a clear indication that the rules envisaged multiple proceedings and that a party should not wait up to the conclusion of the matter before filing a bill of costs once an order is made. With due respect to Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> applicant I wish to disagree with the reasoning that they did not want to have multiple proceedings on assessment of costs.

The rules are even more permissive in providing that a party may apply for extension of time to file a bill of costs under sub rule (1). This Court finds the applicants argument without merit as the rules have provided avenues to remedy a situation where there are multiple proceedings by allowing a party to apply for assessment of costs before the conclusion of the proceedings and even where the time frame has expired to apply for extension. None of these avenues were utilized by the applicants and this Court does not sympathise with that failure.

In the case of *Goodrich Merchandise Ltd vs Phazi Industries Ltd* Commercial case no 153 of 2014 the High Court dismissed the action on the grounds that it was commenced out of time. The Court said as follows:

'Limitation periods exist to prevent oppression, to protect individuals from having to defend themselves against claims when the basic facts have become obscured with the passage of time. They are founded on grounds of public policy and give effect to two maxims '*ripublicae ut sit finis litium*'- the interest of the state requires that there should be a limit to litigation; and secondly *vigilantibus non dormientibus jura subveniunt*- the law aids the vigilant and not those who slumber. see the case of *Stambolie vs Commissioner of Police* 1989 (3) ZLR 287 referred to in Ziberu Banda, R (ed) *Sources and Institutions of Labour Law in Malawi* (Montfort Press, Lilongwe, 2008 at page 41).'

Much as the above cited case was referring to section 4 of the Limitations Act, the principle is equally applicable in the present case where the law is limiting the timeframe within which a party should be stretched to attend to matter outside the time frame. The applicants were not vigilant in pursuing their matter on costs. Costs could have been assessed without waiting for the conclusion of the review proceedings on 2<sup>nd</sup> September, 2021. Even after 2<sup>nd</sup> September, the applicants should have applied for permission to extend time for filing the bill of costs citing the fact that proceedings were continuing as the basis for the delay. That they did not do. As already stated above the law will not aid those who slumber on their rights, and it is in the interest of public policy that litigation should come to an end.

It is the considered view of this court that the notice for assessment of costs be dismissed and it is dismissed for being filed out of time and without obtaining permission for extension of time.

Looking at the history of the matter this court exercises its discretion not to award costs to either party.

It is ordered.

Either party aggrieved by this ruling has the right to appeal to the Supreme Court of Appeal.

Made in Chambers this 8<sup>th</sup> day of October, 2021 at High Court Lilongwe Registry.



Madalitso Khoswe Chimwaza

ASSISTANT REGISTRAR