JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL APPEAL NO. 8 OF 2015

BETWEEN:

CELCOM LIMITED ..... **APPELLANT**

-VS-

DAVIE HUWA AND OTHERS ..... **RESPONDENTS**

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Hara, of Counsel, for the Appellant
Mr. Kalua, of Counsel, for the Respondents Mr. 0.
Chitatu, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J

Introduction and Background

This is an appeal by the Appellant against an order of the Industrial Relations Court (lower court) dated 20th April 2015.

The background is of the simplest. The Respondents commenced an action in the lower court claiming withheld salaries and other benefits. The Appellant contested the action and filed a defence. The first hearing of the case took place on 11th November 2013 and both parties attended the hearing. On the next set hearing date of 15th September 2014, the lower court proceeded to hear the case in the absence of Appellant and its counsel.

The lower court delivered its judgment on 28th October 2014 wherein it ordered the Appellant to pay the Respondents notice pay, withheld salaries and other benefits such as gratuity, cell phone allowance, fuel allowance and school fees. The

Appellant then made an application in the lower court on *2ih* January 2016 to have the matter reviewed or re-heard. Having considered the application, the lower court made the following order:

> *"Having heard the parties, it is ordered as follows.*

HIGH COURT LIBRARY

This court will not be able to do a review because there is a need to have further information for that, the option for the respondent would be to appeal.

On the second point of re-hearing the applicants are of the view that a rehearing is not essential. The respondent states that while the people were not paid it is a matter of what they were entitled to and what they ought to be paid and this calls for evidence to be heard. The court is aware that on the date of hearing of this matter last time, one of the Court case had overrun the allocated time. For this reason, it is fair for both parties if the matter is reheard and a new judgment is entered.

The court orders a rehearing of the matter.

The stay of execution order falls off as there is nothing to execute

The matter is adjourned to 9th and 10th February for re-hearing. "

At the scheduled date for re-hearing, that is, 9th February 2015, the Appellant sought an adjournment on the ground that it had changed lawyers from M/s Kaphale Lawyers to M/s Ritz Attorneys at Law. The adjournment was granted and the hearing was set for 16th February 2015 but neither the Appellant nor its counsel appeared on the set hearing date. The lower court was not amused at this development, as evidenced by the tone of its order dated 16th February 2015. As the contents of that order are of relevance to this appeal, extensive quotations from the formal order might not be out of place:

"The respondent is not being serious in prosecuting this matter and seems to be acting in bad faith.

After not appearing in court for hearing and advancing no excuse for such absences, the court heard the applicant and proceeded to pass judgment, which judgment was delivered on 28th October 2014...

After all the parties discussed and agreed on a date of hearing, which is today, 16 February 2015, the respondent and his counsel have not availed themselves for this hearing. This is indeed annoying and the respondent is acting in bad faith to delay this matter.

To this end, it is ordered that the stay order of 14th January 2014 BE and IS vacated with immediate effect.

It is further ordered that the judgment of 28th October 2014 BE and JS effected forthwith and it has to be executed within 7 days of this order. Failure to do so will lead to a warrant of execution being issued against the respondent.

The respondent still has a right of appeal against the judgment of this court as delivered on 28th October 2014. "

Before the Respondents could execute, the Appellant made an application to stay the lower court's decision of 16th February, 2015. The lower court delivered its ruling on 20th April, 2015 and denied the application for stay. The Appellant then sought from the High Court an order of stay of execution of the judgment of the lower court and the same was granted by this Court on 4th May 2015.

Judgment of the Lower Court

In order to better appreciate the appeal, it may be necessary to set out in full the order being appealed against. The order is worded as follows:

"Introduction

The respondent and its counsel have applied for a stay of execution of judgment following the order of this court which was made on 16th February 2015 and swore an affidavit in support. The respondent also filed skeleton arguments. Counsel urges that he was unable to attend court as he was otherwise occupied with a non-scheduled matter at the High Court. Counsel states that he gave deference to the High Court due to its higher jurisdiction.

As stated in the order made by this court on 16th February 2015, I reiterate that the respondent and his counsel are not serious in prosecuting this matter and are acting in bad faith. In one breath, counsel tells the court that the matter in the High Court was not planned, meaning that they availed themselves to the High our solely because of the 'superiority ' of the High Court in Jurisdiction. Looking at the attachments to the affidavit sworn by Counsel Lusungu Gondwe, I note that there is a notice of hearing for the matter in the High Court which was issued on 4th November 2014. This was a very good planned hearing, not a chance hearing. It goes to show that counsel was well aware of what was happening and disrespected this court by not turning up or delegating the matter to another lawyer.

Furthermore, before the date of hearing (16th February 2015) was set, the court and both parties had a discussion on dates for hearing and both parties agreed to convene and hear the matter on 16th February 2015. The hearing of matters cannot be held ransom by the fact that counsel is unable to plan for his calendar and dates for court hearings properly. I am not satisfied by counsel for the respondent's explanation of their failure to attend court, nor I am I impressed by their conduct. I do agree with the applicant's

Counsel that the respondent's counsel is from a firm with many lawyers and I do not see why the firm could not have delegated the matter to another lawyer. If there was need to apply for adjournment so that the lawyer familiarize themselves with the case, such application would have been made before the court. Respect for court processes would have led counsel to plan his diary properly and avail himself to court accordingly.

Having heard both parties, it is the decision of this court that the respondent's application is denied. The court reiterates the order made on 16th February 2015; that

1. There will be NO stay order issued by this court pending a rehearing of the matter.

2. The judgment of this court made on 28th October 2014 BE and IS effected forthwith and it has to be executed within 7 days of this ruling. Failure to do so will lead to a warrant or execution being issued against the respondent.

3. The respondent still has a right to appeal against the judgment of this court which was made and delivered on 28th October 2014. "

Grounds of Appeal

The Appellant is dissatisfied with the whole judgment of the lower court and it has put forward the following four grounds of appeal:

"3.1 The lower court erred in law and in principle by proceeding to re-instate the judgment of 28th October, 2014 not being a judgment on the merits as the appellant was not heard (audi alteram partem).

3.2 The lower court erred in law by breaching fair procedure, substantive justice and equity by refusing to rescind its decision of 161h February, 2015 on good cause being shown that the appellant's counsel who was personally seized of the matter was also scheduled to appear in the High Court at the same time and was not heard.

3.3 The decision of the Industrial Relations Court was made in complete disregard of authorities as the court was bound by the doctrine of stare decisis inter alia PostScript Trading Company V The Trustees of the A frica Business Association (1991/ 14 MLR 413 (HC)

3.4 The lower court erred in law and in fact in exercising its discretion without working out the prejudice that would be suffered by the appellant condemned unheard. "

Submissions by the Appellant

The main thrust of the submissions by Counsel Hara is to the effect that as Counsel Gondwe happened to have been seized of another matter before the High Court that had not been planned, the lower court should not have refused to rescind its decision

of 16th February, 2015. The relevant part of the submissions is quoted hereunder as follows:

> *"5.1 It is a principle of practice that in the hierarchy of courts, where two matters are coming up at the same time, i.e. High Court and a Subordinate Court, Counsel must first give due reverence before the High Court. See Post Script Trading Co v The Trustees of the African Businessmen's Association [1991] 14 MLR 413 (HC). The decision of the Industrial Relations Court is violative of the principle of stare decisis in refusing to follow a decision of the Higher Court.*
>
> *5.2 All that the Appellant required was to be heard on assessment of salaries and contractual benefits.*
>
> *5.3 The principle of* audi alteram partem *(no one can be condemned unheard) requires one to be given a chance to present his/her side of the story before a decision is reached against him/her*
>
> *5.4 The Industrial Relations Court reinstated its ruling of 28th October, 2015 being a ruling that the Court itself rescinded/ discharged/aborted on the ground that the Appellant was not heard on the awarding of salaries and contractual benefits. The said ruling awarded the sum of MK20, 154, 660. 89 to the 1st Respondent (Davie Huwa); the sum of MK8, 975, 769. 85 to the 2nd Respondent (Malcom Machinjiri) and the sum of MK18, 331, 949. 74 to the 3rd Respondent (Edward Sauti Phiri). There was scheduled a rehearing for the same.*
>
> *5.5 The Appellant believes that the Court wrongfully awarded the Respondents three months' salary as payment in lieu of notice although the Appellant resigned and gave notice.*
>
> *5.6 The Appellant also believes that the Court wrongfully awarded the Ft Respondent six (6) months' salary when the]st Respondent stated in both his statement of Claim and witness statement that he was not paid salaries for three (3) months. "*

Counsel Hara placed reliance on the case of Post Script Trading Co v. The Trustees of the Africa n Businessmen's Association [1991] 14 MLR 413 (HC) for his proposition that it was a matter of course that when counsel is obliged to appear in a superior court at the same time as a scheduled appearance in an inferior court, the latter proceedings should be adjourned.

Submissions by the Respondent

The hallmarks of the case of the Respondent are that (a) the lower court was justified in proceeding to hear the matter in the absence of the Appellant's Counsel, (b) the Appellant's appeal is misplaced and misleading, (c) the lower court's decision denying the appellant a stay of execution was correct and proper.

The Respondent is also of the view that the Appellant is bent on attacking the order of 16th February, 2015 through the backdoor. The relevant parts of the submissions read as follows:

> *"7.1.1 The appellant has appealed against a refusal for a stay of execution*
>
> *7.1.2 The grounds of appeal filed before the court give the impression that the order of 20th April, 2015 was an appeal or an application to review the order of 16th February, 2015. The order of 20th April, 2015 was a decision of an application for a stay of execution.*
>
> *7.1.3 In so far as the appellant leads the court to believe that it is appealing against the order of 20th April, 2015 when it is in fact practically appealing against the order of 16th February, 2015 the same is an abuse of this court's process, it is vexatious to the respondents as they have to keep attending interlocutory applications and appeals that lack merit, and it is frivolous."*

With respect to the case of **Post Script Trading Co v. The Trustees of the African Businessmen's Association,** supra, Counsel Kalua submitted that the same was distinguishable. The point was put thus:

> *"Suffice to submit that this was a decision of the Registrar of the High Court and thus not binding this Court in any way, the facts that transpired in the said matter are peculiarly unique. Counsel had talked before the hearing of the summons and Counsel who had proceeded in the absence of the other had been informed of the other matter in the more superior court being handled by his colleague. This was in fact what led the learned Registrar in that case to set aside the said order that had been made.* "

Analysis

I have carefully considered the submissions made by both counsel. The issue of how a case should be disposed of where a party fails to attend a hearing is a longstanding one. There is pressure on courts to decide cases as quickly as possible and this tends to discourage courts from granting postponements and adjournments anyhow.

It is commonplace that the "overiding objective" of rules governing practice and procedure in any court is to enable the court to deal with cases fairly and justly. This includes ensuring, so far as practicable, that the parties are able to participate fully in the proceedings and avoiding delay, so far as compatible with proper consideration of the issues. In this regard, rule 25 (1) (h) of the Industrial Relations Court (Procedure) Rules is relevant and it provides as follows:

> *"Without prejudice to the decision-making power of the Court under section 67, the Court may on application or of its own motion at any time-*
>
> *h) Rescind on good cause being shown, any order made by it in the absence of a party,"*

There is need for courts to proactively consider whether it is the interests of justice to decide a case in the absence of a defendant. Where a defendant does not attend a hearing of which he has notice, critical question is whether the defendant has deliberately and consciously chosen to absent himself from the court. If so, then normally, no doubt, the court would make an express finding to that effect, and would summarise its reasons for the finding.

In the present case, the lower court expressly found that the Appellant had failed to show sufficient reasons why it did not attend the hearing before the lower court on 16th February, 2015. The finding cannot be faulted on the following grounds. Firstly, the Appellant's legal practitioners are a law practice firm and had more than one lawyer as at 16th February 2015. Secondly, the date of hearing, that is, 16th February, 2015 was obtained on 14th January, 2015 after all concerned parties had discussed and accepted the date. Thirdly, notice of hearing for the High Court case scheduled for 16th February, 2015 had been issued on 4th November, 2014. Thus when the Appellant's Counsel was accepting on 10th February, 2015 to have the case adjourned to 16th February, 2015, he was aware of the dates and his schedule and how his law practice firm intended to handle the two cases. Fourthly, the Appellant's Counsel informed neither the lower court nor the Respondents' Counsel of his having to first attend the case in the High Court. Further, I am not persuaded by the suggestion that Counsel was only late for the hearing by 10 minutes

Conclusion

The only issue/question this Court has to decide is whether the lower court exercised its discretion properly. In the view of this Court, the lower court plainly did so exercise it. The Appellant and its counsel were treated with complete fairness and, indeed, were shown every consideration by the lower court. To the contrary, it is the improper conduct of the Appellant's counsel that led the lower court to determine the case in the way it did. Counsel for the Appellant failed to appear for the hearing on 16th February 2015 without any excuse. Accordingly, it certainly does not lie in his mouth to complain that the case was dealt with in his absence.

All in all, this appeal is entirely without merit, notwithstanding the skill with which Counsel Hara sought to advance it. There is no ground whatsoever for the claim by the Appellant that it is being condemned unheard. The Appellant has brought this

entirely on its own head by Counsel's disrespect for the lower court by not turning up or delegating the matter to another lawyer within or without its law practice firm, and it must now take the consequences. The appeal is, therefore, dismissed with costs.

Pronounced in Chambers this 9th day of January 2017 at Blantyre in the Republic of Malawi.

_____

Kenyatta Nyirenda
JUDGE