



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 29 OF 2018

BETWEEN:

**DEVISON MULENGA
GEORGE MBALUKU
PATRICK SOLOMON**

**1st CLAIMANT
2nd CLAIMANT
3rd CLAIMANT**

AND

BLANTYRE CITY COUNCIL

DEFENDANT

CORAM: JUSTICE M.A. TEMBO,

Phokoso, Counsel for the Claimants
Thindwa, Counsel for the Defendant (not served)
Mankhambera, Official Court Interpreter

ORDER

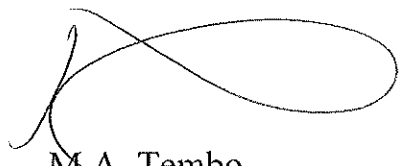
1. This is this Court's order on the claimant's application, without notice, for an order restoring this matter to the cause list the same having been dismissed for the non-attendance of the claimants at mediation. The application is taken out under Order 13 rule 6 (2) of the Courts (High Court) (Civil Procedure) Rules.
2. Order 13 rule 6 (2) of the Courts (High Court) (Civil Procedure) Rules allows a party whose case has been dismissed for non-attendance to apply for restoration of the same.
3. In the present matter, the claimants' counsel failed to attend the mediation due to a problem he had with his motor vehicle.

4. This Court would ordinarily have insisted that the application be made on notice so that it hears the views of the other side and the claimants should therefore not make a habit to make such applications without notice. This Court however sees no reason why it should not restore the claimants' case. There appears to be a plausible reason for the non-attendance. The matter is accordingly restored and shall proceed before the Judge who was seized of this matter.
5. This Court would however like to address one important issue raised by this present matter. The claimants' case was before one of my brother Judges. However, the instant application has been made before me, a different Judge, on account of the decision of the High Court directing that such be the procedure, as held in the case of *Dr Joyce Banda v Honourable Ngwira* civil cause number 7 of 2018 (High Court) (unreported). It was held in that case that an application to restore a matter after a dismissal for non-attendance at mediation must be made before a different judge other than the one presiding and making the order dismissing the matter for non-attendance.
6. This Court has read the decision in the case of *Dr Joyce Banda* and found no rationale for the position that the application to restore the dismissed matter be made before a different judge. The rationale is also not borne out of a reading of the Courts (High Court) (Civil Procedure) Rules.
7. This Court would therefore like to depart from the decision in the *Dr Joyce Banda* case and assert that the correct procedure is to apply before the same judge seized of the matter once a matter is dismissed for non-attendance at mediation.
8. The underlying philosophy of the Courts (High Court) (Civil Procedure) Rules is that a Judge has to be in charge of a matter once it is commenced until mediation is done. Should mediation be terminated that is the time when the matter is moved to another judge for trial. This is meant to curb the movement of case files amongst judges which was a source of serious challenges to case management before the current Rules of procedure came into place. In this Court's view, it would run counter to this underlying philosophy that we start creating situations which will take us back to the scenario when files moved amongst judges over preliminary matters and resulted in serious challenges to effective case management, such as, problems with tracking of files, many judges reading the same file over and over instead of a single judge efficiently

dealing with a file that he or she was familiar with and such other like problems.

9. The application is allowed with costs to the defendant.

Made in chambers at Blantyre this 20th October 2020.



M.A. Tembo

JUDGE

2017