IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 848 OF 1979

BETWEEN:

LAWRENCE KASHITIGU ..... APPLICANT

- and -

WELLS KAZEMBE ..... RESPONDENT

Coram:

F. L. Makuta, C.J.

Ng'ombe of Counsel for the Applicant
Nakanga of Counsel for the Respondent
Nthukane, Law Clerk

R U L I N G

This is an application by Mr Kashitigu who is asking the court to restore the case. It dates back to 1979 when judgment was given after trial in the absence of the applicant. The judgment was made under 0.35 r.1(2) which provides that if, when the trial of an action is called upon, one party does not appear, the judge may proceed with the trial of the action or any counterclaim in the absence of that party. But under 0.35 r.2(1) it is provided that such judgment, order or verdict may be set aside by the court, on the application of the absent party, on such terms as the court thinks fit. Such an application, however, should be made within seven days after the trial. The court has a discretion to extend the period of seven days.

In order to appreciate the issues involved it will help to go through the history of the case. The plaintiff filed his Statement of Claim against the applicant on 19th December, 1979. Notice of Appearance was entered on behalf of the applicant by Mutuwawira & Co. on 4th January, 1980. The applicant did not file any defence and on 21st February, 1980, judgment in default was obtained against the applicant. Then there was an application to set aside the judgment and it was heard on 1st April, 1980. The application was granted on condition that the applicant should file defence within seven days of the date thereof. It was also ordered that reply should be filed within seven days of the date of service of the defence. The defence was very promptly filed on the same day, 1st April, 1980. After some delay the case was set for hearing on 1st September, 1980 and Notice of Hearing was duly sent to the parties. On 26th August, 1980, Mutuwawira & Co., just four days before the hearing, ceased to act for the applicant on the ground that the applicant had failed to give further instructions and there was lack of co-operation from him. It will be appreciated therefore that from the time this action started the applicant was legally represented.

When the court assembled on 1st September, 1980, the applicant was not present. The learned judge, Mr Justice Villiera, however, was of the view that since the applicant was previously represented there was a possibility that the defunct lawyers had not notified him. The learned judge therefore ordered that the applicant be served personally. When the court assembled on 2nd September, 1980 the applicant was not present. The case was then adjourned to a date to be fixed by the Registrar. It was then set for hearing on 21st October, 1981. Again the applicant was not present. It would appear that on this occasion he was not served. It was further adjourned for a month. When the court assembled again on 24th November, 1980 both parties were not present and it was adjourned still further. On 18th February, 1981 when the court reassembled it was ascertained that the applicant had been served and the case proceeded under 0.35 r.1. The plaintiff called three witnesses to support his case. Judgment against the applicant was pronounced on 26th February, 1981.

Messrs Fachi & Co. were then appointed sometime in early April 1981 to represent the applicant. This appointment, it would appear, was prompted by the levying of execution by the Sheriff on the property of the applicant as a result of the judgment. On 3rd May, 1981, Messrs Fachi & Co. on behalf of the applicant obtained an order for a stay of execution on condition that the applicant pays costs in the sum of K1,386.90. This sum was to be paid within seven days and failure to do so would mean that the judgment would stay. There is no indication that the applicant paid the costs as stipulated in the order of 3rd May, 1981. The judgment therefore stood. On 9th December, 1981 the applicant was scheduled to appear before court on his application to pay the debt by instalment. He did not appear and the application was dismissed with costs. He made another application subsequently and he appeared on 20th January, 1982. The Chief Justice, Mr Justice Skinner, ordered a stay of execution on condition that the applicant paid the judgment debt by three instalments of K50 each on 15th February, 15th March and 15th April 1982 and thereafter should pay monthly instalments of K100 until the debt is liquidated. Judgment creditor was awarded costs. This has not been complied with. It must be mentioned that Messrs Fachi & Co. had disappeared from the scene after the order of 3rd May, 1981. It may be for the same reasons that Mutuwawira & Co. ceased to act. The applications to pay the debt by instalments were made by the applicant himself, personally.

More than four years after the order of 20th January, 1982 and more than six years after the start of the action the applicant comes back on the scene again to make the present application. He stated, in effect, in his affidavit in support of this application that he paid all costs as ordered on the 3rd May, 1981 but he cannot recall whether such payments were made within the seven days. There is no indication anywhere on the record to show that the costs were fully paid. As a matter of fact the evidence is to the contrary. It would appear to me that Mr Kashitigu does not care to satisfy the judgment debt and only takes action to make an application to court when there is a move to enforce the judgment. On 3rd May, 1981 when setting aside the judgment Mr Justice Jere who actually tried the case remarked thus: "The defendant displayed quite unreasonable behaviour throughout these proceedings". These remarks were made because the applicant failed to appear in court even when he was served with notice. The court nevertheless exercised its discretion in that it extended the seven days

limit. The judgment was passed on 26th February, 1981 and, as it will be recalled, the application to set it aside was made on 27th April, 1981, more than two months after the judgment. Despite all that, as already mentioned, the applicant did not comply with the conditions of the setting aside of the judgment.

After examining the circumstances of the case I am of the view that it will not be in the interest of justice to exercise the discretion again. Some efforts made so far by the applicant to forestall payments in satisfaction of the debt is clear indication that this is another attempt to buy time. If the application is allowed it will be an abuse of the legal process. There must be an end to legal proceedings and an aggrieved party must bring forward the grievances within a reasonable time. In my view even more than a year after judgment cannot be regarded as reasonable to reopen a case unless there are very compelling reasons which are not available in the present case. I would echo the learned judge's remarks that the applicant has displayed unreasonable behaviour throughout the proceedings and this must be discouraged. I dismiss the application with costs.

MADE in chambers this 17th day of June, 1986, at Blantyre.

F. L. Makuta
CHIEF JUSTICE