Banda J.

IN THE HIGH COURT OF MALAWI, BLANTYRE

PRINCIPAL REGISTRY

CIVIL APPEAL CAUSE NO.8 OF 1986

BETWEEN:

MOSES MZUNGU ..... APPELLANT

AND

MALAWI RAILWAYS LIMITED ..... RESPONDENT

CORAM: UNYOLO, J.

Appellant, present, unrepresented
Saidi of Counsel for the Respondent
Chigaru, Official Interpreter
Longwe, Court Reporter

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JUDGMENT

This is an appeal against the order of the Second Grade Magistrate, Blantyre, dismissing the appellant's action in his absence.

The history of the matter is as follows. On 18th October, 1985 the appellant instituted proceedings in the court below claiming the sum of K158.00 being the value of goods belonging to the appellant which were allegedly converted and wrongfully disposed of by the respondent. The respondent not having filed an affidavit of intention to defend the appellant proceeded to obtain a default judgment for the K158.00 claimed and K5.00 costs. That was on 6th November, 1985. And a few days later the appellant filed a writ of fifa and a warrant of execution was accordingly issued against the respondent for a total sum of K180.00 including interest and costs of execution.

I am not sure what precisely the Sheriff did. I can only guess that he or one of his officers did call on the respondent with a view to executing the said warrant. Be that as it may in no time the respondent instructed counsel to do the needful and have the judgment herein set aside and the execution stayed. An application in this regard was accordingly filed with the court below and, as is required by the rules, an affidavit was sworn explaining inter alia the respondent's reasons for not having filed a notice of intention to defend, let alone a defence itself, within the prescribed time. Also filed with the said application was a document containing the respondent's proposed defence in the matter. Perhaps I should mention right here that the

only reason given by the respondent for not having filed either a notice of intention to defend or a defence itself was that its company secretary who dealt with legal matters was at the material time away on leave.

The application was set down for hearing before the Court below on 10th December, 1985. Evidently the application had to be served upon the appellant. Then something interesting happened. The application was passed to one Y.P. Mzembe, an employee of the respondent, to effect the requisite service upon the appellant. In his affidavit dated 26th November, 1985 the said Mr. Mzembe stated that he found the appellant at the Railways Station in Limbe and attempted to effect personal service of the documents upon the appellant. He went on to say that the appellant however refused to either sign or accept the same. He said that since that was a "public place" he reckoned he could not leave the documents there. Accordingly he took them away with him. I will come back to this aspect later in this judgment.

I have said that the application was set down for hearing on 10th December, 1985. When the case was called on the appointed day the appellant was not present. After hearing counsel for the respondent briefly the learned Magistrate granted the application and set aside the judgment and stayed the execution. The respondent was given two weeks within which to file its defence.

Next, the case was set down for hearing, upon the merits, on 5th June, 1986. A notice of hearing was duly served upon both parties. However when the appointed day came the appellant was not present. Counsel for the respondent accordingly moved the court below to dismiss the appellant's claim. The learned magistrate allowed this motion and proceeded to dismiss the claim with costs. The appeal here is from that order, largely. However when the grounds of appeal are read between the lines there can be little doubt that the appellant also attacks the earlier order setting aside the judgment in this case. Such are the facts.

There is one procedural point to which I wish to refer at this juncture. It is noted that the present appeal was filed in this Court directly. However Order XXXIII of the Supreme Court Rules provides that civil appeals from sub-ordinate courts to the High Court must be filed in the subordinate court which heard the case in the first place. The only exception I can mention in this regard is an appeal in affiliation proceedings. There an appeal must be filed in the High Court directly as if it were an appeal in a criminal case. Consequently in so far as the present case is concerned there was an irregularity. This point must therefore be noted by all those whose duty it is to process appeals.

I now turn to the most substantive matters raised in the appeal itself. The first point, and it is also a procedural point, taken by counsel for the respondent was that since the order the appellant appeals against was made in the appellant's absence, what the appellant should have done was to apply to the court below to set aside the said order rather than proceed by way of appeal as he has done. Counsel cited for authority for this submission Order XIX, rule 3(5) of the Supreme Court Rules which provides that any judgment or order made in the absence of a party may be set aside on application if good reason for such absence is shown. The proceedings may then be reheard.

I have examined the rule closely. It is couched in plain and clear language. To my mind the rule is not restrictive in the sense that the appellant could only proceed by way of an application as envisaged there and that proceeding by way of appeal, as the appellant has done, is prohibited. I do not think so, with respect. No doubt costs and time would be saved in most cases if a party proceeded by way of an application in the first place and lodge an appeal when the application was unsuccessful or when at the very end of the day the case had been reheard and the party did not succeed. Of course where a party was represented obviously these issues would exercise counsel's mind but where, as here, the party is unrepresented perhaps the appropriate officers of the court would do well to point out to such party that it is open to him to proceed by way of an application under the above-mentioned rule. Indeed it is to be observed that the appeal was already before the court and the appellant actually proceeded to argue it and no preliminary objection was raised. For all these reasons I will proceed to consider the merits of the appeal.

The first point taken by the appellant was that he actually reported at the court below on the 5th June, 1986 in the morning for the hearing of the case. He said that he was there told by the clerk of the court that counsel for the respondent had gone to the High Court for other matters. The appellant went on to say that he however waited at the court up to 10.00 a.m. and still counsel for the respondent was nowhere to be seen. He therefore thought the case would not be heard and he left. He said that he however came back to the court later that day only to be told that the case had been called in his absence and that his claim had been dismissed. He protested and he was advised to lodge an appeal. These submissions have not been challenged. Admittedly the High Court takes precedence over subordinate courts and it is therefore appreciable the court below waited until counsel for the respondent had finished his business before the High Court that morning. However I think that the learned magistrate should have exercised some patience over the absence of the appellant and no doubt the clerk of the court must have informed the court that the

appellant had reported earlier that day. Indeed this was the first day of hearing and while this would have meant time wasted the interests of justice weighed heavily for an adjournment of the case. All in all I think that there is disclosed a good reason for the appellant's absence at the time the case was called. Indeed as I have shown he did not just disappear completely. He came back. Consequently I consider that this court would be justified in setting aside the order made by the court below in this case.

The matter does not however end there. I have said that the appellant also appeals against the lower court's order setting aside the judgment in this case. Before turning to the crux of the matter on this aspect I have a comment to make in regard to the manner in which the application to set aside the judgment was served upon the appellant. Order VIII, rule 2(2) of the Supreme Court Rules provides that service of every court document shall be effected by, and I quote:

> "an officer of the Court or of another Court or by the legal practitioner acting for the party at whose instance or on whose behalf such service is to be effected or by a person in the employment of such legal practitioner or by an agent of such legal practitioner authorised in writing in that behalf."

The facts in the instant case show that the said application was served by one Y.P. Mzembe, an employee of the respondent. Counsel for the respondent argued that Mr. Mzembe served the said application in the capacity of an agent. It is however significant that under the provisions of the abovementioned rule if service is to be effected by an agent of a legal practitioner such agency must be evidenced by a document. No such document exists in the present case. The purported service in this case was consequently irregular. Indeed I venture to add it was no service at all. It is also observable that the appellant actually refused to accept personal service of the documents herein. Mr. Mzembe avers in his affidavit that he then tried to simply leave one set of the said documents with the appellant but again the appellant refused. He says that then and there he walked away and returned to his office with the documents. Order VIII, rule 3 is pertinent. It provides that where the person to be served refuses the document or copy, it may be left near him and his attention drawn to it. Mr. Mzembe says in his affidavit that he could not leave the documents with or near the appellant because he met the appellant at a railway station which was a public place. With respect, much as I sympathise with Mr. Mzembe the law is clear. To start with he had no authority to serve the documents. Secondly even if he had he was obliged to leave a copy of the documents near the appellant or later on try to serve the said documents in some other manner e.g. by substituted service. Here too was an irregularity in the mode of service of the application.

But now comes this other point. Under the provisions of Order X, rule 4(2) of the Supreme Court Rules any judgment obtained by default, as in the present case, may be set aside by the court on application by the defendant for good cause. As already indicated an affidavit was sworn on the part of the respondent in the instant case in support of the application to set aside the judgment. It is noted, and this is the point I wish to bring out, that the only reason given there for the respondent's failure to file a defence was that the respondent's company secretary who apparently dealt with all legal matters was away on leave at the material time. In my judgment this, with respect, was not a good reason. There are numerous legal firms in the City of Blantyre alone who could have been asked to deal with the matter. Indeed the respondent is represented here as it was in the court below not by the said company secretary but by a firm of legal practitioners. The court below did not address itself to this very important point in the case. Accordingly that being the only reason advanced by the respondent for its failure to file a defence within the prescribed time, the order setting aside the judgment in this case cannot be supported. It is set aside as is the order dismissing the appellant's claim against the respondent.

In the result the judgment obtained by the appellant and the warrant of execution issued in respect thereof in the total sum of K180.00, as earlier indicated, are restored. The Sheriff is accordingly ordered to proceed and bring the matter to a finality.

The appeal therefore succeeds with costs.

PRONOUNCED in open Court this 15th day of January, 1988 at Blantyre.

L.E. Unyolo
JUDGE