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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 527 OF 1988

BETWEEN:

Y M TUTLA.....APPLICANT

- and -

AUTOCRAFT (FIRM).....RESPONDENT

CORAM: MKANDAWIRE, J.

Kumange, of Counsel, for the Applicant
Chizumila, of Counsel, for the Respondent
Kaundama, Law Clerk
Phiri, Senior Court Reporter

R U L I N G

This is an application to set aside judgement. It is brought under Order 35/2 of the Rules of the Supreme Court.

Mr Kumange and his client did not attend Court on 6th April, 1992 to give defence and so judgement was entered against the defendant. The judgement itself shows that Mr Kumange did not attend Court on 2nd March, 1992. He claims that he has been treated unfairly, as the dates of hearing were fixed by Mr Chizumila and the Registrar. He had no say in the matter and Mr Chizumila's attitude was all along oppressive. As for the 20th of March, 1992, a date which was specifically agreed upon by both Counsel in open Court, he says that he had learned that his client was ill and so on the 19th he had sent telegrams to Mr Chizumila and the Court. It is a mystery that the telegrams have not been received to this date. Turning to the 6th of April, he says that he had told Mr Chizumila that he was engaged in other matters on that day.

Order 35/2 of the Rules of the Supreme Court provides that an application to set aside judgement must be made within seven days after the trial. Mr Kumange sent the application from Lilongwe on 15th April, 1992, judgement having been delivered on 10th April, 1992. The application was date-stamped by the Court on 23rd April, 1992, meaning that it was received on that date. Mr Kumange's allegation is that some officer of the Court is interested in this case and so he sat on the papers so that time should run out.

In reply, Mr Chizumila says that the accusations Mr Kumange is making are unfounded. The case was first set down for hearing for two days from 2nd March, 1992. This was not because Mr Chizumila had twisted the Registrar's

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hand, but that the Registrar had called a meeting of all legal practitioners to set down cases for the Hilary Session and at that meeting this case was set down. Mr Kumange did not attend that meeting and it was not Mr Chizumila's fault that he did not attend. It was then up to the Court to inform Mr Kumange of the hearing dates and the case did appear on the Cause List. Mr KUmange did not come to Court on 2nd March, but he did attend on 4th March.

The case was then adjourned to 20th March, 1992. It is Mr Chizumila's contention that it was not prudent of Mr Kumange to send the telegrams on the 19th March, knowing that there are at times delays in the Post. It is his view that the telegrams should have been sent much earlier. If, however, Mr Kumange had learnt rather late of his client's illness, then he should have telephoned, instead of just relying on the telegrams. Mr Chizumila went on to say that if he was oppressive, as it is alleged; then he should have applied for judgement on that day, because that was a date that was specifically agreed upon by both Counsel. Instead, he only applied for adjournment; so the case was adjourned on 6th April, 1992.

Mr Kumange did not try to find out what happened on 20th March. Mr Chizumila rang him on 2nd April and advised him that the case was coming up on 6th April. He explained that it might not be possible to get another date this year. Thereupon Mr Kumange said he would contact the Registrar and get back to him. When Mr Kumange did not ring back up to the 6th, Mr Chizumila assumed that he was going to attend. It was submitted that no valid reason has been advanced for setting aside the judgement.

Finally, Mr Chizumila submitted that the application is out of time, but if I am minded to set aside the judgement, he must have costs of the abortive trial.

I very much sympathise with Mr Kumange, but I do not see any merit in any of the accusations he has made. The legal profession is a noble one and I would not encourage a legal practitioner to make accusations which he cannot substantiate. It was certainly not Mr Chizumila's fault that he did not attend the meeting summoned by the Registrar. Contrary to the accusations, the calendar of events shows that Mr Chizumila was very accommodating. If he was oppressive, then he should have applied for judgement on 20th March, for that was a date specifically agreed upon by both Counsel. It is on record that on that date he asked that the defendant be given another chance and so the case was adjourned to 6th April, 1992. I entirely agree with Mr Chizumila that it was not enough to rely on the telegrams, knowing that hearing was the following day. Having failed to attend, he made no enquiry as to what happened. On 2nd April he said he would consult the Registrar and then get back to his colleague, but he did not. The accusations made against Mr Chizumila are, therefore, wholly unjustified.

Even the accusation made against the Court is without justification. No doubt, there was some delay in processing the application, but it reached the Court on 23rd April, 1992 and by that date time had already run out. The Court, therefore, played no part in rendering the application out of time.

However, in view of the case of **Schafer v. Blyth (1920) 3 K.B. 141**, I would have been minded to extend the time, but I note that Mr Kumange has not shown any excusable reason for failing to attend Court. He not only failed once, but on three occasions. In the circumstances, I dismiss the application with costs.

MADE in Chambers this 26th day of June, 1992, at Blantyre.


M P. Mkandawire
JUDGE