IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO 580 OF 2001

BETWEEN:

S.H. METANI ..... PLAINTIFF

AND

PHARMACY, MEDICINES AND
POISONS BOARD ..... DEFENDANT

CORAM: HON JUSTICE NYIRENDA

Kadzakumanja	Counsel for the Plaintiff
Kamanga S.C.	Counsel for Defendant
Mrs. Nakweya	Court Interpreter

RULING

This is an appeal against the Learned Assistant Registrar's ruling delivered on the 9th of June 2004 in which he stayed execution against the defendant following a series of events in the matter, which I will briefly recount. Being an appeal from the master this court will deal with it by way of rehearsing pursuant to Order 58 of the Rulers of the Supreme Court.

The background of the matter is that the plaintiff filed this action on the 20th of September 2001 for wrongful termination of his services with the defendant. The statement of claim was served on the defendant on the 21st September 2001. As of the 29th October 2001 there was no defence served on the plaintiff. The plaintiff filed for judgment in default which was entered by the court on the 6th of November 2001.

The matter proceeded to assessment of damages which was done in the absence of the defendant despite the plaintiff having served on the defendant the notice of assessment. An order of assessment was obtained on the 21st day of February 2003 awarding the plaintiff K500,000.00 in damages. The assessment took so long probably because from the time judgment in default was obtained the defendant showed signs of wanting to set the judgment aside. Apparently an application to set aside judgment was drawn up and filed with this court on the 7th of December 2001 but for some reason the summons were not dealt with. It would appear the papers for the application were not properly handled by the court and got misplaced. Although the defendant became aware of this situation in May 2002 there were no fresh papers brought to court until the plaintiff proceeded to assessment of damages.

Execution followed the award. When the defendant became aware of the writ of fieri-facias on the 27th of March 2003 an application to

stay the writ was hurriedly brought and alongside it, it was sought to revive the application to set aside judgment.

The reasons given by the Attorney General for not being able to deal with the matter with ordinary dispatch and the failure to comply with procedural time limits was that the Attorney General Chambers were attacked by fire which destroyed records and the file for this case was amongst those burnt. Attempts were made to reconstruct a file of the relevant court documents from the court file.

The writ was stayed on terms as to execution costs and subsequently the judgment was set aside virtually by consent and on payment of the plaintiff's costs. This was on 30th April 2003. On 13th May 2003 the parties entered a consent order for directions to be complied with within 21 days from that date and the matter was to be set down for hearing within 60 days from that date.

The defendant defaulted again by failure to serve a list of documents pursuant to the order of the 13th of May 2003. One year later on the 8th of April, 2004 on application by the plaintiff, the defence was again struck out and judgment of the 6th of November 2001 and the assessment of damages of the 21st February 2003 were restored. The plaintiff again proceeded to execution. Upon being visited by the Sheriff the defendant came to court again and sought to have the

order striking out the defence varied in order to enable the defendant to defend the action.

In the affidavits of Mr. Anthony Kamanga S.C. and Mr Cleophas Chafulumira, Senior Law Clerk, the reasons for the defendants failure to comply with the time schedules in the court order of 13th May 2003 are that at the time the summons to strike out defence and the court order striking out defence were served on the defendant, the defendant's file was missing and therefore the documents could not be placed on the file. The documents were not, as a result, brought to the attention of counsel who only became aware of them when the plaintiff moved in to execute.

It is also stated in the affidavit of Mr Kamanga S.C. that since the time his office was gutted with fire it has been difficult to deal with some matters and the file for this matter was among those destroyed and so were the documents required for disclosure. It is further stated that the defendant has now been able to retrieve some of the documents required for disclosure which are ready to be furnished to the plaintiff.

The defendant submits that there is a defence on merit and therefore prays that the order striking out defence should be varied and the judgment obtained by the plaintiff should be set aside.

It is in these circumstances that the Learned Assistant Registrar varied his earlier order effectively setting aside judgment and allowing the defendant to file a list of documents. In his ruling the Registrar observed that much as there is no sufficient cause shown by the defendant for failure to serve the defendant list of documents, it did not seem clear that the defendant really intended not to comply with the consent order for directions.

In this appeal Mr Kadzakumanja, learned counsel for the plaintiff submits very strongly that having found that there was no good cause the Assistant Registrar had no choice other than to dismiss the defendant's application. Counsel insists that indeed the defendant has no good cause for the failure because the main reason advanced by the defendant about offices being gutted with fire was the reason given for the initial default. The defendant cannot be using that reason again because the court at that time was told that a file had been reconstructed.

Mr Kamanga's response is that while it is true that the file was reconstructed, that was done using the court file, which did not have the defendant's list of documents. The relevant documents, for purposes of compiling the defendant's list of documents, were still being fetched and that task has now been achieved and the list is ready.

The defendant's application is made under Order 24 r 17 of the Rules of the Supreme Court and rightly so. Cleary the defendant realizes that the matter is beyond order 24 r 16. Order 24 r 17 provides:

> **"Any order made under this Order (including an order made on appeal) may, on sufficient cause being shown, be revoked or varied by a subsequent order or direction of the Court made or given at or before the trial of the cause or matter in connection with which the original order was made"**

The key words in this Order are 'sufficient cause'. What amounts to sufficient cause will depend on the circumstances of each case. What is equally true is that whether the cause is sufficient is for the court in its discretion and in doing so no doubt the court will engage in sound judgment and not merely do as it chooses. William L. Reguolds in "Judicial Process" says:

> **"The court operates within a great many institutional constraints, among them the need to engage in reasoned elaboration, the need to explain a decision in public ..... and the need generally to satisfy the hard learned demands of the judge's craft. Thus, it can be said that although a judge of a court of last resort is "free" to choose, in practice the "freedom" is limited.**

The path a judge must tread is carefully circumscribed, and the deviations permitted relatively few in number. Even when one of those is taken, the judicial profession compels the judge to explain the decision in the fashion that will satisfy the most caustic of commentators as to why that was the one chosen".

The situation in the instant case can very shortly be stated. The defendant had been very casual to say the least in handling the matter mindful that at one point State Chambers were gutted with fire and the file for this case was among those that were destroyed. When the matter went up to execution the first time surely there was reason to symphathise with the defendant on account of the fire that gutted State Chambers. One could imagine the confusion that must have arisen in locating or retrieving files that might have been affected in that disaster. That is probably the reason the plaintiff readily accepted stay of execution and setting aside judgment at that time.

In setting aside judgment and in order to bring the matter quickly on course the parties agreed on deadlines in the order for directions, which was a consent order for direction, referred to earlier in this ruling. The first paragraph in the Consent Order for Directions states:

"That there be discovery of documents through exchange of Lists of Documents within 14 days from the date here of and inspection to take place within 21 days thereafter"

It is scarcely necessary to say that when the defendant made this undertaking it must have been with conscientiousness. It must also have been with a clear conviction that by then the documents to be listed would be available. The defendant did not come to court to seek any exertion of that order and as stated earlier there was no list from the defendant for one full year after the Consent Order for Directions.

Further to the one year delay and even when the defendant was served with Summons to Strike Out Defence and the Order restoring an earlier judgment, the matter was not immediately acted upon. It is said the file was missing and apparently the officer, Mr Chafulumira, who accepted service, did not even bring or mention the matter to Senior Counsel who was seized of the case until the Sheriff was at the defendant's doorsteps. Mr Kadzakumanja is entitled to wonder how suddenly the file was found when the defendant was faced with execution. Perhaps not to suggest deliberate neglect but certainly lack of diligence on part of the defendant be it by Chafulumira.

After the Consent Order for Directions which is virtually an impermeable order at law, the defendant can only be excused on

grounds that are fairly critical and weightily as apposed to mere oversight or lack of devotion, which is the impression one gets from failure to attend to the matter on account of a file missing as submitted by the defendant.

With due respect to the submissions by the defendant and the concerns raised, I am of the clear view that the defendant has not been able to establish sufficient cause to compel this court to revoke and or vary the order striking out defence. Accordingly the judgment entered by the plaintiff stands and so does the assessment of damages. The appeal succeeds.

Made in Chambers at Lilongwe this 19th day of April 2005.

A.K.C. Nyirenda

JUDGE