

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 1124 OF 2000**

BETWEEN

J.M. SAWALI PLAINTIFF

-AND-

MOBIL OIL (MW)(PVT) LTD..... DEFENDANT

CORAM: HON. KAMANGA, J.

Kita, Counsel for the Plaintiff
Majamanda, Counsel for the Defendant
Chulu, Court Interpreter
Mrs Mbewe, Court Reporter

Time: 10:25 am

Court: Before we proceed with today's issues there are some issues to wit defence counsel should address me. This matter was previously given a date of hearing. Defence did not put up an appearance. Judgment was entered. In applying to set aside the judgment and for rehearing application was made ex-parte before a different judge, the affidavit included not defendant. Chamber was not aware of the proceedings when the service was personal and not by post.

Can I be addressed why the matter or application for rehearing was made before different judge and ex-parte.

Majamanda: Let me mention that much as we (Mbendera) are dealing with this matter, we had sub-contacted Knight and Knights to deal with the application that you are addressing me. Still, I believe that the application under the order to which was made could be made before another judge. The same was in order. As applications can be heard in the manner that this was heard. The of matter being after it was heard there was an order for rehearing.

Court: I do not have issues until the order for rehearing. My issue is with application being heard before another judge when the Order under which it was made encourages that it should be heard by judge who concluded that there be judgment.

Majamanda: The order says it is at the discretion of the judge. In essence My Lady this was a default judgment.

Court: Much as it was default my issue is why was it made ex-parte.

Majamanda: It was ex-parte My Lady because this was a clear case and plaintiff was aware.

Court: How do you know that it was a clear case for setting aside. Why did you presume that the other party did not wish to be heard.

Kita: Much as My lady you are the one that is seeking clarification we were also at a loss on why the application was made by Knight & Knight. Much as my colleague indicates that Knight was sub-contracted, the record is like they appearing in their own right. And there was no Notice of change of Legal Practitioner.

Majamanda: As I said My Lady, Knight were sub-contracted. And as to there being no Notice of change of Legal Practitioner my colleague also has not served us with change, were equally surprised. On ex-parte application, as I have explained, the essence of matter is that there is an order for rehearing that was granted.

Court: So can a defendant who has failed to appear before court on an appointed date, subvert misconstrue issues before another judge and deliberately fail to give notice of his application for rehearing to the plaintiff so that he the defendant can be given the opportunity of rehearing.

Majamanda: It is not about misconstruction my lady, it is about judgment being entered in default and appreciating that such judgment can be set aside and matter can be reheard.

Court: I am not prepared to proceed with this rehearing on the basis that the process of gaining the same was unprocedural, in that

- (1) *it was made Exparte, thereby denying the other party opportunity to respond to issues that formed basis of application.*
- (2) *Application was heard before a different judge.*

These issues make me wonder whether the application was not a deliberate ploy on defendant's part to delay justice. Hence as far as I am concerned, and much as an order for restoration was gained, I find that the same was ill-gained so that the judgment that was made still subsists.

I will only proceed with the matter if I am overturned should the defendant see fit to appeal against my decision.

Ivy Kamanga

JUDGE

25/01/07

IN CHAMBERS

Majamanda: I seek leave to appeal on the preliminary issue.

Court: Leave is granted.

Ivy Kamanga

JUDGE

25/01/07