IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY

(Being CIVIL CAUSE NO. 431 OF 2012)

BETWEEN

G4S SECURITY SERVICES LIMITED ..... APPELLANT

-and-

DINALA MAGOLA ..... RESPONDENT

CORAM: HON. JUSTICE ZIONE NTABA
Mr. Sauti, Counsel for the Appellant
Mr. J. Suzi Banda, Counsel for the Respondent
Mr D. Banda, Court Clerk

RULING

The Respondent sued the Appellant claiming damages for loss of amenities of life, damages for loss of earning capacity, special damages for medical treatment, fees for police and medical reports and costs of action. The Respondent entered a default judgment and was awarded K2,005,000.00. The application before me was an appeal against the decision of the Registrar made on 10th February, 2014 refusing to set aside the default judgment entered against the Appellant.

At the date of hearing of the appeal, the Respondent raised a preliminary objection that the appeal be dismissed summarily with costs on account that the counsel had not filed a notice of appointment of legal practitioners. Counsel argued that the law on this point is clear and settled, and it has further been applied in Malawian courts. And person wishing to be represented by counsel needs to have counsel file a notice of appointment in order for them to be allowed appearance in court. Furthermore, upon filing the said notice, it must then be served on the other party. Justice Chipeta (as he was then) in ***McDell Chingeni v Godfrey Mfiti and NICO***, Civil Cause No. 52 of 2008 (ZaR) ruled in a similar case to this one where the plaintiff had obtained a default judgment against the second defendant and had proceeded to file a notice of assessment of damages and duly got an order from the Registrar, upon which they had obtained a warrant of execution. At that point Messrs Kainja and Dzonzi appeared and got a stay order and filed a summons to set aside the default judgment. Similarly

like in this case, their summons to set aside was dismissed and they proceeded to file an appeal to a judge in chambers. And during the appeal counsel for Mr Chingeni brought to the attention of the judge that Messrs Kainja and Dzonzi having done all the work had not filed a notice of appointment of legal practitioners to which Justice Chipeta proceeded to dismiss their appeal.

Counsel proceeded to highlight to the court Justice Chipeta's words –

> *"...Per Order 12 rule 5 of the Rule of Supreme Court, 1999 and the Practice Notes thereunder it is very important in Civil Proceedings for a Defendant to place him/her/itself on record before gaining the entitlement to take any steps in the proceedings. This aside, in case it may be construed as superseded by the circumstances prevailing in the case, what I also know is that a party wishing to put iself on record via Legal Representation, a precondition to the instructed Lawyers taking any step in the proceedings affecting that party, is for them to place themselves on record by filing in Court, and serving on all other parties concerned, a Notice of Appointment. From the processes and other documents currently on the Court file, it seems to me that the 2nd Defendant and its Lawyers just entered into this case as if they were entering into their own backyard. They did not observe any of the prerequisite formalities discussed above."*

The court was also asked to also take into consideration the following passage as well –

> *"It is my understanding that procedural rules of this Court, a party that takes a step in proceedings he is not officially part of, takes a void step. It is simply amazing that the 2nd Defendant and the Lawyers purporting to represent it have managed to take so many steps in this case, as well as to engage a number of Judicial Officials in various applications and to obtain Adjudicative Orders from them therein, when they are both not on record in the case. In a way, therefore, they have taken the Court for granted, and have thereby abused its process. The question that is foremost in my mind now, therefore, is whether I should perpetrate this abuse of process by tolerating the void steps the 2nd Defendant and its Legal Practitioners have successively taken in this Action, by treating the appeal they have argued before me as a regularly brought appeal, and proceeding to determine on merit, as if there is nothing wrong with it.*
>
> *After giving this question sufficient consideration, it is my view that the requirement in our rules of procedure that parties and Counsel be only allowed to take steps in proceedings if they are properly on record fundamental. If it were not, I apprehend it would be open to parties in a case destabilizing otherwise regularly progressing or concluded proceedings without justification of any requisite locus standi for bringing in such instability. It is my judgment, in the*

circumstances, that a Defendant who/which does not place him/her/itself on record forfeits the right to take part in those proceedings by way of taking steps in it, just as I believe a Legal House that is not on record in a case is as much at large in relation to that case as any other as any other Legal Houser not on record vis-à-vis the taking of any stein the proceedings.

Counsel also presented as cases for further buttressing his argument, that is, ***Escom Limited v George*** **Matola,** Civil Cause No. 418 of 2006(PR)(H/H Masoamphambe) and **Benedicto** ***Mbewe v Malawi Television Limited***, Civil Cause No. 1708 (PR) of 2007 (Justice Kamwambe) which cases highlight the importance of counsel being on record not only for procedural issues but also substantive issues of the case.

The Appellant in response conceded that that they had not filed a notice of appointment of legal practitioners but argued that that this was an irregularity that is not a fundamental irregularity under O.2 of the Rules of the Supreme Court as such can be cured by O.2 r.1. Furthermore, this curability is enshrined in section 41 of the Malawi Constitution, which grants the right of access to justice and in that a party has as of right to have matters determined without over reliance on technicality of this nature. He further argued that the Justice Chipeta judgment was distinguishable as it was made per incuriam of O.2 r.1 and the Constitution. He also highlighted that Justice Chipeta' s approach was procedurally wrong as he should not have dealt with matters that were not before him but should have invited submissions for whether the irregularity could be cured or not. Counsel opined that this was an error of law and it took away the litigant's right to be heard. In conclusion he reminded the court that ***Chingeni case*** is not a binding decision on this court and he prayed that the court order the lack of notice as a irregularity under O.2 r.1 which can be cured by them filing the appropriate notice.

The Respondent in response argued that the issue of access of justice is a debate which is still ongoing in Malawi and elsewhere whether its applicable to corporations. He stressed that the predominant view is that its not applicable to corporations but even if the argument was to be stretched to corporations, the issue was courts weren't stopping the Appellant to be represented but the fact remained that their counsel was not on record and as such did not have right of audience. Secondly, the Respondent argued that if the lack of notice of appointment of legal practitioner was not a fundamental irregularity, then what was. Counsel further argued that what the Appellant is saying is that court rules should be flouted anyhow and any person or lawyer can come be on record without notifying the court or the other side. The Respondent believes that this was a fundamental breach and as such Messrs Ralph and Arnold should not be heard.

Firstly, let me immediately point out that I shall not be dealing with the issue of constitutionality which has been raised by the Appellant that if the court is of the mind to dismiss the appeal based on the preliminary objection, it would mean their right to access to justice is not being heard. First and foremost, by the mere fact Counsel was allowed to respond to the preliminary objection when this court being informed of the circumstances of the case could have easily stated that that Counsel had no right to be heard clearly justifies that there has or will there be a breach of its constitutional right. Furthermore, it turns of the whole right of access, which has so many connotations, the

issue here is them not being denied but that their appointed counsel has no right of audience and as such all cannot proceed to argue the appeal. In my opinion, the issue of a possible or actual breach of a constitutional right was inappropriately raised.

Secondly, let me say that as a former practicing lawyer, O.2 r.1 of the RSC was a useful tool especially where in my preparation some steps were not taken but even then I recognized which irregularities were fundamental and which ones were not. It is from this point that I would like to disagree with the Appellant that this is not a fundamental irregularity. Notably, the whole issue of audience/appearance is fundamental for a case. The person granted audience to represent a party is not only legally liable professionally but also assists in ensuring the smooth transitioning of the case in terms of notifications by the Court or the other party. Therefore for Counsel to say that this is an irregularity that could easily be cured by O.2 r.1 of the RSC is not justified. Let me put across a scenario, which I am sure one of the rationale the court set procedures for filing a notice of appointment is where there has been professional negligence, if there is no counsel on record although the documents would show Messrs Ralph and Arnold appearing in the coram of the court, as long as Messrs Ralph and Arnold put across a defence that there was no filed and served notice of appointment of legal practitioners, the court would at that point find in their favour. Although this seems too simple a scenario but I believe this puts the point across. That certain irregularities are fundamental when not adhered to. Therefore, the filing and serving of a notice of appointment of legal practitioners is not a mere technicality but a fundamental issue in terms of audience but also safeguarding the parties so being represented.

CONCLUSION

In the circumstances of this case, I am satisfied that the Respondent's argument that the non filing and serving of a notice of appointment of legal practitioners by Messrs Ralph and Arnold is not a regularity that can be cured by O.2 r.1 of the RSC and as such I dismiss the appeal and award costs as prayed to the Respondent.

I order accordingly.

Made in Chambers on 8th day of July, 2014 at Zomba.

Z.J.V Ntaba
JUDGE