



**MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 417 OF 2015**

BETWEEN:

NINKAWA TRANSPORT LIMITED.....PLAINTIFF

AND

REAL INSURANCE COMPANY LIMITED.....DEFENDANT

CORAM: K. BANDA, ASSISTANT REGISTRAR

Chingota, Counsel for the plaintiff.

Mbendera, Counsel for the defendant.

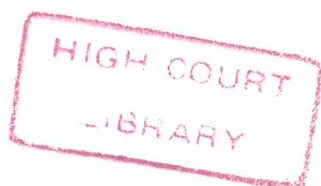
Ms. Faith Ngoma, Court Clerk.

ORDER

This is an order on an application to strike out defence under order 18, rule 19(1) of the Rules of the Supreme Court (herein after called RSC) brought by the plaintiff on the ground that the defendant has failed to comply with the Mandatory Mediation Rules. The plaintiff further prays that judgment be entered in its favour and that it be awarded costs for this action.

Briefly the facts are that upon closure of pleadings, the matter herein as usual was supposed to go for mandatory mediation. The said mediation was set to take place on the 5th of February, 2016. The notice of mediation was served on the plaintiff on the 29th of January, 2016 whilst the same was served on the defendant on the 3rd of February, 2016. To wit at 12.10 hours. The defendants acknowledged service but did not appear at the scheduled time rendering the mediation impossible. Consequent to this act, the mediator terminated the process on the grounds of non-compliance by the parties and hence these proceedings.

Reverting to the necessary procedural law, to wit Order 18 rule 19(1) of the RSC, it states as follows:



The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-

- a. It discloses no reasonable cause of action or defence, as the case may be; or*
- b. It is scandalous, frivolous or vexatious; or*
- c. It may prejudice, embarrass or delay the fair trial of the action; or*
- d. It is otherwise an abuse of the process of the court ;*

And may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

And again referring to rule 14 of the said Courts Mandatory Mediation Rules, it states as follows

14. *Non-compliance*

(1) Where a certificate of non-compliance is filed, the Assistant Registrar (ADR) shall refer the matter to the Magistrate, Chairperson of the Industrial Relations Court, Registrar or the Judge, as the case may be, concerned with case management.

(2) Where a matter is referred under sub-rule (1), the Magistrate, Chairperson of the Industrial Relations Court, the Registrar or the Judge, as the case may be, concerned with case management may—

- (a) establish a timetable for the action;*
- (b) strike out any document filed by a party;*
- (c) dismiss the action, if the non-complying party is a plaintiff, or strike out the statement of defence, if the non-complying party is a defendant;*
- (d) order a party to pay costs; or*
- (e) make any other order that is deemed just.*

In the matter before this court counsel informs that the matter was set for mediation on the 5th of February, 2016 and service of notice of mediation was effected on the afternoon of 3rd February, 2016 at the defendants offices. It was his averment that service was accepted without any complaint. In all above assertions, documentary evidence was adduced in support by the plaintiffs counsel.

Counsel for the defendant does not refute this allegation. All she stated was that indeed service was effected during lunch hour of the 3rd of February, 2016 whilst the same was done 5 days before for the plaintiff. She pleaded with the court not to dismiss the action. She emphasized

that it was because of time constraints due to the short notice that they found themselves in this predicament. She prayed that the court should exercise its discretion by opting for the choice of establishing a timetable for the action.

The analysis of the argument of counsel for the defendant seems to point to one thing and thus shifting the blame on their failure to attend mediation to the plaintiff by insinuating that they were supposed to be served with the process at the same time that it was effected on the plaintiff. Counsel however does not indicate whether anything was done to express their discontentment to the mediator or indeed the other party way before the date of these proceedings. Without any indication of such act of caution, this court views defence counsels' argument as not reasonable enough. In essence, the act simply shows lack of time management skills.

As alluded earlier, counsel for the plaintiff asked this court to strike out the defence and enter judgment in favour of his client on the basis of order 18, rule 19 of the Rules of the Supreme Court and rule 14 of the Mandatory Mediation Rules. The said rules have been reproduced as above. A quick look at these rules provide several options for the court. And without losing direction, it must be mentioned that the discretion to exercise any of the available options is with the court. However caution must be taken in that the exercise must be done judiciously.

That said, this court is aware that it is trite principle of law and the same has always been its practice that matters must be settled on the merits and not by mere technicalities. Off-course reasons must be given for the failure to comply at all times. With due respect, in regard to the matter herein, this court find the reason given as not reasonable. This notwithstanding, this court declines to order that the defence be struck out and instead order that counsel for the plaintiff do file summons for directions within seven days of the date of this order. The defendant is condemned in costs for this action.

Pronounced in chambers this 21th day of June, 2016 at Blantyre in the Republic of Malawi.


Kondwan Banda

ASSISTANT REGISTRAR