



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO 30 OF 2012**



BETWEEN

EDWARD PEMBA PLAINTIFF

AND

RAB PROCESSORS LIMITED DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Kapoto, of Counsel, for the Plaintiff

Mr. Jere, of Counsel, for the Defendant

Mr. O. Chitatu, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is the Plaintiff's Summons for an Order that the matter herein which was dismissed on 9th February 2017 for non-attendance by the Plaintiff and his legal practitioners be restored to the cause list [hereinafter referred to as the "Plaintiff's Summons"]. The Defendant's Summons is brought under Order 32, r.5 of the Rules of Supreme Court (RSC) and the Court's inherent jurisdiction.

The background to the Plaintiff's Summons is very brief. Hearing of the case was set for 9th February 2017 (set hearing date). The set hearing date was communicated to the parties through an order of this Court dated 11th January 2017. On the set hearing date, the case was called at 9:13 in the forenoon. There was default of appearance by the Plaintiff, either in person or by counsel, and there was also no explanation before me for the default.

O.35, r.1 of the RSC comes into play where there is failure to appear by both parties or either party and it reads as follows:



"1. (1) If, when the trial of an action is called on, neither party appears, the action may be struck out of the list, without prejudice, however, to the restoration thereof, on the direction of a Judge.

(2) If, when the trial of an action is called on, one party does not appear, the Judge may proceed with the trial of the action or any counterclaim in the absence of that party."

Counsel Jere prayed for the dismissal of the case. Acting on the basis of O.35, r. 1 of the RSC, I ordered the case to be struck out of the cause list.

The Defendant's Summons was filed with the Court on 14th February 2017. It is supported by an affidavit, sworn by Asma Osman Kapoto, legal practitioner in the firm of Messrs Chagwamnjira & Company, wherein he attributes the absence of the Plaintiff and his legal practitioners from Court on the set hearing date to an error in diarising:

- "3. THAT the matter herein was set for continued hearing on 9th February, 2017.*
- 4. THAT when our chambers got the said date of hearing, we failed to indicate in our diary the said date of hearing and consequently proceeded to appear before Justices Potani and Mbvundula on the said appointed time of hearing of this case without proper arrangements for this matter. I now exhibit the copy of our diary as AOK 1.*
- 5. THAT just after coming out of justice Potani's court, I was then informed by Mr. Chitatu that this matter had been dismissed for non-attendance.*
- 6. THAT the plaintiff is desirous to prosecute this matter and the failure to attend the court was due our human error, not the plaintiff's.*
- 7. THAT I believe that it is in the interest of justice that this matter be restored to the cause list as the plaintiff should not be punished for errors which are not his."*

I do not believe that the Defendant's failure to attend Court on 27th April 2015 was due to the given reason. Firstly, I wondered how the set hearing date could not have been diarized when the same was communicated in written form by way of an order. Secondly, Practice Note 35/3/1 of the RSC requires that good reasons such as ill-health and domestic misfortune have to be given for a court to order restoring a matter to the cause list. I have serious doubts that non-diarising of a set hearing date constitutes a valid reason.

Thirdly, I am not persuaded by Counsel Kapoto's contention that the Plaintiff should not be punished for errors which are not his. It is trite that that a lawyer acts, as an agent, on behalf of the client. I find the American case of **Link v. Wabash Railroad Co.** 370 U.S 626, 633-34 (1962) to be both instructive and

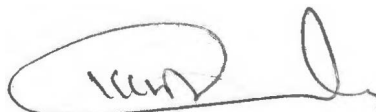
illuminating. The case concerns a review by the United States Supreme Court of a District Court's sua sponte dismissal of a diversity negligence case. Six years after the Appellant had filed the matter, the District Court scheduled a pre-trial conference and gave counsel two weeks' notice of the scheduled conference. On the day of the conference, the appellant's counsel called the court to say that he would be unable to attend the conference, giving the court the impolitic reason that he was busy preparing some documents for the State Supreme Court. The attorney did not attend the conference and the District Court dismissed the matter for failure to appear and prosecute the claim. In reviewing the District Court's dismissal, the Supreme Court made the following pertinent observations:

"There is certainly no merit to the contention that dismissal of the petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose his attorney as his representative in the action, and he cannot not now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney'"
– Emphasis by underlining supplied

I cannot agree more with the reasoning in **Link v. Wabash Railroad Co.**, supra. Our judicial system, as it is and as we know it, would simply collapse if courts were to adopt, as a matter of unqualified principle, the notion that a client (principal) can avoid the consequences of the acts or omissions of his or her freely appointed agent (legal practitioner). I am fortified in my view by two decisions of the Supreme Court of Appeal in **Maclemonce Yasin v. Rep, MSCA Criminal Appeal No. 29 of 2005 (unreported)** and **National Bus Limited v. Michael James Banda & Other, MSCA Civil Appeal No. 7 of 2017 (unreported)**.

In the circumstances and by reason of the foregoing, I have no option but to dismiss the Defendant's Summons with costs.

Pronounced in Chambers this 12th day of May 2017 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE