JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 186 OF 2017

BETWEEN:

GASTAS JUMBE ..... CLAIMANT

-AND-

GRACE ROBERT ..... 1ST DEFENDANT

VILLAGE HEADMAN CHIPAGARA ..... 2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Phokoso, of Counsel, for the Claimant
Mr. Khan, of Counsel, for the Defendants
Mrs. Doreen Nkangala, Court Clerk

ORDER

Kenyatta Nyirenda, J.

Introduction

This is an application by the Defendants to set aside a default judgment granted to the Claimant on 3rd July 2018 and to restore Defence. The application is brought under Order 13, r.6(2), of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as "CPR"].

Sworn Statements

The application is supported by a statement, sworn by the 1st Defendant [hereinafter referred to as the Defendants' sworn statement"]. The Defendants' sworn statement provides, in material part, as follows:

> *"1. The Claimant commenced the present proceedings against the Defendants claiming, among other things, the following;*

(a) *Damages for trespass.*

(b) *Declaration that he is the owner of the piece of land situate at BCA in Chiparaga Village, Traditional Authority Machinjiri, Blantyre.*

(c) *An injunction restraining the Defendants whether by themselves, their servants or agents or whomsoever acting on their behalf from trespassing on the Claimant's property situate in BCA, bringing down or attempting to bring down the Claimant's house, constructing a house on the Claimant's land, evicting the Claimant or his relatives, unlawfully offloading construction material at the Claimant's land, undertaking any construction work at the Claimant's land, restraining quiet enjoyment or interfering with or undertaking any activities whatsoever on the Claimant's land situated in BCA in Chipagara Village Traditional Authority Machinjiri in Blantyre District up until the hearing and determination of this matter or until further Order of the Court.*

(d) *Costs of the action.*

2. *After being served with the Court process we appointed Messrs Banda & Associates, hereinafter referred to as 'our Lawyer', to act on our behalf by putting up a defence and contest the Claimant's claim herein.*

3. *I am informed and verily believe that our Lawyer filed a defence on our behalf consequent which after some other processes the matter was set down for mediation on 26 June 2018 at 9 O'clock in the forenoon.*

4. *However, our Lawyer did not advise us that the matter was set down for Mediation on the said date. Further, having conducted search on the Court record we have discovered that our Lawyer also failed to file Statement of issue as is required by the rules.*

5. *I repeat paragraph 6 hereof and state that we have also discovered that our Lawyer attended late for the said mediation session. Consequently, the Court proceeded to strike out our defence and proceeded to enter Judgment in favour of the Claimant.*

6. *We only came to know about the preceding events when we were served with an Order for possession of Land on 30 July 2018.*

7. *In the premises, it is clear that our failure to attend the scheduled mediation session was not deliberate or by design but due to the fact that we were not aware of the same. Thus, had it been that we were informed of the said scheduled mediation we would have availed ourselves on the said date.*

8. *I verily believe that there was good cause for us not attending the said mediation session.*

9. *I further verily believe that we have a defence on merit to the Claimant's claim and it would only be just if we are given audi alteram partem so that this matter should be determined on merits.*

10. *In the premises, it is expedient in the administration of justice that the Judgment entered herein be set aside and our defence restored."*

The Claimant filed the following sworn statement, by Counsel Phokoso, in opposition to the application:

"3. ***THAT*** *the Claimant commenced action by writ of summons under Rules of Supreme Court on* ***08th June, 2017*** *seeking inter-alia on restraining the Defendants either by themselves, agents and/or servant or whatsoever acting on her behalf refrain from trespassing on the Claimant's property situated in BCA, bringing down or attempting to bring down the Claimant's house, constructing a house on the Claimant's land, evicting the Claimant or his relatives, unlawfully off loading construction materials at the Claimant's land, undertaking any construction work at the Claimant's land, restraining quite enjoyment or interfering with or undertaking any activities whatsoever on the Claimant's land situated at* ***BCA, in Chipagara Village, Traditional Authority Machinjiri in Blantyre District,*** *be declared as the owner of piece of land situated at BCA, Chipagara Village, T/A Machinjiri, Blantyre district having owned it, built on it and lived on it since 1986, that the Defendant bought the Claimant's land from the Claimants nephew who had no authority to sell with actual, implied and constructive knowledge that it belongs to the Claimant having been warned by his neighbours, his agents having been told so, is therefore not a bonafide purchaser and the purported sale is null and void, that the Defendants unlawfully trespassed the claimants land, demolished his house and constructed on it without legal authority and should vacate the land, that the Defendants be held liable in damages for trespass and for the demolition of the Claimant's house to be assessed by the Registrar, that a permanent injunction be granted permanently restraining the Defendant from trespassing on the Claimants land and the Defendant is condemned in costs of this action.*

4. ***THAT*** *the summons for the same were duly served on the Defendant.*

5. ***THAT*** *on* ***14th July, 2017*** *the Defendant filed a defence which they served on the Claimant although the same was not filed and was not on the court record.*

6. ***THAT*** *on* ***7th July, 2017*** *the Defendants were served with an application for an Interlocutory Injunction whose hearing was scheduled for* ***20th July, 2017.***

7. ***THAT*** *on the date of the hearing the Claimant's Lawyers said they were seized with another criminal case involving the Republic v George Chaponda and Others in the Magistrate Court and also sought an adjournment.*

8. ***THAT*** *the Court adjourned the matter to* ***August, 2017.*** *That in the meantime, despite notice of the Court proceedings and the application for an Interlocutory*

Injunction the Defendant herself continued demolishing the Claimant's house, mobilizing and went to occupy the Claimant's land.

9. ***THAT*** *on* ***8th August, 2017*** *the Defendants said they were not available again and were in Lilongwe attending to other matters.*

10. ***THAT*** *the Court went ahead to hear the Inter-parte application for an interlocutory injunction and granted it in their absence.*

11. ***THAT*** *the Defendants were served with the Order of Interlocutory Injunction but again disregarded it and continued their activities on the land.*

12. ***THAT*** *the Claimant's Lawyers wrote the Defendant's Lawyers to protest this but both the Lawyers and the Defendants ignored the injunction and the letter.*

13. ***THAT*** *the Claimant who is based in South Africa meanwhile continued prosecuting the matter herein paying millions in legal fees and travelling between Malawi and South Africa incurring thousands of Rands in expenses.*

14. ***THAT*** *the matter was set for mediation for the* ***26th June, 2018 at 09:00*** *O'clock.*

15. ***THAT*** *the Claimant duly served the Defendants the date of mediation on* ***24th May, 2018.***

16. ***THAT*** *the Claimant duly filed and served mediation bundle on the Defendants on* ***21st June, 2018.***

17. ***THAT*** *the Claimant travelled from South Africa to Malawi to attend mediation.*

18. ***THAT*** *on the morning of the* ***26th June, 2018****, despite being aware of the date both Counsel for the defendants and the defendants as notice to Counsel is notice to them as well did not appear. They had neither filed their mediation bundle.*

19. ***THAT*** *Counsel for the Defendants when telephoned indicated that he was attending a criminal trial before Justice Kalembera.*

20. ***THAT*** *no explanation or good cause was given for the defendant's failure to file mediation bundle or delegate another Counsel within their practice to attend mediation or indeed advise another Counsel to appear on brief , or for the Defendants themselves from attending.*

21. ***THAT*** *the Court subsequently made a ruling striking out the defence of the Defendant.*

22. ***THAT*** *as can be seen failure to defend the matter herein or to avail themselves by the Defendants is attributable both to themselves and their lawyer and they cannot now turn around blame their lawyer in the hope of having the matter restored.*

23. ***THAT*** *clearly where the defence lawyer had been negligent, the matter dismissed and judgment entered, the Defendants have a remedy in damages in the lawyers who handled the matter.*

24. ***THAT*** *the Defendants have that alternative remedy.*

25. ***THAT*** *the Court entered a Judgment in favour of the Claimant on* ***3rd July 2018****, then entered an order for possession of land which was dully served on the Defendants.*

26. ***THAT*** *the Claimant obtained a Judgment, then entered an order for possession of land and then entered a warrant of possession of land that the Sherriff will executing this week.*

27. ***THAT*** *it will be unjust on the Claimant who has now gone all the way to obtain the Judgment and enforced the Judgment, has incurred millions of Kwacha in costs prosecuting this matter and the Court which has spent almost 2 years on this case to be brought all the way back to mediation stage of the matter herein.*

28. ***THAT*** *it is in the interest of justice that litigation must come to an end. From the very beginning of these proceedings the Defendants have shown non chalance in their response to the Claimants prosecution of the matter. They served the Clamant an unfiled defence. They never attended the hearings for the Inter-parte applications for an Interlocutory Injunction. They ignored and disobeyed the injunction itself. They never filed anything for mediation or bothered to attend mediation and gave no good cause why they failed to.*

29. ***THAT*** *even after Judgment and an order for possession of land was entered and they were served they never bothered to comply by handing over possession of the land until the Sherriff notified them of the 30 day period within which he would be evicting them by virtue of the warrant of possession issued by the Court.*

30. ***THAT*** *the Defendants have shown no good reason at all why this matter has to be restored to the cause list and doing so would be unjust for the Claimant. That the matter has been decided on technicalities not merits is neither here or there because it is well within the Rules and the law. If the law and the rules intended all matters to be disposed off on the merits* ***Order 13 rule 6(1)(a)*** *would have been promulgated in vain.*

31. ***THAT*** *restoring the matter herein would there be an affront to the letter and spirit of the High Court Civil Procedure Rules 2017 in particular of* ***Order 1 Rule 5 (d) and (e)*** *which enjoins the Court to deal with matters expeditiously and allocating the Courts fair share of time to proceedings and save expenses.*

WHEREFORE *the Claimant prays that the Honourable Court dismiss application to restore defence and set aside judgment with costs."*

Submission

It is the case of the Defendants that they should not be punished for the omissions of their legal practitioners. The point was dealt with in the Defendant's Skeleton Arguments thus:

> *"4.0 ANALYSIS*
>
> *4.1 It is indisputable that the Defendants failed to attend a scheduled mediation session and failed to file statement of issues as is required by the rules. But as the evidence on record shows, the Defendant did not fail to attend the scheduled mediation deliberately. They failed to do so because Counsel failed to notify them. Their failure, therefore, was excusable.*
>
> *4.2 The Defendants have demonstrated that they have a defence on merit and it is only fair that the Defendants be accorded a chance to defend this cause. It would thus be utterly unjust if the Defendants were to be totally shut out from defending this matter merely because they failed to attend a scheduled mediation which they were not aware of. Justice would demand that this matter be determined on its merits.*
>
> *4.3 In the circumstances, it is expedient in the administration of justice that the Defendant's defence herein be restored and the Judgment that was entered herein be set aside."*

The thrust of the Claimant's opposition to the application is that setting aside the judgement and restoring the defence would be against the letter, spirit and tenets of the overriding objectives of CPR.

> *"4.0* ***ARGUENDO***
>
> *4.1* ***Restoring defence not in line with the overriding objective of the Court Rules.***
>
> *4.1.1 The within matter was allocated several dates for hearing by the Court both at injunction level and later into mediation.*
>
> *4.1.2 The matter concerns a piece of piece of land which is the claimant's home. As can be seen from the sworn statement in support throughout at the proceedings, the Defendants have shown no interest to have the matter dealt with expeditiously within the time and resources allocated to it by the Court.*
>
> *4.1.3 The Defendants through themselves and Counsel were not available to defend the matter either at the interparte hearing for*

an injunction, which was adjourned several times until the Court granted it in their absences.

4.1.4 *They were also not available during mediation without any good cause at all despite having a sufficient 30 days notice of the mediation. They never even bothered to file any mediation bundles in any case. Meanwhile the Claimant who had to commute from South Africa to Malawi for each stage of the proceedings suffered enormous expenses.*

4.1.5 *The totality of how have the Claimant conducted their defence of these proceedings smacks of a party not willing to help the Court to deal with the matter expeditiously within the time and resources allocated to it by the Court.*

4.1.6 *The Court was entirely justified to strikeout the Claimants defence, to proceed to enter judgment in favour of the Claimant and to issue an order for possession of land and a warrant of possession of land entirely disposing of the matter well within the Rules.*

4.1.7 *Restoring the defence therefore would be against the letter, spirit and tenets of the overriding objectives of the Courts Civil Procedure Rules which aim to deal with matters expeditiously, within the time and resources allocated by the Court while saving expenses.*

4.2 ***Restoring defence not in the interest of Justice***

4.2.1 *It is a cardinal principle of interests of justice that litigation must come to an end either on the merits or the technical grounds allowed by the law such as was done herein and that a party who acts in a non chalant manner and squanders opportunities to either expeditiously prosecute or defend a matter must not be allowed to abuse the Courts machinery by prolonging unnecessary court proceedings.*

4.2.2 *As his Lordship Justice Kenyatta Nyirenda held in* ***Ampex Limited vs Zagaf Transport,*** *there must be a point where matters should be closed.*

4.2.3 *The Court herein struck out the defence of the Defendants, the Court proceeded with the matter herein, and entered judgment in favour of the Claimant, the Court further entered an order for possession of land in favour of the Claimant and then the Court*

issued a warrant of possession to the Sherriff to execute the Claimants judgment.

4.2.4 The Defendants did nothing, until recently when they realised that the 30 days required by the rules for the Sherriff to enforce the warrant will expire shortly.

4.2.5 The Claimant, having gone all this way, expeditiously prosecuted this case whilst suffering enormous expenses and is now enforcing the Judgement of this Court, it will not be in the interest of Justice to drag him back 50 steps backwards.

4.2.6 There has to be a point at which matters must be closed. At least before the trial Court.

4.2.7 The Honourable Court should not be coy to put its foot down and sparingly restore only genuine matters that show good cause under Order 13 rule 6 and to affirm its dismissal of matters that disclose no valid cause warranting restoration. It is submitted that the present application does not show good cause warranting restoration and the Court ought to dismiss it.

4.3 ***Omissions of solicitor attributable to a party***

4.3.1 The Defendant herein was represented by Counsel. It is trite that omission, if at all, of Counsel in proceedings are omissions of the party itself.

4.3.2 There is therefore no rule or practice that the Court cannot dismiss a party's case or strike out pleadings due to omissions of the party's solicitors.

4.3.3 Where it is justifiable to do so, as was in this case, it is submitted that the Court was justified to dismiss the case and if anything the Defendant has a remedy against her own solicitors who acted for her at that time.

4.3.4 As can be seen, the Defendant had notice, through Counsel, of the mediation session herein 30 days before the date of mediation itself. They did not bother to file any mediation bundles neither did they bother to show up at the mediation. Their solicitor's notice is binding on them.

4.3.4 That their solicitor did not inform them of the mediation session is neither here nor there for his notice binds them.

4.3.5 It is submitted therefore that the Court rightly struck out the defence and entered judgment in the claimant's favour which ought not to be set aside or the defence restored."

Analysis and Determination

I have considered the application, including the sworn statements and the submissions. I am not persuaded by Counsel Khan's argument that the Defendants should not be punished for errors committed by their lawyers. 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 (suo motu) 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 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)**.

Further, it is very important that an application to restore a matter must be made within reasonable time. In the present proceedings, mediation was scheduled for

26th June 2018 and judgment was entered on 3rd July 2018. On 17th July 2017, the Claimant entered an Order for possession of land which was served on the Defendants. Thereafter, the Claimants obtained a warrant of possession of land whose enforcement is underway by the sheriff. The Defendants filed their application on 27th August 2018, two months after their defence was struck out and after the Claimant had taken three major steps in the proceeding. The Defendants have not put forward any explanation for the delay in bringing the application.

Conclusion

In the circumstances and by reason of the foregoing, I have no option but to dismiss the application with costs.

Pronounced in Chambers this 16th day of October 2018 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE