



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
LAND CASE NO 46 OF 2017**

BETWEEN

STRIPES INDUSTRIES PLAINTIFF

AND

ATTORNEY GENERAL (MINISTRY OF LANDS) DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Tchokhotho, of Counsel, for the Plaintiff

Messrs Matonga, Michongwe and Vokhiwa, Senior State Advocates,
for the Defendants

Ms. Doreen Nkangala, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is the Defendant's application in a proceeding for a re-hearing of an application to set aside a default judgement [hereinafter referred to as the "Defendant's application"]. The application is said to be brought under Order 10, r.21, of the Courts (High Court) (Civil Procedure) Rules [hereinafter referred to as "CPR"].

The background to the Defendant's application is as follows. The Claimant commenced an action against the Defendant on 9th November 2017 and the Statement of Claim is couched in the following terms:

- “1. *The Plaintiff was at all material times a private company and a manufacturer and trader of artificial hair.*
2. *The Defendant is the alter ego of Government and is being sued as such for the negligence committed by the Ministry of Lands as here below shown.*

3. *The Land Registrar issued to the Claimant a Land Certificate over **Title Number Chitsime 4/6/333** as an absolute proprietor on 14th January, 2014.*
4. *The registration of Title referred to in paragraph 3 above followed a Transfer of Land from Mrs. Debra Khansia on 7th January 2014, who in turn obtained title from Chrispine Kanzati who was the first Title Holder of the Freehold interest over the Title in question.*
5. *The Claimant, having obtained Title to the Land in question, constructed a warehouse and factory between the year 2014 and 2017 whose value as at June 2017 was in the sum of K2, 733,000,000.00.*
6. *By a Judgement of the Court dated 18th May, 2017, the High Court in Lilongwe District Registry Civil Cause No. 374 of 2016: **Aniz Abdul Gaffar Mussa vs Anas Jabri, Augustine Mtendere and Village Headman Ngongonda** and Other Persons ruled that the piece of land in question is leasehold land and not freehold land and that according to the testimony of the Land Registrar in the matter, Aniz Abdul Gaffar Mussa, the Plaintiff in that matter, is the correct Title Holder under lease-hold **Title Number Malangalanga 36/649**.*
7. *The Claimant repeats paragraph 6 above and contends that the Ministry of Lands, its servants or agents were negligent in issuing two opposed Titles over the same piece of land and the Claimant shall rely on the maxim res ipsa laquitur.*
8. *By reason of the Defendant's negligence, the Claimant has suffered loss and damage.*

Particulars of loss and damage

<u>Description</u>	<u>Amount</u>
loss of property worthy	K2,733,000,000.00
loss of rentals paid by Claimant to their Landlords that the Claimant shall have to continue paying for a period of 10 years in the sum of K3,739,650.00 per month with a 10% annual increment	K552,901,717.82
Loss of income in the form of Rentals for 3,888 square metres at K2,940.00/square metre with an annual increase of 10% per annum for 10 years	K1,690,015,034.53
Construction losses due to inflation at time of reconstruction in 2020	<u>K500,000,00.00</u>
Total	K5,475,916,752.35

9. *The Claimant therefore seeks the following relief:*
 - 9.1 *The sum of **K2,733,000,000.00** damages for loss of property;*
 - 9.2 *The sum of **K552,901,717.82** loss on rentals that the Claimant has to continue paying for a period of 10 years with a 10% annual increment;*
 - 9.3 *Loss of income in the form of Rentals in the sum of **K1,690,015,034.53** being lost rentals on 3,888 square metres at K2,940.00/square metre with an annual increment of 10% per annum;*
 - 9.4 *The sum of **K500,000,000.00** construction losses;*
 - 9.5 *Costs of this action.”*

The Defendant having filed and/or served no response within the prescribed period, the Claimant obtained judgement in default on 5th December 2017. Shortly thereafter, the Claimant filed with the Court an application to fix time within which Government should comply with the judgement. The application was scheduled for 9th February 2018 and it was served on the Defendant on 1st February 2018.

On the set hearing date of 9th February 2018, the Defendant being in default of appearance, Counsel Tchokhotho proceeded to present the application and the Court granted the Order sought by the Claimant, that is, the Court ordered that the Defendant must comply with the judgement dated 5th December 2017 within 30 days of 9th February 2018.

On 14th February 2018, the Defendant filed with the Court an inter-partes summons on an application to set aside default judgement. The application is supported by a sworn statement of Ms. Brenda Vokhiwa, Senior State Advocate. The material part of the sworn statement provides as follows:

- “3. **THAT** on 5th December, 2017, the Claimant obtained a default judgment in the matter for the defendants failure to file and serve defence
4. **THAT** the matter was set down for an application to fix time within which government should comply with the default judgment on 9th February, 2018.
5. **THAT** meanwhile the Attorney was still waiting for instructions from Ministry of Lands the alleged tortfeasor.
6. **THAT** on the 9th of February, 2018 the Attorney General’s Chambers was supplied with instructions that the Claimants claim has no merit and ought to be defended.
7. **THAT** the defendant has a defence on merits to the Claimants claim. Attached hereto and marked BVI is a copy of the said defence.

8. **THAT** it is therefore in the interests of justice that that the Defendant be given an opportunity to be heard in this matter before proceeding to fix the time frame within which Government should comply with the default judgment.

WHEREFORE I humbly pray to this honourable court that an order be made setting aside the default judgment herein and that the defendant be at liberty to file and serve defence”

The Defence referred to in the sworn statement of Ms. Brenda Vokhiwa is couched in the following terms:

- “1. The defendant refers to paragraph 1 of the statement of case and makes no comment thereof.
2. Paragraph 2 of the statement of case is admitted.
3. The defendant refers to paragraph 3 of the Claimant’s statement of case and contends that the defendants were not party to the transaction that led to the transfer of land between Ms. Debra Khansia and the claimant herein as the same was a Private arrangement between themselves, further the defendant contends that alleged Land Certificate said to have been issued by the Land Registrar over **Title Number Chitsime 4/6/333** on 14th January, 2014 was issued fraudulently, as such they cannot be held liable to it.
4. The Defendant refers to paragraph 4 and 5 of the Claimant’s statement of case and denies having ever issued any title to Mrs Debra Khansia nor to Mr. Crispin Kanzati and Stripes Industries Limited was taking place the land in issue was already public land and not freehold land under Title Number Malangalanga 36/649
5. The defendant repeat paragraph 4 above and states that at the time the alleged transfer of title between Mrs Khansia and Stripes Limited was taking place, the Minister responsible for land matters had already issued a lease over the said land in 2004 to Western Pharmaceuticals (Pvt) Limited and that the said Company had transferred the said lease to Mr. Aniz Abdul Gaffar Mussa in 2007.
6. The defendant refers to paragraphs 6 and 7 of the Claimant’s Statement of case and denies any negligence attributed to its servants or agents and contends that at no time did they issue two opposing titles over the same piece of land was created fraudulently as such cannot be bound by it.
7. The alleged negligence, loss and damages as pleaded and particularized in the Claimant’s statement of case are as such denied.”

The hearing of the inter-partes summons was scheduled for 6th March 2018. Meanwhile, a few minutes before the set hearing time, the Claimant filed with the

Court a sworn statement in opposition to the Application to Set Aside Default Judgement. The statement is made by Mr. Victor Jere and it reads:

- “4. *I have read the proposed defence in the matter and I opine that the proposed defence is not meritorious.*
5. *I note that the Defendant’s contention in paragraph 3 of the defence is that the land certificate issued by the Land Registrar over Title Number Chitsime 4/6/333 on 14th January, 2014 was fraudulent in nature.*
6. *The said Land Registrar who is alleged to have committed fraud is the employee of the Malawi Government under the Ministry of Lands and clearly the Claimant was defrauded in this matter.*
7. *The Claimant in this matter had no knowledge and did not take part in the alleged fraud.*
8. *I have been informed by the Claimant and Mr Ishmael Wadi who prepared the transfer of land that Mr. Mtendere has never worked for the Claimant or the Claimant legal practitioners.*
9. *I am further informed by Mr Ishmael Wadi that Mr Mtendere is the registered proprietor of an adjoining property and the Claimant only came to know him as co-defendant in the High Court of Malawi, Lilongwe District Registry Civil Cause No. 374 of 2010 Amiz Abdul Gaffar Mussa vs Anas Jabri Augustine Mtendere and Village Headman Ngongonda and other persons after the Claimant had already constructed the factory and warehouse over the property in question. Exhibited hereto and marked “VJI” is a copy of the Ruling in the Amiz Abdul Gaffar Mussa case.*
10. *Whatever the Defendant communicated to Mr Mtendere is therefore irrelevant to allegation of prior knowledge on the part of the Claimant but goes a long way to showing that the Defendant had prior knowledge of the defect in title and still proceeded to issue bad title to the Claimant without notifying the Claimant of the same.*
11. *Upon perusal of the file for Title Number Chitsime 4/6/333, it can be noted that the Government of Malawi issued freehold Title to Debra Khansia under Application Number L862/2011 on 13th June, 2011 from Fillimoni Mbetayasamba Kaphiri as family representative who appears to have been the first title holder for the property. Exhibited hereto and marked “VJ 2” is a copy of the transfer of land documents duly certified by the Land Registrar and marked “VJ 3” is a Land Certificate in the name of Debra Khansia.*
12. *On 3rd October, 2013, the Claimant through their lawyers Wadi & Associates applied for transfer of the Land from Debra Khansia to themselves. Exhibited hereto and marked “VJ 4” is a copy of the letter dated 3rd October, 2013.*

13. *By application number 20/2014 the Malawi Government transferred absolute ownership from Debra Khansia to the Claimant. Exhibited hereto and marked "VJ 5" is a copy of the transfer of land documents and marked "VJ 6" is a copy of the Land Certificate in name of the Claimant.*
14. *The Claimant proceeded to build a factory and warehouse on the land. Exhibited hereto and marked "VJ 7" is a valuation report for the property.*
15. *Even a recent search of the property Chitsime 4/6/333 shows that title is in the name of the Claimant. Exhibited hereto and marked "VJ 8" is a copy of the search certificate dated 22nd November, 2017.*
16. *I verily believe that the facts in this matter speak for themselves as but for the negligence or fraud (as is being confessed) of the Ministry of Lands, the Claimant would not have suffered the damage pleaded or at all.*
17. *I verily believe that the Ministry of Lands had a duty to protect the Claimant from obtaining a defective title whereas the Claimant had no way of detecting that the title they had obtained was defective especially when the Land Registrar issued consent for the transfer to proceed and for all intents and purposes, the epitome of title led the Claimant to believe that the freehold title for the property was regular.*
18. *Apart from the allegation of fraud, the defendant only makes general denials.*
19. *I therefore humbly pray for an order dismissing the application to set aside the default judgment herein with costs to the Claimant."*

When the application came for hearing, the Court was informed that the parties had agreed on having the hearing adjourned to allow the parties sufficient time to consider the documents before the Court. The matter was, accordingly, adjourned to 15th March 2018 at 2 o'clock in the afternoon.

On the appointed hearing date, there was default of appearance by the Defendant and there was also no explanation before me for the default. I then ordered the matter to be heard, notwithstanding the absence of the Defendant. Counsel Tchokhotho applied to have the application dismissed. The Court reserved its ruling.

Meanwhile, before the Court could deliver its ruling, the Defendant filed with the Court the present application which is supported by a sworn statement of Loness Micongwe, Senior Assistant State Advocate, wherein she attributes the Defendant's absence from Court on 15th March 2018 to a clerical mistake:

- “3. **THAT** we were supposed to attend to an application to set aside a default judgement on 15th March, 2018.

4. *THAT that the matter was adjourned in Court on the 6th March 2018, however, we mistakenly recorded the date of adjournment as 15th March, 2018 at 3 O'clock in our file instead of 2 O'clock.*
5. *THAT at 2:45 pm we went to Civil Registry to alert the Court Clerk of our presence at Court and to our surprise we were told that that the Court had already heard Counsel for the Claimant and the matter was adjourned to 2 O'clock and not 3 O'clock.*
6. *THAT we sought audience with the Honourable Judge which we were granted and it was confirmed that indeed the matter was adjourned to 2 O'clock and not 3 O'clock and that the Court has heard Counsel for the Claimant.*
7. *THAT the Court did advise us that it could not hear us in the absence of Counsel for the Claimant, if anything we should make the necessary applications to the Court, hence the present application.*
8. *THAT it is in the interest of justice, looking at the Claims and issues raised in this matter that the defendant be given an opportunity to defend this matter.*
9. *THAT it is only proper therefore that the Court should re-hear the defendant's application to set aside the default judgment obtained herein.*
10. *THAT the defence we have filed is a defence on the merits and the Attorney General is very committed to have this matter concluded procedural and conclusive manner and undertakes to timely and procedurally file all documentations and carry out orders given by this Court in relation to this matter.*
11. *THAT the amount being claimed herein are huge in excess of MK5,000,000,000.00 as such it is in the interest of justice that this matter be decided on merits.*
12. *THAT it is therefore in the interest of justice that the Defendant be given an opportunity to be heard and defend this matter."*

I momentarily pause to observe that under the Rules of the Supreme Court (RSC), the issue of proceeding with a matter in the absence of a party is dealt with under Order 32 and Order 35 of RSC. The former Order deals with applications and proceedings in Chambers and the latter Order relates to proceedings at trial.

Unlike under RSC, the issue of absence of a party under CPR is only covered in relation to trial: see Order 16, r.7, of CPR which reads as follows:

"(1) The Court may proceed with a trial in the absence of a party but—

- (a) *where a party does not attend the trial, it may strike out the whole of the proceeding;*
 - (b) *where a claimant does not attend, it may strike out his claim and any defence to a counterclaim; and*
 - (c) *where a defendant does not attend, it may strike out his defence and dismiss his counterclaim.*
- (2) *Where the Court strikes out the proceeding or any part of it under this rule, it may, on application of a party, subsequently restore the proceeding, or that part of the proceeding that was struck out.*
 - (3) *Where a party does not attend and the Court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.*
 - (4) *An application under sub rules (2) or (3) respectively must be supported by evidence.*
 - (5) *Where an application is made under sub rules (2) or (3) respectively by a party who failed to attend the trial, the court may grant the application only if the applicant—*
 - (a) *acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him;*
 - (b) *had a good reason for not attending the trial; and*
 - (c) *has a reasonable prospect of success at the trial.”*

The Claimant is opposed to the Defendant’s application on the grounds that (a) although fraud is alleged, the Defendant does not pin point the person who committed the fraud, (b) due process was followed in acquiring the property in question as evidenced by the fact that consent was obtained from the Minister under section 24A of the Land Act, (c) negligence on the part of the Defendant cannot be denied in that a defective title was passed and this resulted from fraud by an employee of Government and (d) the Defendant makes a general denial as to quantum.

With due respect to Counsel Tchokhotho, the grounds raised in opposition to the Defendant’s application are not relevant at this stage: they are, to my mind, meant as an answer to the Application to Set Aside Default Judgement. For now, the Court is concerned with being provided with a reasonable explanation for the Defendant’s absence on 15th March 2018 and whether or not allowing the Defendant’s application is likely to cause serious prejudice to the Defendant.

Having considered this matter, I am satisfied that the Defendant's failure to attend Court on 15th March 2018 was neither deliberate nor a result of carelessness on the part of Counsel. Just like other professionals, legal practitioners can genuinely make mistakes in note-taking. The case of **Burgoine v. Taylor (1878) 9 Ch.D. 1** is relevant. A defendant was not represented at the trial of the action, because his solicitor was ignorant of the fact that, in pursuance of an order of the Lord Chancellor, the action had, with others, been transferred from one Judge of the Chancery Division to another, and had therefore only watched the list before the former Judge. At the court of first instance, Fry, J. held that the solicitor had been guilty of gross negligence, and that the judgement which had been given for the Plaintiff could not be set aside. On appeal, the Court of Appeal set aside the judgment on payment of the costs of the day. In his judgement, Jessel, M.R made the following instructive observations:

"We think that the order asked for by the Defendant ought to be made. Solicitors cannot, anymore than other men, conduct their business without sometimes making slips, and where a solicitor watches the list, and happens to miss the case, in consequence of which it is taken in his absence, it is in accordance with justice and with the course of practice to restore the action to the paper, on the terms of the party in default paying the costs of the day, which include all costs thrown away by reason of the trial becoming abortive. As a general rule, solicitors in any branch of the Court consent to such order as is now asked, and that such an application should be opposed is to me a novelty. Still as the Appellant was in default, he must pay the costs of the application to the court below, but no costs of the appeal."

In the premises, the application by the Defendant for the re-hearing of the application to set aside the default judgement succeeds. Accordingly, I order that the application be re-heard on 12th July 2018 at 2 o'clock in the ~~forenoon~~ ^{afternoon}.

Costs of the "abortive" hearing on 15th March 2018 are awarded to the Claimant.

Pronounced in Chambers this 13th day of June 2018 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE