

**JUDICIARY
IN THE HIGH COURT OF MALAWI
CIVIL DIVISION
PRINCIPAL REGISTRY
CIVIL CASE No. 194 OF 2017**

BETWEEN:

WELLINGTON KASONGO.....CLAIMANT

-AND-

ATTORNEY GENERAL.....DEFENDANT

CORAM: JACK N'RIVA, JUDGE

Mr. G. Chimowa, for Claimant

Mr. A. Mahonga, for the Defendant

Mrs. D Mtegha, Court Clerk

ORDER

The issue for determination is whether to strike out the defence or not. This is pursuant to order 14 rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017.

On 1st February 2019, I set down this case for hearing. I set down 15th March 2019. I directed the parties to file witness statements and skeleton arguments 15 days before the date of hearing.

On 15th March, Mrs. Kumichongwe sent a word that she was representing the Honourable the Attorney General before the High Court on removal of conditions for legal practitioners.

I postponed the hearing to another date. By then, the defendant did not file the witness statements and skeleton arguments.

I set down again the hearing for 2nd May 2019. The defendant filed, on the same day, a witness statement and skeleton arguments. The claimant applied for striking out of defence for failure to comply with court's order for direction.

Mr. Mahonga, representing the defence, argued that much as they filed the documents late, Mrs. Michongwe sent an e-mail to Mr. Chimowa containing the witness statement as well as the skeleton arguments. Further, Mr. Mahonga argued, striking out of defence is not the only option under Order 14 rule 15; the Court can make any other order as it deems just. He further argued that the evidence of the defence is not strange; they dealt with the issue during mediation.

Indeed, where there is default by a party, the Court can make any other order as it deems just.

In this case, my view is that the defence is in extreme non-compliance with the direction of the court.

Fifteen days before the hearing, they filed no documents. Even after the adjournment, they never filed anything. They only filed the witness statements and the skeleton arguments on the day of hearing. Filing on the same day of hearing might be prejudicial to the claimant. That the issue was dealt with at mediation should not be a reason for the delay. That fact should have been a factor for the defendant to file the documents at earlier time.

Under the new procedural rules, there is need to conduct litigation efficiently. To achieve efficiency, and the over objectives of the rules, last minute-exchange of documents ought to be discouraged.

In *Burt v Linford Christie*, [2004]¹ District Judge Lumb said:

“Leaving matters to the last minute is inconsistent with conducting litigation efficiently and the thrust of the new overriding objective of dealing with litigation justly and at proportionate cost. Early preparation is much more likely to lead to a narrowing of issues between the parties or even agreement of budgets, saving time at the first hearing, thereby freeing up court time to be allocated to other matters ... Having left matters to the last minute and still missing a deadline is unlikely to attract sympathy from the Court in furthering the overriding objective of enforcing compliance with rules and practice directions, particularly when it leads to extra hearings, thereby allotting

¹ Birmingham District Registry, 10th February 2014,

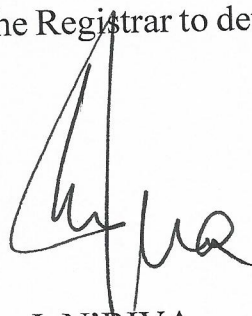
to the case a greater than appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

In *Karbhari v Ahmed* [2013] EWHC 4042, on the day before the start of the trial the defendant served a late witness statement and an amended defence. Turner J, relying on a comparable provision in the Civil Procedure Rules, 1998 [of England and Wales] stated that a witness may not be called to give oral evidence unless the Court gives permission. He said there was no permission for a late witness statement. The defence was struck out and judgment was entered.

Therefore, my judgment is that the appropriate step to take, in this case, is to strike out the defendant's defence and enter judgment for the claimant. I so order with costs to the claimants.

The matter should proceed before the Registrar to determine the claimant's damages.

Made the 7th day of May, 2019

A handwritten signature in black ink, appearing to read 'J. N'RIVA', written over a faint circular stamp.

J. N'RIVA
JUDGE