



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 492 OF 2013

BETWEEN:

PATRICK CHIBWANA.....CLAIMANT

AND

AIR CARGO LIMITED.....1ST DEFENDANT

NICO GENERAL INSURANCE COMPANY LIMITED.....2ND DEFENDANT

CORAM: WYSON CHAMDIMBA NKHATA (AR)

- Mr. Kuliya- of Counsel for the Claimant
- Mr. Chokotho-of Counsel for the Defendant
- Ms. Chida- Court Clerk and Official Interpreter

RULING ON AN APPLICATION FOR EXTENSION OF TIME TO FILE BILL OF COSTS

INTRODUCTION

This is a ruling is predicated upon an application the court had ordered be brought on notice. It is an application for extension of time for filing a bill of costs brought under order 31 rule 12(1) of the Courts (High Court) (Civil Procedure) Rules, 2017 (hereinafter CPR, 2017). The application is supported by a sworn statement sworn by Kuliya Ching'ande of Counsel. Basically, the claimant's case is that the delay was occasioned by the delay in the settlement of the damages by the defendant and the attendant further proceedings in order to enforce payment of the said damages. On the other hand, the defendants oppose the application. Basically, they submit that the claimant has not adduced any cogent explanation as to why he failed to file the bill of costs within the prescribed time.

THE CLAIMANT'S CASE

In brief, the applicant's case is that on the 12th of April 2021 the court awarded the Claimant the sum of MWK 9,760,900.00 in damages. Nonetheless, the defendants took one and half months next upon being served with the order, without making payment or commenting on the Order. On 31st of May 2021, they made an *ex-parte* application to obtain a suspension of the enforcement of the order on damages with a condition that within 7 days of the *ex-parte* Order for suspension they file an *inter partes* application for suspension of enforcement. The defendants defaulted on the Court's *ex-parte* Order for suspension in not filling the *inter parte* application within the time as directed. Consequently, the Claimant on the 11th June 2021 moved for enforcement of the Order by Third Party Debt Order and Seizure and Sale Order. The Court appointed the 8th of July 2021 for the hearing for Final Third-Party Debt Order. Late on 30th July 2021, 19 days of the making of the Third-Party Debt Order the 2nd defendant, paid a judgment settlement cheque for the sum of MWK 5,000,000.00 to the claimant. Consequently, the 2nd defendant was discharged by consent of parties before the return date of 8th July 2021. On the 8th of July 2021 the Third-Party Debt Order with regard to the 1st defendant was made final by the Court against the 1st third party and 2nd third party. No payment has been made yet under Final Third-Party Debt Order and they contemplate further proceedings to facilitate a recovery of this Final Third-Party Debt Order value against the third parties/or the 1st defendant. The time period provided for by Order 31, rule 12 (1) of the C (HC) (CP) Rules for filing of a bill of costs for assessment of costs on the part of the Claimant expires today the 12th of July 2021. This fact and bearing in mind necessary further proceedings in respect whereof costs must not be thrown away it is proper and just that the time limited for commencement of assessment of costs proceedings (the 3 months) be extended.

THE DEFENDANTS' CASE

The respondents, through Counsel, oppose the application. In a sworn statement by Counsel Tamando Lama Chokotho, they aver that counsel representing the claimant has not shown any fact that stopped the claimant from preparing the bill of costs neither does he state any event that automatically extends the period for filing a bill of costs for assessment at law. Augmenting his point in his oral submission, Counsel Chokotho pointed out that where certain activities take place after the assessment of costs, the receiving party is at liberty to file an extra bill of costs. Further to that, Counsel brought to the attention of the court that by the 29th of July, 2021 when the court sat for hearing of this application the claimant had not yet brought a bill of costs. He questioned the basis for granting an extension in the absence of the bill of costs to be assessed. He drew an analogy with an application of setting aside default judgment where it is imperative that a defence be produced and shown to the court. Counsel is of the view that the claimant acknowledges that he is out of time to file the bill of costs and there is no question of an automatic extension. Counsel also challenged the claimant's assertion that there was no need for a sworn statement

to accompany such an application. He drew the court's attention to order 10 rule 4 of the CPR 2017 which says an application for an interlocutory order under shall have with it a sworn statement by the applicant or his legal practitioner setting out the facts that support the relief sought. He also challenged the claimant's assertion that time stopped during the process of enforcing the judgment. Counsel contends that the claimant has not cited any law to the effect that time can be stopped. It is his prayer that the application be dismissed with costs.

THE APPLICABLE LAW AND LEGAL PRINCIPLES

Principally, the application for extension of time to file a bill of costs is governed by order 31 rule 12(1) and (2) of the CPR 2017 which provides that:

(1) A bill of costs shall be filed with the Court for assessment within 3 months from the date of the costs order and the bill shall be filed at the conclusion of the whole proceeding unless the Court orders otherwise.

(2) A party may apply to the Court to file a bill of costs before the conclusion of a proceeding or for an extension of time for filing of the bill under sub rule (1).

That notwithstanding, it needs to be stressed that the power given to this court under order 25 rule 1(d) of the CPR, 2017 to grant extension or abridgment of time and under order 31 rule 12(1) and (2) to grant an extension of time is discretionary. However, this exercise of discretion is unfettered only to the extent that it should not be exercised as a matter of course, but must be exercised judicially and judiciously. It ought to be exercised in favour of an applicant if an exceptional circumstance for his being out of time is established to the satisfaction of the court.

DETERMINATION

The fulcrum of this application is whether the claimant has advanced good and substantial reasons to warrant the grant of his application for an extension of time to file a bill of costs or put another way, whether the delay on the part of the claimant to file a bill of costs was for a good reason in the circumstances of this case. Gleaned from the averments made through oral and written submissions by counsel, it is evident that the sole reason advanced by the claimant for his failure to file the bill within the prescribed time was the delay in the settlement of damages by the defendants. The question is, is this a good and substantial reason?

Before answering this question, it is significant to note that even the manner in which this application was made was challenged. In his oral submission, Counsel Chokotho points out that this application was not

accompanied by a sworn statement which runs counter to order 10 rule 4 of the CPR 2017. In his sworn statement in opposition, Counsel avers in paragraph 5 as follows:

I have noted that in the sworn statement, Counsel has not shown any fact that stopped the claimant from preparing the bill of costs neither does he state any event that automatically extends the period for filing a bill of costs for assessment at law.

The court may have missed a point but to say the least I found the submission contradictory. The application herein is accompanied by a sworn statement sworn by Counsel Kuliya as rightly stated in paragraph 5 of the defendant's sworn statement. I strongly hold the view that whether or not the sworn statement lacks the much needed merit to advance the grounds for the application being made in this matter is another issue.

Further, I noticed that the presumption of an irregularity in the application herein is predicated on the requirement that interlocutory applications be accompanied by a sworn statement per order 10 rule 4 of the CPR, 2017. The question is whether this is an interlocutory application. I am unable to be persuaded by the defendant's submission that the application to extend time to file a bill of costs is an interlocutory application. I think, with deference, that orders settling the rights of the parties on liability and on the extent of damages having already been made, an application to extend time for filing a bill of costs cannot be deemed interlocutory. Indeed, the law is trite, that for all practical purposes, what ought to be taken in to account is the effect the application being made tends to have on the right of the parties. Thus, if the order determines once-and-for-all the rights of the parties, the application cannot be said to have been interlocutory. All the same, it appears I have digressed. The court having already found that there was a sworn statement herein, the contention is rather academic.

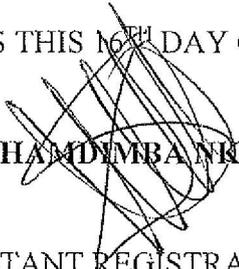
In respect of the requirement for good and substantial reasons for failure to file the bill within the prescribed time, as aforementioned the claimant deposed in his sworn statement that the delay was occasioned by the delay in the settlement of damages by the defendant. The claimant argues that the time stopped while they were in the process of enforcement proceedings. Observably, the assertion was not backed by any law. The defendant made an endeavor to demonstrate that it was possible for the claimant to proceed with the filing of a bill of costs in order to comply with the time limits and later file a supplementary bill to cover the work done after filing of the initial bill. Nothing of that nature happened in this matter. I must also mention that even on the date of the hearing of this application, the supposed bill was not yet filed even just to show how keen they are with the assessment of costs.

Delay, they say, defeats equity. The law aids those who are vigilant not those who sleep upon their rights. I strongly believe that timelines in the rules are intended to make the process of judicial adjudication and

determination swift, fair, just, certain and even-handed. It need not be over-emphasised that public policy demands that cases be heard and determined expeditiously.

Thus, since in the instant application, the sole reason adduced by the claimant for failing to file a notice for appointment of assessment of costs and the bill of costs within the prescribed time and therefore for invoking the discretionary jurisdiction of this Court is that they were preoccupied with enforcement proceedings for payment of damages that had been awarded, I am constrained to find that it can be regarded as amounting to a good and substantial reason for the delay in filing the bill of costs. In the light of the foregoing consideration, I hold that the application is without merit and is accordingly refused. No costs are awarded.

MADE IN CHAMBERS THIS 16TH DAY OF AUGUST, 2021


WYSON CHANDIMBA NKHATA

ASSISTANT REGISTRAR