



**JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)
CIVIL CAUSE NO. 682 OF 2017**

BETWEEN:

LEONARD YANKHO PHIRI & OTHERS CLAIMANTS

-AND-

LILONGWE CITY COUNCIL 1ST DEFENDANT

LILONGWE WATER BOARD 2ND DEFENDANT

MALAWI HOUSING CORPORATION 3RD DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Messrs. Kita and Katundu, Counsel for the Claimants

Mr. Songea, Counsel for the 1st Defendant

Mr. Henry Kachingwe, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is my Ruling on an application by the 1st Defendant for two orders, namely, an order setting aside the judgement against the 1st Defendant pronounced on 9th September 2020 and a further order restoring the Defence of the 1st Defendant. The application is brought under Order 16, rule 7(2) and (3), of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as the “CPR”].

The application is supported by a sworn statement by Mr. Alickson Msukwa, the Assistant Legal Officer for the 1st Defendant, wherein he depones as follows:

- “5. **THAT** *this matter was being handled on our behalf by the office of the Honourable the Attorney General and that Counsel Neverson Chisiza was the officer responsible for handling this matter.*
6. **THAT** *I had last interacted with Counsel Chisiza on different matters on 6th August, 2020 on several issues but no mention was made about this case coming up for a*

hearing on 17th and 18th August, 2020 in order for me to organize witnesses in readiness of this case.

7. **THAT** on 12th August, 2020 I went to Counsel Chisiza's office after noting that he was not picking my calls that was when I was told that he was ill and admitted at ABC Clinic and nobody was allowed to visit him .
8. **THAT** when we followed up on the media reports that the Court entered a judgment against the 1st Defendant we sought audience and explanation from our legal representative, the Honourable the Attorney General through Mr. Chisiza who told the 1st Defendant that he was yet to resume duties because of the illness.
9. **THAT** the 1st Defendant later learnt that the matter was being handled by Counsel Aristotle Mahonga.
10. **THAT** the 1st Defendant became concerned with the progress of the matter and sought audience with the Honourable the Attorney General through a letter dated 2nd October 2020. Attached hereto and marked "**AM 1**".
11. **THAT** after engagement with the office of the Attorney General the 1st Defendant decided to engage private lawyers to represent it in this matter.
12. **THAT** being a public institution the 1st Defendant had to follow the rules and regulations for procurement of such services thereby losing more time before an action was taken on the matter.
13. **THAT** paragraph 11 hereof refers. On 22nd September, 2020 the 1st Defendant issued a request for quotations from a number of law firms to provide a legal opinion to the 1st Defendant on how it can possibly proceed with the matter since there was no such direction from the Attorney General that far. Attached hereto and marked "**AM 2**" is a copy of the request for quotations.
14. **THAT** getting the legal opinion on the matter, on 13th October, 2020 the 1st Defendant released a request for proposals for provision of legal representation in the matter. Attached hereto and marked "**AM 3**" is a copy of the bid document.
15. **THAT** the 1st Defendant concluded the procurement process for external legal representation on 27th October 2020.
16. **THAT** the delay in making this application was occasioned by factors beyond the control of the 1st Defendant. However, the 1st Defendant did its best to expedite the process given the restrictions for procurement of such services by public institution.
17. **THAT** the 1st Defendant has prospects of success if this application is granted. There is evidence on record that some of the Claimants reside in residences that do not get water supply from the water pipe that carried contaminated water.
18. **THAT** further to the above, most of the Claimants do not have evidence of having consumed contaminated water and have attempted to tender purported medical

reports that are not medical reports at all or fail to establish that the Claimant concerned suffered any damage.

19. **THAT** *therefore, the 1st Defendant has prospect of success and should be granted this application so that the matter is decide on its merit.”*

Shortly thereafter, the 1st Defendant filed with the Court three supplementary sworn statements by Mr. Aristotle Mahonga, Mr. Neverson Chisiza and Dr. Malemia respectively.

Mr. Mahonga was one of the counsel that represented the 1st Defendant in this matter and he deposes thus:

- “5. **THAT** *this matter was being handled by my colleague Counsel Neverson Chisiza.*
6. **THAT** *however, on the 16th of August, 2020 Counsel Chisiza was taken ill abruptly. He had no time for any handover of files because of the seriousness of his illness.*
7. **THAT** *I was given the file on 23rd August 2020. At this point I was told that judgment was entered against the 1st and 3rd Defendants for failure to attend trial on or about 17th August, 2020.*
8. **THAT** *I had therefore intended to prepare an application to set aside the judgment. However, on 25th and 26th August I had trials in Lilongwe and Blantyre respectively and I could not immediately start working on the present file as they were court processes in the two cases that I had to attend to before I attended to the present case.*
9. **THAT** *on the morning of 27th August 2020 I was given a copy of sworn statement in opposition to an application to set aside the judgment that was purportedly entered on 18th August 2020. I established the time for hearing of the application and I decided to attend Court all the same.*
10. **THAT** *during the hearing I was granted leave to make an oral application to set aside the said judgment and I also supported the 3rd Defendant’s application. The Court dismissed the applications on the basis that they were made prematurely before the Court had made a decision.*
11. **THAT** *meanwhile, Counsel Neverson Chisiza who was the officer seized of conduct of the matter has not been feeling well and has hardly reported for duties.*
12. **THAT** *the 1st Defendant requested to be handed over the file on or around 25th September 2020. The matter had to be discussed internally and with the 1st Defendant first.*
13. **THAT** *the case file was handed over to the 1st Defendant through cover memorandum dated 16th October 2020. Attached hereto and marked “AM 3” is a copy of the said memorandum.*

14. **THAT** the reason why no officer from the Attorney General's Chambers represented the 1st Defendant on the appointed day of 17th August 2020 was that the officer who was handling the matter was not available due to his illness and that no one at the Honorable Attorney General's Chambers knew about the hearing.
15. **THAT** the reason why the office did not immediately take action after the judgment herein was that we needed to consult internally, including with Counsel Chisiza who was hardly available due to his illness."

The material part of Mr. Chisiza's supplementary statement provides as follows:

- "3. **THAT** I make this sworn statement today, on 20th November 2020.
4. **THAT** I was counsel that represented the 1st Defendant in this matter and I am by this reason thereof duly competent to make this Sworn Statement in these proceedings.
5. **THAT** the matters to which I depone to herein are within my personal knowledge which I verily believe to be true to the best of my belief and information.
6. **THAT** I was aware of the appointed dates for this matter and had planned to attend trial on behalf of the 1st Defendant.
7. **THAT** however, on 10th August 2020 I fell seriously ill that I was admitted at ABC Clinic in Lilongwe. Attached hereto and marked "NC 1" copies of relevant pages from my health passport showing the diagnosis by doctors and the prescriptions I was subjected to.
8. **THAT**, my illness was so sudden that I did not handover any work file, including the one for this matter to any colleague in the Attorney General's chambers.
9. **THAT my** situation got worse after a few days so much so that I temporarily lost my sight. Due to the Covid -19 pandemic and the preventive measures that were put in place, no one was allowed to see me. Neither was I allowed to use any gadgets due to the sight problem and my blood pressure problems.
10. **THAT** I remained in hospital until 16th August, 2020.
11. **THAT** the reason for me not attending court on 17th August 2020 was a circumstance beyond my control as I was still very ill and I had not regained my sight. I was still not allowed to use any gadget for reasons aforesaid.
12. **THAT** all this time, my office was locked and the keys were in the pocket of the trousers I wore on the fateful day. As such, my colleagues could not even get access to my office to be aware of the pending date.
13. **THAT** unfortunately, this is not the only matter I did not attend to due to my sickness. I also missed filing submissions in Savenda **Management Services v. Attorney General (Ministry of Health)**, Commercial Cause number 11 of 2019

where the Claimant is also represented by Counsel Kita who represents some of the Claimants herein.

14. ***THAT*** *I only reported for duties in or around October, 2020 to give briefs to my colleagues to attend to matters in my office that needed immediate attention. I reported for duties on 2nd November, 2020.*
15. ***THAT*** *by the time I was able to briefly report for duties the judgment herein had already been entered.*
16. ***THAT*** *in the meantime, my colleague Counsel Aristotle Mahonga was made aware of the matter after a notice of an application to set aside judgment made by the 3rd Defendant was brought to his attention. At this point, I was still very unwell and was not of any help to my colleague.”*

Dr. Malemia is a medical doctor at ABC Clinic in Lilongwe. He states that on 10th August 2020, Mr. Neverson Chisiza was admitted to ABC Clinic and he was diagnosed with hypertension and sight problem. He concludes by stating that Mr. Chisiza remained admitted until 16th August. 2020.

The application by the 1st Defendant is opposed by the Claimants and there is a sworn statement in opposition by Mr. Gift Katundu wherein he depones that the issues raised by the 3rd Defendant are not enough for the Court to set aside the judgement. The relevant part of the sworn statement is couched in the following terms:

- “3. ***THAT*** *I have read the 1st Defendant’s sworn statements by **Alickson Msukwa** and **Aristotle Mahonga** in support of the application for setting aside judgment and restore defence and state that the issues raised by the claimant are not enough for the Court to set aside Judgment.*

Reply to Alickson Msukwa’s Sworn Statement

4. ***THAT*** *there is no legal basis for staying proceedings due to the first defendant’s Legal representatives negligence in handling the matter herein.*
5. ***THAT*** *Counsel seized of this matter appeared in Court on the 8th of July, 2020 when this matter was set for trial on the 17th and 18th of August, 2020. Therefore Counsel was aware that this matter would come on this particular day.*
6. ***THAT*** *Counsel for the 1st defendant did not attend the hearing on the 17th of August, 2020 and the Court proceeded to hear the matter and appreciated the evidence before it.*
7. ***THAT*** *reference is made to paragraph 6 of the 1st Defendant’s sworn statement in support and state that the deponent having met Counsel Chisiza on the 6th August, 2020, he ought to have made enquiries on the case herein but rather did not and Counsel Chisiza never said anything to him about the case herein. The deponent herein being the Assistant Legal Officer for the 1st defendant was never told that the matter would come for hearing on the 17th of August, 2020 and this should*

reveal a lot about the management of this case by the 1st defendant's Legal Representatives.

8. ***THAT*** the sickness of Counsel Chisiza of 16th August, 2020 is believed to be abrupt, and by then necessary communication to the Client about the hearing of the case on the 17th of August, 2020 was never made by then.
9. ***THAT*** it has to be noted that the said Mr. Chisiza is just an Officer in the Office of the Attorney General and his absence was not personal but rather the Office did not attend.
10. ***THAT*** going through paragraphs 7-9 of the sworn statement in Support herein, it is presented that the said Mr. Chisiza had fallen ill and the Office of the Attorney General did not take up attend trial on the 17th of August, 2020.
11. ***THAT*** the Court proceeded to hear evidence from the Claimants and reserved its judgment and later delivered its Judgment on 9th September, 2020.
12. ***THAT*** reference is made to paragraph 9 of the sworn statement in support and state that at all material times the Office of Attorney General ought to have had somebody to take care of the file and hence Counsel Mahonga was the one dealing with the same.
13. ***THAT*** reference is made to paragraphs 10-15 of the sworn statement in support of the application herein and state that the issues raised thereto are to do with their Administrative arrangements and the same should not affect the rights of the Claimants herein.
14. ***THAT*** reference is made to paragraph 16 of the sworn Statement in support of the application herein and state that the delay in making this application is inexcusable; if the 1st Defendant were really concerned about this case, I do not think that the Office of the Attorney General would fail to make an application of this nature and had to wait for some procurement procedures to materialise to appoint a Private law firm to make this application when the requirement entails that the one trying to seek this relief must be prompt, we find the reason for the delay to be very petty.
15. ***THAT*** reference is made to paragraphs 17 and 18 of the sworn statement in support of the application to set aside Judgment herein and state that the issues raised thereto were not presented in their defence and in any of their pleadings and the issue of liability was never disputed, what was the issue was as who was responsible for the damage of the manhole and the Defendants only kept on shifting the blame to each other; no single Defendant denied liability and therefore the 1st defendant has no prospect of success.

Reply to Aristotle Mahonga's Sworn Statement

16. ***THAT*** paragraph 6 talks of an abrupt sickness of Counsel Chisiza on the 16th of August, 2020 and we are not told as why Counsel Chisiza would not use the modern Technology of phone calls or messages to alert his colleagues of his predicament

so as the colleagues would attend trial on the appointed day. There is no any mention that Counsel Chisiza was seriously ill that he would fail to make a phone call or probably write a message of any sort.

17. **THAT** in reference to paragraph 7 of Mr. Mahonga's sworn Statement, it has to be disputed that the Court did not enter Judgment for failure to attend trial by the 1st and 3rd defendant but rather the Court proceeded to hear the matter on the 17th August, 2020 and by the 23rd August, there was no judgment yet and from Counsel's presentation it shows that he only heard and he does not disclose the source of this information, a development which should still be looked at Counsel from the Attorney general Chambers not having committed themselves to this case as counsel could not have spared some little time to appreciate the Court file to appreciate issues thereto.
18. **THAT** reference is made to paragraph 8 of his sworn statement and state that Counsel further presents to this Court that he had other pressing matters elsewhere and had to be given priority and the promptness required in this matter did not matter.
19. **THAT** reference is made to paragraph 9 of the sworn statement herein and state that Counsel has never been serious with this matter as he states that he just wanted to attend the Court all the same without having appreciated the Court file or showing an intention to make any application.
20. **THAT** reference is made to paragraph 10 and state that the Court dismissed their applications because they made an application for setting aside the Judgment when the Judgment was never delivered then, a result of lack of thorough management of the case herein.
21. **THAT** in reference to paragraph 14, we state that the reason stated therein does not suffice as the 1st Defendant was represented by the Office of the Attorney General and not an individual, Office maladministration should not affect the rights of the Claimants herein.
22. **THAT** the reason proffered in paragraph 15 that it was because they needed to consult internally is contradicting to Counsel's earlier assertions in paragraph 8 that Counsel had other urgent matters other than the one at hand.

Issue already decided

23. **THAT** the 3rd defendant after being made aware of the judgment herein promptly made an application to set aside the Judgment on the 14th September, 2020 and the hearing took place on the 19th of October, 2020 and the Court dismissed the application on the 4th October, 2020 and we attach the copy of the ruling as document marked "GMKI".
24. **THAT** the Court is being called to decide on an issue which was already determined."

The Claimants also filed a sworn statement in reply to the supplementary sworn statements. The material part of the sworn statement in reply will be quoted in full:

- “3. *That in addition to our own sworn statement filed on 20th November, 2020, we also reply to the sworn statement of Neverson Chisiza supplementing to the already filed sworn statement as follows:*
- (a) *That Counsel Chisiza under paragraph 6 of his supplementary sworn statement admits that he was aware of the appointed dates for this matter and had planned to attend trial on behalf of the 1st Defendant*
 - (b) *That in line with the admission with 3(a) above; it will be wrong to assert that the 1st Defendant was not aware of the proceedings herein.*
 - (c) *That reference is made to paragraphs 7 – 10 and state that Counsel Mahonga’s sworn dates totally differs with dates that Counsel Chisiza states he had fallen ill.*
 - (d) *That Counsel Mahonga states that Counsel Chisiza fell ill on August, 16th, 2020.*
 - (e) *That we will contend that the appearance in Court was not personal but rather an office of the Attorney General*
 - (f) *That reference is made to paragraphs 13-16 and state that Counsel’s excuse in **Savenda Management Services vs. Attorney General (Ministry of Health)** Commercial Case No. 11 of 2019 was ignored when he applied for the setting aside of judgement when judgement was entered when Counsel Chisiza missed the deadline for filling the submissions on point of law as directed by the Court; the court dismissed the application for setting aside the judgement in that matter; we attach the application by the Attorney General Chambers in Savenda case and the ruling in Savenda Case as documents marked “GK1” and “GK2” respectively.*
4. *THAT the sworn statement by the Assistant Legal Officer of the 1st Defendant shows that he was not even aware of the proceedings by the 10th of August and he had not yet prepared witness statements and obviously this shows that by 16th of August, Counsel Chisiza would not have been ready.”*

The law applicable to the present application is to be found in Order 16, rules 7 (2), (3), (4) and (5), of the CPR:

- “(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.*”

It is the case of the 1st Defendant that it has met the conditions stipulated in Order 16, rule 7 (5), of the CPR. Paragraph 6.7 of the 1st Defendant’s Skeleton Arguments is relevant and this paragraph is couched in the following terms:

“Analysis and submission

6.7 *It is submitted that:*

- 6.7.1 *The failure to appear for trial of the case occurred due to no fault of the 1st Defendant. Counsel who was seized of the matter was seriously sick and could not give brief to any of the lawyers within the Attorney General’s Chambers to appear on his behalf. The 1st Defendant, therefore, had a good reason for not attending the trial in terms of Order 16 rule 7 (5) of the Courts (High Court) (Civil Procedure Rules)*
- 6.7.2 *In any event, Counsel who was seized of the matter on behalf of the 1st Defendant did not appear for the hearing of the case on 16th June, 2020 because he was sick. He could not, therefore, not have been aware that the case had been adjourned to 17th and 18th August, 2020.*
- 6.7.3 *No notice of adjournment for the hearing of the case on 17th and 18th August, 2020 was served on the Attorney General’s Chambers. The record shows that when the court sat on 16th June, 2020 it adjourned the case to 17th and 18th August, 2020. It behoves the Claimants’ lawyers to prepare and serve the notice of adjournment on the Attorney General’s Chambers following the oral order for adjournment of the case considering that no one from the Attorney General’s Chambers was present in court when the case was adjourned to 17th and 18th August, 2020.*
- 6.7.4 *The application has been made promptly: judgment was delivered on 9th September, 2020 and the application to set aside judgment filed on 3rd November, 2020. Alternatively, if one month and 26 days can be considered*

as a delay, which we deny, then there is an explanation for the delay, namely, the 1st Defendant needed to adhere to public procurement laws before it could engage private counsel to handle the application on its behalf.

- 6.7.5 *In the further alternative, any delay could be as a result of negligence by the Attorney General's Chambers for which the 1st Defendant should not be punished. In **Chombe Foods Ltd v George Botha** Miscellaneous Civil Appeal No. 3 of 2020 MSCA (Unreported), the Malawi Supreme Court of Appeal departed from the principle that mistake of counsel should be remedied by a suit for negligence. The court rebuked this approach as inconsistent with the 'rights to a hearing and access to the courts.' So, the court in that case proceeded to allow the application to extend time within which to file a notice of appeal whose failure to file in time was a result of previous counsel's negligence.*
- 6.7.6 *The 1st Defendant has a reasonable prospect of success at the trial. Although the court found that the 1st Defendant was both negligent and in breach of its statutory duties, the court was deprived of the 1st Defendant's assessment of the Claimants' own pleadings to the effect that the spillage of the sewage into the main 2nd Defendant's pipe was as a result of lack of pressure in the 2nd Defendant's water pipe [per paragraph 15 of the statement of case] and the 2nd Defendant's failure to repair 'the broken pipe that was lying next to the sewage' [per paragraph 14 of the statement of case]. Further, there was absence of the 1st Defendant's thorough consideration of the Caparo test, namely:*
- (a) *harm must be reasonably foreseeable as a result of the defendant's conduct (as established in **Donoghue and Stevenson** [1932] AC 562);*
 - (b) *the parties must be in a relationship of proximity, and*
 - (c) *it must be fair, just and reasonable to impose liability. (**Caparo Industrial Plc v Dickman** [1990] 1 All ER 668).*
- 6.7.7 *The question to be answered is whether it was reasonably foreseeable that sewage would escape into the 2nd Defendant's pipe and contaminate the water. That question can be answered after hearing evidence from all the parties. More importantly, the 1st Defendant would have presented counter-evidence that in fact no harm was caused on the Claimants as a direct result of the alleged failure to maintain or repair the sewer line. The bursting of the 2nd Defendant's pipe was certainly a supervening event that cannot be attributed to the 1st Defendant.*
- 6.7.8 *Although the Claimants withdrew the claim against the 2nd Defendant, its presence as a party was necessary for the court to effectively adjudicate the issues (**Nseula v Attorney-General and another** [1996] MLR 401). In fact,*

the 2nd Defendant's evidence indicate that more than half of the Claimants were not affected by the water pollution.

- 6.7.9 *It was inconceivable that all the Claimants drank the water as some might have already gone to work or to school. Some might have been sleeping at the time. Further, no right-thinking person can drink discoloured water. It is ludicrous that the Claimants drank the water fully knowing that it had fecal smell or had foul odour.*
- 6.7.10 *The Claimant's evidence was unchallenged. The cross-examination of the Claimant's witness would show that it was inconceivable that they suffered the injuries they claim to have been injured. The cross examination would also have shown that no hospital handled a case arising from consumption of water that was mixed with sewage.*
- 6.7.11 *Rules of natural justice would be seriously breached if the judgment is not set aside to allow for the 1st Defendant to be heard: see Mzuzu City Assembly and Kesale Auctioneers and Estate Agents v. G.H. Bandawe Singini [supra].*
- 6.7.12 *Per Budget Rent-A-Car Corporation v Abdulla and others [supra] and per Seyani v Meyer [supra], this Honourable Court's judgment of the 9th day of September, 2020 should be set aside to allow the Defendant to be heard in the matter."*

The Claimants hold a different view. They have advanced four main reasons why the application has to be dismissed, namely, that:

- (a) the application was not made promptly;
- (b) the reason given for non-attendance is not genuine;
- (c) the 1st Defendant does not have reasonable prospects for success at trial; and
- (d) the matter cannot be reopened after judgment was given after a full trial.

In the interest of parity of treatment, the relevant part of the Claimants' skeleton arguments will also be quoted in full:

"Is there promptness by the 1st Defendant as required under Order 16 rule 7(5)(a) of the Court (High Court) (Civil Procedure) Rules}?"

As it can be noted in the circumstances, the 1st Defendant herein has taken almost after 2 months after the delivery of the judgment herein to make this application. The reason for the delay it is said that they had to consult internally before they find another representation. The office of the Attorney General could not act promptly on this matter because Counsel Mahonga who took over from Counsel Chisiza was busy with the other matters very important than this one. It is therefore our submission that the 1st defendant

did not act promptly to make this application to be considered the relief of setting aside the Judgment.

Was there a good reason for not attending trial as required under Order 16 rule 7(5)(b) of the Court (High Court) (Civil Procedure) Rules}?

The first Defendant has presented through counsel Mahonga's sworn statement that the reason for non-attendance of trial was because Counsel attending to the matter was suddenly ill and that no one at the Honourable Attorney general Chambers knew about the hearing. We submit that the reason herein cannot hold water because the matter was handled by the office and not an individual. It is also very important to note that the Assistant Legal Officer for the 1st defendant was not aware of this case even after the Judgment was delivered. This entails that by the 15th of August, 2020, the 1st Defendant's Assistant Legal Officer was not aware of the date of hearing of this matter. The Assistant Legal Officer in his sworn statement under paragraph 6 states that he was never told that the matter was coming on 17th August, 2020 for him to organise witness statements in readiness of this case. This therefore entails that by the 16th of August, 2020, the 1st Defendant was never ready for this trial. We therefore contend that even if the 1st Defendant would have come for hearing on this day, we do not think they would have been ready as we go by the stories of Mr. Alickson Msukwa; the 1st Defendant's Assistant Legal Officer. We further submit that the reason hereof is not enough and therefore the 1st Applicant's application be dismissed.

Is there a reasonable prospect of success at trial as required under Order 16 rule 7(5)(c) of the Court (High Court) (Civil Procedure) Rules}?

The 1st defendant has gone a mile in trying to explain how they think they have prospects of success at trial. The 1st Defendant has brought in new things which were never pleaded in their defence before the commencement of this matter. The 1st defendant never denied liability but only shifted the blame to the other defendants. The same is not being disputed in the circumstances. The Defendants if at all they have issues on the issue who should compensate the claimants herein, they can among the defendant apply before Court to decide on who should compensate the Claimants considering that all are entities of government.

Matter already decided

The 1st defendant herein has made an application which was already dealt with by this Court when the 3rd defendant made the application. The Court dismissed the 3rd Defendant's application which was made under the rule cited by the 1st defendant herein.

Whether the First Defendant was not aware of that the case had been adjourned to 17th and 18th August, 2020

The first Defendant submits in the concluding paragraph that they were not aware that the case had been adjourned to 17th and 18th August, 2020 and that no notice of adjournment for the hearing of the case on 17th and 18th August 2020 was served on the first defendant. We find this to be a mockery to the administration of the case herein. It is on record that Counsel Chisiza was present on the day this matter was adjourned on the 8th of July of

2020. The same has not been disputed in the sworn statements filed in support herein. The only reason proffered for nonattendance of Court by the 1st Defendant on the 17th August, 2020 was that Counsel Chisiza had fallen ill suddenly and that at all material times he was aware of the matter herein.”

It is important to observe that the judgement that the 1st Defendant seeks to set aside was made on 9th September 2020. The judgement was against both the 1st Defendant and 3rd Defendant. The 3rd Defendant promptly made an application to set aside the Judgment on 14th September, 2020. On the other hand, it took the 1st Defendant almost two months to make a similar application. Counsel Songea argued that the inordinate delay was due to the fact that “*the 1st Defendant needed to adhere to public procurement laws before it could engage private counsel to handle the application on its behalf*”: see paragraph 6.7.4 of the 1st Defendant’s Skeleton Arguments. To my mind, the length of time it takes to engage private counsel was one of the critical factors that the 1st Defendant ought to have taken into account in deciding whether or not to do away with the services of the Attorney General in preference for a private legal firm, bearing in mind the requirement in the relevant provisions of CPR for an applicant to act with promptness.

I am also very much persuaded by the arguments advanced on behalf of the Claimants that the 1st Defendant did not have a good reason for not attending trial on the set hearing dates. Counsel Chisiza is emphatic in stating that he fell seriously ill on 10th August 2020 and he was admitted at ABC Clinic in Lilongwe on the same day: see paragraph 7 of his supplementary sworn statement. The evidence of Dr. Malemia is to the same effect. This means that there were at least six days between the day when Counsel Chisiza was taken ill and the set hearing date of 17th August 2020.

In this regard, on 27th August 2020, during the hearing of an oral application by Counsel Mahonga to allow the 1st Defendant to join the application by the 3rd Defendant to set aside the orders that were made on 7th August 2020, the Court asked Counsel Mahonga why the 1st Defendant failed to make proper arrangements during the six days for another legal officer to attend Court on 17th August 2020. Counsel Mahonga failed to give a satisfactory reason. The Court is, therefore, not surprised that Counsel Mahonga has now changed tack: he states that it is on 16th of August, 2020 (and not 10th August 2020) that Counsel Chisiza was taken ill abruptly: see paragraph 6 of his supplementary sworn statement. Needless to say, this misstatement speaks volumes about lack of good reason on the part of the 1st Defendant for not attending trial.

In the same vein, the statement by Counsel Chisiza that his office can only be accessed using one key has to be taken with a pinch of salt. The norm is that office

keys come in twos or threes (spare keys). It is always cost-efficient to have spare keys. An office does not have to wait for a locksmith to open a locked-out door. Spare keys also give the convenience of allowing other members of staff to get access to the office. This works out really helpful when the office occupant is not around. You need not call a sick officer just to access files in his office. That would be a total hassle for nothing.

In light of the foregoing, I very much agree with the submissions by Counsel Katundu that (a) there was inordinate delay on the part of the 1st Defendant in making the present application and (b) the 1st Defendant did not have a good reason for not attending the trial. In the circumstances, it is my finding that the 1st Defendant has failed to clear two of the hurdles prescribed by Order 16, rule 7(5), of the CPR. This means that, as the matter presently stands, two of the three prerequisites a Court ought to be satisfied about before restoring proceeding or setting aside a judgement are missing. As such, the application has to fail irrespective of whether the arguments by the 1st Defendant on it having a reasonable prospect of success at the trial would have been sustained or not.

All in all, the application by the 1st Defendant has to be dismissed with costs. It is so ordered.

Pronounced in Chambers this 4th day of January 2021 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE