

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 143 OF 2015

BETWEEN:

AUGUSTEN HERMES GWIZIMA

1st CLAIMANT

CHRISSIE PATRICIA GWIZIMA

2nd CLAIMANT

AND

LODZANI HAPANA FATCH

1st DEFENDANT

ROSHANI THAKER

2nd DEFENDANT

CORAM: JUSTICE M.A. TEMBO,

Chipeta, Counsel for the Claimants
Mickeus, Counsel for the 2nd Defendant
Mankhambera, Official Court Interpreter

ORDER

1. This is this Court's order on the 2nd defendants' application to strike out the claimants' case due to the claimants' failure to comply with the direction of this Court made on 12th March, 2021, that the claimants file and serve a summons within 10 days.
2. The application was made under Order 14 rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017. The 2nd defendant filed a sworn statement in support of his application. The claimants opposed the application.
3. This present matter was commenced by the claimants in 2015 by originating summons under the old rules of civil procedure. The Judge who was previously seized of this matter found in April, 2018, that the originating summons procedure was not appropriate considering the

contentious nature of the claimants' claim herein, namely, that the 1st defendant fraudulently transferred the claimants' property to the 2nd defendant who purchased the same after the claimants had put the property as collateral for a loan advanced by the 1st defendant to one of the claimants. The Judge ordered that the matter stand as if commenced by writ of summons and that the affidavits filed on the originating summons should stand as statements of case and that the parties were at liberty to seek further directions from the Court.

4. The matter was subsequently transferred to this Court and in view of the coming into operation of the current rules of civil procedure a notice of scheduling conference was taken up before this Court. After reviewing the record, this Court on 12th March, 2021, ordered the statement of case to be redone and that the claimants file a summons within 10 days. That was never done and led to the instant application by the 2nd defendant.
5. The 2nd defendant laments the fact that the claimants got an injunction in 2015 stopping him from developing the property in issue herein but have failed to comply with the direction of this Court to move the matter to finality. His view is that in the circumstances he should be allowed to develop the property and that the claimants can carry on and get their intended reliefs against the 1st defendant.
6. The 2nd defendant observed that in the case of *Kasongo v Attorney General* civil cause number 194 of 2017 (High Court) (unreported) the defendant's defence was struck out for failure to comply with a direction to file witness statements 15 days before the hearing date. He asked the court to similarly strike out the case herein for failure to comply with the direction of the court in the present case.
7. In opposing the application, the reason advanced by the claimants for failing to file the summons, as explained by their counsel, is that they had issues to do with payment of legal fees and that they only managed to resolve the same on the eve of the hearing of the present application. The claimants submitted that it would be unjust to dismiss their case against the 2nd defendant since they have always desired to conclude this matter except for their financial hardship.
8. The 2nd defendant insisted that the delay by the claimants herein is an indication of their lack of seriousness to prosecute this matter. He further observed that counsel for the claimants has always been on the record and never ceased acting for the claimants and therefore the explanation that

there were issue of fees is unsatisfactory. He reiterated that he is being prejudiced since 2015 when this matter was commenced and should be allowed to develop the property he bought herein and that if anything the claimants can proceed against the 1st defendant.


9. This Court observes that failure to follow time orders of this Court is detrimental to the efficient disposal of matters and to controlling costs of litigation as observed in the case of *Makwinja (a minor) v Charter Insurance Company Limited* personal injury cause number 2017 of 2015 (High Court) (unreported) in which my brother Judge Nriwa sounded the warning on adherence to time tables set by the Court. In that case, a defendant did not file anything in relation to a trial and the defence was struck out. The court appreciated that procedure is there to aid substantive justice but emphasized the importance of sticking time tables set by the court too.
10. This Court, like the court in the *Makwinja case*, does not lose sight of the importance of deciding cases on merit. However, it is indeed important that parties must be aware that they are expected to comply with the overriding objectives of the current rules of procedure that enjoin all the parties and the Court to deal with matters justly by, among others, ensuring that matters are dealt with expeditiously and fairly whilst saving expenses among other things. See Order 1 rule 5 Courts (High Court) (Civil Procedure) Rules.
11. This Court observes that in England they have developed an approach to the problem of noncompliance with court orders and court sanctioned timelines by parties with a view to ensuring that the culture of noncompliance does not take root under their own civil procedure rules that have overriding objectives that are similar to ours. That approach is very persuasive in the circumstances. And that persuasive approach if adopted will ensure that we are all aware and alert that rules are rules and must be abided by if matters are to be dealt with justly.
12. In *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, a three tier approach was developed to ensure consistency in how applications for relief from noncompliance are dealt with by the courts. The position in *Denton* requires that at stage one, the court must identify and assess the seriousness of the non-compliance. The court will ask the question: Is the breach 'serious or significant? If the breach is serious, then at stage two the court will ask the question: why did the default occur?

Then at stage three, the court will consider all the circumstances of case in order to deal with the application 'justly', including (a) the need for litigation to be conducted efficiently and at proportionate cost and (b) the need to enforce compliance with rules, directions and court orders. This Court recommends a similar approach in the exercise of discretion on non-compliance as has happened in this matter.

13. So applying the three tier approach in the present matter, this Court observes that the breach in this matter was a serious one in that the claimants failed to file a summons and statement of case over a number of months in a matter that has been ongoing since 2015.
14. The next matter for consideration is, why did the default occur? The claimants have offered the reason for default being their inability to pay legal fees. The 2nd defendant however remains very skeptical about the sincerity of the reason so advanced.
15. This Court finds that the reason given for the default herein is rather not very convincing because, as contended by the 2nd defendant, indeed the claimants were aware of the direction of this Court. Counsel for the claimants remained on the record for the claimants throughout the relevant period. He never ceased to act for the claimants and therefore it is untenable that he could not do the needful.
16. Lastly, this court will consider all the circumstances of the case in order to deal with the application 'justly', including (a) the need for litigation to be conducted efficiently and at proportionate cost and (b) the need to enforce compliance with rules, directions and court orders.
17. This Court has observed that the matter herein has been going on since 2015 when the 2nd defendant was stopped from developing the property he purchased herein. Failure on the part of the claimants to act on the direction of this Court unduly prolongs this matter and the 2nd defendant is unjustly kept out of the property he purchased since 2015. That is unjust and runs counter to the overriding objectives of the applicable rules of procedure.

18. In the foregoing circumstances, this Court is persuaded that this a proper case in which the claimants' claim should be struck off, as against the 2nd defendant, for failure to comply with the relevant direction of this Court. The claim is accordingly dismissed as against the 2nd defendant who shall at liberty to develop the property in issue accordingly.
19. The claimants shall be restricted to getting reliefs against the 1st defendant only herein.
20. Costs are for the 2nd defendant.

Made in chambers at Blantyre this 19th July 2021.



M.A. Tembo
JUDGE

