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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 186 OF 2015

BETWEEN:

CHRISTINE MUNGOMO **CLAIMANT**

MALAWI HOUSING CORPORATION **DEFENDANT**

CORAM: JUSTICE M.A. TEMBO,

Suzi Banda, Counsel for Claimant
Matumbi, Counsel for Defendant
Mankhambera, Official Court Interpreter

ORDER

1. This is this Court's order on the claimant's application, with notice, for an order that the claimant's case herein be reheard. This Court heard the claimant's case on a claim for damages for breach of contract in the absence of the defendant who had failed to prepare for and attend the hearing. The application is contested by the claimant.
2. The facts on this application are not complex. The claimant commenced the matter herein seeking damages against the defendant on account of a breach of a contract to do with allocation of land by the defendant to the claimant.
3. The matter was set for a scheduling conference on 17th June, 2019 which the defendant did not attend. At the scheduling conference, directions for trial

were made and a date of hearing was also set for 18th July, 2019. Despite being served with the trial directions, the defendant neither complied with the directions nor did it appear at the trial.

4. After hearing the claimant's evidence, this Court determined the matter in the claimant's favour. The defendant was ordered to pay back to the claimant the development charges she had paid as well as land rentals with compound interest from the date of payment. This Court also ordered the defendant to pay the claimant damages for breach of the contract in question and costs of the proceedings.
5. When the defendant was served with the notice of hearing to assess damages in November, 2019 herein it realized the state of affairs and in December, 2019 applied to suspend enforcement of the decision of this Court pending its application for rehearing. It also filed an application for a rehearing. By then, this Court was indisposed to hear the applications as it was out of this registry attending to a lengthy constitutional matter. Eventually, damages were assessed by the Registrar in October, 2021.
6. The application for rehearing was eventually set down for hearing and this is this Court's determination on the same.
7. Essentially, the defendant indicates that it failed to attend both the scheduling conference and the hearing of the claimant's claim due to the internal hiccups at its lawyer's firm to do with a case management software.
8. The defendant seeks that the matter be reheard so that at least it can cross examine the claimant to put across its case that it is in fact the claimant who breached the contract herein by failing to develop the piece of land in question within the time stipulated in the offer of the piece of land herein.
9. Although the defendant did not indicate on the application for rehearing under what rule of procedure the application was made, during oral arguments it indicated that the application was made under Order 16 rule 7 (5) of the Courts (High Court) (Civil Procedure) Rules, 2017.
10. The defendant essentially submitted that Order 16 rule 7 (5) of the Courts (High Court) (Civil Procedure) Rules, 2017 gives power to this Court to rehear a matter decided in the absence of a party so long as certain conditions are met.

11. This Court observes that Order 16 rule 7 (3) of the Courts (High Court) (Civil Procedure) Rules, 2017 provides that an absent party that has judgment entered against it at trial may apply for that judgment to be set aside.
12. The defendant submitted that Order 16 rule 7 (5) of the Courts (High Court) (Civil Procedure) Rules, 2017 provides that

> 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-
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> (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.

13. The defendant asserted that it acted promptly to seek to have the judgment set aside after realizing that judgment had been entered against it in its absence herein in that it filed the application for rehearing on 19th December, 2019 after being alerted by the assessment of damages papers on 21st November, 2019.
14. The defendant then indicated that it had a good reason behind its failure to attend trial because its lawyer's internal case management software had a hiccup which led to inaction on the part of the defendant in relation to trial directions and the trial itself.
15. The defendant then indicated that it has prospects of success considering that its case is that the claimant had breached the offer relating to the allocation of the piece of land by failing to adhere to time period allowed for development of the land.
16. As earlier stated, the claimant contested the application. She objected to the application on several grounds. She noted that the application was not sealed by the Registrar though the Registrar signed the same. And that this was a breach of section 3 (1) of the Courts Act that requires a summons to be sealed. The claimant therefore submitted that there is therefore no application before this Court. The defendant respondent that it was not its fault that the application was not sealed.
17. This Court observes that indeed sealing of court process is mandated by statute as well as the rules of procedure. However, that function of sealing the process

rests with the Registrar and not the defendant. Failure to seal the process by the Registrar is therefore not a good reason for penalizing a party as a matter of justice. This Court orders that in that regard, the Registrar duly seals the court process and this Court will proceed on that basis.

18. The claimant then contended that the application herein does not indicate under which rule of the Courts (High Court) (Civil Procedure) Rules, 2017 it is made. And that reference to Order 16 rule 7 (5) of the Courts (High Court) (Civil Procedure) Rules, 2017, was only made during arguments. The claimant indicated several authorities that point to the importance of reference to the relevant rule of procedure relied upon on an application and that lack of a reference will lead to a dismissal of an application. See *Kalinde v Limbe Leaf Tobacco Company Ltd* civil cause number 1542 of 1995 (High Court) (unreported). She therefore asked that the application not be entertained on account of failure to indicate under what rule it is made.

19. The defendant admitted omitting to refer to the relevant rule but asserted that the claimant has not been prejudiced thereby.

20. This Court entirely agrees with the claimant that lack of citation of a rule under which an application is made will in an appropriate case be fatal to an application. However, on the facts of this matter, this Court observes that the claimant has adequately dealt with the defendant's application and that it cannot be said that the lack of citation of the rule under which the application is made is prejudicial to the claimant's case on the present application.

21. This Court is buttressed in this view considering what was said about the logic in the *Kalinde* case in the case of *State v Ministry of Natural Resources and Environment [Attorney General] and another* [2010] MLR 433 at 439 that:

> The respondent argued that because the application does not on its face state under which provision of the law or the rules it is brought it should be dismissed out of hand. The case of FW Kalinde v Limbe Leaf Tobacco Civil Cause Number: 1542/1995 High Court Principal Registry [unreported] was cited. The sentiments of Chimasula Phiri J [as he then was] is quoted as having said that application should be dismissed if it does not state the rule/law under which it is brought. The rationale is that indicating the provision allows both the other part and the court to prepare accordingly.
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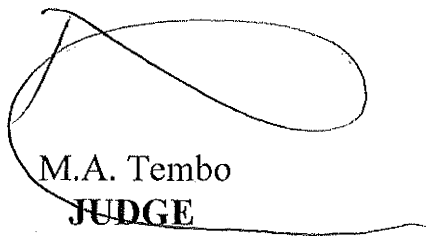
> It is impossible to argue [with] His Lordship's logic in the Kalinde case. It is clear however that such logic should not be understood literally. Whereas it is therefore

> desirable and important that such be the case an application will in our view not be summarily dismissed merely because it does not on its face state under what provision/rule it is brought. It will, in our view, only be dismissed if it is impossible to discern under what provision/rule it is brought with the result that the court and the other party are unable to prepare for the matter. If it happens therefore that the application does not on its face state under what provision/rule it is brought the immediate reaction is not to dismiss it. Rather it is for the issuing officer to refuse to issue it. Where it has been issued the proper action is in our view to determine whether the absence of a citation notwithstanding it is possible to determine under what rule/provision the application is brought. If the response be in the positive and the parties have been able to prepare the fact that the application did not on its face state the rule /provision under which it is brought ceases to be an issue.

22. Consequently, this Court will allow the application to proceed on the basis of the relevant order despite it not being cited in the application but only at the oral hearing.
23. The claimant then contended that this Court was *functus officio* meaning that it had performed its task and had no authority to deal with this matter any further after the decision made at the trial herein. This Court observes, in agreement with the defendant, that this argument cannot prevail in the face of the clear provisions allowing for a rehearing so long as certain conditions are met as envisaged in Order 16 rule 7 of the Courts (High Court) (Civil Procedure) Rules, 2017. This Court is therefore not *functus officio.*
24. The claimant then contended that the defendant had no good reason for failure to attend trial. This Court thought long and hard about this aspect and it concluded that the fault in the case management software of the defendant's lawyer's firm appears to be a good reason in the circumstances. This is not to encourage sloppiness on the part of law firms but this Court does not find it far-fetched that such a case management software hiccup can indeed be at the root of the non-attendance. It is not a deliberate aspect on the part of the law firm.
25. Having found that there was a good reason behind the non-attendance herein, this Court observes that defendant acted promptly to file for a rehearing as soon as it became aware of the progression of this case. This Court further finds that there are reasonable prospects of a defence that is advanced if proved, namely, that the claimant was herself in breach of the contract.

26. Given that this is a 2015 matter and has been on our cause list for some time, this Court will allow the defendant its request for a rehearing limited to cross-examination of the claimant's witnesses as sought and re-examination.
27. This Court however orders costs of the proceedings from the date of the trial up to this application to be paid by the defendant before it files a notice of the rehearing. Such costs shall be agreed by the parties within seven days failing which they shall be assessed by the Registrar and be paid by the defendant seven days after such assessment.

Made in chambers at Blantyre this 25th February, 2022.



M.A. Tembo
JUDGE