

Uyelo

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NUMBER 51 OF 1993

BETWEEN.

CAYWOOD TWALEMA MKANDAWIRE.....PLAINTIFF

AND

MALAWI CONGRESS PARTYDEFENDANT

CORAM: JANE HAYEMU ANSAH (MRS) DEPUTY REGISTRAR

Mvalo of counsel for the Plaintiff
Kaliwo of Counsel for the Defendant

RULING

This is an application to set aside an interlocutory default judgement, which was followed by assessment of damages. The application is duly supported by an affidavit. The plaintiff strongly opposes the application, although there is no affidavit in opposition.

The facts of the case are these. The plaintiff, a commercial farmer, brought the present action against the defendants, claiming damages for loss suffered as a result of unprovoked malicious destruction of his thirteen tobacco sheds and thirteen houses for his tenants on 24th February, 1993, the plaintiff filed an especially indorsed writ of summons. This summon was served by post on the defendants. No notice of intention to defend was filed, consequently the plaintiff on 15th April, 1993 obtained an interlocutory default judgement against the defendants. Damages were assessed later. A notice of appointment to assess damages was issued, returnable on 12th November, 1993. On that date, damages were assessed in the absence of the defendants and their lawyers.

The application is two fold. It is made under Order 35, Rule 2(1), order 13 Rule 9 and order 3 rule 5. The first application is to set aside the default judgement and the proceedings. In the same

application there is a second application, for the extension of time. The court has power in the rules to deal with such applications. However the application was not made within the prescribed seven days. I find this to be a small irregularity in that interlocutory ex parte orders can be challenged anytime, if new facts come up, to allow the party who defaults for good reasons to be heard to avoid injustice. Lush J in the case of Bradshaw and another vs Bird 1920 KB. 143

"it cannot, I think, have been intended that the period of six days appointed by the rule should in every case be treated as a fixed period incapable of extension, in as much as a litigant might be absolutely prevented by illness or an accident, or other circumstances, from making the application at a later date."

The defendants became aware of the order of the court the time they were visited by the sheriff. Mr Kaliwo, Counsel for the defendant submitted that, the default judgement and the assessment of damages were made in his absence due to circumstances beyond his control. The Attorney General was on record as representing the defendants. Following constitutional amendment, the Attorney General ceased to act for the defendants and Messrs Kaliwo and company were engaged by the defendants. Messrs Kaliwo and company wrote to all legal houses in Malawi, formally informing them that they were the lawyers for the defendants. Such letter was sent to Messrs Mvalo and Company who immediately sent a reply to Messrs Kaliwo and Company informing them all the cases their clients had against the defendants. One of the cases was the cases at hand. Mr Kaliwo wrote back to Messrs Mvalo and Company, requesting them to supply him with copies of the writ of summons, statement of claim, and the default interlocutory judgement. It is Mr Kaliwo's submission that he further contacted the Attorney General and requested for the defendants file. Although the Attorney General promised to send the writ of summons, statement of claim and the interlocutory judgement, these documents were never sent. While Mr Kaliwo was still waiting to hear from Messrs Mvalo and Company, the court and the Attorney General he was shocked to learn from his clients that they had been visited by the sheriff.

Mr Kaliwo contended that his application be granted because not to do so will result in injustice and his clients will suffer unfairly. he further contends that his client has a defence on merit.

On the other hand, Mr Mvalo contended that

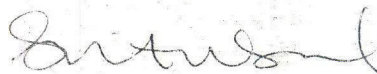
whereas it is true that there was such correspondence between himself and Messrs Kaliwo and Company, the defence lawyer did not put himself on record. That resulted in all notices of appointment for assessment of damages being sent to the Attorney General's chambers. He further contended that he was not obliged to send notices to Kaliwo and Company. He further submitted that the defendants application is not on merit.

An omission by a lawyer to file a notice of change of legal practitioner is an irregularity. However such irregularity can be waived. The learned Judge in the case of Mason vs Grigg [1909] 2 KB 341 said:

"if a notice of appointment is not given, and the opposite party does not know of the appointment, the new solicitor can recover no costs since the opposite party will have dealt with the matter on the footing that they could not be liable except for out of pocket expenses, but if they knew of the appointment the new solicitor can recover his costs."

In this case, the plaintiff's lawyer was aware of the change of legal practitioners. Having promptly responded to the defence lawyer's first letter, indeed, the defence lawyer expected a continuation of such a commendable and honourable of behaviour. In the circumstances therefore the plaintiff's counsel was expected to supply the information requested by the defence counsel and to inform him of the date for the assessment of damages. Bearing in mind that the lawyers are human beings like any man. Therefore they cannot conduct their business without sometimes making slips. Where a lawyer writes to a fellow lawyer and waits for a reply, should be pardoned. Especially where the lawyer who should have given the necessary information goes behind the back and obtains ex parte order. The defendant's application succeeds. The defendant should serve his defence on the plaintiff within seven days from today's date and that the sum of K70,000 should be paid into court. As the defendant was in default, he must pay the costs of the application.

Made in Chambers this ^{29th} day of April 1994



Jane Mayemu Ansah (Mrs)

DEPUTY REGISTRAR OF THE HIGH COURT