IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 1945 OF 1994

BETWEEN:

F N SADYALUNDA.....PLAINTIFF

AND

MALAWI CONGRESS PARTY.....DEFENDANT

CORAM: QOTO, DEPUTY REGISTRAR
Mbendera of Counsel for the plaintiff
George Kaliwo of Counsel for the defendant

R U L I N G

QOTO DEPUTY REGISTRAR

I have before summons by the plaintiff for judgement on admissions. It is supported by affidavits of Zangaphe Jushua Chizeze and Grant Sadyalunda.

The background to the application is that by a writ of Summons and statement of claim issued on 13th October, 1994, the plaintiff claimed against the defendant special damages for conversion of the plaintiff's estates known as Chikumbutso 1 and 2, K450,000 for conversion of motor vehicles, a Toyota truck and trailer, Toyota land cruser and a peugeot 504 saloon, K2,700,000 for loss of profits in respect of the estates over a period of 18 years at an average profit of K150,000 per amnnum and K3,000,000 for prospective loss of profits in respect of the period otherwise remianing expired under the lease.

The plaintiff further claimed against the defendant and I quote from the statement of claim "general damages for false imprisonment for a period of October 1976 to July 1981 for personal injuries sustained in prison, for shock, distress and physchological trauma in respect of the solitary confinement, loss of consortium, dismissal of her children from school and detention of her husband rendering the children homeless destitute and wrongfully marginalised and for defamation of character."

Service of the writ of Summons and the statement of claim was by post and there being no notice of intention to defend given by the defendant, it was on 8th November 1994, adjudged that the defendant do pay the plaintiff K8,212,500.00 special damages, general damages to be assessed by the court and costs of the proceedings to be taxed if not agreed. Execution was however stayed by the court on 22nd November, 1994 on condition that the defendant filed an application to set aside the default judgement within 14 days from that date. The parties also agreed that the defendant should serve a defence to the plaintiff's claim. The plaintiff took out the present summons for summary judgement on admission on 29th March 1995., The sumons was adjourned for several times and mainly due to Mr Kaliwo's engagement in what is known as the "Mwanza Trial" which also involved some members of the defendant.

When we set to hear the summons on 27th October, 1995, Mr Kaliwo did apply for an adjournment on the ground that he was appearing in the "Mwanza Trial." Let me at this juncture mention that the "Mwanza Trial" hearing covered almost the whole of 1995. Mr Mbendera opposed the applicatioin for an adjournment on the ground that there had been too many adjournments already and his client was anxious and impatient about the case. After argument and with the consent of both parties, it was agreed that I should adjourn the hearing of the summons to a specific date. This I did and I adjourned the hearing of the summons to 1st December,

1995 at 8.30 a.m. and in my Chambers. On this date Mr Mbendera did not appear and Mr Kaliwo prayed for an adjournment of the hearing of the summons **sine die** with liberty to the plaintiff to restore it. I granted the application.

Meanwhile the plaintiff had filed a notice of adjournment of the summons returnable on 13th December 1995. It was not heard on the day and the plaintiff put in yet another notice of adjournment returnable on 22nd December, 1995 at 9.00 o'clock. It is what happened on this day that has given a rise to this ruling.

As I said the hearing of the notice was set for 9 o'clock in the forenoon. Mr Mbendera told the court that the scheduling of the hearing of the summons on that date was by way of agreement between the parties. Mr Kaliwo came to Court before 9 o'clock but had told him that he had forgotten the file in relation to this case in his motor vehicle and he was going back to collect it. He left at 8.45 a m and we waited for him until 25 minutes to 10 o'clock that morning. Mr Mbendera moved the court to proceed with the hearing of the application. Seeing that no reason was given why Mr Kaliwo did not come up to that time, I saw no reason to refuse the application. I granted it and Mr Mbendera began to address me on the summons for summary judgement.

In the middle of the address, Mr Kaliwo entered the Chambers and he heard part of the address by Mr Mbendera.

When it came for Mr Kaliwo to reply, he said his clients, Mr Tembo and Mr Chakuamba had not given him further instructions after he had referred the summons for summary judgement to them. In view of this he asked for an adjournment so that he asks his client about further instructions. He said this was necessary in view of the fact that the matter was an important one. He also said he needed a short time within which to get those instructions and without them, he was disabled from answering Mr

Mbendera's address to the court on the summons of summary judgement. There ensued an argument as to whether Mr Kaliwo was to bring new evidence or simply make a response to the address by Mr Mbendera. I did not make a specific ruling on this argument but I adjourned the hearing of the summons to 16th January, 1996. On this day, Mr Mbendera did not appear and the hearing was again adjourned to date to be fixed, 23rd January, 1996 was a date which was fixed for continued hearing.

On this day Mr Kaliwo narrated the events which made him miss part of the address of Mr Mbendera on 22nd December, 1995. In a nutshell he said he had forgotten his file and he had told Mr Mbendera that he was going to be back in 30 minutes time. He took longer than that. Part of the hearing proceeded in his absence. As he came in the middle of the address he could not apply for adjournment until the end of the address. He argued that he sought an adjournment so that he could adduce evidence in opposition to the summons for summary judgement on admissions. He further argued that it was not proper for the court to proceed with the hearing of the summons in his absence as he had indicated to Mr Mbendera that he was to be present. He then applied for another adjournment so that he adduces evidence on behalf of the defendant.

The truth of the matter is that the hearing of the summons had been adjourned on divers of occassions at the instance of the defendant. The position as shown by the record of proceedings in this action is that the summons for summary judgement was filed in April 1995. It beats my imagination why up to now Mr Kaliwo cannot get instructions from his clients on this Summons. He has been aware of this Summons through out 1995. Coming to 22nd December 1995, the matter was scheduled for hearing at 9 oclock in the forenoon. When Mr Mbendera told me that Mr Kaliwo had forgotten the file, we waited for him up to 25 minutes to 10 oclock. Mr Kaliwo had left court 9 oclock before and surely it could not have taken him more than 30 minutes to get his file.

When he came in it was past 10 a.m. The court gave him the oportunity to be heard on the summons which opportunity he did not avail himself of. If he was indeed minded to file affidavits in oppostion to the hearing of the summons, he would have done that before 22nd December, 1995. In my view, there is nothing irregular in the court proceeding in absence of a party who has been duly served with a notice which the starting time is precisely stated. Under Order 32 of the Rules of the Supreme Court, it is possible where it is expedient, to proceed with hearing of the summons in the absence of party. As it is now Mr Kaliwo must make a reply to the address by Mr Mbendera. He has not availed himself the oportunity to put affidavits in opposition and having heard the address on affidavits of the plaintiff, the defendants only recourse to answer that address. The accpeted rules of evidence and practice have to be followed. The position, in my view is like that in **Baker v Furlong (1891)2 ch. D 172.** There, an application was made by the plaintiff after the defendant had closed his case to call certain witnesses. At page 184 **Ramer J.** said:

> "...it appeared to me that in a case like this, in granting the plaintiffs application after the defendant's case had been closed and a reply begun, I should be making a precedent which would, if established, lead to an improper amount of laxity in the conduct of the plaintiff's case."

This principle was adopted with approval by this High Court in the case of **Chilington Agrimal (Malawi) Limited v Petros Kalanje,** Civil Appeal No 6 of 1990 (unreported)

So in this case, allowing the defendant to put in affidavits in oppostion after counsel for the plaintiff has addressed the court on the affidavits of the plaintiffs would lead to improper laxity in the conduct of the case. I take it to be the duty of

counsel to uphold the legitimate interests of their clients fearlessly subject only to their duty to the court and to justice. The role of a civil court, I conceive is to be available to hear disputes speedly. In **Lungly v N W Water Authuly (1991)3 All E. R. 610,** speaking about delay Lord Donaldson M R said at p 612:

> "There was a time when the role of the courts...was to be available, it being left entirely to the parties to decide the pace at which the litigation should be conducted. The increase in amount of litigation which has occured over the years has given rise to a reappraisal of that role."

He added that steps must be taken towards a court - controlled case management as recommended by the House of Lords in **Dept of Transport v Chris Smaller (Transport) Limited (1989) 1 All E R 897** in order to reduce delays.

I accordingly rule that the defendants counsel must apply to the address of counsel for the plaintiff. If he wants to look at the record to see what transpired before he came in, the record will be made available to him.

Made in Chambers this 22nd February 1996, at Blantyre.

W W Qoto

DEPUTY REGISTRAR