**REPUBLIC OF MALAWI**

**IN THE HIGH COURT OF MALAWI SITTING AT BLANTYRE**

**PRINCIPAL REGISTRY**

**CIVIL DIVISION**

**PERSONAL INJURY CASE NUMBER 87 OF 2019**

**BETWEEN**

**GIVEMORE MALOYA----------CLAIMANT**

**AND**

**PATSON PHIRI----------DEFENDANT**

**CORAM: HIS HONOUR THE ASSISTANT REGISTRAR**

Mr. Masanje, Counsel for the Claimant,

Mr, Maliwa, Counsel for the defendant,

Mr. F. Mathanda, Clerk/Official Interpreter,

**ORDER**

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**Daniels AR**

1. By the order of the Honourable Justice Nriva, made on 28th day of June, 2018 the defendant's defence was struck out for not attending mediation session. Time after, there was an application to restore the defence which was denied by the same Honourable Judge on 26th day of November, 2019. As it were, the matter proceeded for assessment of damages and on 5th day of October, 2020 the learned Assistant Registrar, awarded a sum of K6,003,000.00 (Six Million Three Thousand Kwacha Only) as damages for pain and suffering, loss of amenities of life, deformity and special damages in favour of the claimant. The execution of the order of the learned Registrar was stayed on 26th November, 2020 pending reassessment. Thus, on 4th day of March, 2021 the learned Registrar, her Honour

Soko maintained the order of His Honour Nkhata and awarded money in the region of K6,003,000.00 (Six Million Three Thousand Kwacha Only) as damages in favour of the claimant. Ever since, the defendant has changed lawyers and there is extensive activity on this record. In particular, the claimant got a sale and seizure order which was duly executed against the defendant's property. The warrant is dated 14th January, 2022. As it were, with the permission of the Honourable Judge, I stayed the execution of the warrant which the claimant obtained.

2. Like I said, there has been a lot of activity on this record and my view is that for the purposes of logical conclusion and also that litigation must come to an end, the ideal situation in my view is that the matter must be dealt with once and for all. In my view, all the issues must be dealt with extensively with finality. That said, I must further say that what brings this matter before me is an application to restore the defence, because it would appear from the many correspondence on record that Counsel for the defendant has put forward that perhaps those who represented the defendant in the first place omitted to do what they ought to have done and that it would not be correct to extend the strict adherence of the rules as against the innocent defendant whose lawyers did not either inform the defendant to attend mediation session or indeed attend any proceedings that ensued after that. That is exactly the summary of the case for the defendant.

3. As it were, when I received this application after I stayed the execution of the assessment order on 5th August, 2022, I according to Order 25 Rule 1 of the Courts (High Court) (Civil Procedure) Rules 2017 proceeded to forward the record to the Honourable Judge for his action and or instruction. The learned Judge on 7th October, 2022 proceeded to grant me authority that I should deal with this application. As it were, I proceeded to direct that the matter should come *inter partes* because I did not want to deal with the matter back and forth. Consequently, I heard the application made by Counsel. I must say that from both Counsel, the Court was amazed with the ingenious arguments that were advanced and I must commend Counsel as officers of this Court to always remember that their primary service and duty is to the law and that their duty is largely to inform the Court, and to help the Court make sound decisions based on law.

4. Be that as it may, Counsel Maliwa argues that, the judgment was entered against the defendant for failing to attend the mediation session (I should think by this he meant that, the defence was struck out and judgment was then entered, this I say because it is only the procedural logic as it were). Like I said, the issue with Counsel Maliwa can be summed to mean that his client the defendant should not be penalised by the inadvertence and omissions of Counsel who first represented the defendant. On the other hand, Counsel Masanje argued that this Court does not have jurisdiction to preside over this application. The argument is that under Order 13 rule 6 (2) of Courts (High Court) (Civil Procedure) Rules 2017 it is only the Judge who can restore a matter. To this he further argued that under Order 25 of Court s (High Court) (Civil Procedure) Rules 2017 there is nothing given

to the Registrar with a semblance of restoring any matter which suffers death under Order 13 of the Courts (High Court) (Civil Procedure) Rules 2017.

He again argues that, if anything the Registrar can only set aside a default judgment entered for not complying with Order 5 of the Courts (High Court) (Civil Procedure) Rules, 2017. Further, Counsel enunciated that should this Court find that it can restore the matter as it were, then the Court should warn itself not to proceed because in his considered view, the matter is so contentious that either Counsel would want to appeal the decision of this Court no matter where it falls. With greatest respect, I take issue with this reasoning because it presumes that the work that the Registrar does is not contentious but I have lived enough to see appeals on almost every work that the Registrar is allowed to do under Order 25 of the Courts (High Court) (Civil Procedure) Rules 2017. Perhaps, I must understand Counsel to mean that we Registrars are meant to deal with issues which are not contentious. Perhaps that is exactly the reasoning of the ***Elida Liphava and Others v Prime Insurance Company Limited and Another Civil Appeal No. 4 of 2019 (Unreported)***. I am willing to understand Counsel to mean that ordinarily the Registrar is supposed to deal only with non-contentious matters. Perhaps, that is only a hidden policy founded on the fact that indeed under Order 5 rule 19 Courts (High Court) (Civil Procedure) Rules 2017, the Honourable Judge in charge assigns the initial directions to the Judge, arguably the record entirely belongs to the assigned judge. No Registrar should from that premise assume jurisdiction without the sanction of the Honourable Judge seized of the matter. Respectfully, although not clearly said, this reasoning is not far from the one espoused in the *Elida Liphava* case.

5. Interestingly, Counsel Maliwa argues in rebuttal that the first position we should consider is section 9 of the Constitution. Counsel argued that from the section two things we must consider namely: facts and prescriptions of law. Thus, he submitted, that under Order 25 Rule 1 of Courts (High Court) (Civil Procedure) Rules 2017, this Court works for and on behalf of the Honourable Judge s, and the record has it that the learned Judge referred this matter to this Court and therefore I can proceed to hear and determine the issues as it were. An ingenious argument was further made by Counsel Maliwa, in that he responded to Counsel that the judgment entered was in default of attending mediation. On this, Counsel argues that under Order 25 of Courts (High Court) (Civil Procedure) Rules 2017, the power to set aside default judgment presumes that the Registrar can enter or set aside judgment entered by not doing something which is required by the rules. This argument was countered with the argument that entering judgement in default is completely a different regime guided by a separate Order from the Order on mediation. I think that is the correct position. I must add that mediation is not listed on Order 25 of Courts (High Court) (Civil Procedure) Rules 2017. It is rather clear that under Order 13 of Courts (High Court) (Civil Procedure) Rules 2017, only the Honourable Judge can dismiss a case or strike out defence. This is in my view clearly different from Order 25 Courts (High Court) Civil Procedure Rules 2017 which allows the Registrar to both enter and set aside judgments in default.

6. Moreover, there were several arguments made by both Counsel and one would note how intense Counsel argued on their side. I must say that, on the issue of this Court having to refer the matter to the Honourable Judge, because the matter is contentious, I expressed reservations with that. Thus, I paused questions to both Counsel on what constitutes a contentious matter. Again, I further asked Counsel as officers of the Court to guide this Court as to whether the Supreme Court provided sufficient tools and clear principles on what constitutes a contentious matter. Respectfully, the test that any matter which may be appealable should be elevated to being a contentious matter remained a response that I had difficulties to understand its hidden logic. Again, without a satisfactory answer from Counsel for the claimant, I further asked whether the Registrar should every time Counsel raise an issue of the matter being contentious fold his hands and agree with Counsel. On this again I received no persuasive response.

7. Moreover, I also asked that shouldn't the question of whether the matter is contentious or not be a question that the Registrar should exercise his judicial mind on? Respectfully, on this again I received not much clarity of thought from Counsel. Perhaps I must mention that I paused these questions because I have read the decision of the Supreme Court of *Elida Liphava and Others v Prime Insurance Company Limited and Another (Supra).* As it were, perhaps this case can be distinguished from that Supreme Court's decision for in that case, the Registrar did not have authority from the Honourable Judge to proceed to hear the application he entertained. But I have the authority in this case from the Honourable Judge. As it were, from this premise, I can unbind myself from its grip.

8. In any case, I think my understanding of the Supreme Court judgment is that you cannot appeal the decision of the Registrar to the Supreme Court where he acted without authority under Order 25 Rule 1 of the Courts (High Court) (Civil Procedure) Rules 2017. Implicitly that means if there is authority from the Honourable Judge, then perhaps the order made by the Registrar becomes that of the Judge by virtue of the authority given and therefore it should be appealable to the Supreme Court. If this understanding is correct, which I think it is, then perhaps the argument of Counsel that if I proceed to determine this matter, they may not appeal is not sustainable and it does not with respect connote a correct interpretation of the Supreme Court 's decision.

9. Be that as it may, what then should this Court do? All the questions I paused to Counsel, I might not have the liberty to regurgitate their responses but I must commend both Counsel for doing their statutory duty which is to inform the Court on correct use and application of the law. If I was to take the view of Counsel Maliwa that since I am given authority to deal with this matter therefore, I should deal with it, I would still think that I must deal with the matter of the application which is before me within the prescriptions of the law and the rules. I am willing to understand Counsel Maliwa that that is indeed what he meant in fact. Assuming that is what is the correct position, I have read his application, which is titled as follows: "Without notice Application for an order to set aside judgment, under Order 13

Rule 6 (2) and Order 1 Rule 5 (1) of the Courts (High Court) (Civil Procedure) Rules 2017. As it were, I ordered the proceedings to come inter parte.

10. In any event, noting the titling of the application and questions I paused over the Supreme Court's decision which respectfully remains binding on this Court, further added to the confusion when I read order 13 Rule 6(2) of the Courts (High Court) (Civil Procedure) Rules 2017. As it were, Counsel argues that the Only a Judge has power to restore a case under the said order. I have searched and searched within the bellies of that Order and I saw nowhere where anything about restoring a defence other than a claim. For the avoidance of doubt here is the relevant part of Order 13 Rule 6 (2) of Courts (High Court) (Civil Procedure) Rules 2017:

> *"6.—(1) Where it is not practical to conduct a scheduled mediation session because a party fails without good cause to attend within the time appointed for the commencement of the session, the Judge may—*
>
> *(a)* ***dismiss the claim,*** *where the non-complying party is a claimant,* ***or strike out the defence,*** *where the non-complying party is a defendant;*
>
> *(b) order a party to pay costs; or*
> *(c)* ***make any other order that is deemed just.***
>
> *(2) A party whose case has* ***been dismissed*** *for non-attendance may apply to the Court for restoration of the case.*
>
> *(Emphasis Added)*

11. My reading of this provision in brief is simple: Order 13 Rule 6 of Courts (High Court) (Civil Procedure) Rules 2017 must be read in its entirety and perhaps the spirit within the wording must further be understood as it were. But the letter, killing as it does but ordinarily speaking, I have seen no place under this Order where Counsel can base his application on. I know that the law requires that whenever Counsel seeks the aid of the Court, they must cite the particular provision on which to premise their application on. Justice Kenyatta Nyirenda in the case of *George Kainja and Another v Attorney General and Another Judicial Review Number 48 of 2022:*

> *"It is commonplace that a party who seeks to move the Court has to cite the specific provision (s) of the law that clothes the Court with the jurisdiction that the party seeks to invoke. An application that does not cite the law under which it has been brought is as good as an application grounded on a wrong legal provision. Both are bound to fail, that is, the applications will be dismissed in limine"*

12. As it were, Counsel Maliwa has brought his application under Order 13 Rule 6 (2) of the Courts (High Court) (Civil Procedure) Rules 2017, in making his application. Ironically, I

do not think that the application has the blessing of that rule as is cited by many a Counsel when making similar applications. Again, I have read the case of ***Patrick Ngwira & Another v Francis Ngwira Civil Appeal No.16 of 2020(Unreported)*** and this provision was applied in that case. That case did not however discuss what I am about to expose.

13. When I read this Order, I noted that the Rules have a manifest gap and that gap needs to be addressed. In particular, Order 13 rule 6 (2) of Courts (High Court) (Civil Procedure) Rules 2017 must be read conjunctively and together with Order 13 rule 6(1)(a) of Courts (High Court) (Civil Procedure) Rules 2017. This Court understands that under Order 13 rule 6 (1)(a) the statement of case or a claim can be dismissed for non-attendance but a defence can only be stricken out in a similar circumstance. Thus, if this thinking holds to be correct, which from the literal construction of the Order is in my considered opinion, then Order 13 Rule 6 must be understood to mean that the use of different terms such as "dismiss" and "striking out" must mean different things.

14. As it were, I think Order 13 rule 6(1)(a) of Courts (High Court) (Civil Procedure) Rules 2017 was intentional and deliberate, because striking out a defence must not be heard as dismissing a claim neither should dismissing the claim be understood to mean the same as striking a defence. As it were, the two mean entirely different things. Consequently, a closer look at Order 13 rule 6(2) of Courts (High Court) (Civil Procedure) Rules 2017 reveals that the case of restoring a "case" dismissed for want of attendance can be restored. In my view, since under Order 13 Rule 6 (1) (a) of Courts (High Court) (Civil Procedure) Rules 2017 you can only dismiss a claim, that should as a matter of logic include a counterclaim. However, that is not my inquiry as it is. My worry is, if the framers of the rules wanted striking a defence to have the same reading and meaning as dismissing a claim, then they should have made their intentions clear. It is from the foregoing that I think order 13 rule 6(2) should be confined to a claim or perhaps a counter claim because the only thing that can be dismissed under Order 13 rule 6(1)(a) of Courts (High Court) (Civil Procedure) Rules 2017 is a claim.

    My understanding is that dismissing and striking are not or do not have a similar legal meaning. If they do, perhaps that is the very reason why the words used on Order 13 rule 6 (2) of Courts (High Court) (Civil Procedure) Rules 2017 are rather too general and broad in that they use the word, "case". Meaning, perhaps Order 13 rule 6 (1) (a) of Courts (High Court) (Civil Procedure) Rules 2017 should be read to mean dismissing a case for either party. If that is the understanding perhaps there may be no gap after all. Suffice to mention however that the framers of the law would have been categorically clear on Order 13 rule 6 (2) of Courts (High Court) (Civil Procedure) Rules 2017 where perhaps the rule would have said, "Any party whose case is either dismissed or strike out shall apply to the Court for restoration". Perhaps that would have been logical in the usage of the Order. That did not happen. I worry.

15. With this lack of clarity perhaps it is prudent that such a declaration should be made by the Honourable Judge who has the requisite jurisdiction to even make a pronouncement about the reading and indeed the application of this Order. In any case, I further think that Counsel Masange's argument is correct where he submits that the only person who should entertain

this application coming under Order 13 rule 6 (2) of Courts (High Court) (Civil Procedure) Rules 2017 is the Honourable Judge seized of this matter. This I say because the entirety of Order 13 is about what the Judge should be doing at mediation. On this front again, I should think this matter has to be exhaustively extinguished by the Honourable Judge as it were.

16. I must further say that I do not think this matter or any matter where the learned Judge has given authority to the Registrar to deal with any particular application, Counsel should be worried that they may not have the right to appeal to the Supreme Court. In fact, when that happens the decision of the Registrar retains the authority from the Honourable Judge and it should in my humble view be appealable to the Supreme Court because then, the decision is the decision of the Judge done by him through his messenger. As it were, I have always understood the maxim, "*Qui facit per alium facit per se"* to mean that he who does anything through another does it by himself. This is exactly my point that I have authority under Order 25 Rule 1 of Courts (High Court) (Civil Procedure) Rules 2017 given to me by the Honourable Judge, thus my reading of the *Elida Liphava* case, in that situation, the decisions made may be appealable to the Supreme Court. Commenting on the decisions of the Registrar, the eloquent Judge Rtd, Justice Mwaungulu (As he was then) in the case of *George Sakonda v SR Nicholas Civil Cause No. 67 of 2013(Unreported)* being a judgment on liability, had the following to say:

> *"Appeals to the Supreme Court ...stall because of the uncertainty on appeal forums on Registrar's assessment of damages. Registrars, for all that is worth, do a great good job and it is inconceivable that on matters on which they have been made dominant participant, their decisions on assessment of damages which, in fact are* ***decisions of this Court*** *and, on* ***correct appeal jurisdiction****, are* ***appealable to the Supreme Court****, never appear in law reports or some form of publication. Yet Registrar's awards actually inform the Supreme Court and the High Court (Tabord v David Whitehead & Sons (Malawi Ltd (1995) 1 MLR 297)."*
>
> *(Emphasis Added)*

17. I must add that I do not find it correct in a constitutional order or regime that a person would have no right to appeal against judicial decisions made by lesser Courts. My understanding of the *Elida Liphava* case, whose facts may be distinguished from this case, on the premise that the Supreme Court in that case was addressing an application that the learned Registrar proceeded to hear without prior authority from the Judge. My understanding is that although like correctly presented by the Supreme Court, before the assessment order is made the judgement of the Court remains inchoate, but where like in this case the judgement is followed with an assessment of damages order, and then numerous applications following after that, my humble view is that should the Registrar proceed with the authority of the Judge under Order 25 Rule 1 of the Courts (High Court ) (Civil Procedure) Rules 2017, then any decisions made thereof can be appealed to the Supreme Court if any party is aggrieved. Like I said, This Court forms this view premised on the ancient maxim: *"Qui facit per alium facit per se"* meaning, he who does anything through another does it himself. Thus, when I am directed and or instructed under Order

25 Rule 1 of the Courts (High Court) (Civil Procedure) Rules 2017, any decision I make thereon is or should be seen as the decision of the High Court or indeed the decision of the Judge seized of that matter.

18. With greatest respect, I do not think it is a correct interpretation or understanding of the *ratio descindi* of the *Elida Liphava* case where Counsel for the claimant assumes that even where the judge has granted permission to the Registrar to deal with an application then should Counsel be dismayed with it, he may not be allowed to appeal. With respect, the Supreme Court must not be heard to have meant that. This is the more reason I am inclined to push these issues to the Honourable Judge that perhaps a binding clarity to all Registrars may be timely. Should we fold our hands every time Counsel argues that the matter is contentious? What constitutes a contentious matter? Who should decide that question? Is the question of a probable appeal the only measure of a contentious issue? The listed things that are on Order 25 of Courts (High Court) (Civil Procedure) Rules 2017 are they not contentious in themselves if parties have a difference of opinion which is almost always the case? Or should it not be the facts of each and every case that should make a matter contentious? Haven't we had appeals of almost everything listed on Order 25 of Courts (High Court) (Civil Procedure) Rules 2017? If not here but perhaps in our sister common law jurisdictions? Put differently, where does the Registrar sit? Does he not sit to a limited extent (within Order 25) in the High Court? Should the Registrar make a judicial decision, where does it lie? Mwaungulu J (as he was then) correctly in my view addressed partly this issue in the *Sakonda* case. But these are the questions we meet in the ordinary course of our duty. Perhaps clarity is needed and I cannot pretend to be so potent as to provide one.

19. However, I must be intellectually honest, by perhaps adopting this reasoning: under Order 1 of the Courts (High Court) (Civil Procedure) Rules 2017, the Court is defined as the High Court. Again, under Order 25 Rule 1 of the Courts (High Court) (Civil Procedure) Rules 2017, the Registrar exercises the powers of the Court (meaning the High Court) and when he has authority to deal his decisions beyond a decision on assessment of damages must in my view be taken to be a decision of the High Court. Perhaps that is my innocent view. Like I said, since we are meeting these questions every time perhaps such issues should be addressed with clarity of thought by the reverend Superior Courts to which our hands are bound to respect and follow. We can only express our thoughts, but theirs are binding and they provide guidance. Perhaps this is the matter I must refer to the Honourable Judge for clarity over the questions I have paused and we get to meet through Counsel in the event that my understanding of the Supreme Court's order and indeed the law is found wanting.

20. Coming back to this case, like I have said it would appear that there is a solid argument that perhaps I must not clothe myself with the power under Order 13 of Court s (High Court) (Civil Procedure) Rules 2017 when in fact that is only reserved for the Honourable Judges. I must never be that ambitious. I think the argument that Order 25 of Court s (High Court) (Civil Procedure) Rules 2017 and the contents thereof are far different from Order 13 such that, a default judgment as envisaged thereon cannot be juxtaposed with a judgment entered by way of striking out a defence for non-attendance. Like I said, the argument of Maliwa of Counsel was ingenious that perhaps default must be understood to mean noncompliance with something required by the rules. With this understanding Counsel

argued, striking out a defence under Order 13 rule 6 (1)(a) is basically entering Judgment in default of attendance. Neat as that argument is as it comes, but I reckon that default judgment is entirely a regime controlled by its own processes. It must not be equalled with Order 13 Rule 6 (1)(a) of Courts (High Court) (Civil Procedure) Rules 2017.

21. So even if I am to proceed, I would still grudgingly proceed because I am not sure on some of the questions I raised and indeed, I think that I do not have power to make any order on an application that comes under Order 13. The argument that since I have the authority of the judge under Order 25 Rule 1 of Courts (High Court) (Civil Procedure) Rules 2017, therefore I should proceed to determine the matter, cannot be sustained. Respectfully, I disagree with the learned Counsel Maliwa on this. However, I agree with Counsel Maliwa where he argues that I should be moved only from prescriptions of law and indeed procedure. Counsel argued the question I should ask myself is whether the law has clothed me with the jurisdiction to handle a particular matter. Indeed, that is a correct position to hold. However, my thinking is that when the Judge gives me authority under Order 25 Rule 1 of Courts (High Court) (Civil Procedure) Rules 2017 the Honourable Judge can only give me authority to deal with the listed things. Anything outside that, I must warn myself not to proceed as it were and respectfully refer any such matters to the Honourable Judge for want of requisite capacity to hear and determine any issue that may arise.

22. It is from the foregoing, that I proceed to under Order 25 Rule 2 of Courts (High Court) (Civil Procedure) Rules 2017 do refer this matter and the questions that are arising to the Honourable Judge in chambers to deal with this application comprehensively and exhaustively or give any directions that the learned Judge will consider fit under Order 25 Rule 2 (2)(a) & (b) of Courts (High Court)(Civil Procedure) Rules, 2017, because for a fact, the record has had a marathon of applications which Counsel sought from the Court and yet within their rights to so do.

23. With respect to costs, I understand that they are entirely in my discretion to make. Thus, I make no order on cost.

24. It is so directed.

**MADE** in chambers this 19th April, 2023 at the High Court of Malawi, Sitting in Blantyre, Principal Registry, Civil Division.

Elijah Blackboard Dazilikwiza Pachalo Daniels
**THE ASSISTANT REGISTRAR**