

IN THE MALAWI SUPREME COURT OF APPEAL

PRINCIPAL REGISTRY

M.S.C.A. CIVIL NO. 4 OF 1989

BETWEEN:

LEONARD W. B. CHIKADYA APPELLANT

- AND -

THE MALAWI COLLEGE OF ACCOUNTANCY RESPONDENT

Coram: MKANDAWIRE, AG. J.

Ng'ombe of Counsel for the Applicant
Makhalira of Counsel for the Respondent
Chigaru, Clerk

JUDGMENT

This is a composite notice of motion for leave to appeal against the decision of the learned Mr. Justice Unyolo given on the 11th day of July, 1988 and for enlargement of time within which to appeal to the Malawi Supreme Court of Appeal. The Notice of Motion comes to me sitting as a single member of that court. The Notice of Motion is duly supported by an affidavit as required by the Rules.

A brief history of the matter is as follows: By a writ of summons dated 2nd December, 1987, the plaintiff, now the respondent, brought an action against the defendant, now the applicant, claiming the sum of K61,192.61 being damages for breach of bond between the parties. There was a detailed statement of claim which gave particulars of the action. After the defendant put in his defence, the plaintiff proceeded under Order 14 R.S.C. and applied for summary judgment. The Registrar of High Court found for the plaintiff and entered judgment in his favour as was claimed.

That ruling dissatisfied the defendant and so he appealed to a Judge in Chambers. In his ruling dated 11th July, 1988, the learned Mr. Justice Unyolo upheld the finding of the Registrar on the question of liability, but ordered that the quantum of damages be assessed by the Registrar or his deputy.

No appeal was made against that ruling until the learned Deputy Registrar proceeded to assess the damages and in his ruling dated 3rd January, 1989, he found that the defendant was to pay the sum of K50.735.29.

The matter appeared to have ended there until some six months later when the applicant gave instructions to M/S Ng'ombe & Co. to appeal against the ruling of the learned Mr. Justice Unyolo. It was only on 27th January, 1989 that M/S Ng'ombe & Co. filed the present Notice of Motion. It is worth of mention that formerly the applicant was represented by Mr. D.R.D. Alufandika. Section 23(2) of the Supreme Court of Appeal Act empowers the court to extend the time for giving notice of intention to appeal, notwithstanding that the time for giving such notice has expired. This power, however, is discretionary. In considering whether to enlarge the time or not, the court must have due regard to Order 3 rule 4 of the Supreme Court of Appeal Rules which provides as follows:

"Every application for an enlargement of time in which to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal within the prescribed period, and by grounds of appeal which prima facie show a good cause why the appeal should be heard. When time is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal."

Mr. Makhalira who is acting for the respondent submits that the affidavit deposed to by Mr. Ng'ombe does not give good and substantial reasons as to why an appeal was not lodged within the prescribed period. With the greatest respect to counsel for the applicant, I am inclined to agree with Mr. Makhalira's submission. I have carefully looked at Mr. Ng'ombe's affidavit but I do not see any explanation as to why the applicant failed to appeal in good time. In the course of giving his instructions to Mr. Ng'ombe, the applicant produced two letters which are on the subject of recovering the damages as assessed by the learned Deputy Registrar. There is no indication as to when and how the applicant came to be in possession of those letters because they had not been addressed to him. It is true that Mr. Alufandika did not attend to the assessment but that fact would not affect the filing of a notice of appeal on the question of liability. As a matter of fact the assessment was set down for hearing on 16th December, 1988, when time to appeal had already expired. Perhaps I should set down paragraph 6 of Mr. Ng'ombe's affidavit in full and it reads as follows:

"That upon receiving instructions I immediately went to peruse the record and discovered therein that there was an earlier Order of the Learned Judge L.E. Unyolo which has in effect confirmed the summary judgment herein and that although there were serious points of law which counsel for the Defendant could have taken to the Supreme Court of Appeal counsel did nothing about it and I am informed and honestly do believe that my client was not properly advised thereon."

This paragraph suggests that the applicant did hold discussions with his former legal practitioner after the ruling of the learned Mr. Justice Unyolo. It is not stated, as to when those discussions took place or whether instructions to appeal were ever given to Mr. Alufandika. Certainly, the affidavit does not say what the applicant did from the 11th of July, 1988. Supposing Mr. Alufandika had advised him against appealing to the Supreme Court of Appeal, would it have to take him 6 months before going to another legal practitioner. I think that a delay of 6 months is both inordinate and unreasonable. To make things worse, no proper reasons have been given to explain this long delay. On his part, Mr. Ng'ombe himself acted promptly and diligently. He was approached by the applicant only on 11th January, 1989, and within a fortnight or so he took out this notice of motion. But the real question is what was the applicant doing between 11th July, 1988 and 11th January, 1989.

I have looked at the cases of A.G.A. Karim & Sons v A.M.I. Marine Press (Mw) Ltd., and Marine Container Services Ltd., M.S.C.A. Civil Appeal No. 4 of 1988, and Tratsel Supplies Ltd. vs S. J. Kwakalinga, M.S.C.A. Civil Appeal No. 19 of 1987. I must say that I have found the judgments in these cases most instructive. According to these cases the court has a discretion to grant or refuse an extension of time for filing a notice of appeal provided:

- (a) good and substantial reasons for the failure to appeal within the prescribed period; and
- (b) grounds of appeal which prima facie show a good cause why the appeal should be heard.

It is important to note that both conditions must be met before time can be extended. In the A.G.A. Karim & Sons case, the application to extend time was made 2½ months after time to appeal had expired while in the Tratsel case it was just a matter of days. In both cases leave was refused because no good and substantial reasons for the delay were given.

I have already carefully considered Mr. Ng'ombe's affidavit and submissions but regret to say that I do not see any good and substantial reasons for failure to appeal within the prescribed period. In addition, I would say that a delay of 6 months is inexcusably inordinate. Three grounds of appeal have been filed and these cannot be said to be vexatious or frivolous but unfortunately both conditions must be met. I, therefore, dismiss the application with costs.

MADE in Chambers this 21st day of April, 1989, at
Blantyre.


M. P. Mkandawire
ACTING JUDGE