

**IN THE MALAWI SUPREME COURT OF APPEAL**

**AT BLANTYRE**

**M.S.C.A. CIVIL APPEAL NO. 24 OF 2001**

(Being High Court Civil Cause No. 593 of 1999)

**BETWEEN:**

ELECTRICITY SUPPLY .....PLAINTIFF

COMMISSION OF MALAWI

- and -

O.E. ESSAU PHIRI.....DEFENDANT

**BEFORE: THE HONOURABLE MR. JUSTICE TAMBALA**

Kadzakumanja, Counsel for the Plaintiff

Msowoya, Counsel for the Defendant

Mchacha, Official Interpreter

**R U L I N G**

**TAMBALA, JA**

This is a plaintiff's application to revoke a consent order made on 3rd October, 2001. It is brought by a summons which is supported by an affidavit sworn by the plaintiff's Counsel. The application is resisted by the defendant. An affidavit in opposition sworn by Counsel for the defendant has been filed.

In an action commenced by a writ the plaintiff claimed from the defendant K1,321,427.00 as the value of property destroyed by fire which occurred due to the defendant's negligence. He additionally claimed damages for loss of use of the destroyed property. The action succeeded. On 27th July, 2001 judgment was delivered in favour of the plaintiff who was awarded a total sum of K1,622,797.00. The defendants were not satisfied with the decision of the High Court in this matter and expressed their intention to appeal against the judgment.

On the 3rd October, 2001 an order was made by this court with the consent of both parties. The terms of the consent order were that the judgment of the High Court would be stayed on the following conditions -

(a) That the court record and skeletal argument of both Counsel should be ready by the 31st December, 2001;

(b) That costs amounting to K17,000.00 should be paid to Counsel for the plaintiff within 7 days, upon his undertaking to pay them back in the event that the appeal should succeed.

Counsel for the defendant filed a notice of appeal. He undertook to file the grounds of appeal upon receiving the lower court's record of proceedings.

Summons to settle the record were issued by the court on 24th October, 2001. The date of hearing the summons was 27th November, 2001. The summons was not heard on the 27th November due to the non availability of the Registrar. Another summons to settle the record was issued on 25th February, 2002. It was returnable on 1st March. Again, no Registrar was available to hear the summons on 1st March.

Counsel for the plaintiff has pointed out that it is the responsibility of the appellant to prepare the record required for appeal. He cited rule 9-(1) of Order III of the Supreme Court of Appeal Rules. He appreciated the fact that Counsel for the defendant wrote the court on three occasions requesting that a summons to settle the record should be issued. Counsel for the defendant informed this court that besides writing the three letters he verbally reminded court Clerks on several occasions to take appropriate steps to settle the record. Counsel points out that if the practice of reminding the court is overused, it tends to be discourteous and it may become a personal issue with the person who omitted to take the required step.

Counsel for the defendant says that his understanding of the consent order was that the judgment was stayed pending the determination of the appeal. He argues that there is nothing in the order to suggest that the order for stay was only valid for three months.

My understanding of the consent order of 3rd October, 2001 is that the defendants undertook an obligation to ensure that the record of appeal and the appellants skeletal arguments were ready by 31st December, 2001. I agree with Counsel for the plaintiff that the purpose of the undertaking was to avoid delay in prosecuting the appeal and to ensure that the plaintiff is not kept waiting for a long time before enjoying the fruits of a successful litigation. The defendants were given three months to ensure that the record of appeal and their skeletal arguments were ready. That, in my view, was not a very onerous task, even considering that in practice it is the court which actually prepares the record and issues the summons to settle the record. The obligation imposed on the defendants by the consent order only required Counsel for the defendants to get more involved in the preparation of the record, obviously working in active co-operation with the court staff. The order was intended to ensure that the preparation for the appeal was conducted efficiently. I agree with Counsel for the plaintiff that if there existed valid reasons why the deadline of three months could not be met, then it was the duty of Counsel for the defendants to apply for the extension of the three months period. To hold that the consent order meant that the order for stay would remain valid till the determination of the appeal, regardless of the fact that the record and skeletal arguments would not be ready within three months, would render the condition relating to the time limit totally impotent.

I take the view that the defendants failed to satisfy the condition that the record and their skeletal arguments should be ready by 31st December, 2001. The validity of the consent order depended, in my view upon the fulfilment of that condition by the defendants. I would consequently allow the application. The consent order made on 3rd October, 2001, is discharged. The defendants shall pay the costs of the present applications in any event.

**MADE** in Chambers, this 12th day of March, 2002, at Blantyre.

D.G. Tambala

**JUSTICE OF APPEAL**