

**IN THE MALAWI SUPREME COURT OF APPEAL
AT BLANTYRE**

MSCA CIVIL APPEAL NO. 6 OF 2010

*(Being High Court Lilongwe District Registry
Miscellaneous Civil Cause No. 21 of 2009)*

BETWEEN:

THE COUNCIL FOR THE UNIVERSISTY
OF MALAWI APPELLANT

- AND -

JOHN KAPONDA MASIYE RESPONDENT

**CORAM: THE HON. JUSTICE MTAMBO, SC, JA
THE HON. JUSTICE TEMBO, SC, JA
THE HON. JUSTICE NYIRENDA, SC, JA**

Kanyenda, Counsel for the Appellant
Kalasa, Counsel for the Respondent
E. W. S. Mwale, Official Interpreter
Ethel Matunga Chisale (Ndunya) Senior Personal Secretary

R U L I N G

NYIRENDA, SC, JA

This is an appeal against the decision of Justice Chombo in an application for judicial review pursuant to Order 53 of the Rules of the Supreme Court. The respondent was a medical student with the appellant. In the fifth and final year of his studies the appellant informed the respondent that he had failed three subjects, therefore that he would not be awarded the medical qualification (MBBC) which he was pursuing. It is against that decision that the respondent sought judicial review.

Before Justice Chombo the matter proceeded undefended. The court observed that in addition to being absent at the hearing, despite being served with the notice of hearing, the appellant did not file a defence to the originating motion. The judgment was therefore obtained in default of defence and without the appearance of the appellant. The appellant has appealed to this Court against that judgment.

The respondent has raised a preliminary point of objection to the appeal. The respondent relies on Order 35 r. 2 of the Rules of the Supreme Court and submits that the appellant should first have sought to have the judgment set aside by application before the lower court that heard the matter before lodging the appeal. The appeal should then have been against the order of refusal to set aside the judgment, if that turned out to be the outcome of the application.

Order 35 r. 2(1) provides:

Any judgment, order or verdict obtained where one party does not appear at the trial may be set aside by the Court, on the application of that party, on such terms as it thinks just.

In the practice notes to the rule, it is emphasized that the application should be made, if possible, to the judge who tried the case, **Schafer v Blyth** [1920] 3 KB 141. It is stated further that the absent party should apply for a new trial not to the Court of Appeal but the Court which tried the action, and, if possible, to the trial Judge himself.

The appellant concedes that generally this ought to be the procedure but that there is the alternative that the Court of Appeal in its discretion could entertain an appeal direct from such a judgment.

It would appear to us that the correct position is a combination of the respondent's submission and that of the appellant. The most appropriate procedure is that the absent party should make an application to set aside the judgment before the court which tried the action and preferably before the Judge who heard the matter. It is equally correct that the Court of Appeal, in an appropriate case, has power to entertain an appeal direct from such judgment, **Armour v Bate** [1891] 32 QB 323.

We put it to the appellant if indeed the submission was to urge this Court to entertain the appeal directly. It would appear that the appellant is in a dilemma. If the appeal were to be entertained directly the matter would have to be determined on the evidence that the respondent placed

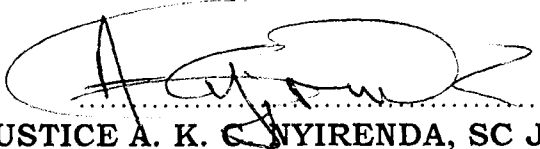
before the court below which does not include some vital documents which the appellant wishes to rely upon. This therefore is a typical case where allowing the appeal to proceed would not assist the appellant.

It is clear to us that the appellant realizes this predicament and therefore does not wish to proceed with this appeal. In the result, the respondents' preliminary objection is staid. We award costs to the respondent.

PRONOUNCED in Open Court this 2nd day of July 2010 at Blantyre.

Signed: 
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HON. JUSTICE I. J. MTAMBO, SC, JA

Signed: 
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HON. JUSTICE A. K. TEMBO, SC, JA

Signed: 
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HON. JUSTICE A. K. NYIRENDA, SC JA