**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 1791 OF 2002**

**BETWEEN:**

**THE LEASING AND FINANCE CO. OF MALAWI LTD. ……PLAINTIFF**

**VERSUS**

**GREENLINE CAR HIRE LIMITED DEFENDANT ……1 ST DEFENDANT**

**GRESHAM NAURA……2ND DEFENDANT**

**CORAM: POTANI, REGISTRAR**

**Tembenu, Counsel for the Plaintiff**

**Nyimba, Counsel for the Defendant**

**R U L I N G**

This is an application by the defendants to restore an application to set aside judgment. It is supported by the affidavit of Viva Nyimba, of counsel for the defendants.

Counsel for the plaintiffs has raised a preliminary objection to the application; such objection being that the application is misconceived in that it is taken on the ground that the application the defendants wish to be restored was dismissed for non attendance while in actual fact the court dismissed the application after hearing the plaintiff on the merits of the case.

I would wish to begin by agreeing with the observation made by counsel for the plaintiffs that the defendants application was dismissed not for attendance but after the court heard counsel for the plaintiffs and got satisfied that the defendants' application had no merit. That said, my attention has been drawn to order 32 rule 5 of the rules of the Supreme Court which deals with proceedings held in the absence of a party. The order reads as follows:

(1) Where any party to a summons fails to attend on the first or resumed hearing thereof, the court may proceed in his absence if, having regard to the nature of the application, it thinks it expedient so to do.

(2) Before proceeding in the absence of any party the court may require to be satisfied that the summons or, as the case may be, notice of the time appointed for the resumed hearing was duly served on that party.

(3) Where the court hearing a summons proceeded in the absence of a party, then provided that any order made on the hearing has not been perfected, the court, if satisfied that it is just to do so, may re – hear the summons.

(4) Where an application made by summons has been dismissed without a hearing by reason of the failure of the party who took out the summons to attend the hearing, the court, if satisfied that it is just to do so, may allow the summons to be restored to the list.

Observably, the defendant's application proceeded under sub rule (4) quoted above. However, as noted earlier, the dismissal of the defendants application came about after the court proceeded to hear the plaintiffs under sub rule (3). It is therefore clear that the defendants application is misconcerved. I, however, still need to consider whether although the defendants' application has been wrongly brought, it should still be re-heard under sub - rule (3). It should be noted that under that sub-rule, a re –hearing can only be ordered in a situation where the court's order made on a hearing proceeding in the absence of the order party has not been perfected. The court's order in this case was perfected on September 24, 2002. It was only on October 3 that the defendants took out the present application. In terms of sub rule 3, therefore, it is not permissible for the court to order a re –hearing. The application is therefore dismissed with costs

MADE in Chambers this day of November 11, 2002, at Blantyre.

**H S B Potani**

**REGISTRAR** Nyimba: I wish to appeal and also apply for stay of execution.

Tembenu: No objection so long stay with conditions.

Court: Leave to appeal granted. Execution to be stayed on such terms that within 7 days hereof the defendants should file notice and grounds of appeal.