

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO.39 OF 2005**

**BETWEEN:**

FINCA MALAWI ..... PLAINTIFF

AND

ELMA HIGH SCHOOL ..... DEFENDANT

**CORAM : HON JUSTICE M. C. C. MKANDAWIRE**

Mr. Kalua for plaintiff

Mr. Kauka for Defendant

Mr. Allan Chuma Official Interpreter

**RULING**

This is an appeal against the order of the Assistant Registrar of the 27th of August, 2005 setting aside the judgment entered by the plaintiff on grounds of irregularity and that the plaintiff bears the Sheriff fees and expenses following execution of an irregular judgment.

The facts of this case are as follows: The plaintiff commenced an action against the defendant through a specially issued writ dated the 13th of January, 2005 claiming for K1,534,980.23. The plaintiff further claimed K233,247.03 as collection costs, K40,818.23 as Government Surtax plus costs of this action. The defendant acknowledged service indicating on intention to defend. On the 19th of April, the defendant applied for a stay of execution which execution was duly granted. One of the conditions was that the defendant should file an application to pay debt by instalments within 14 days from the date thereof. The summon to pay

debt by instalments were indeed filed on that very day and was returnable on the 3rd of May, 2005. On that day, the parties appeared before the Judge whereby both Counsels confirmed that they were exploring a settlement out of court and asked for an adjournment. The matter was adjourned sine die. On the 2nd of August, the plaintiff amended the statement of claim whereby the plaintiff was now claiming for a sum of K7,646,075.56, plus interest and collection fees of K359,382.27 and costs. As this amendment was done, the defendant had filed in a notice to pay debt by instalments which was returnable on the 3rd of October 2005. On the 23rd of August, 2005 the plaintiff entered a default judgment on the amended statement of claim. On the 30th of August, 2005, the plaintiff had a warrant of execution issued and on that very day, the defendant obtained stay of execution of the warrants pending determination of the application to pay debt by instalments which was scheduled for the 3rd October, 2005. It is this state of affairs that led the defendant to bring the application whose decision is the subject of this appeal. I have looked at the grounds of appeal in this case and the ruling that was delivered by the learned Registrar. I note that the basis for setting aside the default judgment was that it was entered for too much in that it included a claim for collection costs and therefore was irregular. The learned Registrar therefore ordered that the plaintiff should reimburse the defendant of the Sheriff fees and expenses which had been paid during the execution of the default judgment.

It is clear from the facts that the sums of money as put on the default judgment that was entered corresponded with the amounts that had been endorsed on the amended writ. As the Learned Registrar rightly found, the plaintiff was entitled to amend the pleadings at that time. It is also clear that the affidavit of Counsel for the defence did not raise any meritorious defence to the claim for the principal amount. Pursuant to order 19, rule 2(1) RSC, the plaintiff was very much entitled

to enter final judgment against the defendant because the defendant failed to serve its defence within the prescribed period. What the plaintiff did therefore was merely to enter judgment for the sum that had been claimed in the amended writ and amended statement of claim. Thus with regard to that, judgment was not entered for too much. It is clear from the ruling of the learned Assistant Registrar that the issue of the inclusion of the claim of indensity for collection costs prayed a major role in her concluding that judgment was entered for too much. The Assistant Registrar basing on the J.L. Kankhwangwa and others vs Liquidator Import and Export Malawi Civil Appeal 4/2003, found that the law provides that collection costs are payable by a party to their legal practitioners in terms of the legal practitioners (Scale and Minimum charges). Amendment Rules 2002.

I totally agree with the arguments as put forward that these collection costs or indemnity in the sum of K359,282.27 are not claimable from a debtor under our law. It is however very clear that this amount was endorsed on the writ which formed the basis of the default judgment. There was thus compliance with order 13 r.1 RSC. I would concur with the views of my learned brother Katsala J in the case of Associated Suppliers and Malawi Electral Commission Civil came in 840 of 2005. I do agree that the indemnity in the sum of MK359,382.27t as collection costs is not claimable from the defendant in terms of our law. However, that per se does not lender the judgment irregular in the light of 0.19, r 2 (1) RSC. Since this claim for indemnity for collection costs was endorsed on the writ the default judgment complies with order 13 r 1 RSC. I therefore do not think that it was correct for the learned Assistant Registrar to say that the judgment was entered for too much simply because it includes an amount that is misconceived or is not tenable under our law. The fact that the defendant has a defence to the claim for collection costs does not, lender the judgment irregular. I therefore find that the

judgment entered herein was regular since it was entered for the amounts endorsed on the writ.

I therefore set aside the decision of the Assistant Registrar whereby the undisputed part of the judgement (the principal sum of MK7,646,075.56 with interest thereon and costs should stand and let only the disputed part on indemnity of collection costs to proceed for trial.

I further order that the order relating to reimbursement of Sheriff fees and expenses to the defendant is hereby reversed as execution herein followed a regular judgment. I award cost of this appeal to the Plaintiff (appellant).

MADE IN CHAMBERS at Blantyre this 2nd day of November 2006

M. C. C. Mkandawire

**JUDGE**