



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 2772 OF 2004**

BETWEEN:

DR MUSAIWALE CHIGAWA..... APPELLANT/PLAINTIFF

AND

YUNUS ABU MUSSA.....RESPONDENT/DEFENDANT

CORAM: Hon. Justice M.L. Kamwambe
Dr. Chigawa of counsel representing himself
Mr. Nampota of Counsel for the Defendant
Mr. Chuma, Official Interpreter

RULING

Kamwambe J.

This is an application by the Defendant for extension of time within which to appeal against the ruling of the Assistant Registrar and secondly, to set aside two certificates of taxation dated 7th day of August 2007. These applications were issued out by the office of the Registrar on 11th September 2007. At this time when filing the two summonses Messrs Nampota and Company was properly representing the Defendant after being so appointed.

Let me start with the first application which is for extension of time within which to appeal against Registrar's decision to the High Court, under Rule 3(2) of the High Court (Exercise of

Jurisdiction of Registrar) Rules. However, I find it necessary to expose some background position for the proper comprehension of the matter.

On 20th September, 2004, by writ of summons Plaintiff commenced proceedings against the Defendant as a result of a road traffic accident involving their cars. Messrs Nampota and Company was clearly acting for NICO General Insurance Company NICO is not a party to these proceedings. On 15th April, 2005 the Registrar sat to determine whether the default judgment was irregular and whether the Defendant had a defence on merit. On 7th day of February, 2006 the Registrar set aside the default judgment on the ground that the Defendant had established a defence on the merit warranting the matter to proceed to full trial.

The Plaintiff being dissatisfied with the ruling appealed to the High Court but the notice of appeal was not served on Messrs Nampota and Company or NICO. As a result the appeal proceeded in their absence. Two issues were before the High Court, to wit,;-

1. That Messrs Nampota and Company were not appropriately acting for the Defendants as they represented NICO.
2. That the Defendant erred to set aside default judgment as there was no defence on merit warranting trial.

The High Court dismissed the appeal on the ground that Plaintiff waived his rights by conceding that Messrs Nampota and Company filed a Notice of change of Legal Practitioners before the Registrar and the same was duly filed and that the defence on the merits was raised during the hearing of the application to set aside judgment.

On being dissatisfied further the Plaintiff appealed to the Supreme Court against the High Court ruling on the issues as follows:-

1. Whether Messrs Nampota and Company were appropriately acting for the Defendant
2. Whether the judgment entered was irregular
3. Whether upon establishing before the Supreme Court that the motor vehicle in issue belonged to Shereen Mussa and not the Defendant, the Defendant had not raised a defence on the merit.
4. Whether by establishing that the amount the Plaintiff was claiming against the Defendant included an invoice that related to a different accident altogether apart from the accident in issue the Defendant did not raise a defence on merit.
5. Whether the Order setting aside default judgement made by the Registrar and upheld by the High Court should be set aside.

The Supreme Court delivered its judgment dated 8th September, 2006 and held that Messrs Nampota and Company were not appropriately acting for the Defendant. They stated that Messrs Nampota and Company would only be able to act for NICO under the principles of subrogation and that would only be after NICO had settled the Plaintiff's claim by way of indemnity. The Supreme Court judgement proceeded to state that the appeal had succeeded in its entirety and condemned Messrs Nampota and Company to pay costs without necessarily tackling issues 2 to 5 before it.

Since the judgment in the Supreme Court "succeeded in its entirety", Plaintiff levied execution on the Defendant. Messrs

Nampota and Company were appointed legal practitioners for the Defendant by notice of appointment dated 24th January 2007 after the Supreme Court judgement obviously.

It was then that Messrs Nampota and Company applied before the Registrar to have the Supreme Court judgement set aside believing that the Plaintiff was interpreting the judgment as meaning that the orders sought were null and void. At the hearing of the application to set aside judgment the Defendant simply required the Registrar to read the judgment and make a decision whether the judgment had the effect that the orders obtained by Messrs Nampota and Company were null and void and whether prima facie the Supreme Court judgement said that the orders made by the Registrar on 7th day of February, 2006 setting aside the judgment of 3rd November, 2004 was set aside thereby.

At the hearing of the application the Plaintiff raised a preliminary objection contending that the issues in the application are **res judicata** as the issues had already been determined by the Supreme Court. The Registrar agreed with the Plaintiff because the Supreme Court had decided the appeal in its entirety.

Observing that the Supreme Court judgment is presenting enforcement problems the Defendant decided to bring the matter again before the Supreme Court in order for it to clarify the judgement in the four matters not considered by it directly since no pronouncement had been made on them specifically. The only pronouncement made was that Messrs Nampota and Company did not appropriately represent the Defendant.

I have no doubt that the Supreme Court of Appeal has mandate to review its own judgments. Order 3 rule 29 of the Supreme Court Rules state that:-

“The Court shall not review any judgment once given and delivered by it save and except in accordance with the practice of the Court of Appeal in England.”

However, we note that the Supreme Court refused to entertain the matter on review because it had determined the matter to finality. The Defendant cries foul with the Registrar for supporting the argument of **res judicata** without reading the Supreme Court judgment and appreciating that some matters had not been settled clearly and finally. My task is not to decide on the Supreme Court actions but whether the Registrar was right to hold that the matter was **res judicata**.

The default judgment was definitely irregular for want of service of a statement of claim on the Defendant and the Supreme Court could not have intended to uphold the default judgment by nullifying the Registrar's order setting aside the judgment. Likewise the accident motor vehicle did not belong to the Defendant thereby affording the Defendant a defence on merit and the Supreme Court could not have intended that execution to proceed against the Defendant who is not the owner of the motor vehicle.

I do not think the Supreme Court made an oversight of the other issues brought on appeal before it. It is very much my view that upon deciding on the propriety of representation of the Defendant by Messrs Nampota and Company, all other matters were accordingly decided as they hinged on the matter of representation. Now that the Supreme Court decided that Messrs Nampota and Company did not appropriately represent the Defendant all it means is that:-

1. the application to set aside the default judgement was null and void since Messrs Nampota and Company had no audience to be heard by the Registrar for want of appointment. Therefore the default judgement still stands and it's up to the Defendant now that Messrs Nampota and Company is duly appointed to reapply.
2. in the same vein the defence on merit falls away so too all other proceedings or matters that Messrs Nampota and Company was engaged in such as in the application to set aside the two certificates

of taxation of the 7th August 2007 before the Registrar and the High Court.

The short of it is that Messrs Nampota and Company had no mandate to act on behalf of the Defendant and consequently all acts undertaken by it are nullified. In other words, the Supreme Court decision on legal representation pre-empted consideration of the four other issues. But now that it is duly appointed it can start afresh with an application to set aside default judgment by raising a defence on the merits as it did before, and due to irregularity. And further, it may apply for a stay of execution.

In this regard, I find that the Registrar had not erred in treating the matter as **res judicata** and I uphold the Registrar's decision.

Made in Chambers this 20th day of August, 2008 at Chichiri, Blantyre.

M.L. Kamwambe
JUDGE