



JUDICIARY

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 2772 OF 2004**

BETWEEN:

DR MSAIWALE CHIGAWA.....RESPONDENT

-AND –

HONOURABLE YUNUS MUSSA.....APPLICANT

CORAM: THE HONOURABLE JUSTICE E. B. TWEA

Dr Chigawa, of Counsel, for the Respondent

Absent, of Counsel, for the Applicant

Mr Manda. – Official Interpreter

R U L I N G

Twea, J

The plaintiff herein raised preliminary objections to the summons by Messrs Nampota and Company, for leave to extend time for appeal against ruling of Kamwambe, J.

This case has a long history of preliminary objections and appeals. It is fair to say that, in the process, the main issues seem to have been forgotten.

To put issues in context however, I should mention that the plaintiff sued the defendant Messrs Nampota and company came in to act for the defendant

without express instructions, purporting to rely on subrogation of the policy of insurance between the “defendant” and NICO General Insurance Company. The Supreme Court ruled that Messrs Nampota had no authority to appear under the doctrine since they had not indemnified the “defendant”. They were condemned to pay costs.

As a result of this ruling all steps taken by Messrs Nampota and Company were nullified up and until the point when they were specifically instructed to ask for the defendants. The main action was left aside. The plaintiff filed a bill of costs against Messrs Nampota and Company. It was called for taxation before the Assistant Registrar who heard it in the absence of Messrs Nampota and Company. Attempts to have it reviewed before the same Assistant Registrar failed because he excused himself on account of other duties. The review was done before different Assistant Registrar. The Assistant Registrar held that matter was res judicata. The certificates of taxations remained on record. The matter went before a judge for extension of time to appeal and to set aside the two certificates. The learned judge found that, according to the ruling of the Supreme Court, Messrs Nampota and Company had no standing and opined that since they were subsequently regularly instructed, everything must start afresh.

There was yet another application in the same vein before a different Judge. The judge upheld the earlier ruling of his Brother Judge and the Assistant Registrar. Messrs Nampota sought to appeal the ruling and to extend time to appeal for extension.

The order of that Judge Kamwambe, which was delivered on 20th August 2008, provided, in part, that:

“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 7th August 2007 before the Registrar and the High Court”.

If the proceedings to set aside the certificates fell away, by necessary implication, the certificate obtained in the absence of the Messrs Nampota

remains on record. However, according to Order 62 r 35, Messrs Nampota need not have appealed they had a right to review the certificate before a Judge within 14 days, as submitted by the plaintiff; see **Catherine James Kachale V Alisa Ashani and Anne Ashani cival Case No.2306 of 2004.** The 14 days have since expired. This is because the procedural lapses were not addressed by the “parties” or the Court. In my view it is still open to the parties to have the review by the Judge under Or 62 r 35 re-opened. This procedure is supported by Or 62 r 34/4 which gives power to taxing master to set aside a certificate and extend time for objections; see **Thorne Vs Thorne (1979) 3 all E.R 164,** also Or 62 r 22. This would be the proper way of disposing of the matter.

The problem in the present case is the haste by the plaintiff to execute which is being resisted. However, it is important to note that in the course of the proceedings both parties committed procedural errors, acted with undue haste, which has contributed to the unnecessary expenses. I would therefore be vital to have the bills properly taxed in respect of care and conduct of both parties.

Each party to bear its own costs.

Pronounced in Chambers at this 31st day of March, 2009 at Blantyre.

E. B. Twea

JUDGE