



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO 34 OF 2014**

BETWEEN

ALEXANDER SOLANKE (JNR) 1ST PLAINTIFF

RHODA SOLANKE 2ND PLAINTIFF

AND

NBS BANK LIMITED 1ST DEFENDANT

PELANI MALANGE 2ND DEFENDANT

ALEXANDER SOLANKE 3RD DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA Mr.

Gulumba, of Counsel, for the Plaintiff

Mr. Mpaka, of Counsel, for the Defendant

Ms. E. Chimang’anga, Official Interpreter

ORDER

Kenyatta Nyirenda, J.

This is the Plaintiffs’ Summons for an order to set aside the judgment that the Court entered in default of appearance by the Plaintiffs and their Counsel [hereinafter referred to as the “Plaintiffs’ Summons”]. The Summons is brought under Order 35, r. 2 of the Rules of the Supreme Court (RSC). Until the filing with the Court of the Plaintiffs’ Summons, Counsel on record were Counsel Ndhlovu of Messrs Makuta & Company for the Plaintiffs and Counsel Mpaka of Destone & Co. for the Defendants.

The background to the Plaintiffs' Summons can be briefly stated. The Plaintiffs commenced the present action by writ of summons claiming several orders. After several interlocutory applications, the case eventually proceeded to trial for the first

time on 17th April 2015. The case was adjourned to 13th May 2015 in anticipation of cross-examination of the sole witness for the Plaintiffs' side, to wit, the 2nd Plaintiff. On 13th May 2015, trial was adjourned at the instance of the Plaintiffs because the Counsel Ndhlovu was absent. It was postponed to 11th June 2015.

On 11th June 2015, Counsel Ndhlovu did not show up at the set hearing time of 9 o'clock in the forenoon. I postponed the hearing to 10:30 o'clock in the forenoon in the presence of the 2nd Plaintiff, among others. When the case was called at 10:30 o'clock in the forenoon, the 2nd Plaintiff as well as Counsel Ndhlovu were once again absent and there was also no explanation before me for the default.

Order 35, r.1 of the RSC comes into play where there is failure to appear by both parties or either party and it reads as follows:

"1. (1) If, when the trial of an action is called on, neither party appears, the action may be struck out of the list, without prejudice, however, to the restoration thereof, on the direction of a Judge.

(2) If, when the trial of an action is called on, one party does not appear, the Judge may proceed with the trial of the action or any counterclaim in the absence of that party."

Acting pursuant to Order 35, r.1 of the RSC and the notes thereto and having taken the view that there is no counterclaim in the present case, I dismissed the Plaintiffs' action with costs.

The Plaintiffs' Summons was filed with the Court on 12th June 2015 and it is accompanied by an Affidavit, sworn by Mr. Jones Stanly Gulumba, wherein he primarily blames the previous Plaintiffs' lawyer for the dismissal of the action:

"14. THAT the plaintiffs are determined to prosecute their claim and to have a decision made by the Court on the merits. The Plaintiffs have therefore, now instructed alternative counsel. It is the plaintiffs' view that the matter could have proceeded normally had it not been for their Counsel's failure to appear before the Court.

15. THAT it is clear from the conduct of Counsel that he greatly compromised his professional duty to the plaintiffs and prejudiced the prospects of their successful prosecution of the matter. This could would inevitably require the intervention of the Malawi Law Society as it is bound to bring the profession of the law into disrepute."

The Defendants are opposed to the Plaintiffs' Summons on the ground that the Plaintiffs have failed to satisfy the criteria for setting aside the judgement that the Court entered on 11th June 2015. Counsel Mpaka submitted that there are several general indications that have to be taken into account when a court is considering to set aside a judgment obtained as a result of a party failing to appear. He listed the general indications as follows:

- "i) Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision.*
- ii) Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important; unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a re-hearing.*
- iii) Where the setting aside of judgment would entail a complete re-trial on matters of fact which have already been investigated by the court the application will not be granted unless there are very strong reasons for doing so.*
- iv) The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success.*
- v) Delay in applying to set aside is relevant, particularly if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it.*
- vi) In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered; where he has failed to comply with orders of the court, the court will be less ready to exercise its discretion in his favour.*
- vii) A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences.*
- viii) There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither is short. Per Leggatt L.J. in **Shocked v. Goldschmidt** (1994) *The Times*, November 4, CA"*

Counsel Mpaka submitted that much as the Court has discretion under Order 35 r.2, of RSC, it is not whimsical discretion but one which should be exercised on set principles of law. Counsel Mpaka concluded by contending that there is no legally relevant reason to warrant exercising discretion in favour of the Plaintiffs

and he, therefore, prayed for order disallowing the Plaintiffs' Summons.

In his response, Counsel Gulumba submitted that it would not be just to deprive the Plaintiffs of their right to a fair hearing because of the conduct of the previous Plaintiffs' lawyer. It was further submitted that any prejudice suffered by the Defendants can be appropriately compensated by an award of costs for the failed hearing.

I have carefully considered the submissions made by both Counsel. I will first discuss the contention by Counsel Gulumba that the Plaintiffs must not be punished due to the conduct of the previous Plaintiffs' lawyers. A similar argument was unsuccessfully advanced in the case of **Kulinji Mafunga v. Litto Phiri t/a Eagle Contractors, HC/PR Civil Appeal Case No. 498 of 2012 (unreported)**. I find the following passage therein, at page 10, particularly apposite:

*“Furthermore, and perhaps more importantly, a client and his or her legal practitioner have a very special principal and agent relationship. A lawyer acts, as an agent, on behalf of the client, with consequences that bind the client. I find the American case of **Link v Wabash Railroad Co 370 U.S. 626, 633-34 (1962)** to be both instructive and illuminating. The case concerns a review by the United States Supreme Court of a District Court’s sua sponte dismissal of a diversity negligence case. Six years after the Appellant had filed the matter, the District Court scheduled a pre-trial conference and gave counsel two weeks’ notice of the scheduled conference. On the day of the conference, the Appellant’s counsel called the court to say that he would be unable to attend the conference, giving the impolitic reason that he was busy preparing some documents for the State Supreme Court. The attorney did not attend the conference, and the District Court dismissed the matter for failure to appear and prosecute the claim. In reviewing the District Court’s dismissal, the Supreme Court made the following pertinent observation:*

“There is certainly no merit to the contention that dismissal of the petitioner’s claim because of his counsel’s unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose his attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have ‘notice of all facts, notice of which can be charged upon the attorney’ - [Emphasis by underlining supplied]

I cannot agree more with the reasoning in **Link v. Wabash Railroad Co**, supra. Our judicial system, as we know it, would simply collapse if courts were to adopt, as a matter of unqualified principle, the notion that a client (principal) can avoid the consequences of the acts or omissions of his freely appointed agent (lawyer).

I say “*as a matter of unqualified principle*” because it is not to be thought that it will necessarily be fatal in all circumstances where a party seeks to have a

judgment set aside on the ground that it is his or her lawyer's action, omission or conduct which led to the dismissal of a case. The legal principles pertaining to a particular legal

question or exceptional facts obtaining in a particular case may make it unjust not to allow an application to set aside a judgment entered as a result of the conduct of a party's lawyer. In the present case, as already observed hereinbefore, a key consideration that has to be taken into account when a court is considering to set aside a judgment ought to be whether the party in whose favour the judgment was entered would be prejudiced by the judgment being set aside without the party being protected against financial consequences emanating therefrom.

In the case before me, I am persuaded by the argument by Counsel Gulumba that an award of costs to the Defendants for the failed hearing would constitute adequate compensation for any prejudice suffered by the Defendants. In any case, it is always important, I believe, to bear in mind that the ultimate aim of the court is to facilitate the just, quick and cheap resolution of the real issues in the proceedings. I need hardly say that courts loath the perdition of cases through technicalities.

In the premises, I am inclined to allow the application and I, accordingly, set aside my order dated 11th June 2015 dismissing the Plaintiffs' action and the consequential formal order dated 11th June 2015 striking out the action.

I now turn to the issue of costs. Counsel Gulumba has prayed that Counsel Ndhlovu should be condemned to pay the wasted costs because the same were, in Counsel Gulumba's opinion, caused by the failure of Counsel Ndhlovu to adhere to his professional commitments. On the basis of the affidavit evidence before me, I have no hesitation in agreeing with the prayer by Counsel Gulumba. The inexcusable conduct of Counsel Ndhlovu on 11th June 2015 is the chief reason that led to the dismissal of the Plaintiffs' action. In the circumstances, I have no choice but to order that all costs thrown away by reason of the trial becoming abortive on 11th June 2015 and costs of the Plaintiffs' Summons herein be payable personally by Counsel Ndhlovu within 28 calendar days hereof. If costs are not agreed within 7 days hereof, they are to be taxed by the Registrar within 14 days hereof.

Alexander Solanke & Another v NBS Bank & Others

Kenyatta Nyirenda, J.

For the sake of completeness, the case is set down for continued hearing in open court on 16th March 2016 at 9 o'clock in the forenoon.

Pronounced in Chambers this 10th day of February 2016 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE