MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 368 OF 2016

BETWEEN:

FRANK MSISKA (On his own behalf and on behalf of Students at the University of Malawi, the Polytechnic).....PLANTIFF

AND

COUNCIL FOR THE UNINVERISTY OF MALAWI (The Principal, the college Registrar, the Polytechnic).....DEFENDANT

CORAM: THE HON JUSTICE H.S.B. POTANI

Mr. Hara, Counsel for the Plaintiff

Mr. Roka, Counsel for the Defendant

Mr. Kanchiputu and Mathanda, Court Clerks

RULING

The question the court is called upon to decide is whether the order made in favour of the plaintiff on October 19, 2016, should be set aside.

The brief history of the matter is that by an expedited originating summons issued on September 27, 2016, the plaintiff commenced this action against the defendant seeking a determination on a number of questions and ancillary reliefs in the nature of declarations and orders arising from and

in relation to the University of Malawi (UNIMA) revised tuition fees for mature and generic students approved by the defendant. On the same day the originating summons was issued, the court granted and *exparte* injunction order restraining the defendant from prematurely demanding the revised fees as approved in the 2015116 academic year at the Polytechnic, a constituent college of UNIMA. The court fixed October 19, 2016, at 9.00 am for the hearing of the matter. Come the hearing day, there was no appearance on the defendant's side and upon proof of service of all necessary processes on the defendant, the court proceeded to hear the plaintiff's case in the absence of the defendant. Having been satisfied that sufficient cause had been shown to warrant the granting of the declarations and reliefs sought by the plaintiff, the court proceeded to so grant. The relevant part of the order of the court is as follows:

1. *The Defendant BE AND IS HEREBY permanently restrained from demanding and receiving the revised tuition fees in the sum of MK400,000.00 for first year students, the sum of MK350,000.00for continuing students and the sum of MK900,000.00 for mature entry students at the University of Malawi, the Polytechnic in the forthcoming 2015/2016 academic year.*

Subsequently, on October 28, 2016, the defendant knocked on the doors of the court with an *ex parte* application to set aside the order. The application was made pursuant to Order 32 rule 2 of the Rules of the Supreme Court but the court directed that the application should be heard *inter partes* and the hearing took place on November 23, 2016.

At the hearing, the defendant was granted leave to amend the application so that it proceeds as one made under Order 28 rule 4(1) of the Rules of the Supreme Court instead of Order 32 rule 2 as earlier indicated. The defendant's application is supported by the affidavit and a supplementary affidavit of Tisungeni Kaime-Mauluka of counsel. On the part of the plaintiff, there is the affidavit of Wanangwa Hara of counsel, in opposition.

Order 28 rule 4(1) under which the present application has been made reads:

The Court by whom an originating summons is heard may, if the liability of the defendant to the plaintiff in respect of any claim made by the plaintiff is established, make such order in favour of the plaintiff as the nature of the case may require, but where the Court makes an order under this paragraph against a defendant who does not appear at the hearing, the order may be

varied or revoked by a subsequent order of the Court on such terms as it thinks just. [Emphasis supplied]

Order 32 rule 5 (3) also gives the court the same powers as those under Order 28 rule 4(1) and it provides as follows :

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.

It is pertinent to note that under Order 32 rule 5(3), the order made in the absence of a party can only be set side if the order has not been perfected. The order the defendant seeks to be set aside in this case was already perfected way back such that strictly speaking Order 32 rule 5 (3) would not apply. Counsel for the defendant has submitted that the power of the court under Order 28 rule 4(1) is wider than that under Order 32rule 5(3). The court would accept such a submission because, among others, under Order 28, the power of the court is not limited to the time before the order sought to be set aside has been perfected as is the case under Order 32. Further under Order 28 rule 4(1) the court has power not just to set aside but also to vary the order. What is important to bear in mind is that in both instances the power is essentially discretionary as can be seen from the use of the word *'may '* in both provisions. And the present application being one made under Order 28 rule4 (1) the court's hands are not tied merely because the order the sought to be set aside was perfected.

There are a number of grounds advanced by the defendant in the bid to have the order of October 19, 2016, set aside and/or varied and I shall endeavor to deal with all them but not necessarily in the order they have been presented. To begin with, in the initial affidavit in support, the defendant in essence is offering an explanation on the absence of counsel on the hearing date. What comes out most prominently is that counsel for the defendant informed counsel for the plaintiff to ssek and adjournment as she could not be able to attend court since her infant child had suddenly been taken ill. I wish to hasten that say that the court does not doubt that conversation between counsel and indeed the truthfulness regarding the infant's illness. It should, however be noted and as at the hearing day there was not process filled by the defendant in response to the plaintiff s case yet the record shows that the defendant had been served on October 3, some 16 days earlier and that was

what mainly drove the court to proceed with the hearing in the absence of the defendant. It should also be mentioned that the court deemed it just to so proceed considering that the matter was commenced by an expedited originating summons and it is quite evident to any reasonable mind that the matter hinges on issues to do with the right to education which is a fundamental constitutional right hence the need to resolve it with dispatch and speed. Therefore the court has a very clear conscience in so as it relates it having proceeded in the absence of counsel for the defendant on October 19.

The other point of argument in aid of the defendant's plea is that the application has been made without undue delay it having been made on October 31 and the order having been made on October 19. This comes out in paragraphs 5, 6, and 7 of the supplementary affidavit in support. It is contended counsel that the defendant being a colossal institution with four constituent colleges there is always need for more time to get information regarding its business and transactions. While tending to agree that the defendant is a large institution, I would hasten to say that that in itself does not give the defendant the luxury to slumber in dealing with issues of litigation brought against it. The defendant like any other legal entity is expected to have working mechanisms to respond to suits within the prescribed times rather than expect preferential treatment at the expense of the rights of those seeking redress against its alleged indiscretions. In my considered view, the defendants delay in the necessary filing processes in response to the plaintiff's case cannot be justified. It is also the court's position that the order having been served on the defendant's lawyers on the same day it was made, that is, October 19, considering the nature importance of the matter which, as already stated, relates to the right to education , the defendant should have made the application much earlier than 10 days later.

It has also been argued for the defendant that the plaintiff's action is irregular as the originating summons was served without Acknowledgement of Service Form and that the order of *ex parte* injunction was also endorsed with a date of hearing thereby giving to room for the *inter parties* hearing on the injunction. I have considered these aspects of the defendant's contentions and what is clear is that although the flaws pointed out could have been there, the defendant has not demonstrated that it has suffered any prejudice or injustice. I should hasten to mention that if the defendant wanted to challenge the *ex parte* injunction order it could have done so by filing the necessary application without necessarily having to wait for the plaintiff to move for the *inter parties* hearing. And the defendant having been able to file the affidavit of Moses Mwenye in

opposition to the plaintiff s action, though belatedly, the absence of an Acknowledgement of Service Form is of no consequence. In any case the order the court made on October 19 was not in default of acknowledgement of service

Then there is the argument that the defendant has to be heard on the matter as it is one of huge public interest. Yes the matter is undoubtedly one of significant public interest and one would have expected the defendant to deal with it as such by acting with diligence, speed and dispatch upon being served with the processes from the plaintiff but as it has been shown earlier, the defendant took a *laissez fare* attitude and approach. The defendant can therefore not be allowed to buy sympathy using public interest.

Finally there is the contention by the defendnat that it has a defence on the merits which is contained on the affidavit of Moses Mwenye, Registrar for the Polytechnic exhibited to the supplementary affidavit in support as **TKMl.** In that affidavit the deponent has endeavored to explain what he meant by in the Press Release exhibit **FMM3** in the affidavit of the plaintiff in support of the originating summons in which he announced the opening of the Polytechnic 2015/2016 academic year. I will not dwell much on the contents in the affidavit as that would amount to a re-hearing, suffice to note that there is the plaintiff s affidavit in reply to that affidavit. What is clear from a glimpse the affidavit of Moses Mwenye and all the other evidence before the court is that indeed the opening the Polytechnic is due for is for the 2015/2016 academic year which has been delayed due to reasons that are beyond the scope of the present proceedings. The critical point to note is that as it is clearly spelt out in the revised fees announcement by the defendant as contained in exhibit **FMMl** to the affidavit of the plaintiff in support of the originating summons that the revised fees are effective from the 2015/2016 academic year, the so called defence on the merit would amount to an ambush on the students especially the continuing students. I have singled out continuing students because for the new students, certainly they are not in the 2015/2016 academic year. Having said that, it is the court's considered view that a pragmatic approach to the matter is to order a variation of the order, as

provided for in Order 28 rule 4 (1) rather than setting aside of the order and ordering a hearing . It is consequently directed and ordered that the order of October 19, 2016, be varied so as to apply only to continuing students and to any new entrants.

On costs the position of the law is that they normally go to the successful party and in this case the from outcome, it can be said that the order the defendant sought to be set aside and a re-hearing ordered having been varied, the defendant's application has partly failed and partly succeeded. In exercising it discretion on costs, the court largely takes into account that the application could have been avoided had the defendant acted with speed and diligence upon being served with the processes on the initial hearing as such the defendant is condemned to costs of the application.

Made this day of December 12, 2016, at Blantyre in the Republic of Malawi.

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H.S.B POTANI

JUDGE