JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 87 OF 2005

BETWEEN:

MRS ELUBY ISSA ..... 1ST PLAINTIFF

MR MORRIS ISSA ..... 2ND PLAINTIFF

MR MOLENI ..... 3RD PLAINTIFF

-AND-

MR. HENRY CHINKHATA SABOLA ..... DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Chipeta, of Counsel, for the Plaintiff
Mr. Chagwamnjira, of Counsel, for the Defendant
Mr. O. Chitatu, Court Clerk

JUDGMENT

Kenyatta Nyirenda, J.

This is an appeal by the Plaintiffs against an order that was made by learned Assistant Registrar on 31st October 2013. The order was made upon hearing the Plaintiffs' summons to set aside an order setting aside a default judgement and an order striking out a party [hereinafter referred to as the "Plaintiffs' Summons to Strike out a Party". The Notice of Appeal was filed pursuant to Rule 3 of the High Court (Exercise of Jurisdiction of Registrar) Rules.

The background information to the appeal can be briefly stated. On 13th January 2005, the Plaintiffs commenced an action against the Defendant claiming that they

are the rightful heirs to the chieftaincy of Group Village Headman Namasalima, as opposed to the Defendant who is not a member of the royal family of Group Village Headman Namasalima. The Defendant having failed to file an acknowledgement of service, the Plaintiffs obtained a judgement in default of defence on 23rd May 2005.

On 4th April 2013, M/s Chagwamnjira and Company filed a Notice to the effect that they had been appointed by the Defendant to act on his behalf and they proceeded to file with the Court an ex-parte summons for an Order for a stay of execution of the Default Judgment pending summons to set aside the default judgment. A stay order was granted subject to the Defendant filing a summons to set aside the default judgment within 7 days from 4th April, 2013. The Defendant did not file the said summons within the stipulated 7 days period but filed it on 11th June 2013 without any Court Order extending the time within which to file the said summons. The Defendant's summons to set aside the default judgment was set for hearing on 25th June 2013 at 11:25 but the Defendant did not attend to the hearing of the summons on the said date and time.

On 23rd July 2013, the Plaintiffs filed with the Court an ex-parte summons for an order setting aside the stay order and dismissing summons to set aside default judgement for want of prosecution and abuse of court process. Having heard the application, the learned Assistant Registrar made the following order:

> *"1. The order for stay dated 4th April, 2013, obtained by the Defendant herein BE and IS HEREBY set aside;*
>
> *2. The Defendant's Summons to Set Aside Default Judgement filed herein BE and IS HEREBY dismissed with costs to the Plaintiffs; and*
>
> *3. This Order may only be set aside on an inter-parte application."*

On 5th August 2013, the Defendant filed with Court an ex-parte summons for an order of stay of execution of the default judgement pending summons to set aside the default judgement. The stay of execution of the default judgement was granted subject to the Defendant filing summons to set aside the default judgement within 7 days of 5th August 2013. The inter-partes summons to set aside the default judgement was filed with the Court on 7th August 2013.

On 13th August 2013, the Plaintiffs filed a Notice of Preliminary Objections [hereinafter referred to as the "1st Notice of Preliminary Objections"] which reads, in part, as follows:

> *"1. The Summons was dismissed by Order of 23rd July 2013, an Order which can only be set aside on an inter-partes application. The Defendant has not made any inter-partes application to set aside the Order of 23rd July 2013.*
>
> *2. Messrs Chagwamnjira & Co are acting without instructions from the Defendant, and have actually misled the Court by mispresenting the fact that they have been appointed by the Defendant, as the Defendant died away in 2010 or thereabouts.*
>
> *3. There has been excessive delay in filing the Summons occasioning prejudice to the Plaintiffs as the said Summons are being made eight years after the Default Judgement was filed and only after the Defendant passed away."*

The Court dismissed the Defendant's Summons primarily on the ground that *"it is an abuse of Court process, as M/s Chagwamnjira and Company misrepresented the fact that they had instructions from the Defendant"* and Messrs Chagwamnjira and Company were ordered to pay the costs.

On 22nd August 2013, the Intervening Party filed with the Court an application for leave to be joined as an interested party and the application was duly granted. In this regard, the Court directed the Intervening Party to file summons to set aside the default judgement and the summons were filed on 29th August 2013. Before the set hearing date of 11th September 2013, the Plaintiffs filed with the Court the following Notice of Preliminary Objections [hereinafter referred to as the "2nd Notice of Preliminary Objections"]:

> *"1. Mrs. Jean Mbengwa, the Intervening Party herein, has wrongly been added as a party because there is no evidence showing that she is the manager of the deceased Defendant's estate, against which or for the benefit of which this cause of action survives, or that the deceased's Defendant's interest or liability has passed to her.*
>
> *2. The summons to set aside default judgement herein is fatally irregular because Part 13 of the CPR 1998, under which it had been brought, only applies to setting aside default judgements entered under Part 12 of the CPR 1998. The default judgement at issue in the present action was not entered under Part 12 of the CPR 1998.*
>
> *3. For the foregoing reasons, the Intervening Party should be struck out as a party to this action and the summons herein be dismissed for being an abuse of the Court Process with costs to be paid before any further steps are taken."*

On the date and time of hearing the summons, Counsel for the Plaintiffs failed to attend the hearing because he was misled by a court clerk that the matter was to be heard before His Honour Kacheche but the matter was called before His Honour Mdeza who proceeded to grant an Order setting aside the default judgement without considering the preliminary objections.

On 19th September 2013, the Plaintiffs filed with the Court the Plaintiffs' Summons to Strike out a Party on the same grounds as those that were set out in the 2nd Notice of Preliminary Objections. The Assistant Registrar held that (a) the Intervening Party was properly joined to the proceedings and as such she had a right to bring summons to set aside default judgment and (b) although the summons had been brought under erroneous rules of procedure, the Appellants had not been prejudiced in any way.

In arguing the appeal, Counsel Chipeta put forward three arguments. Firstly, he argued that the Intervening Party was wrongly added to the proceedings because she did not get letters of administration. Counsel Chipeta placed reliance on section 10 (1) of the Statute Law (Miscellaneous Provisions) Act (Act).

Secondly, Counsel Chipeta argued that the Order setting aside the default judgement was irregular and an abuse of court process because the application to have the default judgement set aside was brought seven years out of time. In his view, this was more than inordinate delay.

Thirdly, Counsel Chipeta invited the Court to note that the Summons to set aside the default judgement was brought under Part 13 of the Civil Procedure Rules 1998 (CPR), which Part only applies to setting aside of default judgment entered under Part 12 of the CPR. Counsel Chipeta submitted that default judgement at issue in the present action was not entered under Part 12 of the CPR 1998. It was thus argued that as the summons to set aside default judgement herein was fatally irregular, it must be struck off.

In his response to the 1st argument, Counsel Chagwamnjira Counsel contended that the Intervening Party was not supposed to get letters of administration for her to be added as a party to the proceedings as this was not a matter under Wills and Inheritance Act. Turning to the argument that the application to set aside the default judgement was brought under wrong rules of procedure, Counsel Chagwamnjira submitted that the time for defeating justice on the basis of an irregularity was long gone, particularly where the irregularity is in respect of a curable defect as was the case here.

Regarding the issue of abuse of court process, Counsel Chagwamnjira submitted that the argument of inexcusable delay does not appear in summons filed with the Court on 19th September 2013, which summons led to the decision under appeal herein. Counsel Chagwamnjira concluded his submissions by stating that the Appellants must be taken to have abandoned the ground that the judgement being appealed against was obtained in their absence.

Counsel Chipeta made two quick responses to the submissions by Counsel Chagwamnjira. Firstly, he argued that abuse of court process can be addressed by the Court on its own motion, particularly as this appeal is by way of re-hearing. Secondly, he contended that he had not abandoned any of the grounds, including the ground that the summons was proceeded with in the absence of the Appellants, as he had made it clear at the outset in his introductory remarks that he would rely on the material that was before the learned Assistant Registrar.

I have considered the submissions by both counsel and in my view the determination of this appeal rests upon the provisions of section 10 of the Act. The learned Assistant Registrar held that section 10 of the Act does not apply to the present proceedings:

> *"My understanding of that provision is that it applies to one's personal capacity but not where one is sued or suing in their official capacity like in the present case. The present matter is not about the personal interest of the defendant who is now deceased but he was sued in his official capacity as a group village headman. I very much doubt if in such a case one needs to get letters of administration to become a party to the proceedings. This is not a wills and inheritance matter where one needs to get letters of administration to administer the estate of the deceased."*

Section 10 of the Act consists of six subsections but it is only subsection (1) which is relevant for purposes of this appeal and it provides as follows:

> *"Subject to this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:*
>
> *Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery."* - Emphasis by underlining supplied

It is clear from section 10(1) of the Act that the moment a person dies, all causes of action (with the only exceptions being causes of action listed in the provisio thereto) subsisting against him survive against his estate. Accordingly, it is only a person who has been duly authorized to administer the estate of such a party who can pursue the defence of such an action.

The unchallenged evidence is that no person came forward as having obtained the appropriate legal instruments to administer the estate of the Defendant. This effectively and practically means that upon the death of the Defendant on 12th September 2012, there was no defendant to this case. In the premises, I have great

difficulties in understanding how a person can intervene in an action that has, for all intents and purposes, no defendant.

In any case, the caption to this case tells its own story. The Defendant to the case is Mr. Henry Chinkhata Sabola and not Group Village Headman Namasalima. In the result, the argument that the Defendant was sued in his official capacity as a group village headman is untenable. I have no doubt that if the Plaintiffs had intended to sue the Defendant in his official capacity as the holder of the office of Group Village Headman Namasalima, the suit herein would have been appropriately entitled as such.

It is also noteworthy that the application to have the default judgement set aside was brought seven years out of time. In this respect, I agree with Counsel Chipeta that, considering all circumstances of the matter, the delay is intolerable. "*They have lasted so long as to turn justice sour*", to use the words of Lord Denning M.R. in **Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 2 Q.B. 229, 243**. Clearly, the approach of the Intervening Party constitutes contumacious conduct and abuse of court process of the highest order.

To sum up, therefore, the appeal succeeds for the reasons I have given.

That really is the end of the appeal but it is right that I should go on to comment on a matter that I have found very disturbing in this case. It is to do with conduct of counsel. There in unchallenged evidence before the Court that the Defendant died in 2010. Having died in 2010, I do not understand how it could have been possible for him to give instructions to M/s Chagwamnjira and Company in April 2013. In short, the Notice of Appointment by M/s Chagwamnjira and Company dated 4th April 2013 contains falsehood.

Pronounced in Court this 17th day of February 2017 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE