



REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
CIVIL DIVISION  
PRINCIPAL REGISTRY  
CIVIL CASE NO 73 of 2016

BETWEEN

BRIGHT NGULUBE AND OTHERS .....CLAIMANTS

AND

PRESSCANE LIMITED..... DEFENDANT

Coram Hon J N’riva J  
Mr P Mzembe, Counsel for the claimants  
Mr Mmeta and Mr Alide Counsel for the defendants  
Mrs Deliwe Mtegha Court Official

RULING

The defendant made an application to call an expert witness. On the date of the hearing, the defendant did not attend the trial. I heard the application and made a determination on the application. The defendant wants the Court to set aside the order on the ground that their failure to attend the application was due to the fact that counsel forgot to diarise the hearing of the application. Counsel, Mr Mmeta, argues that under Order 16 Rule 17 of Courts (High Court) (Civil Procedure Rules) the Court has power to set aside an order made in the absence of one party. Mr Mzembe, legal representative for the claimants has doubts if Order 16 Rule 17 of Courts (High Court) (Civil Procedure Rules) is applicable to this case arguing that that order applies to cases of trials.

Counsel argues that Order 16 rule 17 gives three legs on which the court can set aside an order:

1. The party must act promptly
2. The party must have a good reason of not attending the trial
3. The party must have prospects of success at trial

Counsel argued that failure to diarise was not a good reason to set aside the order. Counsel, therefore, argued that the defendant had no good reason to attend the application. Counsel urged the Court not to allow the application arguing that if the courts allow such applications there would no end to litigation.

Counsel argued that to hear the application would just be a scholarly action. Counsel argued that the defendant filed skeleton arguments on 17<sup>th</sup> May and the matter was coming on 18<sup>th</sup> May. The claimants filed objection on 16<sup>th</sup> May. Therefore, the defendant would have been alert of the date of hearing.

Further, counsel argued that it was doubtful if the defendant has prospects of success as the court did not automatically dismiss the application. It heard the application and made a decision on merit.

Mr Mmeta argued that when they had discussions on the dates, the parties' minds were fixated on 25<sup>th</sup> May as the day when the Court would deliver a ruling on the matter. Counsel argued that if he was operating under mistake, his colleague should have corrected him and not take advantage of the situation.

Counsel further argued that it was illogical for the claimant to argue that the matter was disposed of on merits when in fact, the mover of that action, the defendant, was not in court. Further, the defendant is desirous to give evidence on the application.

Counsel, therefore, applied that the order should be set aside so that the application can be heard on merits and both parties be given opportunity to be heard.

The issue is whether I should set aside the order. I should mention at the outset that my ruling was about two issues

1. to hear a witness at the locus
2. to call an expert witness

I dismissed both. I should be borne in mind that heard the application to testify at the *locus in quo* in the open court. Thus, I heard both parties. This ruling can, therefore, only apply to the application to call an expert witness.

On this aspect, it suffices to say, I made observations that it was not necessary to allow the expert witness or the expert analysis. I gave these reasons:

1. It was questionable if the witnesses would be able to give evidence in the court about the state of the soil as it was at the time the claim arose.

2. It was a little too late to make that application at this point in time. I said:

In the new rules of civil procedure, there is need for parties to put up issues before the hearing of the matter to ensure that matters are disposed of with speed. See the decision of Justice Katsala in the case of *Mike's Trading v NBS Bank* Commercial Cause No. 78 of 2014. In that matter, the Court made an observation that there is need to identify issues at an early time. I believe that had the defendants intended to call an expert, they had to indicate that at earlier stages of the trial.

I went on to say:

The Courts (High Court) (Civil Procedure) Rules recognises and emphasises, under overriding principles and active case management, that parties and the court have to identify matters at an earliest opportunity. More to that, the claimants dear might be justified that the soil analysis might take longer. If that would be the case, the matter will drag on.

Thus, I dismissed the application on merits and/or on the reasons of procedure. The defendant raises the same issues in this application to set aside the order. Because I made the decision on the merits, I do not see justification to set aside the order. I dismiss the application.

I must reiterate the need to identify issues at an earlier stage. If we allow parties to be calling witnesses as and when they please, litigation would take unnecessarily longer periods.

MADE the 29<sup>th</sup> day of June, 2018

A handwritten signature in black ink, appearing to read 'J N'RIVA', written in a cursive style.

J N'RIVA

JUDGE