

Dan Dice v Loius Kambuwa and Others Land

Cause Number 92 of 2020

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice Allan Hans Muhome
Cause Number:	Land Cause Number 92 of 2020
Date of Judgment:	December 03, 2024
Bar:	For the Claimant: Mr. Patrick Kalanda For the Defendants: Ms. Audrey Tolani

Head Notes

Civil Procedure - Striking Out Defence - Failure to comply with an Order for Directions - The Court becomes functus officio where there is no specific rule empowering it to restore the defence.

Civil Procedure -Functus Officio - Dismissal of an application to restore defence - The Court has no jurisdiction to restore a defence struck out under Order 14 rule 5 of the CPR.

Civil Procedure - Natural Justice - Right to be heard - The right to be heard does not override the Court's lack of jurisdiction to restore a defence.

Summary

The Defendants, having had their defence struck out for failing to comply with an Order for Directions, applied to the High Court, Principal Registry, to have the defence restored. The Claimant opposed the application, arguing that while the Courts (High Court) (Civil Procedure) Rules 2017 (CPR) provides for the restoration of a defence under other orders, it is intentionally silent on the procedure for restoring a defence struck out under Order 14 rule 5, which was the applicable rule in this instance. The Defendants' new counsel contended that their former counsel's unhelpfulness led to the striking out and that, in the interest of natural justice, they should be heard.

The main legal issue before the Court was whether it possessed the jurisdiction to restore a defence struck out for non-compliance with an Order for Directions under Order 14 rule 5 of the CPR. The Court, relying on the precedent set in *Energem Petroleum Limited v General Alliance Insurance Company Limited*, held that once a defence is struck out under a rule that does not provide for its restoration, the Court becomes *functus officio*. The Court determined that the right to be heard, while fundamental, could not grant the Court jurisdiction it did not possess under the law. Accordingly, the application was dismissed. The Court further advised that the Defendants' only recourse was to either appeal or seek to have the order set aside by consent. The application was dismissed with costs awarded to the Claimant.

Legislation Construed

- The Courts (High Court) (Civil Procedure) Rules 2017 (O. 12 r. 54(1), O. 12 r. 55(1), O. 13 r. 6(1), O. 13 r. 6(2), O. 16 r. 7(1), O. 16 r. 7(2), O. 14 r. 5)

Judgment

1. This Court struck out the defence herein as the Defendants did not comply with the Order for Directions. The Defendants have now taken up this application to have the defence restored. The application is supported and opposed by respective sworn statements from counsel. Both parties also filed skeleton arguments. For the Defendants, they allege that their previous Counsel was not helpful leading to the striking out of the defence. They insist that having retained new counsel, it is in the interest of justice that this Court allows them to prosecute the matter so that they are not condemned before being heard, in keeping with the rules of natural justice.

2. The Claimant's Counsel, on the other hand, submitted that there are four occasions under which the Court can strike out a defence, under the Courts (High Court) (Civil Procedure) Rules 2017. Firstly, under Order 12 r. 54(1) which can be restored under Order 12 r. 55(1), secondly, under Order 13 r. 6(1) which can be restored under Order 13 r. 6(2), thirdly, under Order 16 r. 7(1) which can be restored under Order 16 r. 7(2) and lastly, under Order 14 r. 5 which is applicable herein, where the defence can be struck out for failure to follow an Order for Directions. Curiously, the CPR does not provide for a procedure to restore the defence. Counsel argued that this was done on purpose and so the defence herein cannot be restored. He relied on the Ruling of Msungama J. in Energem Petroleum Limited v General Alliance Insurance Company Limited Commercial Cause Number 316 of 2018.

3. That Ruling is to the effect that where a matter has been dismissed or a defence struck out, the Court becomes *fancus officio* unless the rule under which the matter was dismissed or defence struck out specifically gives the Court power to retain jurisdiction over the matter by empowering it to order restoration. This Court is persuaded by this Ruling and conclude that the application herein must fail. This Court

is *fancetus officio* and the Defendants have two options, either to appeal or have the order set aside by consent. The application is therefore dismissed with costs to the Claimant.

Made in Chambers this 3rd day of December, 2024.