H Msofi v The Peoples Trading Centre and Attorney General Civil Cause No. 1929 of 1996

Ruling/Judgment

Court:	High Court of Malawi
Registry:	Principal Registry
Bench:	Honourable Justice Chimasula Phiri
Cause Number:	Civil Cause No. 1929 of 1996
Date of Judgment:	February 12, 2002
Bar:	Mr. C. Mhango, Counsel for the Plaintiff Mr. T.C. Nyirenda, Counsel for the Defendants

ORDER

This is an application by the plaintiff for an order to restore the action to the cause list. It is brought under Order 35 Rule 1 of the Rules of the Supreme Court. There is an affidavit in support of the application sworn by the plaintiff's counsel. The first defendant vehemently opposes the application. On 10th November 2000 trial of the action began.

At the end of the day the matter was adjourned to a date to be fixed. The new date was 12th January 2001. Trial did not proceed because the plaintiff's witness was absent. The matter was adjourned to a date to be fixed. On 11th February 2002 the matter was called in the absence of both parties, and/or their counsel. The Court Clerk informed the judge that the parties were aware that the matter was coming up for hearing that day. The judge proceeded to make the following order:

"..... In view of the foregoing this court cannot do otherwise but to dismiss the action for non-attendance. The matter can only be restored to the cause list if an application to that effect is made and accepted by the court."

It is this order which has given rise to the current application. Mr Mhango states that the matter was previously handled by M/S Golden & Law. Mr Mhango left for the United Kingdom in September 2001 and returned in October 2002. Upon his return he was informed of the judge's order. Mr Mhango inquired from his former partner at Golden & Law as to why there was no attendance. The simple answer was that no one was aware of the date of hearing and there was no notice of hearing or adjournment issued. In his submissions Mr Mhango has argued that the plaintiff has the desire to conclude his matter.

Mr Nyirenda submitted that the judge's order creates a technical problem in that the action was dismissed and not merely struck off the cause list. If the action

was dismissed it means it was favourable to the defendants and as such the plaintiff should have applied to set aside the order and not this kind of application. Mr Nyirenda contends that the application should have been made under Order 35 Rule 2 of the Rules of the Supreme Court. When I first read the judge's order I thought and still think that he had in mind the provisions of Order 35 Rule 1 of the Rules of the Supreme Court. It reads as follows:

"If when the trial of an action is called on, neither party appears, the action may be struck out of the cause list, without prejudice, however, the restoration thereof, on the direction of the judge."

I do not think the judge intended to abate the action. If that were the judge's intention he could not have indicated that the dismissal was subject to application for restoration. I believe that restoration is not the same as setting aside the order.

Secondly, Mr Nyirenda argues that, there has been inordinate delay in bringing this application. The order was made in February 2002 and it is almost a year old now. He has further added that absence of counsel for further studies is not good reason. He should have arranged for the firm of Golden & Law to attend to the matter in the absence of Mr Mhango. I agree with Mr Nyirenda on both aspects except that in the absence of notice of hearing or proof of service thereof no fault can be imputed to the plaintiff or his lawyers. As soon as the plaintiff became aware of the status of the matter, the court was moved to consider restoration of the action on the cause list. I am inclined to hold that there is no inordinate

delay. I have also considered whether the defendants will be prejudiced by the restoration of the action to the cause list. I think the parties came to court to have their dispute resolved on merit. They will continue with evidence and cross-examination and so forth.

Lastly, both lawyers did not attend the court and in the absence of any notice of hearing, it is clear in my mind that the court clerk misled the judge. The fact is that the matter came before the judge by error because it had not been fixed for hearing as was expected. If it was fixed for hearing, the fixture was not duly communicated to both parties, hence their non-attendance. No fault can be imputed to either party hence my order that the action be restored to the cause list and that hearing shall continue before Hon. Justice Kapanda.

I make no order as to costs.

MADE IN CHAMBERS this 12th day of February 2002 at the High Court in Blantyre.