IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY
Civil Cause No. 60 of 2014

BETWEEN

HERBERT MUYILA..... PLAINTIFF

-AND-

MALAWI REVENUE AUTHORITY.....DEFENDANT

CORAM: Hon. Justice Prof. R.E. Kapindu
Mr. Kadzipatike of Counsel for the Plaintiff
Mr. Mhone, Official Interpreter

ORDER

Kapindu, J

1. INTRODUCTION

1.1 This is an *ex-parte* application, brought by way of Summons, to set aside default judgment. It is made in terms of Order 32 rule 5 of the Rules of the Supreme Court (RSC), and also under the inherent jurisdiction of this Court.

1.2 The decision that the Applicant seeks to be set aside, made by my brother Judge, the Hon. Justice Madise on 27 May 2014, has been couched in the form of a final judgment. The Judgment related to an Originating Summons which the Plaintiff took out on 17th March 2014 against the Defendant. In the Originating Summons, the Plaintiff sought the following reliefs:

(a) A declaration that the plaintiff's goods cannot be subjected to the Notice Seizure in respect of goods not belonging to the Plaintiff;

(b) A declaration that having paid the excise duty and the fine in respect of the plaintiff's goods, the goods were therefore cleared [on] the basis of which they ought to have been released to the Plaintiff;

(c) A declaration that the Defendant had no legal basis to seize the Plaintiff's 18 bales of zitenje cloths.

(d) An order for damages for loss of business;

(e) An order for damages for inconvenience; and

(f) Costs of the action.

1.3 In his Application for Summary Judgment, the Plaintiff's Application was supported by the Affidavit sworn by his Counsel, Mr. Mustafa Amidu. Counsel Amidu stated in his Affidavit that since the Originating Summons was served on the Defendant on or about 1st April 2014, the Defendant had not filed any evidence in the form of an Affidavit in Opposition to the Affidavit in Support of the Originating Summons.

1.4 Counsel pointed out that the Originating Summons itself clearly indicated that that failure by the Defendants to acknowledge service within 14 days from the date of service might result in the Court entering judgment against the Defendant in a manner that the Court might deem fit.

1.5 He further states that, in terms of RSC O. 28, r. 1A(4), the Defendant had 28 days from the time of acknowledgment of service to file an Affidavit in Opposition to the Affidavit in Support of the Originating Summons, which the Defendant had failed to do.

1.6 Counsel stated that such failure on the part of the Defendant showed that the Defendant agreed with the Plaintiff's claims. On that basis, he stated, the Plaintiff was invoking the provisions of Practice Note 28/1A/1 as read with RSC O. 28, r.4(1) to enter judgment in favour of the Plaintiff for the claims and also costs of the action

1.7 Generally, Counsel stated that the delay by the Defendant in filing evidene in opposition to the Originating Summons was inordinate and inexcusable, and that on that basis the Court had to allow the application and eneter judgment on the orders and declarations sought in the Originating Summons.

1.8 It was on the basis of these representations that the Court proceeded to deliver its judgment in this matter by granting a permanent order of injunction restraining the Defendant, his servants or agent or whosoever from seizing or detaining the 18 bales of Zitenje cloths. The Court further awarded damages to the Plaintiff for the inconvenience caused, for loss of business and costs for the action. The Judgment further required the Plaintiff to file Summons for assessment of damages before the Registrar within 14 days from the date of the Judgment. I notice from the Court Record that the Summons for Assessment of Damages and Taxation of Costs was duly filed on the 30th day of May 2014, and the hearing of the Summons has been set down for the 26th day of June 2014.

1.9 It has to be observed that for the Court to reach that decision (of 27 May 2014), it was moved ex-parte, under an "Ex-parte Summons on an Application for a Final (Summary) Judgment" brought "Under Order 28, rule 4(1) of the RSC and the Court's Inherent jurisdiction". So it appears that what the Applicant had in mind when he made the Application for Judgment was Summary Judgment. It is a legal axiom that Summary Judgment is not the same as Default Judgment. It appears however that the learned Judge when he delivered his Judgment of 27 May 2014, had at the back of his mind that this was a default judgment. This is evident from his reference to "Order 19 r 7 RSC" as forming the basis of the Plaintiff's Application. That Order deals with Judgments in Default of Defence.

1.10 Reverting to the instant Application by the Defendant, the Ex-Parte Summons to set aside default judgment is supported by an Affidavit Sworn by Lydia Makwinja, Legal Practitioner for the Defendant.

1.11 Counsel Makwinja deposes that the Plaintiff, along with two others, namely Amos Mtambo and Happy Mbizi, were charged with the offence of smuggling contrary to Section 142 of the Customs and Excise Act; and further, that one Stanley Phiri was charged with the offence of being accessory after the fact to the commission of the offence of smuggling contrary to Section 133 as read with Section 143 of the said Customs and Excise Act.

1.12 Counsel states that the lower Court acquitted the four accused persons, and that pursuant to the order of that Court, the Plaintiff and the other accused persons immediately collected the goods and motor vehicle that were the subject of the proceedings.

1.13 Counsel Makwinja avers that the Defendant has since appealed against the decision of the lower Court in Criminal Appeal No. 6 of 2013.

1.14 Counsel further deposes that the Defendant later obtained an order of stay pending determination of the appeal, and that in granting the order of stay, the High Court further ordered that the released goods and motor vehicle be returned within 7 days failing which each of the accused persons were to pay the sum of MK200,000 into Court within 7 days.

1.15 After failing to comply with the order within the stipulated 7 days, the accused persons successfully applied for variation of the said order. Among the terms of the variation was that two of the accused, namely Happy Mbizi and Stanley Phiri were to pay MK 100,000 each into Court instead of MK200,000.00.

1.16 The money herein was paid.

1.17 Counsel however deposes that even though the Plaintiff paid duty in respect of the bales of Chitenje herein, there is still a debt owing in terms of unpaid duty

[for the other smuggled goods] by the Plaintiff to the Defendant which debt has not been satisfied.

1.18 Counsel Makwinja further depones that the Defendant has exercised its power, in terms of Section 92 of the Customs and Excise Act, by placing a lien over the Plaintiff's goods that were in the Defendant's custody.

1.19 Counsel states that in the premises, the Defendant is therefore justified at law in not releasing the Plaintiff's goods.

1.20 Counsel further states that the Plaintiff is well aware that a lien was placed on his goods because of the unpaid duty in respect of smuggled goods to the Defendant.

1.21 Counsel proceeds to depone that the Plaintiff, by not mentioning to this Court the debt by way of customs duty that he owes the Defendant in respect of the [alleged] smuggled goods, the Plaintiff is not coming to this Court with clean hands.

1.22 Counsel concludes her Affidavit in support of te Defendant's application by stating a point of law that the Defendant has general immunity under Section 153 of the Customs and Excise Act for anything done in good faith under the powers conferred by the customs laws.

1.23 I must say that having gone through all the Affidavits in support of the Plaintiff's various applications before this Court, I am left with the impression that responses to some of the substantive issues raised in Counsel Makwinja's Affidavit can be found in some of those Affidavits. Whether those responses would be satisfactory or not is a different question, and for the approach and decision I make below, that issue is not for me to make a decision as part of the instant application.

2. ANALYSIS

2.1 As I mentioned earlier, the decision that my brother Judge made took the form of a final Judgment. Ordinarily, I would not have jurisdiction to hear an application to reverse a final judgment of a Court of co-ordinate jurisdiction. The matter would have to proceed by way of appeal. But the application before him was made *ex-parte*. It was made *ex-parte* by design, not because the Summons for the hearing of the application had been served on the Defendant and the Defendant failed to attend.

2.2 RSC. O. 32, r.6 provides clearly that *"The Court may set aside an order made ex parte."* In terms of Section 2(1) of the General Interpretation Act (Cap 1:01 of the Laws of Malawi), the term Judgment includes an Order. According to RSC Practice Note 32/6/30, *"Rule 6 embodies the fundamental rule of practice that a*

party affected by an ex parte order may apply to the Court to discharge it, inasmuch as he has not had an opportunity of being heard (H.M.S. Archer [1919] P. 1 at 4)."

2.3 RSC Practice Note 32/6/30 proceeds to state that:

> By its nature, an *ex parte* order is essentially a provisional order made by the Judge on the basis of evidence and submissions emanating from one side only and there is therefore no basis for making a definitive order and accordingly when the Judge reviews his provisional order in the light of the evidence and argument adduced by the opposite party, he is not hearing an appeal from himself and is in no way inhibited from discharging or varying his original order (per Sir John Donaldson M.R. in **WEA Records Ltd v. Visions Channel 4 Ltd** [1983] 1 W.L.R. 721; [1983] 2 All E.R. 589, CA). Where an order is made by a judge *ex parte* the same judge, or another judge of co-ordinate jurisdiction has power to set aside the order after an *inter partes* hearing (**Minister of Foreign Affairs Trade and Industry v. Vehicles and Supplies Ltd** [1991] 4 All E.R. 65, PC).

2.4 Thus it is clear from the rules that this Court has jurisdiction to hear an application to set aside the Order that was made by my brother Judge on 27 May 2014, the same having been made *ex-parte*, and this being a Court of co-ordinate jurisdiction. However, such an application must be brought *inter partes*. It cannot be made *ex-parte* as is the case in the instant proceedings.

2.5 I must point out that I noted with concern that Counsel for the Defendant, instead of articulating the principles applicable to set aside a Judgment entered ex-parte, did not address the same at all. Instead, she concentrated, in her Affidavit, in stating facts that, to my mind, whilst somehow relevant at this stage, would only really become particularly relevant at the substantive trial if this matter ever gets to that stage. In addition to such facts, I invite Counsel to address the relevant principles of procedural law relating to the application.

2.6 If the Defendant decides to bring the *inter-partes* application as directed by this Court, I wish to specifically invite the parties to address the Court on the question as to whether default judgment can be obtained ex-parte against a defendant in a matter commenced by way of originating Summons.

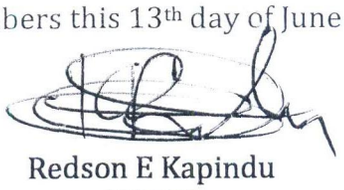
3. CONCLUSION

3.1 In conclusion, therefore, This Application fails. I order that it be brought inter-partes and the inter-partes application to be heard either before me or my

brother Judge on a date to be fixed but in any event before the 26th day of June 2014.

3.2 Costs are in the cause.

Delivered in Chambers this 13th day of June 2014 at Mzuzu



Redson E Kapindu
JUDGE