

# Augusten Hermes Gwizima & Another v Lodzani Hapana Fatchi & Another

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<b>Court:</b>	High Court of Malawi
<b>Registry:</b>	Civil Division
<b>Bench:</b>	Honourable Justice M.A Tembo
<b>Cause Number:</b>	Civil Cause Number 143 of 2015
<b>Date of Judgment:</b>	July 19, 2021
<b>Bar:</b>	Chipeta, Counsel for the Claimants Mickeus, Counsel for the 2nd Defendant

## Head Notes

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**Civil Procedure** - Overriding Objective – Compliance with time orders – Need for efficient and fair disposal of matters – Justly dealing with cases is paramount

**Civil Procedure** - Overriding Objectives – Enforcement of Compliance – Court must balance deciding cases on merit with the need to enforce rules and ensure litigation is efficient.

**Civil Procedure** - Relief from Sanctions – Three-tier approach from Denton v TH White Ltd applied – Breach was serious; reason (legal fees) was unconvincing; prejudice to 2nd Defendant was unjust.

## Summary

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The Second Defendant applied to the High Court, Principal Registry, to strike out the Claimants' case due to their failure to comply with a court direction. The matter was commenced by the Claimants in 2015 via an originating summons. The claim alleged that the First Defendant had fraudulently transferred the Claimants' property, which had been put up as collateral for a loan, to the Second Defendant, who then purchased it. A Judge previously seized of the matter, finding the procedure inappropriate for the contentious nature of the claim, ordered in April 2018 that the matter should stand as if commenced by a writ of summons. Subsequently, on 12th March 2021, the present Court directed the Claimants to redo their statement of case and file a summons within 10 days. The Claimants failed to comply with this direction, which led to the striking out application by the Second Defendant. The Claimants opposed the application, citing issues with payment of legal fees as the reason for the non-compliance.

The principal issue before the Court was whether the Claimants' case against the Second Defendant should be struck out for serious and prolonged non-compliance with a clear court order, considering the overriding objective of the rules.

The application was allowed, and the claim was **dismissed** as against the Second Defendant. Applying the three-tier approach developed in *Denton v TH White Ltd*, the Court found that the breach was **serious** because the Claimants failed to file the required documents for several months in a matter ongoing since 2015. The Court deemed the stated reason for default— inability to pay legal fees—**unconvincing**, as counsel had remained on the record and was aware of the direction. Considering all the circumstances, including the need for efficient litigation and enforcing compliance, the Court held that the Claimants' failure unduly prolonged the matter, unjustly keeping the Second Defendant out of his purchased property since 2015. The non-compliance ran counter to the overriding objectives of the applicable rules of

procedure. The Court ordered that the Claimants' claim be struck off and dismissed as against the Second Defendant, who was granted liberty to develop the property. The Claimants were **restricted** to seeking reliefs against the First Defendant only, and the Court awarded **costs** to the Second Defendant.

## Legislation Construed

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Subsidiary legislation

Courts (High Court) (Civil Procedure) Rules, 2017 (Order 1 rule 5; Order 14 rule 5)

## Judgment

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ORDER

1. This is this Court's order on the 2nd defendants' application to strike out the claimants' case due to the claimants' failure to comply with the direction of this Court made on 12th March, 2021, that the claimants file and serve a summons within 10 days.
2. The application was made under Order 14 rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017. The 2nd defendant filed a sworn statement in support of his

application. The claimants opposed the application.

3. This present matter was commenced by the claimants in 2015 by originating summons under the old rules of civil procedure. The Judge who was previously seized of this matter found in April, 2018, that the originating summons procedure was not appropriate considering the contentious nature of the claimants' claim herein, namely, that the 1st defendant fraudulently transferred the claimants' property to the 2nd defendant who purchased the same after the claimants had put the property as collateral for a loan advanced by the 1st defendant to one of the claimants. The Judge ordered that the matter stand as if commenced by writ of summons and that the affidavits filed on the originating summons should stand as statements of case and that the parties were at liberty to seek further directions from the Court.