

Dan Dice v Loius Kambuwa and Others Land Cause Number 92 of 2020

Judgment

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| 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 |

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 *functus 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 *functus 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.