

Kasongo v Attorney General

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice Nriva
Cause Number:	Civil Cause Number 194 of 2017
Date of Judgment:	May 07, 2019
Bar:	Mr. G. Chimowa, Counsel for Claimant Mr. A. Mahonga, Counsel for the Defendant

Head Notes

Civil Procedure -Non-compliance - Court order - Order 14 rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017 - Defence struck out for extreme non-compliance with direction

Civil Procedure -Case Management - Overriding objective - Efficiency - Last-minute exchange of documents discouraged as inconsistent with efficiency

Civil Procedure -Sanctions - Striking out defence - Prejudice to claimant - Filing documents on day of hearing is prejudicial and warrants striking out

Civil Procedure -Evidence - Witness statement - Late service - No permission for late witness statement results in defence being struck out

Summary

The Claimant applied to the High Court, Principal Registry, for an order to strike out the Defence due to the Defendant's repeated failure to comply with a court direction requiring the timely filing of witness statements and skeleton arguments. The Court, had initially set the case down for hearing on 15 March 2019 and directed both parties to file the documents 15 days before the hearing. The Defendant failed to file anything by the deadline. After an adjournment, the Court set the hearing for 2 May 2019. The Defendant only filed the documents on the actual day of the hearing. The Defendant's counsel argued that striking out the defence was not the only option under Order 14 rule 15 and that the Court could make any other just order, further asserting that the evidence was not "strange" as the issue had been dealt with in mediation.

The Court considered that where there is a default, it may make any just order, but found the Defendant to be in **extreme non-compliance** with its direction, noting that even after the adjournment, the documents were only filed on the day of the hearing. The Court reasoned that filing on the same day might be **prejudicial to the Claimant** and that prior mediation was not an excuse for the delay. Emphasising the need for **efficient litigation** under the new procedural rules and the overriding objective to enforce compliance, the Court cited supporting jurisprudence that discouraged last-minute exchange of documents. Relying on the precedent that a witness may not be called without court permission for a late witness statement, the Court determined that the appropriate step was to **strike out the defendant's defence and enter judgment for the claimant**. The Court so ordered with costs to the Claimant and directed that the matter proceed before the Registrar to determine the Claimant's damages.

Legislation Construed

Subsidiary legislation

Courts (High Court) (Civil Procedure) Rules, 2017 (Order 14 rule 5; Order 14 rule 15)

Civil Procedure Rules, 1998 [of England and Wales]

Judgment

ORDER

The issue for determination is whether to strike out the defence or not. This is pursuant to order 14 rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017.

On 1st February 2019, I set down this case for hearing. I set down 15th March 2019. I directed the parties to file witness statements and skeleton arguments 15 days before the date of hearing.

On 15th March, Mrs. Kumichongwe sent a word that she was representing the Honourable the Attorney General before the High Court on removal of conditions for legal practitioners.

I postponed the hearing to another date. By then, the defendant did not file the witness statements and skeleton arguments.

I set down again the hearing for 2nd May 2019. The defendant filed, on the same day, a witness statement and skeleton arguments. The claimant applied for striking out of defence for failure to comply with court's order for direction.

Mr. Mahonga, representing the defence, argued that much as they filed the documents late, Mrs. Michongwe sent an e-mail to Mr. Chimowa containing the witness statement as well as the skeleton arguments. Further, Mr. Mahonga argued, striking out defence is not the only option under Order 14 rule 15; the Court can make any other order as it deems just. He further argued that the evidence of the defence is not strange; they dealt with the issue during mediation.

Indeed, where there is default by a party, the Court can make any other order as it deems just.

In this case, my view is that the defence is in extreme non-compliance with the direction of the court.

Fifteen days before the hearing, they filed no documents. Even after the adjournment, they never filed anything. They only filed the witness statements and the skeleton arguments on the day of hearing. Filing on the same day of hearing might be prejudicial to the claimant. That the issue was dealt with at mediation should not be a reason for the delay. That fact should have been a factor for the defendant to file the documents at earlier time.

Under the new procedural rules, there is need to conduct litigation efficiently. To achieve efficiency, and the over objectives of the rules, last minute-exchange of documents ought to be discouraged.

In *Burt v Linford Christie*, [2004] Birmingham District Registry, 10th February 2014, District Judge Lumb said:

"Leaving matters to the last minute is inconsistent with conducting litigation efficiently and the thrust of the new overriding objective of dealing with litigation justly and at proportionate cost. Early preparation is much more likely to lead to a narrowing of issues between the parties or even agreement of budgets, saving time at the first hearing, thereby freeing up court time to be allocated to other matters ... Having left matters to the last minute and still missing a deadline is unlikely to attract sympathy from the Court in furthering the overriding objective of enforcing compliance with rules and practice directions, particularly when it leads to extra hearings, thereby allotting to the case a greater than appropriate share of the court's resources, while taking into

account the need to allot resources to other cases."

In *Karbhari v Ahmed* (2013] EWHC 4042, on the day before the start of the trial the defendant served a late witness statement and an amended defence. Turner J, relying on a comparable provision in the Civil Procedure Rules, 1998 [of England and Wales] stated that a witness may not be called to give oral evidence unless the Court gives permission. He said there was no permission for a late witness statement. The defence was struck out and judgment was entered.

Therefore, my judgment is that the appropriate step to take, in this case, is to strike out the defendant's defence and enter judgment for the claimant. I so order with costs to the claimants.

The matter should proceed before the Registrar to determine the claimant's damages.

Made the 7th day of May, 2019