IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 520 OF 1994

BETWEEN:

KAMLEPO KALUA ..... PLAINTIFF

- and -

UNITED PRINTERS LIMITED ..... DEFENDANT

CORAM: Tembo, J
Nyirenda, Counsel for the Plaintiff
Mbendela, Counsel for the Defendant
Jere, Official Interpreter

R U L I N G

This is an appeal by the plaintiff against the decision of the Registrar given on 5th October, 1994, setting aside a default judgment. By Ord. 58. r.1 of the Rules of the Supreme Court, I am obliged to deal with the appeal by way of re-hearing the application before the learned Registrar.

The plaintiff has claimed exemplary damages from the defendant for libel, by a writ of summons which was issued on 15th March, 1994. The writ was served on the defendant by post as it is clearly evidenced by the affidavit of the plaintiff's process server. The defendant did not give notice of his intention to defend. Thus, no notice of intention to defend having been given by the defendant, the plaintiff proceeded to enter judgment for the damages claimed, which had to be assessed. A date for the assessment of the said damages was appointed by the Registrar, notice of which was given to both parties. It is only then that the defendant had taken some action, by obtaining an order of the Court staying further proceedings in the above cause pending the hearing of the defendant's applicaton to set aside the default judgment. Thereafter, the defendant obtained the Court's decision, which was made and delivered by the Registrar, on 5th October, 1994, setting aside the default judgment and granting leave to the defendant to serve his defence within 14 days of that date. It is against that decision that the plaintiff has made the appeal before me; that the decision of the Registrar should be rescinded and that the default judgment be restored, accordingly.

I have heard both counsel, each of whom has made lengthy submissions before me, in favour of their respective clients. On his part, Mr Nyirenda, in the main submitted that the defendant by its proposed defence, to the effect that-

> the defendant was not the publisher or owner of the newspaper called "the Chronicle" as alleged by the plaintiff; that there was no publication of the defamatory material by the defendant; and that even if it may be held that there were such publication by the defendant, that such publication was in respect of the communication of the same between the defendant as the Printer, on the one hand, and the publisher/owner of the newspaper, on the other hand in circumstances which rendered the communication to be privileged,

the defendant had in so doing merely made a general denial that the defendant was not the owner/publisher of the newspaper in question and further merely raised a defence of qualified privilege without stating facts in the affidavit disclosing who the owner/publisher of the newspaper was or upon which the Court would find that the defence of qualified privilege was based. In the circumstances, Mr. Nyirenda contended that the learned Registrar ought to have held the view of the plaintiff that the defendant were also publishers and owners of the newspaper in question by which view the Learned Registrar would also have rejected the defendant's defence of qualified privilege and, therefore, should not have set aside the default judgment in the above cause. Hence, now, this appeal to rescind the decision of the Learned Registrar and to restore the default judgment.

On his part, Mr Mbendela, Counsel for the defendant, maintained the view that on the authority of Ord. 13 r.9 (5), the default judgment in question was a regular judgment in regard to which there must be an affidavit showing that the defendant has a defence on the merits inorder to set aside the said judgment; that the proposed defence need only to raise arguable or triable issues; that in the circumstances, the defendant proposed defence had sufficiently raised arguable or triable issues namely that the defendant was not the publisher/owner of the newspaper in question as was alleged by the plaintiff and further the defence of qualified privilege. Mr Mbendera further submitted that to be asked now to disclose who the actual publisher/owner of the newspaper are is to ask the defendant to provide evidence before the matter is scheduled for trial, which disclosure is not necessarily required of the defendant inorder for the default judgment to be set aside.

Turning on to the law and practice relating to the issues raised by this appeal, the following is the position: ord. 13. r9 makes provision for the discretionary power of the Court to set aside or vary any judgment entered under that Order, thus, where there has been failure to give notice of intention to defend. The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by failure to follow any of the rules of procedure. Such is the principle as was stated by Lord Atkin in Evans - V - Bartam (1937) A. C. 473 and 480. In the case of David Whitehead and Sons (Malawi) Limited - V - C Phiri

Civil Cause No. 395 of 1990 (unreported) Justice Unyolo had stated the following:-

> "Observably, there was no controversy at the hearing of the application before the learned Registrar that the default judgment in this case was regular. It is now trite that before such judgment can be set aside, there must be an affidavit stating facts showing a defence on the merits and that where such an application is not so supported, it ought not to be granted, except for some very sufficient reason. The landmark case for this rule and which the courts here have constantly followed, is **Farden - V - Richter** (1889) 23 Q B D 124 and according to a later case, namely **Drayton Giftware Ltd - V - Varyland Ltd (1882)** 132 New LJ 558, the defence on the merits which the defendant is required to show need only disclose an arguable or triable issue.".

In that case, the defendant merely stated that he had a good defence without stating it. Justice Unyolo, therefore, had set aside the decision of the learned Regisrar setting aside the defendant judgment and he, accordingly, restored the default judgment. In doing so, Unyolo, J. had, **inter alia**, stated the following-

> "what the defendant states in these two paragraphs is simply that he has a good defence or a defence on the merits to the plaintiff's claim. But, as has already been pointed out, the rule in the **Farden's** Case requires that the affidavit should actually contain facts showing a defence on the merits. In other words, a bare statement that the defendant has a defence on the merits or a good defence, as was deposed in the present case, is not enough. The real nature of the defence relied on should be stated."

In the instant case, the defendant has done much more than merely asserting that it has a good defence on the merits without at the sametime specifying the defence as was the position in the Case of **David Whitehead and Sons.** By paragraphs 2 and 5 of its proposed defence, the defendant has clearly and sufficiently specified the nature of its defence, namely, that at the trial it will contend that it was not the owner/publisher of the newspaper in question and that it will also show that as a printer, the publication of the defematory words by it were upon an occasion of qualified privilege. Such being the case, it is my considered view that the defendant's proposed defence has clearly and sufficiently disclosed arguable or triable issues necessarily required for the case to proceed to trial.

Besides the foregoing, I have also considered whether there is some other very sufficient reason why the order of the learned Registrar should be set aside as prayed for by the plaintiff. With respect, I am unable to find any at all.

In the circumstances, and for those reasons, I am unable to find any basis upon which to set aside the Order of the learned Registrar. Consequently, the order of the Registrar is confirmed and the defendant should, therefore, serve his defence within 14 days of the date of this ruling. Costs are for the plaintiff.

MADE in Chambers this 5th day of October, 1995, at Blantyre.

A K Tembo
JUDGE