

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 3918 OF 2002**

BETWEEN:

BAZUKA & CO. (A FIRM)PLAINTIFF

AND

ALLIANCE FOR DEMOCRACY AFORD.....DEFENDANT

CORAM: S A KALEMBERA, DEPUTY REGISTRAR

Bazuka Mhango, Counsel for the Plaintiff

Kaphale, Counsel for the Defendant

O R D E R

This is an application by the defendant to set aside default judgment obtained herein, brought under 0.13 r. 9. It is supported by an affidavit sworn by Mr. Kaphale Counsel for the defendant. Mr Bazuka Mhango, Counsel for the plaintiff has also sworn and filed an affidavit in opposition.

The brief facts of this case are that the plaintiff commenced action against the defendant by writ of summons and statement of claim dated the 28th day of November, 2002 claiming the sum of K2,225,000.00 being legal fees due to the plaintiff for legal services rendered to the defendant. Default judgment was obtained by the plaintiff on 7th day of January, 2003. Subsequently a Garnishee Order **nisi** was granted to the plaintiff on the 11th day of February, 2003. The defendant then obtained a stay against the garnishee proceedings pending this application to set aside the default judgment.

As already stated herein, both parties filed affidavits and also addressed me. The defendant seeks to have the default judgment herein set aside on the grounds that the writ of summons was received well after being served with the Garnishee order, and that the defendant has a meritorious defence. Counsel for the plaintiff has vehemently argued that the defendant has no arguable Case and that it would be prejudicial to the plaintiff if the defendant's application were to succeed.

I am satisfied though that the default judgment herein is a regular judgment and as such, for the defendants' application to succeed there must be an affidavit on merits, i.e. an affidavit showing a defence on the merits or the defendant must show that he has a meritorious defense – **Forden v Richater** [1889] 23 QBD 124; **Alpine Bulk Transport Co. Inc; -v- Saudi Eagle Shipping Co. Inc; The Saudi Eagle** [1986] 2 Lloyd's Rep. 221.

In paragraph 5 of the affidavit in support of the application the defendant set the following grounds for contending existence of a meritorious defence:

S. 1 the plaintiff Mr Bazuka Mhango was an official of the defendants' political party. He held the position of secretary for Legal Affairs. As such the matter handled by him for the defendant were impliedly for free as no other officer of the party got paid for rendering services to the party.

5.2 The plaintiff did not issue any bills of costs to the defendant for all the matters for which legal fees are being claimed.

5.3 The defendant denies owing the plaintiff K2,225,00.00 in legal fees or at all.

5.4 If the defendant billed the plaintiff in the said sum which is denied, the defendant would like to have the plaintiffs bills taxed by the court as the same would be very exorbitant in any event.

In paragraph 4:3 of the affidavit in opposition the plaintiff has contended that the defendant did pay the bills on debtors accounts for the legal services rendered by the plaintiff to the defendant and has hereto exhibited 'BMK 1', 'BMK 2' and 'BMK 3' as evidence that legal fees were charged and partly paid.

As I have already intimated my sole duty is to determine whether the defendant has a meritorious defence or not, otherwise I might fall into the temptation of delving into matters which would otherwise be determinable by a trial judge.

On the affidavit evidence before me I am satisfied that the plaintiff rendered legal services to the defendant, and that at some point the defendant paid the plaintiff the sum of K1,056,585. In the matter at hand the plaintiff is claiming the sum of K2,225.000 as legal fees for services rendered in matters which have been particularized in the statement of claim. The defendant contends that no bills of costs were issued to the defendant and further denies owing the plaintiff that kind of money.

This is a very contentious issue and as such it is a matter which can be properly determined by the trial judge after hearing both parties. It is my considered view that the defence is right to contend that they do not know how the plaintiff came up with the sum of money being claimed as there were no bills of costs issued. Indeed what is the basis of this claim? Rendering legal services to the defendant in the matter particularised in the statement of claim is one thing and billing the defendant is also another thing. It is therefore not enough for the plaintiff to only show that legal services were rendered to the defendant, but he must also show that he billed the defendant and the bill of costs amounted to K2,225.000 the figure being claimed.

The plaintiff has further argued through Counsel that it would be unjust for the court to exercise its discretionary powers in favour of the defendant as the same would be denying the plaintiff the fruits of the judgment to which he is entitled and therefore it would be prejudicial to him. In the matter of **Day v RAC Motoring Services Ltd.** [1999] 1A11 ER 1007 on page 1011 Ward, LJ had this to pay:

“At the heart therefore of this discretionary exercise is the need to do justice. Justice has to be done both to the plaintiff, to the defendant and, ofcourse, and especially in this day and age, to the whole process of the administration of justice in these courts”

The learned Lord Justice further quoted Lord Atkin in the case of **Evans v Bartlam** [1937] 2 All ER 646 at P. 650 who said the following:

“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 been obtained only by a failure to follow any of the rules of procedure”.

The learned Lord Justice Ward went on to say that he saw very little distinction between the approach of the court to extending an indulgence of a rehearing where a party has failed to attend a hearing and where he has failed to put in his defence. And that if anything he should have thought it more heinous not to appear at the court hearing than to fail to file a defence.

I must satisfy myself therefore as to whether the defendant has an arguable defence which carries some degree of conviction. I should not deny the defendant the opportunity to argue their case just because they inadvertently failed to file a defence. It is clear from the argument by Counsel for the defendant, that the defendant intends to defend this matter. That is what I must be satisfied with – **Gainshaw v Bumbar** [1958] 1 All ER 350.

In the matter at hand the defendant has shown that there is a contentious issue which must be determined at trial. The defendant has therefore satisfied the test and established that there is an arguable defence which carries with it some degree of conviction.

I therefore grant the defendant application and set aside the default judgment obtained herein. The defendant shall serve its defence on the plaintiff with 7 days after service of this order on the plaintiff.

The costs must be in the cause.

MADE in Chambers at Blantyre this 4th day of March, 2003.

S A Kalembere

**DEPUTY REGISTRAR OF HIGH COURT AND
SUPREME COURT OF APPEAL**