

HIGH COURT  
LIBRARY

IN THE HIGH COURT OF MALAWI AT BLANTYRE

CIVIL CAUSE NO. 1 OF 1979

BETWEEN:

L. J. MAPEMBA.....APPELLANT

- and -

LILONGWE CITY COUNCIL.....RESPONDENT

Coram: Villiera, J.

For the Appellant:	Mutawawira of Counsel
For the Respondent:	Munthali of Counsel
Official Interpreter:	Kadyakale

R U L I N G

This is an appeal against an order of the Resident Magistrate at Lilongwe dismissing the appellant's application to set aside a judgment entered against him in default of defence on the 12th June, 1979.

By a summons dated the 29th May 1979, the respondent claimed from the appellant a sum of K500, being arrears of rent for the period April 1977 to March 1979, in respect of a canteen on Plot No. 2240 in the City of Lilongwe, particulars of the said arrears of rent having already been supplied to the appellant.

The appellant failed to file any defence within the time required to file such a defence, and accordingly judgment in default of defence was signed on the 12th June 1979. On the 25th June 1979, the appellant filed an application to set aside the judgment and attached an affidavit in which he deposed that he had a good defence to the claim but that he had been unable to file such a defence because of illness. Counsel for the appellant submits that the learned Resident Magistrate erred in law in not allowing the appellant's application under these circumstances since the appellant had showed clearly why he had not been able to file a defence. Counsel for the respondent, on the other hand, submits that the affidavit sworn by the appellant did not contain any grounds of defence which would enable the court to consider the merits of the application and that therefore the learned Resident Magistrate properly rejected the application. He has referred me to Order 10, rule 3(2) of the Subordinate Courts Rules which is in the following terms:-

"(2) The affidavit shall state that the defendant has a good defence to the plaintiff's claim and shall, subject to subrule (3) indicate clearly the grounds of his defence."

HIGH COURT  
LIBRARY

It was held in the case of Fardon vs. Richter (1889) 23 Q.B. 124, that if a judgment is regular then it is an almost inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating facts showing a defence on the merits. It was further held in that case that an application which is not supported by such an affidavit ought not to be granted except for some very sufficient reason.

The appellant's affidavit did not state clearly any grounds of the defence that the appellant had in mind. The affidavit was therefore inadequate. The matter however did not end with the inadequate affidavit. On the 27th July 1979, the appellant gave evidence on oath in open court and stated that he intended to file a defence and that he wanted to put in a counterclaim. He did not enlarge on the nature of the counterclaim but stated that he had paid five instalments.

Although the appellant's evidence of the nature of his defence is rather vague, it seems to me that he may be saying that he does not owe as much as the respondent says he does. I am inclined to believe that the appellant may have a defence of some sort and for this reason will allow the appeal. The judgment entered on the 12th June 1979, is set aside on the condition that the appellant will bear responsibility for all wasted costs in any event. The defence, if any, to be filed within ten days from today's date. Costs for today's appearance for the respondent.

Made in Chambers this 11th day of February 1980, at Blantyre.

  
J. B. VILLIERA  
JUDGE