IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 676 OF 2001

BETWEEN:

T. CHILENJE t/a COMBINADO

PESQUEIRO DE METANGULA ..... PLAINTIFF

-and-

THE ATTORNEY GENERAL ..... DEFENDANT

(Director of Fisheries-Mpwepwe Boatyard)

CORAM: THE HON. MR. JUSTICE F.E. KAPANDA

Mr. NKhono of Counsel for the Plaintiff

Mr. Nkhata of Counsel for the Defendant

Miss Mzungu, Court Clerk

Date of hearing: 17th February 2002

Date of ruling: 28th February 2002

Kapanda, J

RULING

Introduction

The matter before me is an appeal from the decision of the Assistant Deputy Registrar made on 2nd December 2002. It is therefore a rehearing of the application that was before the Assistant Deputy Registrar. The defendant wanted to have the default judgment entered against the Malawi Government set aside. The application was not successful. Hence the appeal that we have before us.

Facts of the case

On the 13th day of March 2001 the plaintiff issued a writ of summons against the defendant. The defendant was served with the writ of summons and he duly filed a notice of intention to defend the action that was commenced by the plaintiff. There was a statement of claim attached to the writ of summons. I do not wish to set out all the allegations of fact that were made in the statement of claim. Suffice to say that I will give a sketch of what the plaintiff was claiming against the defendant. It is important that I do so because of what this court

thinks of the type and form of default judgment that was issued by the Deputy Registrar. The plaintiff was claiming, *inter alia*, the following: K60, 005.00 being repair charges lost; K119, 280.00 being upkeep expenses due to delay in effecting repairs; USD75, 000.00 being the replacement cost of the "Lichinga"; USD853, 000.00 being lost profits for 2 years from 1st February 1999 to 31st January 2001; and further damages for loss of profits from 1st February 2001 until replacement of the boat at the rate of USD8, 530.00 per week.

It is observed from the statement of claim that the above-mentioned sums of money were pleaded as special damages. The way a claim is pleaded has a bearing on how a party may proceed to enter a default judgment. I will come back to this observation later in this ruling.

The Attorney General's chambers did not serve a defence to the plaintiff's action. Due to this default a final judgment was entered against the Attorney General. The Deputy Registrar issued the judgment in default of defence on 26th April 2001. It was adjudged that the Attorney General (the defendant) should pay the claimant the following: the sum of K179, 285.00 being repair charges (K60, 005.00) and upkeep expenses (K119, 280.00); the Malawi Kwacha equivalent of USD75, 000.00 being the replacement cost of the "Lichinga", and

damages for lost profits. It was further adjudged that the damages for lost profits were to be assessed from 1st February 1999 until payment of the value of the boat.

On 29th November 2002 the Attorney General's chambers applied to have the default judgment herein set aside. The application to set aside the judgment in default of defence was heard by the Assistant Deputy Registrar. An affidavit of Mr. Nkhata was filed in support of the application to set aside the said judgment. The affidavit has eight paragraphs. A good part of the sworn statement of Mr. Nkhata deals with the reasons why the defendant did not serve a defence to the plaintiff's action. It is paragraph seven that is of particular significance to this appeal. In this paragraph the defendant, through the affidavit of Mr. Nkhata, has stated that he has a very good defence on the merits. The said defence is exhibited to the affidavit in support of the application to set aside the default judgment. The defendant does not set out, in the affidavit itself, the facts supporting the claim that the Attorney General has a defence that is meritorious. Be that as it may be the exhibited statement of defence in essence denies the existence of a contract between the plaintiff and the Malawi Government. In point of fact, the Attorney General averred that at the time the plaintiff brought the "Lichinga" to Mpwepwe Boat Yard for repairs the

Malawi Government had sold the Boat Yard to a private company.

The plaintiff objected to the application by the defendant. Further, learned counsel purported to file an affidavit in opposition to the application by the defendant. Through this affidavit the plaintiff attempted to dispute the deposition by the defendant to the effect that at the time the plaintiff took his boat for repairs the Boatyard had been sold to a private company. A Photostat copy of a sale agreement was exhibited to the said affidavit. I must observe that the original of the alleged sale agreement was not produced either before the Assistant Deputy Registrar or this court. The Assistant Deputy Registrar rightly refused to accept the sworn statement of Mr. Mbendera. I will also not take into account what was deposed by learned counsel for the plaintiff in opposing the application by the defendant: **Malawi Book Service vs. Blantyre Chalkmakers Ltd. Civil Cause No. 1374 of 1994 [High Court decision][unreported]**. If the affidavit of counsel for the plaintiff were to be allowed then the application to set aside judgment would have turned into something akin to a contested application for summary judgment.

The Assistant Deputy Registrar's Ruling

The learned Assistant Deputy Registrar refused the defendant's application to set aside the default judgment. He was of the view that,

since the defendant did not exhibit the sale agreement between the Malawi Government and the private company referred to in the defendant's proposed defence, it could not be said that the defendant had shown a defence on the merits. It is this ruling that the defendant is appealing against.

Grounds of appeal

The defendant, through counsel, has brought to the attention of the court his reasons for appealing against the decision of the Assistant Deputy Registrar. These are contained in the grounds of appeal filed together with the Notice of Appeal on 28th February 2003. There are six grounds upon which the appeal is based. The following are the said grounds of appeal:

"1. The learned Registrar did not address his mind to the fact that a judgment by default is neither given after consideration of the merits nor even represents an unequivocal judgment by consent.

2. The learned Registrar erred in law and fact by allowing the plaintiff to adduce evidence or rely on a document not bespoken or lodged in accordance with practice direction and denying the defendant the same privilege.

3. Having concede that oral evidence and or submissions be given to supplement documentary evidence the learned Registrar erred in law in giving weight to oral evidence and or submission of the plaintiff and totally ignoring the evidence and or submission of the defendant contrary to Order 32/15/6.

4. The learned Registrar erred in law and fact in his finding that the

defendant is in custody of the sale agreement of the Boatyard.

5. The learned Registrar erred in law in giving undue weight to the implied terms of the repair agreement allegedly entered into between the plaintiff and the defendant ignoring the express terms thereof.

6. In holding that the defendant ought to have exhausted his defence by affidavit or documentary evidence the learned Registrar misdirected and or contradicted himself in the exercise of discretionary powers vis-à-vis setting aside default judgment"

I have not made any corrections to the grounds of appeal. If there are any clerical or grammatical errors in the above-mentioned grounds of appeal they should not be attributed to the court.

The contentions of the parties

During submissions learned counsel for the defendant essentially repeated what is stated in the grounds of appeal. Mr. Nkhata further submitted that the Attorney General has a defence on merits in that the defendant is denying the existence of any contract between the plaintiff and the Malawi Government. He further contends that at the time the plaintiff's vessel got lost the Malawi Government was not the proprietor of Mpwepwe Boatyard.

The plaintiff on the other hand has argued that since the judgment herein is regular it can only be set aside if there is an affidavit showing that the defendant has a meritorious defence. It is the contention of Mr. Nkhono that there is no such defence on the

merits in view of the fact there was only a bare statement that the Malawi Government had already divested itself of the business at the Boatyard when the plaintiff took his boat for repairs. Learned counsel for the plaintiff is of the opinion that the defendant should have exhibited the agreement of sale to show divesture on the part of the Malawi Government thus demonstrating that there is a defence on merits. He further submits that actually in one of the documents the plaintiff attempted to exhibit it shows that the Malawi Government divested itself of the Boatyard on 14th May 1999 and not 14th May 1998 as put in the defendant's proposed defence. This court has already made its findings regarding the plaintiff's desire to have an affidavit used in opposition to the defendant's application. I will not therefore repeat myself on these findings.

The issues on this appeal

Since this appeal is by way of a rehearing the primary question that I must resolve is the same one that was before the Assistant Deputy Registrar. The principle question that must be determined is whether the default judgment herein should be set aside on the ground advanced by the defendant. I must point out that when dealing with this main issue I will also answer some ancillary issues that arose during the submissions of counsel.

Consideration of the issues

Is the default judgment herein regular or irregular?

I am mindful of the fact that the defendant did not seek to have the default judgment herein set aside on the ground that it was irregular. As a matter of fact, both parties proceeded on the footing that the default judgment of 26th April 2001 was regular. Indeed, counsel for the plaintiff urged this court to note that there is no suggestion that the judgment we are dealing with here is irregular. This notwithstanding I am aware that even though the parties consider the judgment herein to be regular that assertion or thought is not correct. The claims by the plaintiff were not liquidated or at most some of the claims were not wholly liquidated. It is the opinion of this court that the prayer for payment, by the defendant, of the plaintiff's upkeep expenses and the replacement cost of the "Lichinga" ought to have been assessed before a final judgment was entered in respect of those heads of claims. It matters not that the plaintiff had indicated what he considered was the amount that would compensate him on his heads of claims. The fact that he quantified his claims in his statement of claim did not make his claims a debt owing to him. As a matter of, fact the statement of case clearly shows that these claims were pleaded as special damages. Furthermore, there is no positive assertion by the

plaintiff that there was any agreement regarding the amounts indicated in the statement of claim as representing the damages that would have been payable to the plaintiff in the event of breach of duty on the part of the defendant or any person acting on behalf of the Malawi Government. To arrive at the amounts pleaded one would have to look at the documentation in the possession of the plaintiff to come to a conclusion as to what quantum of damages would adequately compensate the plaintiff. Put differently the amounts would be arrived at after hearing the plaintiff in evidence. It is a fact that at the time the default judgment was entered no such documentation or evidence was before the Deputy Registrar. It was not even pleaded that there was an agreement that the plaintiff would be paid the sums indicated in the said statement of case. By reason of the foregoing the plaintiff ought to have caused to be entered an interlocutory judgment in default of defence and not a final judgment as was done in the present case: **Malawi Book Service vs. Blantyre Chalkmakers Ltd.** *ante.* The long and short of it is that the default judgment of 26th April 2001 was an irregular one. As a matter of law, the Deputy Registrar should not have in the first place issued the default judgment herein. It ought to be set aside on grounds of irregularity. In case I am later found to have erred in concluding that the judgment herein should be set aside on grounds

of irregularity I will proceed further to consider whether this judgment should be set aside on the premise advanced by the defendant.

Is there a defence on the merits?

As mentioned earlier, the parties have proceeded to make their submissions on the premise that the default judgment herein is a regular one. If that is accepted then it is trite law that the default judgment obtained by the plaintiff can only be set aside if the defendant demonstrates that he has a meritorious defence. Further, it is now settled law that it is not enough to merely show a defence that would entitle one to obtain leave to defend but the applicant must demonstrate that the defence has a real prospect of success. For this to happen the court must, on reading the affidavit and the defence, form what has been described as a provisional view of the outcome of the action. Accordingly, if on reading the affidavit and the proposed defence the court is of the opinion that there is a likelihood of the defence succeeding the judgment will be set aside. The defendant would then be given leave to defend the action. It must be noted though that the weighing exercise should be done with caution. There is a danger that the court might be seen to be deciding the issues that ought to be dealt with by the trial court if the court's discretion is not

exercised prudently. We have adequately discussed the law governing the setting aside of a regular default judgment. Let us now turn to the matter at hand.

It is on record that the Assistant Deputy Registrar, on 2nd December 2002, rejected the defendant's application to set aside the default judgment herein. The Assistant Deputy Registrar was of the opinion that by failing to exhibit the sale agreement the defendant did not show that he had a defence on the merits. This is also the view of the plaintiff. I do not agree that that was a good reason to refuse the defendant leave to defend the action. As a matter of law the defendant should have been given the opportunity to file a supplementary affidavit if an opinion was formed that the exhibiting of the sale agreement was necessary: **Manica Freight Services (Malawi) Ltd. vs. Butao 12 MLR 379.** In my judgment the presence of the sale agreement was not necessary at the time of hearing the application. It would have perhaps been necessary at trial or if the defendant were to be defending an application for summary judgment. Furthermore, realising that the granting of leave to defend an action is discretionary, it was open to the Assistant Deputy Registrar to set aside the judgment on terms on account of the defendant having not followed procedural rules: **Order 13/9/14 of the Rules of the Supreme Court.** Moreover, it might as

well be said that the defendant could very well establish, at trial, that the Director of Fisheries was not privy to the alleged contract to carry out the repairs to the "Lichinga" boat. Indeed, if this defence of non-existence of a contract were to be established at trial it would be a complete defence to the plaintiff's claim against the defendant. We should not, as was the case in the court below, dwell so much on the conduct of counsel in not exhibiting the said sale agreement or indeed on the fact that a Government General receipt was issued to the plaintiff. As regards the issuance of this receipt the defendant has made an allegation of fact that he proposes to prove that it was issued in error. If we attempted to form an opinion on the said agreement and the general receipt that would, in my view, amount to making a determination of the whole case on affidavit evidence, and or on submissions, without the benefit of *viva voce* evidence and cross-examination. Adjudication on the agreement and the receipt would be better left to be dealt with at the trial of this action. Moreover, it is advisable to remember the following celebrated words of Lord Atkin in **Evans vs. Bartlam [1947] A.C. 473 @480:**

> "The principle obviously is that unless and until the court has pronounced a judgment on 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 a failure to follow any of the rules of procedure"

The default judgment herein was entered not on merit or consent. It was issued by the court as a result of the defendant's failure in serving a defence on the plaintiff pursuant to procedural rules. It has already been noted that the Assistant Deputy Registrar took issue with the defendant's failure in exhibiting the sale agreement. He then rejected the defendant's application on that score. The non-exhibiting of the sale agreement, which was not imperative, was only a procedural error. Further, this court has already found that the proposed defence, if established at trial, would have the effect of completely defeating the plaintiff's action against the defendant.

Conclusion

In view of the findings, observations and conclusions, made above it would be wrong to deny the defendant permission to defend this action. If we did that then we will be punishing the defendant purely because of Counsel's shortcomings or failure to act in accordance with procedural rules. Moreover, it must be remembered that the default judgment herein is irregular even though counsel for the plaintiff thinks that it is not. The default judgment herein is therefore set aside. It will be set aside on terms. This will be the case in view of the fact that there was breach of procedural rules by the defendant. The said default judgment of 26th April 2001 is consequently set aside on

condition that the defendant should pay the sum of MK60, 005.00 into court. The defendant has implicitly admitted that this sum was brought on charge on a government general receipt. Hence the order that the sum of MK60,005.00 be paid into court. It is further ordered that the defendant shall, within 14 days of the date hereof, pay the money into court and then serve a defence to the plaintiff's action.

Neither party will get costs of, and occasioned by, this appeal because both parties did not comply with the procedural rules requiring the filing of a bundle.

Handed down in Chambers this 28th day of February 2003 at the Principal Registry, Blantyre.

F.E. Kapanda

JUDGE

Civil Cause No. 676 of 2001