IN THE HIGH COURT OF M ALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 911 OF 2007

BETWEEN:

THOMAS MUNYIMBIRI ..... PLAINTIFF

AND

NICO GENERAL INSURANCE COMPANY LTD ..... DEFENDANT

CORAM: Hon. Justice M.L. Kamwambe
Mr Mumba of counsel for the Plaintiff
Mr Manda, Official Interpreter

RULING

Kamwambe, J

The Plaintiff is an Appellant herein appealing against the order of the Assistant Registrar setting aside a default judgment of 29th May, 2007. The Plaintiff is seeking compensation for personal injuries he sustained in a road accident on 9th February 2007.

The action was commenced on 18th April, 2007 and the writ was served on the Defendants on 20th April, 2007. The Registrar's order was made on the 19th March, 2008. About 39 days had elapsed after the Defendants had failed to give notice of intention to defend the action.

The matter was scheduled for assessment on 15th November 2007. Meanwhile the Defendants took out an application to

set aside the default judgment. This was five months after the default judgment and six months from the date of service of the writ of summons. The application was heard on the 19th March 2008, ten months from the date of judgment.

According to Rule 3 of the High Court (Exercise of Jurisdiction of Registrar) Rules made under section 8 of the Courts Act, any person affected by any decision, order or direction of the Registrar may appeal therefrom to a judge in Chambers within 7 days of such decision of the Registrar. This application was made within time on the 27th March, 2008 in accordance with Order 3 rule 2(5) of the Rules of the Supreme Court.

Let m e in the outset state that the Defendant's counsel was conspicuously absent at the time of hearing of this appeal and yet there is evidence that he was duly served with the notice of the judgement on 17th June 2008 just over two weeks before the hearing. I would not be wrong to rely on his skeletal arguments made before the Registrar. I am indebted to both counsels for the abundance of authorities cited.

It is not in dispute that the Court does set aside default judgments in its exercise of discretionary powers. It should also be noted that there are two processes under which the order to set aside a default judgement can be sought. I know that they are well known but their application must be distinguished from one another. The first ground is of irregularity and the second one is a defence on merits to the Plaintiff's claim. In the first instance or ground the judgment is otherwise not faulty and that there exists no defence on merit whatsoever. The reasoning behind this is that a mere irregularity which will otherwise have no real effect on the judgment need not delay substantial justice being done. This is followed in **Sing v Atombrook** (1998)1 All ER 385 wherein the court of appeal held that three months was too late to bring an application to set aside judgment for irregularity. Counsel must always clearly state facts for applying to set aside default judgment, be it on the ground of irregularity or

presence of a meritorious defence. The first ground of appeal will more often than not be rejected due to inordinate delay.

What we have herein is otherwise an application to set aside a regular judgement on the ground that the Defendant has a meritorious defence. Note 13/9/7 (1999 Rules of Supreme Court) guides us that on an application to set aside a default judgment the major consideration is whether the Defendant has disclosed a defence on the application to set aside a default judgement and this transcends any reason given by him for delay in making the application even if the explanation given by him is false **Vaan v Awford** (1986)83 L.S. Gaz. 1725;(1986) The Times, April 23, CA. It goes further to say that the fact that he has told lies in seeking to explain the delay, however, may affect his credibility and may therefore be relevant to the credibility of his defence and the way in which the court should exercise its discretion.

It is difficult for me to believe the explanation by the Defendants that the main file was missing at that time since the practice of the Civil Registry has always been to open a temporary file. Counsel for the Defendant would on learning that the main file is missing have found assistance from the Plaintiff's counsel. In any case the judgment in default may have been served on the Defendant. The writ of summons having been served personally on the Defendants, it should not have taken them 39 days without indicating the intention to defend, and thereafter five months to apply to set aside the default judgement only to bring an explanation of missing file. What is more apparent is that Messrs Nampota and Company were only retained on 17th October 2007. This is when they started acting diligently hence the same date bears their ex-parte summons for stay of execution of the default judgment of 29th May, 2007.

Delay is not the only circumstance to consider. Nevertheless applications should be made promptly. But we are warned that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits. We have also to look at

the injustice or prejudice caused to the Plaintiff. Here we are dealing with a case of personal injury. Such cases must necessarily be dealt with promptness. Merit indicators should not come at the whim of the Defendant.

Having considered all the circumstances surrounding the case I find that the delay in this case was inexcusable and that even if there might be merit in Defendant's case it would result in occasioning injustice to the Plaintiff to allow the Defendants opportunity to be heard on their defence. I am in agreement with the case of **John G. Kawamba t/a Central Associates Ltd v W.T.C. Freight Ltd** Civil Cause No. 541 and 542 of 1986. Five months delay from the date of default judgment is in my view in these circumstances inordinate delay.

Made in Chambers this 23rd day of July, 2008 at Chichiri, Blantyre.

M.L. Kamwambe
JUDGE