



IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
PERSONAL INJURY CAUSE NO: 391 OF 2012

BETWEEN

GRACE MKWALE(on behalf of the Estate of
Victor Kutengule, deceased).....**PLAINTIFF**

-And-

**THE EXECUTOR(S) OF THE ESTATE OF
COSTA CHILOWA (DECEASED)****DEFENDANT**

CORAM: **HOWARD PEMBA**, Assistant Registrar
 Ng'omba, of Counsel for the Plaintiff
 Tepeka, Official Interpreter

RULING

This is the ruling on the Defendant's application to set aside the default judgment entered in favour of the Plaintiff on the grounds that the judgment is irregular and the Defendant has a defence on merit. The application was made under Order 13 rule 9 of the Rules of the Supreme Court and courts' inherent jurisdiction.

The background of this application is that the Plaintiff commenced the present action against the Defendant by a specially endorsed writ of summons issued by his court on 23rd October 2012 claiming for loss of dependency and loss of expectation of life of Victor Kutengule due to a road accident caused by the negligence of Mr. Costa Chilowa's motor vehicle, registration number SA 5892 Honda CV-R Station Wagon. It must be noted that the initial Defendant in this matter was Mr. Chilowa himself before he passed on.

The Defendant having failed to file an intention to defend or the defence itself to the claims herein, the said default judgment was entered in favour of the Plaintiff on the 24th April 2013 and all damages claimed by the Plaintiff were granted to the Plaintiff subject to the assessment by the court.

The matter then came for assessment of the said damages on 6th June 2013 and consequently in its ruling, the court awarded the Plaintiff the total sum of K7,912,000.00 as damages in all the heads of damages she claimed.

After the Defendant passed on, the Plaintiff through counsel then filed an ex-parte summons for amendment under Order 20 rule 8 of RSC substituting the executors of the estate of the said Costa Chilowa (deceased) as a Defendant in these proceedings. The said application was subsequently granted on 24th February 2014, the effect of which was that the Defendant substituted Mr. Costa Chilowa, the initial Defendant.

Later, the Defendant, through counsel, filed an ex-parte summons for stay of proceedings, which was subsequently granted on 21 March 2014 pending the present application.

The applicant was not available during the hearing but in support of this application, they filed an affidavit sworn by Mr. Emmanuel Chapo, of counsel. In this affidavit in support of this application, the essence of the applicant's argument is that the judgment was irregular as there was never service of the writ of summons effected on them and that they have a defence on merits and hence their application to set aside the default judgment.

The Plaintiff, through legal counsel, is opposed to the application on three grounds. First they say that the affidavit in support of the application herein is defective as it was not sworn by the deponent and neither was it signed by the deponent. Secondly, the Plaintiff states that the applicant (Sheena Chilowa) who is the administrator of

the estate of the Defendant(deceased) is not a party to this action and has therefore no capacity to prosecute the matter. They therefore pray that the Defendant's application be dismissed or in the alternative, should the court decide to set aside the default judgment, then the same should be on condition that the monies held by the executors of the estate of Costa Chilowa, Reserve Bank of Malawi should be paid into court, pending determination of the matter.

This court would like to thank both parties for the submissions filed herein. I have given these submissions and the cases counsels cited the most anxious consideration.

Having heard both parties, this court is called upon to determine whether or not the default judgment referred to herein should be set aside on the ground that it as obtained irregularly and the applicant has a defence on merits.

The law regulating issues relating to default judgment is provided under **Order 13 Rule 9** and also **Order 19 Rule 9** of Rules of the Supreme Court whose relevant provisions are to the effect that the Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of these orders. **Order 13** talks about judgment being entered against the defendant for failure to give notice of intention to defend while **Order 19** talks about judgment being entered against the defendant due to default by the defendant in serving defence to a claim.

The general rule 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 a failure to follow any of the rules of procedure. See also *Evans v Bartlam* {1933} AC 480, *Grimshaw v Dunbar* {1953} 1 QB 408 and *Hayman v Rowlands* {1957} 1 ALLER 321.

It is further trite law that the court has jurisdiction to set aside judgment entered in default of failure to comply with rules of Practice which is inclusive of failure to enter an appearance despite any reasons for the delay or failure to file defence.

In the present case, there is an application to that effect by the applicant. The Plaintiff has objected to it on the ground that the applicant is not a party to the action and that the affidavit in support of the application is defective and should not be admissible.

It should be noted from these authorities that whether a regular default judgment should be set aside or not is in the discretion of the court. The defendant does not have this as of right. In the case of *Santagostino vs Attorney General (1997)1MLR 73*, Mwaungulu J stated as follows:

*"I have had a chance to look at the decision of the court of appeal in **Alphine Bulk Transport Co, Inc vs Soudi Eagle Shipping Co. Inc(1986)**Lloyds Rep211@223. There is also a decision of the Supreme Court in **Makaniankhondo Building Contractors vs Hardware and General Dealers MSCA Civil appeal No. 38 of 1984(unreported)**. What comes out from these decisions is that the power to set aside a judgment obtained for failure to comply with rules of court is discretionary."*

In the present case, the issue of whether the judgment was regularly entered or not is in dispute. However, before we deal with this issue, it is important that we should look at whether the applicant is not a party to the action herein or not.

From the evidence before me, it is true that the applicant, Sheena Chilowa who happens to be the administrator is not a party to this action. No application has been made before this court by the administrator to substitute the current defendant with her. Probate cause No. 61 of 2014 referred to by the Plaintiff which was a matter of

application for limited grant by Mrs Sheena Chilowa granted by the Lilongwe high court registry on 19 February 2014 is indeed a separate court proceeding from the present case and cannot have the effect of amending the parties in this matter. Paragraph 5 of the affidavit in support refers to Sheena Chilowa as the Defendant's wife and this clearly shows that she is not yet a party to this action. The word defendant refers to the deceased for the purposes of the affidavit in support. In view of this, I am agreeable to the Plaintiff that the deceased has no capacity to give instruction to counsel to contend that the default judgment be set aside.

Having found that the applicant has nothing to do with the action as she is not a party to the action herein, this court cannot belabor itself to proceed to see whether the default judgment was regularly entered or not or whether the affidavit in support was defective or not as the same will be mere academic for they will still not render setting aside of the default judgment when in fact the application has been made by a person who is not a party to the action.

Thus, the application herein fails on the ground that the applicant is not a party to the action and it is hereby dismissed with costs awarded to the Plaintiff.

DELIVERED in chambers this 10th day of June 2014 at Zomba.



Howard Pemba

ASSISTANT REGISTRAR