



N THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 293 OF 2017

BETWEEN

LUCIOUS KWAKWALA CLAIMANT

AND

DR. JANET BANDA, SC 1ST DEFENDANT

MALAWI LAW SOCIETY 2ND DEFENDANT

CORAM : HER HONOUR MRS. BODOLE, ASSISTANT REGISTRAR

Kwakwala, of Counsel for the Claimant

Mambulasa, of Counsel for the Defendants

Ms. Kazembe, Court Clerk

RULING

Introduction

The claimant issued Summons for an order to strike out the 2nd defendant's defence. The 2nd defendant raised preliminary points for the Court's determination before the hearing of the Summons.

Preliminary Points

Counsel for the 2nd defendant raised 3 preliminary points for the Court's determination. These are:

1. Whether this Court having determined that the 2nd defendant had a good defence on merits to the claimant's claim and having allowed the 2nd defendant to file such a defence, the aspect of the defence has not become *res judicata*, and whether it is not caught by the doctrine of issue of estoppel and whether the claimant can then purport to resurrect and re-litigate it through an application to strike out such a defence.
2. Whether the present proceedings having been commenced before the coming into effect of the Courts (High Court) (Civil Procedure) Rules, (CPR), the claimant was entitled to bring the present application under the new rules or whether it should have been brought under the existing rules.
3. If the application should have been brought under the new rules, that which is doubtful, what is the effect of not complying with the requirements of Order 24 in the preparation of the documents by the claimant?

The Evidence

Counsel for the 2nd defendant contended that the 2nd defendant brought an application before the Court to set aside default judgment obtained by the claimant on the basis that the 2nd defendant had a defence on the merits to the claimant's claim. The claimant opposed the application and filed an affidavit and skeletal arguments. The Court having heard the arguments, made an order setting aside the default judgment and allowed the 2nd defendant to file its defence. A question which arises is whether the Court can be asked to strike out the same defence which it formed an opinion on that it is meritorious. The issue of the defence has become *res judicata* and has been caught by the doctrine of estoppel.

The Counsel for the 2nd defendant further contended that since the present proceedings were commenced before the coming into effect of the Courts (High Court) (Civil Procedure) Rules (CPR), the claimant should have brought the present

application under the Rules of the Supreme Court (RSC) and not the CPR as he has done.

As regards the third preliminary point, Counsel for the 2nd defendant contended that the claimant was not entitled to bring the present application under the CPR as the application does not conform to Order 24 of the CPR. This Order has specified the criteria of which documents must conform to. The claimant's application does not conform to them e.g. the font and the spacing.

In reply, Counsel for the claimant contended that when the 2nd defendant's Counsel made the application to set aside default judgment, both parties dwelt on why the defence was not filed in good time. The Court nor the parties discussed the defence. The Court did not make an opinion that the defence was meritorious. The Court just made the order setting aside the default judgment and that defence should be filed. The mere filing and serving of the defence does not make it meritorious. After the defence is filed, the claimant has a right to attack the defence. That is why the CPR and the RSC provide a reply to the defence. Nowhere do the CPR and RSC provide that once a defence has been filed it automatically becomes meritorious and cannot be attacked.

As regards the 2nd preliminary point, Counsel for the claimant contended that Order 35 of CPR provides for validity of process. He submitted that the application to set aside default judgment ably fits under the CPR.

As regards the 3rd preliminary point, Counsel for the claimant contended that the application complied with the provisions of Order 24 of the CPR save for the font. As such, the application should be allowed.

Applicable Law

Order 35 of the CPR provides that

"1. Under this Order-

"commencement date" means the date of coming into force of these Rules;-

"existing proceeding" means a proceeding commenced before the commencement date."

Order 35 rule 6(3) of the CPR provides that

"Where a new step is to be taken in an existing proceeding on or after the commencement date, it shall comply with these Rules."

Order 24 of the CPR provides that

"2. All documents files in a proceeding shall-

(a) be typewritten in Times New Roman font, size 12, spacing 1.5;..."

Order 2 of the CPR provides that

"1. The failure to comply with these rules or a direction of the Court shall be an irregularity.

2. Notwithstanding rule 1, the irregularity in a proceeding, or a document, or a step taken or order made in a proceeding, shall not render a proceeding, document, step taken or order a nullity.

3. Where there has been a failure to comply with these rules or a direction of the Court, the Court may-

(a) set aside all or part of the proceeding;

(b) set aside a step taken in the proceeding;

(c) declare a document or a step taken to be ineffectual;

(d) declare a document or a step taken to be effectual;

(e) make an order as to costs; or

(f) make any order that the Court may deem fit."

Analysis

The 2nd defendant brought an application before the Court to set aside default judgment. The Court indeed set aside the default judgment and ordered the 2nd defendant to file a defence. The Court did not look at the merits of the defence that was filed together with the application. The Court, in its order, stated as follows:

"The 2nd defendant's application must succeed on the basis that it must be given a chance to defend itself and have this matter determined on the merits and not on a mere technicality...I will not comment on the merits of the defences I have so far. I believe that's a question for another hearing if at all."

This shows that the Court did not look at whether the defence was meritorious or not. He reserved that issue for another hearing if the need arises. The Court's order is very clear that the default judgment was set aside just to give a chance to the 2nd defendant to defend the matter. Since the Court did not look at the merits of the defence, then the issue of the defence being *res judicata* or being caught by the doctrine of estoppel does not arise.

Order 35 rule 6(3) of the CPR clearly provides that a new step being undertaken in an existing proceeding on or after the commencement date must comply with the CPR. The application to set aside default judgment is a new step being undertaken by the claimant. He must, therefore, comply with the CPR by bringing the application under it. As such, there is nothing irregular in bringing the application under the CPR.

Order 24 of the CPR deals with the format of documents and forms. There are many provisions under this Order as to what the documents and orders must comply to. Of particular importance to this case is Order 24 rule 2(a) of the CPR. The application to set aside defence is supposed to comply with this Order i.e. it must be typewritten in Times New Roman font, size 12, spacing 1.5. All these have been complied with except the font. He has also complied with the other provisions of Order 24 of the CPR. The non-compliance is an irregularity which does

not render the application a nullity – (see Order 2 rule 2 of the CPR). This Court will just have to resort to the provisions of Order 2 rule 2(3) of the CPR and make an appropriate order thereunder.

This Court rules that the application is effectual on condition that the claimant must regularize the application within 14 days of this order.

Conclusion

The 2nd defendant's preliminary points for determination by this Court are dismissed with costs to the claimant.

Pronounced in court this 28th day of November, 2018 at Blantyre.



E. BODOLE (MRS.)

ASSISTANT REGISTRAR