



IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY

CIVIL CASE NO. 178 OF 2016

BETWEEN

TAONA VIOLET MSISKA..... CLAIMANT

-AND -

MADALITSO BANDA..... 1ST DEFENDANT

CONSOLIDATED MINING INDUSTRIES COMPANY 2ND DEFENDANT

CORAM:

H.H. Brian Sambo, Assistant Registrar

Mr. Jivason, of counsel for the Claimant

Mr. Kondowe, of counsel for the 2nd Defendant

1st Defendant, absent and unrepresented

Mr. Henry Kachingwe, Court Clerk/Official Interpreters

RULING

BACKGROUND

This is an application to suspend enforcement of seizure and sale order pending application to set aside the default judgment obtained by the Claimant more than 11 months ago. The default judgment was followed by an order of assessment by Hon Austin Jesse Banda in which the Claimant was awarded MK10, 715,000.00 being damages over and above costs of the action, which if not agreeable between the parties, were to be assessed by the Assistant Registrar. A Seizure and Sale Order was then issued against the 2nd Defendant. It was after the birth of the Seizure and Sale Order that the 2nd Defendant sought the services of a lawyer and hence the present application.

The 2nd Defendant is bringing this application under O. 28 r 48 and O. 10 r 1 of the Courts (High Court)(Civil Procedure) Rules, 2017.

ISSUE FOR DETERMINATION

Whether the Seizure and Sale Order against the 2nd Defendant could be suspended pending an application to have the default judgment set aside.

ANALYSIS OF THE FACTS AND THE LAW

I wish to state at once that the Default Judgment herein is regular. The Claimant had followed every adjective step and made sure that the 2nd Defendant was carried along through proper service of court documents. The 2nd Defendant, wearing *laiser faire* attitude, a typical of Malawian syndrome where matters of urgency are usually handled with contempt and thrown at the back seat, it appears the 2nd Defendant thought judicial matters were for recreation, and saw no urgent need to engage a legal counsel let alone avail themselves when dates of hearing were being given. It is now, after being hit by the MK10, 715,000.00 plus costs that their eyes have been

unbolted; they have now known that court matters are not akin to jokes. I wish to say that I find the excuse of *'being laymen we did not envisage the consequences of the litigation....and instead of availing ourselves for hearing or responding accordingly, we chose to do so through ordinary correspondence.....now we want to ask the court to suspend the Seizure and Sale Order pending an application to set aside the default judgment'* a complete abuse of court process. It goes without saying that the law is meant to aid the vigilant and not those who slumber. If the truth is to be told, if all cases without legal representation were to be set aside for retrial on a mere excuse that parties were ignorant of the law and did not know what to do, there would be great chaos and absurdity in the justice system. The law allows parties to appear with or without legal representation; whichever option they go for, they should be ready to face the consequences of their respective choices.

I have, however found the application herein lawful by virtue of Order 28 r 48 which reads;

An enforcement; respondent may apply to the Court for an order suspending the enforcement of an order.

Reading through the law, it appears that an application suspending an enforcement order remains ancillary to a subsequent step that a party applying intends to take, and hence that subsequent step ought to be attached. Like in the instant case, the applicant intends to file an application to set aside the default judgment upon successfully suspending the Seizure and Sale Order. The Applicant, in defence of its application to suspend the Seizure and Sale Order, submits to be in possession of a defence on merit. This is the whole reason the applicant should have filed the application to set aside the default judgment along with the present application. This shows that an application to suspend an order of enforcement is not, strictly

speaking, a stand-alone action. Principally, it is only in an application to set aside a regular default judgment that a party needs to show a defence on merit, and not in an application to suspend an order of enforcement. Nevertheless, for the court to suspend the present order of enforcement, it needs to consider whether the intended application by the applicant will show a defence on merit now that the same was not attached. I noticed that the applicant had lightly stated their purported defence on merit elsewhere in their present application. They said that the 1st Defendant caused the accident while not in the course of duty, and hence they could not be made vicariously liable to pay damages. It is my considered view that, while the defence on merit has not been properly given, a benefit of doubt could still be resolved in favour of the Applicant herein.

The effects of non-compliance with the new rules are enshrined under O. 2 r 1 of the Courts (High Court)(Civil Procedure) Rules, 2017. The provision reads;

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

I therefore hold the application herein just in the same way as stated in the rules; 'an irregularity'.

For the avoidance of doubt, O.2 r 3 of the rules states;

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.

In this case, I grant the application herein on the following conditions:

- i. That the Applicant files an application to set aside the default judgment within 7 days from today.
- ii. That where the Sheriff had already executed upon the 2nd Defendant, sheriff fees should be paid in full but the property/charges of the 2nd Defendant should remain in the custody of the sheriff pending an application to set aside the default judgment. Payment of sheriff fees should also be done within 7 days from today.
- iii. That the Applicant suffers in costs to the Claimant which should first, be agreeable by the parties, and that where the same is unreachable, they shall be assessed by the Assistant Registrar. The 2nd Defendant is the one liable to pay these particular costs.

This court so orders.

Made in chambers today Monday the 10th of December, 2018.

Brian Sambo

Assistant Registrar

