REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO.1144 OF 2016

BETWEEN

Triza Lunduka..... Claimant

AND

Fletcher Zenengeya.....1st Defendant

United General Insurance Co.....2nd Defendant

CORAM:	***Madalitso Khoswe Chimwaza,***	***Assistant Registrar***
	K. Soko,	*Counsel for the claimantt*
	E.D.A Chibwana	*Counsel for 1st Defendant*
	Mpandaguta	*Court Clerk*

RULING ON PRELIMINARY OBJECTIONS TO THE SUMMONS TO SET ASIDE DEFAULT JUDGMENT

The 1st defendant filed a summons to set aside a default judgement where there is also an order of assessment supported by a sworn statement deponed by Mr. Zenengeya and an amended sworn statement deponed by Counsel Dzonzi .

The plaintiff raised objections to the hearing of the summons on the grounds of irregularity.

Specifically the plaintiff's objections are in the following terms:

1. That the 1st defendants application is effectual and irregular for having been made more than three months after the default judgement was entered
2. That the 1st defendant's process is idle and incompetent for having been taken out as a summons
3. That the sworn statement is defective for failure to comply with Order 18 Rule7 (5) (c) and (d) CPR.
4. That the documents filed and served by the defendant do not comply with the requirement as to form spelt out in Order 24 Rule 2(a) of CPR.

The grounds for the objection are that:

5. The 1st defendant could have made the application within 3months after the judgment was entered as per O.12 Rule 21(2) CPR
6. The 1st defendant could have taken out an application and not a summons in prosecuting his interlocutory process in terms of Order 10 Rule1 of CPR.
7. The documents filed and served by the 1st defendant do not comply with the requirements as to form spelt out in Order 24 Rule 2 (a) in that they are not fully type written in Times New Roman font, size 12.
8. In a further notice of intention to rely on preliminary objections the plaintiff objected to the use of the sworn statement of Counsel Justin Dzonzi on the grounds it is idle and incompetent because it is not supporting the application before court and it was not in compliance with Order 18 Rule7 (5) (c) and (d) of CPR.

The plaintiff prays that the court should dismiss the summons to set aside default judgment and the 1st defendant should not be allowed to prosecute it.

The 1st defendant responded to ground 3 and 8 of non -compliance with Order 18 Rule 7(5) (c) and (d) and Order 24 Rule 2(a) of the CPR, by filing an amended sworn statement of Counsel Justin Dzonzi. He further stated that the irregularities being pointed out by Counsel for the plaintiff are not fatal to the proceedings as they are curable by Order 2 rule 3 of the CPR.

Regarding the nature of proceedings, Counsel Chibwana insisted that the summons to set aside default judgement being objected to now, is referring to the order of assessment which was obtained and served in July 2017. According to the sworn statement of Counsel Dzonzi an application to have it set aside was filed in September which was within three months. Therefore the court should proceed to hear it as it was filed within the period of three months as per the rules.

ISSUES FOR DETERMINATION

This court has noted that these are preliminary objections whose outcome will affect the substantive application made by the 1st defendant. Therefore two issues ought to be determined:

1. Whether the irregularities cited render the proceedings a nullity to warrant outright dismissal
2. Whether the 1st defendant filed a proper application under the new Rules and should be allowed to prosecute.

REASONED ANALYSIS OF LAW AND FACTS

The starting point in addressing the first issue on the non compliance with Rules of Procedure is **Order 2 rule 3 of the Courts (High Court Civil Procedure Rules) 2017** which states as follows:

> **Order 2 Rule 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 proceedings
> (b) Set aside a step taken in the proceedings
> (c) Declare a document or step taken to be ineffectual
> (d) Declare a document or step taken to be effectual
> (e) Make an order as to costs; or

(f) Make any other order that the court may deem fit

Clearly this rule deals with non-compliance with the rules at any stage of proceedings and in whatever form that it **shall** not render a proceeding, document, step taken or order a nullity.

See the case of **Lorgat vs Ching'amba & Others** in which the Supreme Court of Appeal remarking on the effect of non - compliance with Rules of Procedure cited **Order 2 (3) of RSC** (now repealed) and held that such failure to comply with the rules is to be treated as a mere irregularity and does not nullify the step taken. **[1997] 1 MLR** at page 5 as per Unyolo, J. SC.

Looking at the rules that were not complied with **Order 18 Rule 7(5) (c) and (d)** on sworn statements and **Order 24 Rule 2(a) of the CPR** all these are procedural requirements which can be cured by Order 2 (3) of the CPR. As already indicated that 1st defendant has already responded to the concerns by filing an amended sworn statement of Counsel Justin Dzonzi and Counsel Chibwana which has complied with both rules.

Therefore the defects or non-compliance are not fatal as they are irregularities, curable by Order 2(3) by amending the sworn statements and all other applications to be made henceforth to comply with the rules.

The **second objection** is with regard to the manner in which the present proceedings were commenced by the 1st defendant, whether the court has the correct proceedings.

The 1st defendant filed a summons to set aside a default judgment, which was obtained on 6th April 2017. This is the default judgment that the plaintiff is challenging that the application has delayed since the period of three months elapsed, and there is no explanation why the application was not made within 3months. **(Order 12 rule 21(2) of CPR)**

Having read the whole case file to appreciate the history of the matter and the sworn statements supporting the application this court has noted that indeed the plaintiff took out default judgements against both defendants separately on 6th April, 2017.

In the present proceedings which were commenced under **Order 12 of the CPR**, the 1st defendant is referring to a default judgment however in the sworn statement supporting the application it has referred to an order of assessment obtained in July 2017.

Clearly the documents on file are not speaking to each other. An order of assessment is not the same thing as default judgement and even the rules governing the two are different.

In the instant case a default judgment was entered by court on 6th April,2017 after the defendants had omitted to enter appearance and or serve defence despite being served with originating process. If the 1st defendant had intended to challenge the default judgement he should have done that in compliance with **Order 12 rule 21(2)** within three months thereafter. Nothing happened until in September 2017 when the 1st defendant filed a summons to set aside an Order of Assessment which was made on 17th July 2017.

Clearly these are two distinct orders. The 1st defendant should have come out clear as to which order of the court he wants to have set aside.

As for the order of assessment this comes into existence after a trial and trials are governed by **Order 16 of the CPR**. The fact that an order or judgment is made in the absence of one party does not make it a default judgment. Default judgments are specifically provided for under Order 12 and the procedure to set them aside is also provided under **Order 12 Rule 21(2) of the** CPR.

In this case the order being referred to in the sworn statement was obtained in the absence of a party and the proper order to be used to have it set aside is **Order 16 Rule 7 (3) of the CPR**.

Order 16 rule 7 (3) provides that:

The court may proceed with a trial in the absence of a party;

> (3) where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgement or order to be set aside.

As far as this court is concerned there is confusion in the manner the proceedings were commenced and how the supporting evidence is coming in. The sworn statements are not supporting the application. It is referring to an order of assessment while the 1st defendants application is to set aside a default judgment which according to **Order 12 Rule 21(2)** the application cannot be sustained as its time limit expired three months after 6th April, 2017.

Does this non-compliance with the rules nullify the step that was taken by the 1st defendant to warrant a nullification of the proceedings.

Unlike **Order 2 (3) of the repealed Rules of the Supreme Court (RSC)** which were specific in the following terms:

> Where, ***in beginning or purporting to begin any proceedings*** or at any stage in the course of or in connection with any proceedings, there has by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content, or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings or any document, judgment or order therein. **(emphasis supplied)**

The current rules of procedure have not included non-compliance with the rules in beginning proceedings to be part of a failure that should be treated as an irregularity.

According to **Order 2 (2) of the CPR**, it clearly states that:

> An irregularity in a proceeding or a document or step taken or order made in a proceeding shall not render a proceeding, document, step taken or order a nullity.

In this matter, the present application was commenced by way of summons. According to the new **Courts (High Court) Civil Procedure Rules, 2017**, the Summons is the only originating process for commencing action. Any interlocutory order or relief to be obtained in a proceeding that has already commenced or where it has not yet commenced has to be done by way of an application under **Order 10 of the CPR**. It is known as an Application in a Proceeding. Therefore by commencing the action using a summons it was irregular but the irregularity is not included as one that can be cured by Order 2(2) of the CPR.

Further the 1st defendant has insisted that they made the application within three months because they filed summons to set aside an order of assessment on 8th September, 2017 against an order of assessment which was obtained on 17th July, 2017 and that the default judgement being referred to is the same order of assessment. With due respect to the 1st defendant, these are two different orders of the court and they are governed by different orders in the rules of procedure if they are to be set aside.

In view of all these circumstances this court is not able to treat the noncompliance as a mere irregularity as this goes to the root of the matter since it presents problems to the other party as to which order is being challenged or being sought to be set aside. This court dismisses the summons to set aside default judgment for being the wrong mode of commencing a proceeding

under the new Courts (High Court) Civil procedure Rules, 2017. The sworn statement of Counsel Justin Dzonzi is set aside for being ineffective in that it is not supporting the application.

The 1st defendant is at liberty to re-apply by filing an application to set aside an order of assessment in compliance with **Order 16 Rule 7(3) of CPR,** within 7days to file and serve the same with 2clear days notice. Costs are in the course.

Either party aggrieved by this decision has the right to appeal.

Made in chambers this 24th days of April, 2018

Madalitso K. Chimwaza (Mrs)

ASSISTANT REGISTRAR