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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 61 OF 2016

BETWEEN:

ELITA BANDA**PLAINTIFF**

AND

ELECTRICITY SUPPLY CORPORATION OF MALAWI
(ESCOM).....**DEFENDANT**

CORAM

Mrs T. Soko : ASSISTANT REGISTRAR

Mr Chisale : Counsel for the claimant

Mr Chibwe : Counsel for the defendant

Mrs Mkandawire : Court Clerk

RULING

BACKGROUND

The claimant in this matter brought a suit against the defendant claiming damages for loss and damage suffered and costs of the action. The facts of the case are that on or around 6th December 2013, there were some power surges in Zingwangwa Township in the City of Blantyre and electrical light kept coming on and off at regular intervals. As a result of such power Surges, the claimant's house caught fire and the damaged property. On 9th October 2017, a default Judgment was entered against the defendant on a ground that the defendant did not file a defence. On 13th March 2018, the defendant filed an application to set aside default

Judgment. The application was supported by a sworn statement of William Chibwe a Legal Practitioner of the defendant. Hearing of the application took place on 27th March 2018.

EVIDENCE

On the date of hearing, Counsel for the defendant adopted his sworn statement which basically stated that the defendant after being served with the writ of summons acknowledged service of writ and indicated that it intended to defend the matter. However, the claimant thought it had instructed Messrs Wilson and Morgan to handle the matter on its behalf considering that the said Legal Practitioners were already handling another claim under Civil cause Number 320 of 2015: Chipatso vs ESCOM Ltd which originated from the same fire accident. Counsel exhibited the writ of summons of Chipatso Khonjera vs ESCOM. Counsel continued that due to the said belief, the defendant did not file a defence to the claimant's claim and the claimant proceeded to enter a default judgment against the defendant. Counsel stated that the omission was not deliberate.

In addition, Counsel stated that the defendant has a defence on merit. Counsel said that on this material day, the claimant did not receive any report from the claimant or any resident of any power disparities within Zingwangwa Township. Besides, the defendant argued that the accident happened as a result of the internal fault within the electric installation of the claimant which installation is solely in the control of the claimant.

Counsel also added that the claim in the statement of claim is for damages for loss and damages suffered, the default Judgment was entered for damages for loss of property and the claim for damages for loss of property was not pleaded. Counsel argued that the default Judgment was irregular.

Lastly Counsel averred that there is already a claim on the same facts and the action herein is just an abuse of Court process. The defendant prayed that the Court sets aside the default judgment and allow the defendant to file its defence.

Counsel for the claimant counter argued that the defendant did not take any step except for filing and serving of Notice of Appointment of Legal Practitioners since February 2016 and it has taken the defendant 2 years and 1 month to take a step towards defending the herein action. Counsel stated that the defendant's conduct lacks seriousness and litigation must come to an end. Counsel further stated that failure by the defendant not to instruct Counsel is an administrative issue which must not affect the rights of the claimant and the case that Counsel is referring to is different from the one at hand. Counsel admitted the defects that the statement of claim and the default Judgment has but said the claimant is considering bringing the application to correct such defects.

ISSUES

Whether the Court should set aside the default Judgment

SETTING ASIDE A DEFAULT JUDGMENT

Order 12 r. 21(1) of the Courts (High Court) (Civil Procedure) provides that:

A defendant against whom judgment in default has been entered may apply to the court to have the judgment set aside

Order 12. R. 21(2) of the same Act provides that:

The application under rule (1) may be made not later than 3 months after the judgment is entered and shall:

(a) *Set out the reasons why the defendant did not defend the application*

(b) *Where the application is made more than 3 months after the judgment was entered, explain the delay; and the court shall not set the judgment aside, unless it is satisfied that it is in the interest of justice to do so*

Order 12 r.3 of the same Act states that:

The court may set aside the judgment in default if it is satisfied that the defendant_

(a) *Has shown reasonable cause for not defending the application*

(b) *Has a meritorious defence, either about his liability for the application or about the amount of the application.*

In Evans V Bartlam [1937] A.C. 473 at 480 Lord Atkin clearly stated that:

"The principle obviously is that unless and until the court has pronounced judgment upon the merits or by consent, it is to have the power to revoke the expression of its exercise power where that has only been obtained by a failure to follow any of the rules of procedure."

In **Alpine Bulk Transport Co. Inc V Saudi Eagle Shipping Co. Inc., The Saudi Eagle [1986] 2 Lloyd's Rep. 221** the Court held that a defendant who is asking the court to exercise its discretion in his favor should show that he has a defence which has a real prospect of success. It must be more than merely arguable and the arguable defence must carry some degree of conviction.

DETERMINATION

In the present matter, the matter herein was commenced on 25th January 2016 between Ellita Banda and ESCOM. In my mind this matter is different from the one that Counsel exhibited in this matter because the latter was commenced by Chipaso Khonjera in August 2015. Much as they were emanating from the same facts, but the claimants are different and they are seeking for different remedies. Besides, it is clear that the actions are different since they were commenced on different dates. Failure of the defendant to give instructions to the Legal Practitioner on the ground that the defendant thought that it already gave instructions to the legal practitioners has no basis. Additionally, it is an internal matter as counsel for the claimant rightly put it and internal matters cannot be used as a ground to set aside default Judgment.

Besides, I need not to decide if the defendant has a defence on merits when the application has been brought two years after the commencement of the matter herein. The defendant having being served with the default judgment had ample time to make the application. Besides, if the defendant thought that he gave the instructions to the Legal Practitioners, the defendant would have checked their records or check with the Legal Practitioners representing them. The delay in my mind is inordinate and inexcusable which prejudices the claimant if the application is allowed. On that basis the Court dismisses the application with costs.

I have considered the issue of pleadings and the default Judgment. Under Order 7 r. 23 of the Court(High Court) (Civil Procedure) Rules a party may amend a statement of case to identify the issues between the parties, correct a mistake or defect or provide better facts about each issue. In my view the claimant must bring an application of leave to amend the statement of claim within 7 days from the date herein.

Pronounced on this 11th day of May 2018.



T. SOKO

ASSISTANT REGISTRAR