JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO.146 OF 2016

BETWEEN:

FREDSON A. MACHEMBA.....1st PLAINTIFF

LAWRENCE BWANALI.....2nd PLAINTIFF
and

FILIPO A. UNYOLO ..... DEFENDANT

CORAM: THE HONOURABLE MR JUSTICE CHIRWA

Mr. Gulumba, of Counsel, for the Plaintiffs

Mr. Domasi, of Counsel, for the Defendant

Mr O. Chitatu, Official Court Interpreter

RULING

Introduction:

This is an appeal by the above-named Plaintiffs, against the decision of the Assistant Registrar, Her Honour **Ms Mandala**, made on the 11th day of April, 2017 setting aside the default judgment entered against the above-named Defendant on the 8th day of November, 2016.

Background:

By a Specially Endorsed Writ of Summons issued on the 7th of April, 2016, the above-named Plaintiffs commenced these proceedings against the above-named Defendant seeking the following reliefs:

(a) A declaratory order that the 1st Plaintiff is the lawfully recognised Village Headman Maloya;
(b) A declaratory order that the Defendant is not entitled to exercise powers and authority of Village Headman Maloya;
(c) An order declaring the installation of the Defendant as null and void;
(d) An order declaring that the Defendant hands over to the 1st Plaintiff the Village Roll;
(e) An order of permanent injunction restraining the Defendant, his servants, agents or through whomsoever from interfering and generally intermeddling with the Plaintiff's lawful exercise of authority as Village Headman Maloya;
(f) Costs of the action.

Practice & Procedure:

This being an appeal from the decision of the Registrar, this Court is mindful that an appeal from the Registrar to a Judge in Chambers is dealt with by way of an actual re-hearing of the application which led to the decision under appeal and that as a Judge this Court must treat the matter as though it came before it for the first time. This Court is also mindful that as a Judge it has to give the weight it deserves to the previous decision of the Registrar, but it is not in any way bound by it (see: **Lord Atkin** in **Evans v Bartlam** [1937] A.C. 473 at p 478.

Issue for determination:

The main issue which this Court has to determine is: whether or not the Assistant Registrar erred in setting aside the default judgment obtained by the Plaintiff in this actions.

The positions of the parties:

The Plaintiffs':

It is the submission of the Plaintiffs that the Defendant's contention that he was never served with Writ of Summons is untenable because of Affidavit of the **Dave Balakasi** filed as proof of service. It is the further submission of the Plaintiffs that the Defendant cannot rely on this ground because he failed to specify the alleged ground of irregularity as required by the practice rules. The case of **The Registered Trustees of Press Trust v I.E. Sabadia**, Civil Cause No. 1682 of 1997 (unreported) has been relied upon.

It is the further submission of the Plaintiffs that the Defendant has not shown that he has a defence on the merits. The Plaintiffs are here also relying on the said case **The Registered Trustees of Press Trust v I.E. Sabadia**, (*supra*). It is the further submission of the Plaintiffs that what is contended in the Defendant's proposed defence are mere assertions and not evidence, the Defendant not having presented to the court any concrete evidence on which the judgment can be set aside.

The Defendant's:

It is on the other hand the submission of the Defendant that before a judgment in default of notice of intention to defend is entered the court has to be satisfied, *inter alia*, that the Writ of Summons was duly served and that there is due proof of service of the said Writ indicating where and how the Writ was served. It is the further submission of the Defendant that the Defendant was never served with the Writ of Summons herein because the alleged service was made on the Defendant's wife. The Defendant is here relying on the cases of **Katengeza v Chikuse** [1992] 15 M.L.R. 179(HC) and **Mangoche v**

Women's World Banking [1996] M.L.R. 232 (HC). It is, in the premises, the contention of the Defendant that where the judgment is irregular, the court ought to set it aside as a matter of right.

It is the further submission of the Defendant that the Courts have discretionary powers to set aside or vary any judgment entered under Order 13 Rule 9 of the Rules of the Supreme Court. It is the further submission of the Defendant that for the purposes of setting aside a default judgment, the Defendant must show that he has a meritorious Defence (O13/9/7RSC). The Defendant is here relying on the case of **K.K Millers Limited v Century Printers and Stationery Suppliers Limited** [1991] 14 M.L.R. 130(HC).

It is the further submission of the Defendant that the appointment and removal of Village Headmen is within the powers of the Chief (see: Section 9 of the Chiefs Act). It is thus the contention of the Defendant that the default judgment entered in this action is usurping the power of the Tradition Authority of the area by appointing the 1st Plaintiff to be Village Headman Maloya.

Determination:

In the determination of the above-stated issue there are several minor issues which this Court has to determine, such as, was the service of the Writ of Summons herein regular? Does the Defendant have a defence on the merits to the Plaintiffs' claims, etcetera?

Was the service of the Writ of Summons regular?

Order 13 Rule 7(1) of the Rules of the Supreme Court provides as follows:

> "(1) *Judgment shall not be entered against a defendant under this Order unless-*

(a) the defendant has acknowledged service on him of the writ; or

(b) an affidavit is filed by or on behalf of the plaintiff proving due service of the writ on the defendant; or

(c) the plaintiff produces the writ indorsed by the defendant's solicitor with a statement that he accepts service of the writ on the defendant's behalf".

There are before this Court two conflicting Affidavits sworn **Dave Balakasi** as regards the service of the Writ of Summons on the Defendant herein, the one filed on the 14th of October, 2016 which states that he handed over a copy of the Writ of Summons to the Defendant and the other filed on the 4th of April, 2017 which states that the Writ of Summons was handed over to the Defendant's wife because the Defendant was at the material time in the bathroom. It further states that the Defendant's wife had assured him that she would hand over to the Defendant the said writ and that when he met the Defendant a few days later the Defendant confirmed to him that he had received the writ. There was no explanation made by the Plaintiffs for the said conflict. The simple conclusion one can however, make is that the latter affidavit was intended to supersede the former, probably, because the contents the former were blatantly false.

Order 65 of the Rules of the Supreme Court deals with the service of documents. And according to Paragraph 65/1/2 of the said Rules a Writ of Summons ought to be served personally. Further, according to Paragraph 65/2/1 of the said Rules personal service is effected by handing to or leaving with the person to be served a copy of the writ.

There is authority to effect that where the defendant was at an upper window of a house, and a process server, who was outside called out

to him, telling him that he had a writ of summons against him and held up a copy for him to see, and then threw it down in the presence of the defendant's wife, that was not sufficient service (see: **Heath v White** (1844) 2 D & L 40). There is further authority that service on the wife or a known agent of the defendant, is not good service (see: **Firth v Donegal (Lord)** (1834) 2 D.P.C. 527 though the latter undertakes to convey it to the defendant (see: **Davies v Morgan** (1832) 2 C& J. 237). However, service on the wife or agent at the request of the defendant is deemed sufficient- see: **Montgomery & Co. v Liebenthal & Co.** [1898] 1 QB 487, per **Chitty L.J**. For due service the copy of the writ must be left with, and not merely shown to, the defendant (**Worley v Glover** (1730) 2 Stra.877) even though he refuses to take it.

In the present case there is no evidence adduced by the Plaintiffs to show that the service on the Defendant's wife had been made at the request of the Defendant. In the premises, this Court is inclined to find that the service of the Writ of Summons herein was thus not regular. It is trite that where a judgment is irregular the defendant is entitled *ex debito justitiae* to have it set aside – see: **Anlaby v Praetorious** (1888) 20 QBD 764.

This Court would thus have been inclined to set aside the default judgment on this ground. The fact that that the Defendant did not specify in its summons the alleged ground of irregularity as contended by the Plaintiffs has constrained this Court from proceeding to do so.

Paragraph 13/9/6 of the said Rules provides as follows:

> *"If it is desired to set the judgment aside for irregularity the irregularity must be specified in the summons (0 2 r 2(2)). The affidavit in support should state the nature of irregularity and the circumstances under which the alleged default has arisen".*

The use of the word "must" in the foregoing paragraph means that it is obligatory to specify the irregularity. And since the summons filed by the Defendant in this action does not specify the irregularity it follows therefore, that the Defendant cannot rely on the alleged irregularity.

In the premises, this Court declines to set aside the default judgment obtained herein on the ground of irregularity.

Does the Defendant have a defence on the merits?

Order 13 Rule 9 of the said Rules gives the Court jurisdiction to set aside or vary any judgment entered in pursuance of this Order. And where the judgment is regular, it is an inflexible rule that there must be an affidavit of merits, i.e. an affidavit showing a defence on merits (see: **Farden v Richter** (1889) 23 Q.B.D. 124.

This Court has carefully examined the Affidavit of **Yasin Domasi**, of counsel, filed in support of the application to set aside the default judgment and is inclined to concur with the submission of the Plaintiffs that the said Affidavit does not disclose a defence on the merits. The Affidavit is stating evidence and not facts which is precluded by the Rules of pleadings (see: Order 18 Rule 7 of the said Rules & the case of **North West Salt Ltd v Electrolytic Alkali Co. Ltd** [1913] 3 K.B. 522). In the premises, the default judgment cannot be set aside on this ground either.

Albeit this Court has concluded that the default judgment could not have been set aside on the two grounds of irregularity and the failure by the Defendant to disclose a defence on the merits to the Plaintiffs' claim, the fact that the default judgment entered herein is for

declarations or declaratory orders has, somehow, exercised this Court's mind. It is trite that declarations of default ought not to be made (see: **Wallersteiner v Moir (Moir) v Wallersteiner & Others** [1974] 1 W.L.R. 991at pp1028 & 1029 per **Bucley L.J**. where he had this to say:

> *"Following the prayer in the counterclaim, it contains a large number of declarations, including declarations that the DR Wallersteiner has been guilty of fraud. I am more familiar with the practice in the Chancery Division than in any other division of the High Court, but it is probably in the Chancery Division that more use is made of declarations than elsewhere. It has always been my experience and I believe it to be a practice of very long standing, that the court does not make declarations of right either on admissions or in default of pleading. A statement on this subject of respectable antiquity is to be found in* ***Williams v Powell*** *[1894] W.N. 141 where* ***Kekewich J****. whose views on the practice of the Chancery Division have always been regarded with much respect, said that a declaration by the court was a judicial act, and ought not to be made on admissions of the parties or on consent, but only if the court was satisfied by evidence. If declarations ought not to be made on admissions,* a fortiori *they should not be made in default of defence, and* a fortissimo, *if I may be allowed the expression, not where the declaration is that the Defendant in default of defence has acted fraudulently."*

This Court fully subscribes to the above-quoted views of **Bucley L.J**. and finds the same to be representing the correct position at law, *nescit vox missa reverti*. This is in fact the spirit behind the provisions of Order 13 Rule 6 of the said Rules which preclude the entering of a judgment in default where the claim endorsed on the writ does not fall within the provisions of Rules 1to 4 of the said Order.

For the foregoing reasons, this Court cannot thus allow the default judgment obtained herein on the 18th day of November, 2016 to stand.

In answering the main issue above-stated, the Assistant Registrar did not therefore, err in setting aside the said default judgment. It is only as to the reasons for setting aside the said judgment that the said Registrar erred.

Conclusion:

The default judgment recorded in this action on the 18th day of November, 2016 shall therefore, stand set aside, though on grounds different from those on which the Assistant Registrar had set it aside.

The costs:

The costs of an action are in the discretion of the Court and normally follow the event. In the present appeal the Defendant has the default judgment obtained herein set aside and is to that extent the successful party, but the reasons upon which this Court has decided to do so are different from those advanced by the said Defendant. In the premise, it is the view of this Court that a fair order on costs ought to be that each party should bear its own costs of this appeal. It is so ordered.

Dated this.....13th..... day of... .....July....., 2018.

CHIRWA J
JUDGE