



REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 151 OF 2018

**BETWEEN**

MOLESI WADRECK.....CLAIMANT

**AND**

GALA ESTATE LIMITED.....DEFENDANT

Coram: **WYSON CHAMDIMBA NKHATA (AR)**

Mr. Supedi - of Counsel for the Claimant

Mr. Kara- of Counsel for the Defendant

Mr. Chitsulo- Court Clerk and Official Interpreter

**RULING**

This matter was commenced by writ of summons issued on the 10<sup>th</sup> of April 2018. The claimant is claiming damages for pain and suffering, loss of amenities of life, disfigurement and costs of this action. A default judgment was entered for want of entering an appearance by the defendant. Subsequently, Counsel for the defendants filed an *ex-parte* application for stay of assessment of damages and any execution pending an application to set aside the default judgment. The application was granted by Honourable Justice N'riva who ordered that the defendant could proceed with the application to set aside the default judgment before the Registrar. This is the defendant's application to have the default judgment set aside.

The application is supported by a sworn statement by Jonathan Kara of Counsel in which he deposes that he is advised by the purported defendant that they were never served with the Writ of Summons nor a notice of hearing in this matter and therefore never had an opportunity to have this matter defended. He further deposes that the purported defendants were only recently served with notice of assessment of damages by leaving the same at the purported defendant's estate. He believes that failure to serve the purported defendant the originating process has greatly prejudiced them. In addition to, this, he contends that the claimant in the affidavit of service allege that they affected service by hand delivery at the purported defendant's farm at Thondwe. He is of the view that the service was not effective as it was not done according to the rules of procedure and was in any event in contravention of the provisions of the Companies Act. He further states that the purported defendant's registered office is in Limbe along Robert Mugabe Highway. He exhibits a copy of the company's registration statement and certificate on change of name marked "JK1". He further deposes that he is advised by the defendants that they believe they have a meritorious defence.

On the other hand, there is a sworn statement by Counsel for the claimant Noel Supedi in which he avers that the claimant commenced proceedings against the defendant claiming damages for personal injuries. He deposes that the defendant refused to acknowledge receipt of the writ of summons. He further stated that the Process Server left the summons within the precincts of the defendant at their secretariat at Thondwe because it has always been a known fact to the claimant that the defendant's Head Office are situated in Thondwe. It is also stated that throughout all the claimant's dealings with the defendant, he has never been aware that the Gala Estate Limited changed name to Namadzi Tobacco Limited Company. He further contends that the exhibit marked JK1 does not validate a claim by the defendant that gala estate now operates as Namadzi Tobacco Limited Company. He also pointed out that in the absence of a valid document (certificate of Change of Name) to substantiate a proposition that Gala Estate Limited Company now operates Namadzi Tobacco Company Limited it would mean the two are separate non-connected companies and would also mean that the defendant is misleading the court. Counsel verily believes that in the circumstances, the defendant's claim that they have a meritorious claim must fail. He is of the view that the defendant want to use the machinery of court to oppress the claimant and deny him fruits of his litigation.

Under order 12 rule 21(3) of the Courts (High Court) (Civil Procedure) Rules 2017 the court is given the discretion to set aside a default judgment upon being satisfied that the defendant has shown reasonable cause for not defending the application and has a meritorious defence, either about his



liability for the application or about the amount of the application. Lord Atkin in **Evans V Bartlam** [1937] A.C. 473 at 480 clearly stated the principle behind it all. He said,

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 coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

In the present case, the gist of the defendant's case is that the default judgment was irregular. They contend that they were not served with the originating summons in tandem with the dictates of the Companies Act. The defendants have tendered a registration statement for the company to show that it is a body corporate governed by the Companies Act. Section 137(1) of the Companies Act provides for the service of a writ of summons upon a company and requires that the writ may be left at the company's registered office or be sent to its registered postal address for there to be proper service. In this instance, the summons was left at Gala Estate which place the claimant throughout his dealings with the defendant verily believed to have been the defendant's principal place of business. I believe that that constituted proper service. However, the defendants argue that their principal place of business is at Limbe along Robert Mugabe Highway and in fact they are registered as Namadzi Tobacco Limited Company. I wish to join Counsel for the claimant in that the document tendered herein does not in any way attest to change of name by Gala estate. It is more of a registration statement and nothing else. One is inclined to believe that Gala Estate and Namadzi Tobacco Company are two different entities. I risk delving into matters that are supposed to go before the trial judge. Suffice to say this court believes the service herein was proper on the strength that this is the place the claimant knew as the principle place of business and there is no evidence indicating that in fact it was not.

All the same, having been satisfied that the default judgment herein is a regular judgment, for the defendants application to succeed there must be a sworn statement on merits or the defendant must show that he has a meritorious defense **Alpine Bulk Transport Co. Inc; -v- Saudi Eagle Shipping Co. Inc; The Saudi Eagle** [1986] 2 Lloyd's Rep. 221.

- a. That such injuries, loss and damage were caused wholly by the plaintiff's own negligence.
- b. That the claimant failed to follow set rules and procedures while carrying out his duties.

- c. That the claimant failed to take any or any adequate measures for his own protection to prevent injury.
- d. That the claimant failed to take heed of his surroundings so as to prevent injury to himself:
- e. That the claimant failed to use or effectively use tools provided for the execution of his duties.
- f. That the claimant with full knowledge and understanding of the danger arising from the risk he put himself to voluntarily accepted the risk of injury arising from each and every one of the acts and omissions complained of in carrying out the work.

In paragraph 12 of the sworn statement in support of the application the defendant further set the following ground for contending existence of a meritorious defence: *that there is no such entity/company in the name of Gala Estate Limited. The purported defendant is therefore a nonentity and unable to be sued.*

As I have already intimated my sole duty is to determine whether the defendant has a meritorious defence or not. In this case, the defendant attributes the whole issue of negligence on the part of the claimant himself. I take note that the defendant has outlined what they purport to be the claimant's failure to observe safety measures at the work place. In my opinion, this is contentious and as such it is a matter which can be properly determined by the trial judge after hearing both parties.

Observably, the claimant however has further argued through Counsel that it would be unjust for the court to exercise its discretionary powers in favour of the defendant as the same would be denying the plaintiff the fruits of the judgment to which he is entitled and therefore it would be prejudicial to him. In the matter of **Day v RAC Motoring Services Ltd.** [1999] 1A11 ER 1007 on page 1011 Ward, LJ had this to pay:

At the heart therefore of this discretionary exercise is the need to do justice. Justice has to be done both to the plaintiff, to the defendant and, ofcourse, and especially in this day and age, to the whole process of the administration of justice in these courts.

The learned Lord Justice further quoted Lord Atkin in the case of **Evans v Bartlam** [1937] 2 All ER 646 at P. 650 who said the following:

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

Essentially, I must satisfy myself therefore as to whether the defendant has an arguable defence which carries some degree of conviction. I should not deny the defendant the opportunity to argue their case just because they inadvertently failed to file a defence. It is clear from the argument by Counsel for the defendant that the defendant intends to defend this matter. That is what I must be satisfied with **Gainshaw v Bumbar** [1958] 1 All ER 350.

In the matter at hand the defendant has shown that there is a contentious issue which must be determined at trial. The defendant has therefore satisfied the test and established that there is an arguable defence. I therefore grant the defendant application and set aside the default judgment obtained herein. The defendant shall serve its defence on the plaintiff within 7 days after service of this order on the claimant.

Costs for this application are for the claimant.

MADE IN CHAMBERS THIS 11<sup>th</sup> DAY OF SEPTEMBER 2018.



**WYSON CHANDIMBA NKHATA**

ASSISTANT REGISTRAR