JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO 91 OF 2018

BETWEEN

HELLEN BANDA ..... CLAIMANT

AND

MALAWI HOUSING CORPORATION ..... DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Mickeus, of Counsel, for the Claimant
Mrs. Mzanda, of Counsel, for the Defendant
Mrs. Doreen Nkangala, Court Clerk

RULING

Kenyatta Nyirenda, J.

There is before this Court an application by the Defendant to set aside a regular default judgment entered in favour of the Claimant. The default judgement was obtained after the Defendant had failed to file and serve its Defence within the prescribed period of 28 days from the date the writ of summons was served on the Defendant. The application is brought under Order 12, r.21, of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as "CPR"].

The background to the application can be briefly stated. The Claimant commenced an action against the Defendant on 22nd March 2018 and the Statement of Claim is couched in the following terms:

> *"1. The Claimant is a tenant of the Defendant's house number NP/555 at Naperi in the City of Blantyre within the Republic of Malawi.*
>
> *2. The Claimant started staying in the Defendant's house as a tenant in the year 2004*
>
> *3. The Defendant is a statutory housing corporation providing houses to various individuals and institutions in the Republic of Malawi.*

4. *On or about the 20th day of March, 2018 the Claimant avers that the Defendant through its servants and/or agents came to the house herein and locked the same without any justification.*

5. *The Plaintiff avers that she tried her best to reason with the Defendant's management not to close the house but to no avail citing that it was only the Regional Manager who could handle the issue.*

6. *The Claimant avers that at some point he had rental arrears but states that at the time of eviction she had cleared the arrears as such there was no basis of the eviction.*

7. *The Claimant avers that in removing her items from the house, the Defendant broke her items like dressing table, bed side lamps, curtains, sofa set.*

8. *The Claimant contends that the actions of the Defendant have occasioned serious inconvenience, embarrassment, damage and loss to her and her family.*

Particulars of inconvenience & embarrassment and loss

(a) The Claimant and her family are rendered homeless

(b) The Claimant's family is sleeping

(c) The Plaintiff and her family were sleeping on bare floor outside the house being exposed to the cold weather and mosquitoes during the night as the house was locked

(d) The Claimant and her family were denied all the pleasure and the comfort that comes with the stay in the house

(d) The Claimant items were damaged."

9. *The Claimant will contend at trial that the Defendant was not entitled to evict her as she had no arrears at the time of eviction and will contend at the trial that the Defendant in locking, entering and removing the Claimant's property from the house amount to trespass to her property.*

Wherefore the Plaintiff claims:-

a) Permanent injunction restraining the Defendant, its agents and/or servants from evicting the Plaintiff from house number NP/555 at Naperi in the City of Blantyre

b) Damages for trespass.

c) Damages for inconvenience.

d) Cost of replacing the damaged items.

e) Costs of this action."

The Claimant also applied for an order of interlocutory injunction restraining the Defendant from evicting the Claimant from house number NP/555 at Naperi in the City of Blantyre (the house) and the injunction was duly granted.

The Defendant having filed and served no Defence within the prescribed period, the Claimant obtained judgement in default on 26th April 2018. On 23rd May, 2018, the Claimant filed with the Court a Notice of Assessment of Damages, including the Claimant's Bundle on Assessment of Damages.

The application herein was filed with the Court on 1st June 2018. The application is supported by a sworn statement of Mrs. Okota Mzanda. The material part of the sworn statement provides as follows:

> *"3. **THAT** on or about the 26th March, 2018 the Claimant obtained an exparte order of injunction restraining the Defendant from evicting the Claimant and thereafter the Claimant commenced proceedings against the Defendant by way of summons served on 28th March, 2018.*
>
> *4. **THAT** upon being served with the court process the Defendant set about to look for the file pertaining to the house that the Claimant was residing in but it could not be found, thereby inadvertently missing the court deadline for filing the defence.*
>
> *5. **THAT** upon finding the file and having prepared its defence to file at the court on 25th May, 2018, the Defendant discovered that there was a default judgment on the file: it set about to prepare an application to have the default judgement set aside but was in the process served with an application by the Claimant for assessment of damages*
>
> *6. **THAT** however, it is in the interest of justice that the Defendant be given the liberty to defend this matter on the merits as there was a valid reason for evicting the Claimant for defaulting in rentals from the Defendant's house as evidenced by Customer Activity Report exhibited hereto as "OM1"*
>
> *7. **THAT** the meritorious defence of the Defendant is exhibited hereto as 'OM2'."*

The Claimant is opposed to the application on two grounds, namely, that the Defendant does not have (a) a good reason for failing to file a defence within the prescribed period and (b) a meritorious defence. The grounds were dealt with in the Claimant's Skeleton Arguments thus:

> *"4.1 The Judgment herein was regular. The Claimant duly served the Defendant but the Defendant chose not to file a defence within the prescribed 28 days from the date of service. The Claimant had just been evicted from the Defendant's house, hence the action. It suffices to say that the facts relating to the eviction of the Claimant from the Defendant's house were still fresh. One cannot talk of the missing of the file as a ground for failing to file a Defence within the prescribed time. The facts*

were still fresh. That is a total fabrication aimed at just covering the lapses by the defendant. There is not good reason justifying the failure to file the Defence.

4.2 Assuming indeed the file was missing, counsel ought to have filed an application for extension of time within which to file defence. That never took place. The Defendant was quite aware of the proceedings and the lapsing of time yet they took no action to remedy the situation. They slumbered on their right and they law cannot come to their rescue. That will be an abuse of the court process.

4.3 There is no legally compelling justification as regards to why the Defendant failed to file her defence within 28 days or apply for extension of time if they had difficulties in filing their defence within 28 days. Even just to file a holding defence, they never did that. Our judicial system will simply collapse or be overwhelmed with extraneous applications should litigants be allowed to apply to set aside regular judgment on wobbly reasons like in the present case. Counsel for the Defendant is an internal legal counsel who ought to have known the consequences of not filing a defence within the prescribed time. Allowing the present application will promote in our view the indolent and sluggish approach taken by counsel in defending matters in our courts of law.

4.4 Even looking at their proposed defence, we see no merits. The question is, was the Claimant in default at the time of eviction? What was the reason for eviction? According the Defendant, the Claimant was in in arrears on rentals which according to the customer activity report, it is in fact the Defendant who owe the Claimant MK360.00."

Counsel Mickeus buttressed his submissions by referring the Court to Order 1, r. 5(1), of CPR. The subrule sets out the overriding objectives of CPR as follows:

"The overriding objective of these Rules is to deal with proceedings justly and this includes-

(a) *ensuring that the parties are on an equal footing;*

(b) *saving expenses;*

(c) *dealing with a proceeding in ways which are proportionate to the-----*

(i) amount of money involved;

(ii) importance of the proceeding; and

(iii) complexity of the issues;

(d) ensuring that a proceeding is dealt with expeditiously and fairly; and

(e) allocating to a proceeding an appropriate share of the Court's resources, while taking into account the need to allocate resources to other proceedings."

In her submissions, Counsel Mzanda attributed the Defendant's failure to file a defence within the prescribed period to the fact that the matter was operationally being dealt with by the Defendant's Regional Office and not the Defendant's Head Office. She invited the Court to note that the Defendant's Regional Office and the Defendant's Head Office are separate and that the former Office deals with so many clients. It was thus contended that it is not reasonable to expect an officer to memorise all the situations pertaining to a particular matter and this explains why they have to resort to records as kept on files.

Order 12, r. 21, of CPR governs the setting aside of judgement in default and it reads as follows:

> *"(1) A defendant against whom judgment in default has been entered may apply to the Court to have the judgment set aside.*
>
> *(2) The application under sub rule (1) may be made not later than three 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 three 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 interests of justice to do so;*
>
> *(c) give details of the defence to the application; and*
>
> *(d) have a sworn statement in support of the application.*
>
> *(3) 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; and*
>
> *(b) has a meritorious defence, either about his liability for the application or about the amount of the application.*
>
> *(4) At the hearing of the application, the Court shall–*
>
> *(a) give directions about the filing of the defence and other statements of the case;*
>
> *(b) make an order about the payment of the costs incurred to date;*
>
> *(c) consider whether an order for security for costs should be made; and*
>
> *(d) make any other order necessary for the proper progress of the proceeding."*
> – Emphasis by underlining supplied

To my mind, Order 12, r. 21, of CPR re-affirms, more or less, the principle that unless and until the court has pronounced a judgment upon the merits or by consent of parties, the court has powers to revoke the expression of its powers. This principle

is often traced to the dictum of Lord Atkin in **Evans v. Bartlam [1937] A.C. 473 at 478:**

> *"Both rules, Order XIII., r.10, and Order XXVII., r. 15, gives discretionary power to the judge in Chambers to set aside a default judgement. The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgement was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has prima facie defence.. It was suggested in argument that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgement was allowed to go by default, such as a mistake, accident, fraud, or the like. I do not think any such rule exists, though obviously the reason, if any, for allowing judgement and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgement set aside who knew at the time and intended that there should be a judgement signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the Court has pronounced a judgement upon the merits or by consent, it is to have the power to revoke the expression of its coercive powers where that has only been obtained by a failure to follow any of the rules of procedure"* – [Emphasis by underlining supplied]

The principles in **Evans v. Bartlam**, supra, as expounded on by subsequent English cases such as **Alpine Bulk Transport Co Inc v. Saudi Eagle Shipping Co Inc [1986] 2 Lloyd Rep 221** and **Day v. RAC Ltd [1999] ALL ER 1007,** have been repeatedly applied in Malawian cases: see, for example, **Development of Malawi Traders Trust v. Kachipande and Another [1997] 2 MLR 260** and **Thindwa v. Attorney General [1997] 2 MLR 260**.

From these authorities, the following proposition may be advanced. Although the primary consideration by a court in exercising its discretion to set aside a default judgement is whether the defendant has merits to which the court should pay heed, the court has also to consider the reason or explanation of the defendant for the delay or failure to comply with the rules. In light of the foregoing, an application to set aside a judgement in default must be accompanied by a sworn statement (a) offering a reasonable explanation for the failure of the defendant to appear and defend at the proper time and (b) showing a defence on merits.

Having considered this matter, including the submissions by both Counsel, I agree with Counsel Mickeus that the reason given by the Defendant for its failure to file its defence within the prescribed period lacks substance. I fail to understand how the Defendant could have embarked on the exercise of evicting the Claimant without first of all ascertaining the state of facts on the file on which this matter rests.

Further, I am at a loss as how the fact that the Defendant's Head Office and the Defendant's Regional Office are separate is of relevance bearing in mind that both offices are situated in Blantyre. In any case, irrespective of the number of files that

the Defendant keeps in relation with its tenants, I have great difficulties in comprehending why it should take more than 28 days to find the file pertaining to Defendant's house number NP/555. Furthermore, I believe it would be unfair to punish the Claimant for the Defendant's poor record keeping.

All in all, the application lacks merit and it is dismissed with costs.

Pronounced in Chambers this 3rd day of September 2018 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE