



REPUBLIC OF MALAWI



## IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 340 OF 2018

BETWEEN:

BENNET KALAVINA .....1<sup>ST</sup> CLAIMANT

McDONALD KALAVINA.....2<sup>ND</sup> CLAIMANT

FRANCIS KALAVINA.....3<sup>RD</sup> CLAIMANT

MADALITSO KALAVINA.....4<sup>TH</sup> CLAIMANT

AND

ELECTRICITY SUPPLY CORPORATION OF MALAWI LIMITED.....DEFENDANT

### CORAM

**Mrs T. Soko** : ASSISTANT REGISTRAR

Mr Mickeus : Counsel for the claimant

Mr Chimowa : Counsel for the defendant

Mrs Mkandawire : Court Clerk

### RULING

#### BACKGROUND

The claimants herein commenced an action against the defendant claiming damages for false imprisonment, defamation and costs of action. The brief facts aver that on 5<sup>th</sup> June 2013, around 3:00 hours the claimants were arrested at their home Manase on the alleged charges of illegal connection of electricity and vandalism. They were locked up at Blantyre police station for seven days and afterward they were released on bail. On 20<sup>th</sup> December 2018, the claimants obtained a default judgments after the defendants failed to file a defence. On 14<sup>th</sup> February 2019, the defendant filed an application to set aside the default judgment.

## EVIDENCE

The application was supported by a sworn statement of Ted Roka. On the date of hearing, the defendant appeared through Counsel Chimowa of Kalekeni Kaphale lawyers. He adopted a sworn statement by Mr Roka and stated that the claimants commenced the following action in October 2018. The documents were served to the defendant on November 2018, but the defendant did not file the defence due to the fact that the documents which were served on the defendant were misplaced by the officer who accepted service and the defendant knew about the proceedings when they were served with a notice of assessment of damages. It was added that the service was effected at ESCOM House while the legal department is in Umoyo House. Further, it was stated that there has been no delay in making the application as it has been made only 2 months after the default judgment was entered against the defendant and hence within the 3 months period required under the Rules.

Counsel stated further that the defendant has a meritorious defence to the claim the defence being that the defendant never procured the arrests of the claimants. Rather, the defendant simply reported cases of illegal connection of electricity and vandalism of the defendant's property to the police and police arrested the claimants following their own investigations of the matter. Lastly, Counsel stated that the defendant is desirous of defending the matter so it can be heard on merits of the claim.

In reply, Counsel for the claimant stated that the reasons advanced by the defendant that they misplaced the summons is not a good reason and lack substance. Counsel stated that it is a poor case management by the defendant and that in itself cannot qualify as a good reason for failure to file a defence within the prescribed time. Counsel went further to state that the administration problems cannot be used as a tool to prejudice the claimant's claim. Counsel argued that if the summons went missing, then the assessment bundle which was served to them on 18<sup>th</sup> January 2019 would have acted as a reminder. Besides, Counsel stated that the defendant appeared on the date of assessment and sought the adjournment to prepare for the assessment. Counsel added that it is uneconomical to set aside the default judgment at this level when the claimants have filed all the relevant documents. He said the matter is at an advanced stage and it will be prejudicial to set aside the default judgment at this level.

In responding, the claimant's Counsel for the defendant admitted seeking adjournment on the basis that he had just received a notice of assessment of damages and wanted to receive clear instructions from the defendant. Counsel added that the fact that the application is coming within a prescribed time it should give the court the impression that it was made within the prescribed time. Counsel then stated that we have the

new Civil Procedure Rules which state that Courts should look at the substantive justice other than technicalities because the same will prejudice justice.

## THE LAW

### SETTING ASIDE A DEFAULT JUDGMENT

Order 12 r. 21 (9)(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 **Hellen Banda vs Malawi Housing Corporation Civil Cause No. 91 of 2018** Honourable Justice K. Nyirenda said the following:

*Although the primary consideration by a Court in exercising its discretion to set aside a default judgment 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 rules. In light of the foregoing, an application to set aside a judgment 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 (b) showing a defence on merits.

**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**

Having considered the sworn statement by the defendant and submissions and having considered arguments by Counsel for the claimant I find that the defendant has not shown a reasonable cause or explanation for the failure to defend the action on time. The reason advanced by the defendant that the officer who received the summons misplaced it lacks substance in essence and it an internal matter that does not concern this court. The evidence before this Court and the Court record shows that the claimant served the defendant and the defendant acknowledged service which means the service was regular. It was the duty of the Officer who received the summons to forward it to the legal department. The blame must not be placed on the claimant when the claimant instituted a proper service. As stated in the Banda case, it would be unfair to punish the claimant for the defendant’s poor record keeping.

Counsel for the defendant citing the Court (High Court) (Civil Procedure) Rules stated that substantive justice must be considered rather than technicalities. **In Samuel Nangatani vs Yolasi Divala etal Civil appeal cause No. 25 of 2013 Justice Mwaungulu stated the following:**

*The procedural rules laid are not supposed to be obeyed in breach on the understanding that judges will regard them as more technicality. Procedural justice is not subservient to substantive justice. Most often substantive justice is hardly achieved by undermining procedural justice. Procedural justice is integral to substantive justice. Show me good substantive justice and I will demonstrate to you that there was procedural justice in the first place.”*

In the light of the foregoing, I dismiss the defendant's application in its entirety with costs.

Made on this 20<sup>th</sup> day of May 2019



**T. SOKO**

**ASSISTANT REGISTRAR**