REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 990 OF 2019

BETWEEN

STEVEN MIKEYASI.....CLAIMANT

AND

CASTEL MALAWI LIMITED.....DEFENDANT

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

Mr. Mpaka - of Counsel for the Claimant

Mr. Kalanda - of Counsel for the defendant

Mr. Chimtengo - Court Clerk and Official Interpreter

RULING ON AN APPLICATION TO SET ASIDE THE DEFAULT JUDGMENTS

This is an application to set aside default judgment brought under order 12 rule 21 as read with order 25 rule 1 of the Courts (High Court) (Civil Procedure) Rules, 2017 (hereinafter CPR, 2017). The Plaintiff commenced the present proceedings claiming damages for injuries sustained whilst working at the Defendant's premises. The Summons was filed on 25th November 2019 and served on the Defendant on 19th January, 2020. Following the Defendant's failure to file and serve its List of Documents and Defence within the prescribed time, on 25th

March 2020, the Claimant filed an application for default judgment which was signed by the Court on 24th July, 2020. On 28th August, 2020, the Claimant served the Defendant with a notice of assessment of damages and an assessment bundle. When the matter came for assessment on 3rd September, 2020, the Defendant's Counsel sought an adjournment on the ground that he wanted more time to enquire on how best he could assist the Defendant in managing the case. The matter was accordingly adjourned to 17th September, 2020. On the adjourned date, the Defendant's Counsel did not attend the assessment. The Court proceeded to assess the damages in the Defendant's absence. On 24th September, 2020, the Court awarded the Claimant damages in the sum of K6.8 million. The Order on assessment was served on the Defendant's lawyers on 25th September, 2020. On 7th October 2020, the Defendant filed an application to set aside the default judgment on the ground that it has a defence on merit.

The application is supported by a sworn statement sworn by Patrick Mpaka of Counsel. The substantive part of the sworn statement is to the effect that the claimant commenced these proceedings on the 8th of January 2020 against the defendant herein claiming damages for pain and suffering, damages for loss of amenities of life and damages for disfigurement arising from an accident which occurred at the defendant's premises in Makata Industrial site in Blantyre. The court process was served on the Defendant on 19th January, 2020. The defendant then forwarded them to its insurance brokers Hubertus Clausius Malawi Limited to handle the claim on their behalf he exhibits a copy of the communication to the brokers marked "PGM1". The defendant thereby believed that the matter was being managed through the said brokers and their insurers and omitted to put in a defence. It was only around 28th August 2020 the defendant discovered that nothing was being done through the insurers. This was after being served with an assessment bundle implying that a default judgment had been entered. Contrary to the rules of practice, the said default judgment had not and has not to date been served on the defendant and the hearing on assessment of damages had already been scheduled for 3rd September, 2020.

Counsel further avers that their firm was then appointed to represent the defendant. On the 2nd September, they wrote the claimant requesting for a copy of the default judgment based on which the assessment was founded as it is required by the law. The claimants have not served them with the copy of the default judgment up to date. He exhibits a copy of the said letter marked "PGM2". He further avers that on the appointed date of assessment, they asked for adjournment in order to make further enquiries on the matter considering the short period they had between the day of appointment and the date of assessment. The court granted the adjournment and the matter was set for 17th September,2020. On the said date, he failed to attend hearing because he was

taken ill and the same was communicated to the claimants through Whatsapp. However, by the time Counsel saw his text he had proceeded with the matter. Later, he obtained an order on assessment of damages dated 25th September, 2020. In the light of the judgment, the claimant is at liberty to execute the default judgment sum on the defendant. However, the defendant would like to defend this action and intend to file a defence to the claimant's claim herein and verily believe that the defendant has a defence on merit. He exhibits a copy of the proposed defence marked "PGM3". In any case, the defendant would like to add in the claimant's employer Messrs Greenland Services and the Defendant's insurers and/or brokers to deal with all the circumstances of their failure to take up responsibility under the relevant scheme. It would therefore be in the interest of justice to set aside the default judgment and allow the defendant to defend the matter.

In opposition to the application, the claimant through Counsel filed skeleton arguments and I shall refer to them as and when necessary.

Principally, the issue herein is whether the default judgment should be set aside. Order 12 rule 21(3) of the CPR 2017 provides that the Court may set aside the judgment in default if it is satisfied that the defendant has shown reasonable cause for not defending the application and has a meritorious defence. Indeed, the court is entitled to set aside a default judgement if there is a defence on the merits and a defence on the merits is one that is deemed to have reasonable prospects of success. These principles were enunciated in the cases of **Evans v Bartlam 1937 AC 473** and **The Saudi Eagle [1986] 2 Lloyd 221**, which counsel for the plaintiff did cite in his skeleton arguments. In as far as this case herein is concerned, it is imperative to add that the law under order 12 rule 21(2)(b) of the CPR provides that where the application is made more than 3 months after the judgment was entered, the defendant shall 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.

In the present case, the claimant motivates the court to take into consideration the philosophy behind order 12 rule 21 of the Rules. He explains that the Rules were meant to balance overriding objectives of the court to do justice between parties before the court and not to deliver justice on technicalities unless it is just to do so. He brings to the attention of the court the Supreme Court decision in **Robert Herriot Martin v Flore-Anne Suzgo Kamanga** MSCA Civil Appeal No. 34 of 2014 in which it was held as follows:

The MSCA adopted a similar approach in MEC & Billy Kaunda v Harry Mkandawire MSCA 67/09 (Unrep). It thought better to deal with matters of substance than procedure. it accordingly allowed the appellants to argue an applicationas if the same had been formally brought within the time stipulated in Practice Direction Number 2 of 2009 when such was not the case at all.

Counsel submits that the approach of the court to application like the present centres on implementation of the following key principles and prescriptions of the law as applied to the facts before the Court, namely:

a. That the cross-cutting objective of the Court remains to determine the substantive rights of the parties;
b. That the application of any rules of procedure should be "in a manner that enhances rather than impedes the potential for trial on the merits;
c. That the Court must evaluate any procedural lapses in the conduct of the litigation in context by considering "all the facts and applying established principles bearing in mind that it has to do justice" and do so primarily on the merits; and
d. That in light of statutory guidance as to management of time lines as stipulated in provisions such as s.47 General Interpretation Act and s.4(a) of the Limitations Act, Courts will not be too eager to refuse to hear the case on the merits if chances of a fair trial abound. Unless substantial risk not curable by a costs order is shown that it is not possible to have a fair trial the Court will not refuse to set aside process obtained through technical glitches.

This is very true but the principle should never be made the instrument of injustice. We ought to bear in mind that there is that need for the orderly processes of judicial procedure which requires an end to litigation. Indeed, the court needs to consider the facts and apply established principles bearing in mind that it has to do justice to both parties. O.12 r, 21(2), provides that the application to set aside judgment may be made not later than 3 months after the judgment is entered and such application should (a), set out reasons why the defendant did not defend the application and (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 interest of justice to do so. I have observed that the application is being made about 2 ½ months from the time the default judgment was entered. The question therefore is whether the defendants have proffered a plausible reason for the court to entertain this application.

In paragraphs 4 to 6 of the Defendant's sworn statement in support of the application herein, the Defendant tries to give reasons for not defending the matter. According to the Defendant, upon being served with the summons in January, 2020, it forwarded the same to its brokers to handle the claim on its behalf. The broker decided to sit on the summons. It was only when it was served with the assessment bundle on 28th August 2020 that the Defendant realized that the broker did not do anything. Counsel for the claimant wants the court to consider that the reason advanced by the Defendant was unsuccessfully raised in **Express (K) Ltd v Patel (2001) 1 EA 54 (CAK)**. Counsel for the defendants argues that in the East African case, the decision was not informed by the Rules obtaining in our jurisdiction. However, the claimant also cited a Malawian case of **Chikondi Banda v. Satemwa Tea Estate**, Personal Injury Cause Number 219 of 2016 in which upon receiving the court summons, the defendant passed it on to its insurance brokers to handle the matter as per the parties' agreement. The brokers did nothing and referred the summons back to the defendant. However, by then, the claimant had already entered default judgment. At page 4, the Court said:

> "The affidavit in support by the defendant does not disclose a valid reason serve for an administrative lapse within the defendant's organization. I find this as no plausible reason to delay the assessment of the plaintiff claims based on the default judgment."

Similarly, in this case no reasons have been given by the Defendant for its broker's failure to serve a defence. The broker itself has not explained why it simply sat on the summons. Clearly, if the broker chose to sit on the summons and statement of claim herein, these are the Defendant's own internal administrative problems/arrangements which should not affect the Claimant's right to reap the fruits of his litigation simply because the defendant can pay costs for the inconvenience occasioned.

Apart from that, the assessment proceedings took place in the absence of the defendant's lawyer when he was fully aware of the proceedings. He says he was not feeling well and it is agreed that sickness is a very valid reason for seeking an adjournment. However, Counsel ought to have sent another lawyer from his law firm on brief to seek an adjournment. In fact, as suggested by Counsel for the claimant, the Court takes judicial notice that on this day, an associate from Destone & Company, Counsel Given Phiri, appeared before the Court in another matter. All in all, this goes to the seriousness with which the defendant wants to conduct this matter.

I strongly believe that timelines in the rules are intended to make the process of judicial adjudication and determination swift, fair, just, certain and even-handed. The defendant cannot be allowed whether by themselves

or their brokers/insurers to sit on the matter only to resurface waving a defence and willingness to pay costs to the claimant. Public policy demands that cases be heard and determined expeditiously since delay defeats equity, and denies the parties legitimate expectations (see **Fitzpatrick v. Batger & Co. Ltd [1967] 2 All ER 657**). In the premises, it is the finding of this court that the reason for not defending the matter is not convincing even in circumstances where the court is mindful of the need to deal with matters on merits. I am of the view that allowing the application to set aside the default judgment would be prejudicial to the interests of the claimant. The application to set aside the default judgment is dismissed with costs.

MADE IN CHAMBERS THIS 16th DAY OF NOVEMBER 2020

WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR