Library

THE JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 47 OF 2015

Between

MISHECK MSISKA..... CLAIMANT

-and-

BLANTYRE WATERBOARD.....1ST DEFENDANT

REUNION INSURANCE COMPANY LIMITED.....2ND DEFENDANT

CORAM: Texious Masoamphambe, Deputy Registrar
Mr. Mumba, for the Claimant
Mr. Katuya, for the Defendants
Ms. Makhambera, Clerk/ Official Interpreter

Masoamphambe, Deputy Registrar

RULING

1. Introduction

The claimants commenced the proceedings on 16th January, 2015 against the 1st defendant and the 2nd defendant, for the estate of Frank Nyirenda, deceased. The deceased was involved in an accident caused by the negligent driving of the 1st defendant's driver. The accident took place along Mulanje/Luchenza road. The deceased was a passenger in the said motor vehicle. The 1st defendant herein is being sued for vicarious liabilities and as the owner of motor vehicle registration number BS 5753 Nissan Hard body Twin cab Pickup, insured with Reunion Insurance Company Limited, the 2nd defendants.

The case came on behalf of the dependents of the deceased as they lost their means of support for survival. A default judgement was entered as the defendants brought no defense against the action brought by the claimants. The matter was then supposed to come for assessment of damages, but the defendants have applied to the court herein that the default judgement that was entered against them be set aside.

2. Issue

Whether the default judgement sought by the 2nd defendant should be set aside

3. Analysis

The defendants seek to set aside the default judgement following the Civil Procedure Rules 2017, **Order 12 r21(1) of the Civil Procedure Rules 2017**, which provides that a defendant against whom judgement in default has been entered may apply to the court to have the judgement set aside. However, **sub rule (2)** goes on to say that the application under **sub rule (1)** may be made not later than 3 months after the

judgement 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 judgement was entered, explain the delay; and the court shall not set the judgement aside, unless it is satisfied that it is in the interests of justice to do so.

The 2nd defendant states that they did not defend the application as they were not aware of the proceedings. On 10th January, 2020, the 2nd defendant was served with a notice of appointment to assess damages, wherein the defendants upon searching in their system could not find any evidence of existence of any claim or action between themselves and the claimant. This is so as they were not served by the claimants or there could be a possibility that the documents were served but got misplaced within their system and were never brought to the attention of the responsible officers on the same. It is only now when the defendants were served with the notice that the matter comes to court for assessment of damages notice when they became aware of the proceedings.

However, the claimants state that they served the 2nd defendant a writ of summons and statement of claim therein attached in their sworn statement which has the 2nd defendant's stamp evidencing receipt of the same. Further, the claimants state that on 17th December 2019, the claimant served the 2nd defendants a notice of discontinuance of the action against the 1st defendant, therein, the proceedings were against the 2nd defendant. The claimant contends that whether the notice was not brought to the attention of those responsible for the court proceedings or whether the notice got misplaced is no concern of the plaintiff nor the court as negligence seems to squarely fall on the 2nd defendant. The application therefore must be struck out.

In addition, the 2nd defendant state that they have a meritorious defense against the claimant's claim and therein the default judgement should be set aside. The 2nd defendant therein state that the policy of insurance which was issued to the 1st

defendant in respect of the motor vehicle excluded passenger liability, with an exception to employees of the 1st defendant. The deceased was not an employee of the 1st defendant and therein the insurance policy does not apply to him therein.

The claimant however raised an issue to strike out the application to set aside the default judgement, stating that there has been an inordinate delay of the same. Order 12 is very clear. Where an application to set aside a default judgement is made more than three months' after the judgement was entered, the defendant is supposed to explain the delay; and the court shall not set the judgement aside, unless it is satisfied that it is in the interests of justice to do so.

The claimant cited the following cases to support their view that 5 years is an inordinate delay herein.

In the case of **Crispo Kuleya v Evance Pullu Civil Cause No. 37 of 1986**, the defendant sought to set aside a default judgement after the expiry of two years from the date of judgement. The Registrar Mwaungulu, as he then was, after observing that the judgement was not wrong in form held that two years was unreasonably long particularly in personal injury cases. The matter was dismissed with costs.

In **John G. Kawamba t/a Central Associates Limited v WTC Freight Limited, Civil Cause No. 541 of 1986**, the defendant brought an application to set aside default judgements after consolidating the actions. The application was brought about six months after the default judgement had been entered. The Registrar dismissed the application and on appeal wherein the plaintiff argued that there had been inordinate delay in bringing the action, Mbalame J, as he then was, stated that even though the defendants would have defenses, it would not be in the interest of justice to allow the same after such an inordinate delay.

In the present case, it is my considered view that there has been an unreasonably long delay in bringing an action to set aside the default judgement. Arguments advanced by the respondents, beautiful as the sound, stand on shaky ground. There is no proof that they were not served with the court process that gave birth to the entry of default judgment. Further, the fact that the court process might have been misplaced in their office or that they were not brought to the attention of the right officer in the firm of counsel for the respondents should not surely concern the claimant. Internal lapses in the firm of the counsel for the respondents should not adversely affect the claimant. There is evidence that the writ was properly served on the defendants and the same was properly acknowledged five years ago. Five years is inordinate delay.

4. Conclusion

It is very clear that there is no good reason why this court should not dismiss the present application. I so dismiss it with costs.

Made in chambers this Wednesday, the 5th day of March, 2020 in Blantyre.

Texious S Masoamphambe
DEPUTY REGISTRAR