



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 904 OF 2020

BETWEEN

MAPETO MLONGOTI.....CLAIMANT

AND

DZIWANI KAPASULE.....1ST DEFENDANT

PRIME INSURANCE COMPANY LIMITED.....2ND DEFENDANT

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

Mr. Mickeous- of Counsel for the plaintiff

Mr. Tembo- of Counsel for the defendant

Mr. Amos- Court Clerk and Official Interpreter

RULING

INTRODUCTION

The Claimants commenced the matter herein claiming damages for pain and suffering, deformity and incapacitation, special damages and costs of the action. Apparently, in default of entering a defence by the defendant, the court granted the claimants a default judgment. This is a ruling on an application by the defendant for an order setting aside the said default judgment on the grounds that the judgment was irregularly obtained and that the defendant has a meritorious defence. The application is brought under Order 10 rule 1 and 12, rule 21(1) of the Courts (High Court) (Civil Procedure) Rules, 2017. The application is supported by a statement, sworn by Counsel Tembo. The claimant opposes the application.

THE APPLICANT'S CASE

Counsel for the defendant in his sworn statement points out that the claimant commenced this action against the defendant claiming damages for pain and suffering, damages for deformity and incapacitation, special damages and costs of the action. He avers that the summons was served on the 2nd defendant on the 16th of December 2020. He points out that the defendant had up to 13th January, 2021 to file their defence and on the 11th January, 2021 the defendant duly filed their defence with the court. He, however, indicates that during that time their Counsel Kalua was diagnosed with Covid 19 and was admitted at Queen Elizabeth Central Hospital. In the light of that, their offices were closed and all members of staff had to observe 14 days self-isolation and this was communicated to all legal houses. By reason of the closure the defence was only served on the claimant's Counsel on the 2nd February 2021.

Counsel further avers that on 11th February 2021, the claimant obtained a judgment in default against the defendant for failure to file defence within the prescribed period. He avers that at the time of obtaining the default judgment or even the time of filing the application for the said default judgment, the defendant had already filed the defence and the same was available on the court file. Upon learning that the matter was set down for assessment of damages in April, 2021, their Counsel Kalua engaged the Legal Practitioners of the claimant to have the default judgment set aside by consent. Following the discussions, a draft consent order was drawn and they were waiting to hear from them. It is upon noting that the discussions have proved futile that they filed this application. It is his contention that the default judgment was irregularly obtained and that the defendant has a right to have it set aside as a matter of right.

THE RESPONDENT'S CASE

The claimant, through Counsel, argue that there is no evidence that the law firm was closed at any point. He contends that the assertion is speculative. They further argue that during the peak of Covid 19, documents were being filed electronically and this is also provided for by the law. He contends that the defence was not on the file and that the court would not have proceeded to issue a default judgment if it was there. Further to that, Counsel contends that in their sworn statement in support of this application, the defendant ought to have adduced that they have a defence on merits. He argues that this has not been done. Other than that, Counsel points out that the claimant has been coming for assessment of damages but the issue of setting aside the default judgment has never arisen. In conclusion, Counsel is of the view that should the court be minded to set aside

the default judgment the defendant should pay costs from the date of the default judgment to this application and should paid up front.

THE LAW AND PRINCIPLES

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. Basically, where the default judgment is regular, it is an almost inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating facts showing a defence on the merits (*Farden v Richter* (1889) 23 9.B.D. 124). Thus the major consideration is whether the defendant has disclosed a defence on the merits, and this transcends any reasons given by him for the delay in making the application even if the explanation given by him is false. (*Vann V Awford* (1986) 83 L.S. Gaz 1725; *The Times*, April 23 1986, C.A.). Where there is an irregular default judgment, a defendant is entitled to have it set aside *ex debito justitiae* (see *J.T. Chanrai (Hong Kong) Limited vs. Climax Clothing Manufacturers Limited* 8 MLR 198).

Other than that, under Order 12 rule 21(3), CPR 2017. the court is given the discretion to set aside a default judgment on such terms as it thinks just. Lord Atkin in *Evans V Bartlam* [1937] A.C. 473 at 480 clearly stated the principle behind it all. He said 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 coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

ANALYSIS AND DETERMINATION

Whether the Default Judgment Herein was Irregularly Entered

I have carefully perused all documents filed by the parties and listened to their counsel's submissions. It is clear that the applicant herein seeks to set aside the default judgment on the basis that it was irregularly entered. In a nutshell, they contend that the defence was on the file within the prescribed period. A perusal of the exhibits herein and the documents on the court file seems to ascertain the averment. What is amiss and also admitted by the defendants is that they failed to serve the claimant with the defence within the prescribed period. The reason proffered is that their Counsel was down with Covid 19 and that this was communicated to all legal houses. What struck me as strange is that the court still proceeded to issue a default judgment. Clearly, it does not sum up. Faced with an application for a court to enter a default judgment it is more or less a rule of thumb for the

court to peruse the record to ascertain if the defence has been filed or not. It will be with considerable hesitation for this court to assume that the court did not peruse the file to check if the defence was filed or not. Choosing my words with care, I wish to state advisedly that this smacks of impropriety somehow. In my considered opinion, there is a strong possibility that the defence found its way into the court file after the default judgment was issued. The question “how” may be a different enquiry altogether. Suffice to say that it is not surprising that the question why they failed to serve the claimant electronically has not been convincingly answered. One is compelled to believe that the defendant knew that they would give themselves away that they are filing the defence out of time by sending the defence to the claimant. I must add that when the Covid 19 pandemic was at its peak, the courts did not shut down completely. The Judiciary published guidelines on dealing with matters and in-person appearances. The precautionary measures demanded remote working, video-conferencing and paperless processes such as e-filing of court documents. Any omissions of filing within prescribed time even under the circumstances herein, unfortunate though it may be, is a lapse by the defendant’s firm and it is entirely their fault. I would answer the question whether the default judgment was irregular in the negative.

Whether Defendant Has Shown a Meritorious Defence

Under Order 12, rule 21(3)(a) and (c) of the CPR 2017, the court may set aside a default judgment where a Defendant has shown reasonable cause for not defending and a meritorious defence. With the finding above, the court must now establish whether the Defendant herein has shown a defence on the merits. Basically, the main consideration is whether the sworn statement discloses an arguable or triable issue, and once the defence is thus shown, its strength or weakness is immaterial at that stage (**Chilenje vs The Attorney General** [2004] MLR 34). In this case, I have carefully analyzed the sworn statement in support of the present application vis-a-vis the Claimant’s Statement of Case herein. The sworn statement, however, dwells on the reasons why they did not file a defence within the prescribed time and not on the merits of the defence. It is only in court where Counsel referred to paragraphs 5 and 6 on the question of the merits of the defence. Be that as it may, the essential averments as pleaded by the Claimant are that he was a lawful passenger in a vehicle driven by the 1st defendant and insured by the 2nd defendant. He avers that along the way, the 1st defendant lost control of the vehicle and the vehicle went to the extreme side of the road and overturned. On paragraph 5 of their defence, the Defendants aver that the accident was inevitable as the driver was driving properly. Mindful of not going overboard and assuming the trial court jurisdiction, I daresay that this is farfetched and there is nothing meritorious about the contention. Other than that, the 2nd defendant on paragraph 6 of its defence claims that its policy of insurance with the insured excluded passengers and therefore they are not entitled to compensate the claimant in the event the 1st defendant is liable. Counsel for the Claimant did not challenge this contention, nor

did they provide a policy document to show that the 2nd Defendant was in fact supposed to cover passengers. If it is true that its policy of insurance with the insured excluded passengers, it would be very unfortunate to make the 2nd Defendant pay compensation to the Claimant in the circumstances. Much as this was not included in the sworn statement, I daresay that the Defendant has a meritorious defence.

Whether the Claimants will Suffer Prejudice Upon Setting Aside the Default Judgment

Last but not least, the respondents raise an issue of prejudice likely to be occasioned to the claimants upon setting aside the default judgment. Counsel contends that the claimants have been pursuing the matter but the issue of setting aside the default judgment has never arisen. They prayed in the alternative that should the court be minded to set aside the default judgment it should make an order that the applicants pay costs to the claimant up to this stage before taking the next step. This court is mindful that costs follow the event but at the same time does not lose sight that they are also in the court's discretion. The claimant has been put at considerable expense pursuing the matter hoping for an expeditious disposal of the same. Somehow, this is worth taking into consideration.

CONCLUSION

In view of the foregoing findings and reasoning, I hereby set aside the default judgment herein, and grant the Defendant leave to defend this action on the following conditions:

1. The Defendant should file their defence within seven (7) days (See O.12 rule 21(4)(a) of the Rules) failing which the Default Judgment and all other processes will remain valid; and
2. Before taking the next step, the Defendant will bear all the costs incurred by the Claimant up to the date of the default judgment. (See O.12 rule 21(4)(b) of the Rules).

MADE IN CHAMBERS THIS 15TH DAY OF NOVEMBER 2021

WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR