



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 250 OF 2020

BETWEEN

WILLIAM MAGADA.....1ST CLAIMANT

CHIKONDI NAZOMBE.....2ND CLAIMANT

AND

MOUNT MERU PETROLEUM LIMITED.....DEFENDANT

Coram: WYSON CHAMDIMBA NKHATA (AR)

Mr. Chizimba- of Counsel for the plaintiff

Mr. Chiume- of Counsel for the defendant

Mr. Amos- Court Clerk and Official Interpreter

RULING

INTRODUCTION

The Claimants commenced the matter herein on 12th August, 2020 claiming damages for false imprisonment, defamation, malicious prosecution, unfair dismissal, withheld wages, gratuity, notice pay, overtime, 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 herein on the grounds that the judgment was irregularly obtained and that the defendant has a meritorious defence. The application is brought under Order 12, rule 21(1) of the Courts (High Court) (Civil Procedure) Rules, 2017 and the inherent jurisdiction of Court. The application was supported by a statement,

sworn by Counsel Chiume. The claimants oppose the application. There is a statement in opposition sworn by Counsel Chizimba.

THE APPLICANT'S CASE

Counsel for the defendant in his sworn statement points out that the claimant commenced the action by way of summons dated 26th August, 2020. He avers that the summons was not served on the defendant's registered office or principal place of business at plot number 3/041, Area 3, in the City of Lilongwe. He exhibits a copy of the defendant's annual return for 2020 marked "JC1". He further avers that the Managing Director was not aware of the matter and hence the defendant did not file a defence. Consequently, a default judgment was entered against the defendant. He adds that the Managing Director only became aware of the matter on 15th June, 2021. He further depones that the claimant purportedly served the summons and all processes at the defendant's Nyambadwe Filling Station in Blantyre. He contends that Nyambadwe Filling Station is not the defendant's registered office and it is not its principal place of businesses. He explains that the defendant's nerve centre of operations is at plot number 3/041, area 3 in the city of Lilongwe. He further points out that the Directors and Managers of the defendant are based at its registered office and principal place of business at plot number 3/041 area 3 in the city of Lilongwe. He avers that the defendant is desirous to defend the substantive matter as it has a meritorious defence. He exhibits a copy of their defence marked "JC2". It is his prayer that the default judgment be set aside so that the matter is adjudicated upon on its merits.

THE RESPONDENT'S CASE

Counsel representing the claimant argues that it is not true that the Defendant was not aware of the matter herein. He points out that on 3rd September, 2020 the summons was served on its employee, a Mr Neetin, at its Nyambadwe offices who refused to accept service and a copy of the summons was left at the premises. Counsel further argues that service is not restricted to a company's head office or its directors. Further to that, they aver that the said Nyambadwe offices herein are the Defendant's principal place of business in the Southern Region and the same doubles as a Filling Station and an office with a Reception, a Mr Neetin's office as the head, and another office for other staff. He points out that on 11th June 2021, the Notice of Assessment was served on the very same Mr. Neetin at the very same Nyambadwe offices and this time he accepted service. He submits that the Defendant got the Summons just as it got the Notice herein since the two documents were served on the very same person at the very same place. Counsel is of the view that the Defendant herein deliberately ignored

court process despite being served with the Summons and deliberately ignored to file defence within the prescribed time. In the premises, Counsel is of the view that the Defendant has failed to demonstrate any meritorious ground for stay and that it will be utterly unjust to the Claimants to grant stay herein.

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.

On the issue of service on a company, section 372(1)(b) of the Companies Act (no. 15 of 2013), provides that service of documents in legal proceedings against a company is effective if the same is served on an employee of the company at the company's head office or its principal place of business. The said section reads that a document in any legal proceedings may be served on a company—by delivery to an employee of the company at the company's head office or principal place of business. It is also noteworthy that section 371(2) of the same provides that the methods of service specified in subsection (1) are notwithstanding any other enactment, the only method by which a document in legal proceedings may be served on a company.

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. Apparently, the applicant's contention on the irregularity is predicated upon an improper service on the defendant company. They argue that the summons and all legal documents in this matter were not served at the registered office of the defendant which is the head office and principal place of business of the defendant.

When dealing with whether there had been proper service on the defendant company, the wording of section 372(1)(b) of the Companies Act (no. 15 of 2013), provides that service of documents in legal proceedings against a company is effective if the same is served on an employee of the company at the company's head office or its principal place of business. The question is, was there service or was there proper service on the defendant company?

It is not in dispute that as the defendant company is a limited company, service should be in compliance with section 372(1)(b) of the Companies Act of 2013. The Act does not define what the registered the head office and principal place of business is but it appears to me as the names suggest, it is the headquarters of a company. It cannot mean anything else. The applicant brought to the attention of the court a case from United States of America where the court had occasion to give a meaning of the term head office or principal place of business. In that case it was stated that the term "principal place of business" means the location from which the major activities of the corporation are directed, coordinated and controlled by the high level officers of the corporation. The case refers to such a place as the nerve centre, a place which serves as headquarters or the center of operations planning. In the present case, the question that immediately follows is whether Nyambadwe Filling Station is the defendant's company's place of coordination of its activities by its directors. I would like to believe that it is one of the places where the defendant company merely carries out its business activities. There was accordingly no proper service in terms of section 372(1)(b) of the Companies Act of 2013. Following the law to the letter, the defendant was not duly served and we could also say that the default judgment was irregularly obtained.

Whether Defendant Has Shown a Meritorious Defence

On the issue whether the defendant has 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 regard to whether the Defendant herein has shown reasonable cause for not defending, the immediately foregoing finding that the default judgment herein was irregularly entered means that the Defendant has managed to show a reasonable cause for not defending. On whether the Defendant herein has shown a defence on the merits, 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).

Coming to the matter at hand, I have carefully analyzed the sworn statement in support of the present application vis-a-vis the Claimant's Statement of Case herein. The essential averments as pleaded by the Claimant are what have been outline above in the background information. On the Defendant's part, what is material is its proposed defence, exhibited to the sworn statement in support of the present application and marked as 'JC2' in which they state that it was the Malawi Police Service that arrested and prosecuted the claimants and not the defendant. In my view, it goes without saying that in determining liability in such a case, the court shall have occasion to consider who the perpetrator was behind the false imprisonment, malicious prosecution and the defamation of the claimants. In my most-considered opinion, the Defendant's averments as highlighted above clearly raise the issue as to whether or not he is liable to pay the Claimant's claims herein. That issue is triable or arguable such that it ought to go to trial if the defendant denies liability. Therefore, I find that, in raising such a triable or arguable issue, the Defendant has, in that sense, shown a defence on the merits.

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 put to a considerable expense prosecuting the matter up to this stage when the defendant deliberately ignored service of the court process. He calls upon the court to consider the case of **Registered Trustees of Lilongwe Diocese -vs- Re-Union Insurance Co Ltd** Commercial Case No. 45 of 2009, where the court held that even where the defendant discloses a defence on merits, the court can still refuse to set aside a regular default judgment where the defendant contumaciously ignored court processes. Counsel contends that it defies logic that the Defendant received the Notice of Assessment which was served on the very same Defendant's employee a Mr. Neetin at the very same Defendant's Nyambadwe offices where the summons was served and yet never received the summons. I wish to agree with Counsel representing the defendant that the fact that the defendant came to know of the matter through service effected to its employee in one of its business places does not vindicate the claimant on the fact

that the service was irregular. However, the defendants' conduct was deplorable. It does indeed smack of contumelia. They chose to ignore the initial court process only to be spurred into action because the matter was now called for assessment of damages. In my opinion, they were still under an obligation to appear before the court and bring to the attention of the court that the service was being misdirected. In the circumstances, the claimant proceeded to incur costs pursuing the matter purportedly seeking final disposal. No wonder, Counsel representing the claimant is now praying 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. I have heard the argument by Counsel for the defendant against the same. Nonetheless, mindful that costs follow the event, we should not lose sight that they are also in the court's discretion.

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