REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 414 OF 2018

BETWEEN:

FRANCIS BINALI.....CLAIMANT

AND

ZESHAN BUILDERS.....DEFENDANT

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

Mr. Manda - of Counsel for the Claimant

Mr. Mickeous - of Counsel for the Defendant

Mr. Amos- Court Clerk and Official Interpreter

RULING

INTRODUCTION

The Defendant filed a Summons on 7th November, 2019 seeking an order that the Judgment in Default entered against the Defendant in this action on 9th October, 2018 by the claimant be set aside. The Summons was filed together with a sworn statement in support deposed by Luciano Mickeous of Counsel. The Application was made pursuant to Order 12 Rule 21 of the Courts (High Court)(Civil Procedure) Rules 2017 and the inherent jurisdiction of the Court. The application was opposed by the claimant and a sworn statement in opposition deposed by Andrea Masangu Manda was filed. Both counsels representing the parties to this proceeding filed their skeleton arguments and accordingly argued their respective cases.

BACKGROUND FACTS

The claimant commenced an action against the Defendant on 24th July, 2018. The Defendant failed in its bid to file and serve his acknowledgment of service and statement of defence which subsequently resulted in the claimant successfully obtaining a Default Judgment pursuant to Order 12 Rule 7 and 8(1) of the Rules against the Defendant. The Default Judgment was issued and served on the Defendant on 9th October, 2018. The matter was then set down for assessment of dagames on the 9th of May, 2019. The

Defendant and or their Legal Practitioners did not attend the hearing on assessment of damages. The claimant was awarded K6,000,000.00 as damages for personal injuries. On 16th October, 2019 the claimant filed a writ of *fieri facias* to levy the judgment debt. Subsequently on 30th October, 2019 the defendant filed an *ex parte* summons for suspension of an enforcement order pending determination of summons to set aside a default judgment. On the 7th November, 2019, the defendant filed a Summons to set aside the Default Judgment hence this determination.

PRINCIPLES ON SETTING ASIDE A DEFAULT JUDGMENT

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. The Court has a very wide discretion in an application of this nature but it is also guided by certain well known principles. One of the principles is that unless and until the court has pronounced a judgment upon the merits or by consent. It is to have the power to revolve the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure. (Per Lord Atkin in Evans v Bartlam [1937] A.C. 473)

The exercise of the discretion is wide and unfettered as until the Court has pronounced judgment upon the merits or by consent it must have the power to revoke a default judgment obtained by a failure to allow any of the rules of procedure *(Evans supra)*. Any defence described in the affidavits supported by the submissions must have a real prospect of success and carry a degree of conviction allowing the court to form a provisional view of the probable outcome of the action. This requires the court to scrutinize the defendant's affidavit to see whether it contains deposed facts which will support a meritorious defence that is one with a reasonable chance of success ***(Wearsmart Textiles (supra). Suva City Council (supra) and Alphine Bulk Transporter Co. Inc. v Saudi Eagle Shipping Co. Inc.*** [1986] 2 Lloyd's Reports 221).

CONSIDERATION OF THE APPLICATION

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. The bone of contention is whether the defendant was duly served with the summons or not. Essentially, the defendant argues that the default judgment herein is irregular. The defendant through Counsel contends the summons was never served on the Defendant as such the Defendant was not aware of the proceedings. They submit that the Defendant has a registered office in Maselema and none of its agents received any legal process in respect of this matter. Further to that, they contend that the Claimant lied under oath that the Defendant's agents did receive the summons on the 8th day of August, 2018.

On the other hand, the claimant submit that the said summons was duly served on the defendant on 8th August, 2018. They contend that service of the summons as well as the accompanying documents was accepted by an individual who introduced himself as the owner of the defendant Company. They further indicate that the person accepting service even signed the document acknowledging service and that the person who effected the service had no reason to doubt the truthfulness of the representation of the person who accepted service at the Defendant's offices.

It appears the arguments by the parties boil down to the question whether the service of the writ was done according to the dictates of the law. When dealing with whether there had been proper service on a 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? In this case, there is evidence that the notices were delivered to an individual who presented himself as the Human Resources Manager of the Defendant at the defendant's offices at Maselema. It is submitted on behalf of the Defendant that the defendant does not have a Human Resource Manager, as such it was a total fabrication that a Human Resource Officer received the notice of assessment. I wish to agree with the claimant in that there was no reason to doubt the authenticity of the representation. They followed the dictates of the law. Whether the person who received the summons and the notices was a Human Resource Manager or not is inconsequential. The law states that the court process ought to be served on an employee of the company at the company's head office or its principal place of business. I find it highly unlikely that a person can just wonder into a company and represent himself as an employee just to receive court documents.

From the foregoing, it is my finding that the Defendants failed in their bid to carry out the necessities and only woke up when the claimant issued and served the order for the *fieri facias* to levy the judgment debt this then prompted the Defendant to engage the legal representative and to counter the same by filing a Summons seeking to set aside the Default Judgment entered against them. I do not find the Defendant's explanation satisfactory and therefore is unacceptable as to what led to the entering of the Default Judgment against the Defendant by the Plaintiff.

Meritorious Defence?

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). The proposed defence of the defendant as stated in the sworn statement in support deposed by of Counsel Luciano Mickeous and reads in part:

THAT *the Defendant denies the claims by the Claimants in their entirety as the same have got no basis. The Defendant shall contend that the Claimant never got injured in the course of his employment with the Defendant at any site including ITG at Limbe. If the Claimant got injured it must be somewhere else not in the course of his employment with the Defendant. In fact, I am informed by the foreman who at the material time was the supervisor at ITG in Limbe that on the alleged date no one got injured in the course of his or her employment.*

Upon a careful consideration of intended defence together with the above rational, I find that the Defendant has a plausible defence. If the defendant can substantiate that there was no accident on the day in question, it would be unjust to hold them to pay in the circumstances. All in all, I further find that there are triable issues and/or arguable Defence that would have some prospect of success at trial.

CONCLUSION

For the aforesaid Rational, I accede to the defendant's Summons seeking an order to set Aside the Default Judgment entered regularly against him. The Default Judgment is accordingly set aside and the Defendant is granted the leave to defend the action with the following conditions:

- The defendant is hereby directed to file and serve his Statement of Defence in 14 days' timeframe and the claimant is granted 14 days thereafter (at liberty) to file and serve any Reply to Defence.

- The matter needs to be expedited and both Counsels representing the parties to this proceeding must ensure to follow a strict timetable set by the court and wind up the pleadings and the cause of action within a reasonable time frame.

- Accordingly, the claimant is entitled to costs up to this stage of the matter to be paid by the Defendant before taking the next step.

- I impose an unless order that if the Defendant fails to either file and serve his Statement of Defence within 14 days and fails to pay the claimant the ordered costs will result in the status quo of the Default Judgment issued on 9th October, 2018 to remain intact and the claimant at liberty to proceed further as he wishes to do so in terms of his remainder of the claim by proceeding with the execution order.

DELIVERED IN CHAMBERS THIS 6TH DAY OF DECEMBER 2021

WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR