REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 719 OF 2021

BETWEEN:

MUSTAFA JULIUS.....CLAIMANT

AND

WILLIAM COMPANY LIMITED.....DEFENDANT

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

Mr. Mickeous- of Counsel for the Claimant

Mr. Ngunde- of Counsel for the Defendant

Mr. Amos- Court Clerk and Official Interpreter

RULING

INTRODUCTION

The Defendant filed the Summons on 5th November, 2021 seeking an order that the Judgment in Default entered against the Defendant in this action on 15th September, 2021 by the claimant be set aside. The Summons was filed together with a sworn statement in support deposed by Chrispin Chimwemwe Ngunde of Counsel. The Application was made pursuant to Order 10 Rule 1 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 Luciano Mickeous 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 14th July, 2021. 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, 12 and 13 of the

Rules against the Defendant. The Default Judgment was issued and served on the Defendant on 15th September, 2021. The matter was then set down for assessment of dagames on the 19th of October,2021. On 19th October, 2021, the Defendant's Legal Practitioners sought an adjournment on the grounds that they had just been alerted that they had instruction to represent the defendant and they wanted seek further instructions from the defendant. The court granted the prayer for adjournment. Subsequently, on 5th November, 2021 they 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. Being common cause that the default judgment herein is regular, the question to grapple with is whether the defendant has shown cause for not defending the application. The defendant through Counsel contends that the failure to enter defence was not intentional but was due to inadvertence on the part of the defendant. In his sworn statement counsel depones that the summons was duly served on 15th July, 2021 and upon being served with the summons, the defendant immediately informed its insurers, United

General Insurance Company Limited "UGI" about the summons and further instructed the insurers to instruct lawyers to represent the defendant. He further avers that on 23rd July, 2021 Ms Neema Chambalo, the then legal and Compliance Officer for UGI drafted a letter of instruction to their firm addressed to him. He exhibits a draft letter of instruction. He further avers that inadvertently the letter of instruction was not sent to him and as a result of the inadvertence, the defendant failed to file a response.

In my considered opinion, the defendants ought to have known better herein that the front page of the Writ of Summons they were served with clearly stated what the defendants were required to do and on their failure to act accordingly would result in the claimant proceeding with the action and obtaining Judgment against them without any further notice. Such being the case, it was incumbent upon the defendants to exercise due diligence by following up on stipulated steps to take even having referred the matter to their agents if at all this is true. Instead, they thought fit and proper to sit back and stay silent on the claimant's claim and not even check if the said agent had acted upon the Summons and if they had what action had been taken by the Legal Representatives that had been engaged. In the long run, they did not file and serve an acknowledgment of service and stayed away from the court proceedings. The defendant should have followed the proceedings and filed his Defence and kept a tab on proceedings until its final disposition only if he was interested in defending this action to the conclusion. I believe it ought to have dawned in their minds that if a legal representative had been engaged to take up the matter, the said legal representative would have engaged them in turn to check on the circumstances giving rise to the action in order to enter a meaningful defence. Essentially, the defendant failed to check on its agent and the agent failed to check on the legal representatives purported to have been engaged oblivious of clearly stipulated instructions and consequences on the first page of the summons. In my opinion, the issue of inadvertence does not arise.

As a postscript, I thought I should also mention that the letter that the defendants wish to rely on to show that they were under the impression that they had engaged legal representatives who were handling the issue, is not even signed to lend it the much-required credence. There is no explanation owing to the omission. I believe it would not be farfetched to render it inept in the circumstances.

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 Judgment by Default on 15th September, 2021 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 claimant.

Delay in filing Setting Aside Default Judgment?

Default Judgment was entered on 15th September, 2021 and the Defendant filed his Summons seeking the setting the Aside of Default Judgment on 5th November, 2021, almost 2 months later. Order 21 rule 2 of the CPR 2071states that the application to set aside a default judgment may be made not later than 3 months after the judgment is entered. In the present case, the application has been brought within the stipulated period. Nevertheless, it does not follow that the application will be granted as a matter of course. Paragraph (a) of rule 2 under the said order enjoins the defendant to set out the reasons why the defendant did not defend the application. As earlier stated, if the **Defendant** had kept a tab on the proceedings and liaised with their agents and or legal representatives, they would not have defaulted in filing the necessary court process under order 5 rule 19 of the CPR 2017. Essentially, the defendant may have been prompt in filing his application to set aside the default judgment herein but I wish to re-iterate that the reason for the default in filing their defence within the requisite period is not satisfactory .

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). In the present case, the proposed Defence of the Defendant has been marked and annexed as **"CCN4"** to the sworn statement in support deposed by Chrispin Chimwemwe Ngunde of Counsel and reads in part:

- The claimant was properly trained to operate the machine that injured him
- The defendant put clear written warning and signs on the machine that allegedly injured the claimant prohibiting its employees from placing any part of the body on such parts of the machine and these warnings were duly brought to the attention of the claimant.
- The defendant believes that the alleged accident resulted from the claimant's negligence or contributory negligence by failing to comply with safety rules.

Upon a careful perusal of the draft defence, sworn statement in support, written and oral arguments, I find that the contents justify that leave ought to be granted to the Defendant to defend and put his Defence to court accordingly. I further find that there are triable issues and/or an arguable Defence. Much as this is the case, I am still inclined not to accede to the defendant's application taking into consideration the reason advanced for their failure to defend. Reference is now made to the Case of **Nyirenda v Sana Cash and Carry** (Civil Cause 487 of 2014) [2015] MWHC 100 (15 June 2015)(unrep) in which Justice Mkandawire stated:

> I hold the view that merit of defence should not come at the whims of the defendant. When I look at the reasons being put forward for the delay, I find them not impressive and convincing. The defendant had a Human Resources Manager who I take to be an able and competent officer. The writ of summons was very clear as to what the defendants were supposed to do. It did not require one to be a lawyer to follow the instructions as stipulated thereon.

I share the sentiments expressed in the foregoing case with regard to the case herein. 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 ought not to be allowed to ignore the court process only to resurface later waving a defence as his shield from continuation of a matter. I re-iterate that I find the reason advanced for not defending not convincing even in the light of a meritorious defence.

CONCLUSION:

For the aforesaid reasons, I do not accede to the Defendant's Summons seeking an order to set Aside the Default Judgment entered regularly against him. The application is dismissed with costs. The claimant is at liberty to proceed with assessment of damages.

DELIVERED IN CHAMBERS THIS 6TH DAY OF DECEMBER 2021

WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR