

REPUBLIC OF MALAWI



IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO. 604 OF 2021

BETWEEN

ESTHER SOMBA.....CLAIMANT

AND

LILONGWE CITY COUNCIL..... DEFENDANT

CORAM: A.P KAPASWICHE

ASSISTANT REGISTRAR

Mwabutwa

Counsel for the claimant

Maoni

Counsel for the defence

Kumwenda

Clerk/ Official Interpreter

**RULING**

---

## **BACKGROUND**

The claimant commenced the present proceedings through Summons (Specially Endorsed) on the 3<sup>rd</sup> day of August 2021 claiming payment of MK2,555,525.00 as purchase price of a plot; compound interest of the said MK2,555,525.00 at 1% above the Commercial Bank lending rate from the time due of actual payment or at such rate as the court may deem fit; damages for inconvenience to be assessed by the court and costs of the action. 14 days elapsed without the defendant filling a response and on the 27<sup>th</sup> day of August 2021, the claimant made an application for default judgment which was granted on the same day. The defence later on the 6<sup>th</sup> September 2021 filled a defence. The matter was scheduled for assesment of interest on the 12<sup>th</sup> day of October 2021 and the hearing was done in the absence of the defendant as they did not avail themselves despite being served with the notice. Interest was assessed at MK1,832,585.54 and the order was that the said interest be paid within 30 days. Just after the hearing of the assesment of interest, the defence made an Ex-parte application for stay of proceedings and execution pending an application to set aside default judgment. This court granted the application and the defence proceeded to file an application to set aside the default judgment on the 19<sup>th</sup> day of October 2021. The application was heard on the 4<sup>th</sup> day of November 2021 and this is my ruling on the application to set aside the default judgment.

## **THE EVIDENCE**

The application by the defendant was supported by a sworn statement as well as skeleton arguments. The defence also filled a sworn statement in opposition to the application and also filled skeleton arguments. The defence told the court that they were served with the summons on the 10<sup>th</sup> day of August 2021 and they were then surprised to be served with a default judgment issued on 27<sup>th</sup> August 2021 on default of filling a response within 14 days as required by the because at the said time the defendant's officers were of the mistaken belief that filling a defence within 28 days was all the defendant had to do in terms of the rule. It was submitted that the defendant has a defence on merits on the claims made by the claimant and accordingly filled a defence on the 6<sup>th</sup> September which was within the 28 days from the time of service of the summons.

The defence proceeded to argue that proceeded to submit that the period of three months has not lapsed since the entering of the default judgment. It was stated that the defence is premised on the fact that the delay in proceeding with the offer of the plot is not a result of the defendant's breach but is a result of a restriction notice issued by the Anti-Corruption Bureau hence the defendant is not liable. It was submitted that owing to the fact that the defendant has a defence on merit and further that there is no delay in applying for setting aside of the default judgment then it is only fair and just that the default judgment be set aside. It was state that the mistake of not filling a response within 14 days is curable under Order 2 rule 2 of the CPR 2017.

In his sworn statement in opposition, Counsel for the claimant argued that the present application should not be allowed on the basis that there is no defence on merit. The defence relied by the defendant is on the basis that it is not in breach of the contract but rather that the defendant failed to complete its part of the contract by reason of the restriction notice from the Anti -Corruption Bureau. The claimant argued that the defence's argument cannot be accepted by the court at trial because it is an issue that arose after the parties had already formed a binding contract and hence the claimant could not suffer at the expense of matters that fell within the internal operations of the defendant.

It was further argued that the claimant herein was proffered a valid offer from the defendant which she duly accepted and any matters relating to the manner in which the offer was made should not prejudice the claimant who had no clue as to how the defendant makes offers. The claimant proceeded to argue that there are no allegations of fraud or corruption against the claimant hence issues of corruption should not affect the claimant. The claimant went further to argue that the defendant, having failed to exercise prudence in the manner it made offers for sale of the plot including the plot in question cannot be allowed to benefit from its own wrong doing by allowing it to evade liability for breach of its contract with the claimant. In the whole series of events, the claimant was and still remains an innocent party who cannot be made to suffer at the expense of the defendant's failure to conduct prudence in the way it offered for sale the plot in question.

In reply, the defence maintained their position as argued earlier. They stated that the restriction order from the Anti-Corruption Bureau cannot be described as an internal issue as the restriction order came from a separate entity. It was argued that the restriction order prohibited any further dealings with regard to the land in question and according to the defendants, this meant that it was even not proper to refund the purchase price paid by the claimant until the ACB would reverse or lift the restriction order.

The above presents a summary of the arguments from the parties.

## **ISSUES**

The only issue for determination is as to whether the default judgment should be set aside.

## **THE LAW**

### **SETTING ASIDE DEFAULT JUDGMENT**

The law on setting aside default judgment is provided for under **Order 12 rule 21 of the CPR 2017**. The relevant parts of the rule provides as follows;

- (1) A defendant against whom judgment in default has been entered may apply to the court to have the judgment set aside
- (2) The application under sub-rule (1) may be made not later than 3 months after the judgment 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 3 months after the judgment was entered, explain the delay; and the court shall not set the judgment aside, unless it is satisfied that it is in the interests of justice to do so;
  - (c). give details of the defence to the application; and
  - (d). have a sworn statement in support of the application.
- (3). The court may set aside the judgment in default if it is satisfied that the defendant—

- (a).has shown reasonable cause for not defending the application; and
- (b). has a meritorious defence, either about his liability for the application or about the amount of the application.

### ***ANALYSIS OF THE LAW AND SUBMISSIONS***

The main argument from the defendant is that they have a defence on merit hence they have to be given an opportunity to defend the matter and this opportunity can only be realised if the application to set aside the default judgment obtained is granted. The essence of the defence from the defendants is that they were unable to complete the transfer of the plot to the claimant due to the fact that the ACB issued a restriction order on the sale and this restriction order stopped all dealings on the plot until completion of investigations. The defendant accepts to have received the money from the claimant as purchase price of the plot after they had offered the claimant the said plot. The defence argue in the defence that they are still interested in transferring the plot to the claimant if the restriction notice is removed and in the event that the claimant is not willing to wait then the defendant is willing repay the sum paid as purchase price but not with interest and damages as the frustration of the contract is not caused by the defendant but rather the restriction order from ACB.

The claimant argues that the defendants do not have a defence on merit as the issues raised in the defence are internal issues that have nothing to do with the claimant. There is no allegation for corruption against the claimant and it is the defendant who is at fault leading to the issuing of the restriction order. It was further argued that the claimant herein was proffered a valid offer from the defendant which she duly accepted and any matters relating to the manner in which the offer was made should not prejudice the claimant who had no clue as to how the defendant makes offers. The claimant went further to argue that the defendant, having failed to exercise prudence in the manner it made offers for sale of the plot including the plot in question cannot be allowed to benefit from its own wrong doing by allowing it to evade liability for breach of its contract with the claimant. In the whole series of events, the claimant was and

still remains an innocent party who cannot be made to suffer at the expense of the defendant's failure to conduct prudence in the way it offered for sale the plot in question.

I have heard and carefully considered the arguments from both parties. I also took time to look at the restriction order from ACB. In my consideration of the said restriction order, it is very much clear that there is nothing to do with any allegation of corruption or malpractice on the part of the claimant. The dispute from the restriction is clearly indicating that there are issues with the land in question involving Lilongwe City Council and Ministry of Lands. I do entirely agree with the submissions from the claimant that the claimant is an innocent bonafide purchaser who was given an offer and performed her part of the contract by paying the purchase price. Actually, the defendant states in their defence that they are fine with refunding the money paid as purchase price only that they do not think that they should pay interest and damages for inconvenience. The only point that the defence are getting it wrong is failure to see or acknowledge that the restriction notice is entirely coming due to their fault and that there is no fault on the part of the claimant.

Under Order **12 rule 21 (3) of the CPR 2017**; a court will set aside a default judgement only if the defendant has shown a reasonable cause for not defending; and where there is a defence on merit. The defence from the defendant is not a defence at all and it does not have merit to warrant allowing the matter to go to trial. The default judgment was regularly entered as no response was filled within 14 days after being served with the summons. It was an issue of incompetence on the part of the defendant not to file a response. However, as prayed by defence Counsel, the incompetence in failing to file a response is curable and the problem remains with the issue of lack of a defence on merit. My finding is that there is no defence on merit. The claimant has been an innocent party throughout. The defendant cannot hide behind the restriction notice for their failure to refund the money received from the claimant as purchase price. The defendants are in the wrong and they have to pay the purchase price, interest and damages for inconvenience as per the default judgment.

Considering the above discussion, this court proceeds to dismiss the present application with costs.

  
Pronounced this .....day of NOVEMBER 2021 at LILONGWE

  
ANTHONY PITILIZANI KAPASWICHE

ASSISTANT REGISTRAR