



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL DIVISION**

Civil Cause Number 791 of 2020

BETWEEN:

AUSTIN CHINTEDZA.....CLAIMANT

AND

LLOYD M'MANJA.....1ST DEFENDANT

NICO GENERAL INSURANCE COMPANY LIMITED.....2ND DEFENDANT

CORAM:	C MANDALA:	ASSISTANT REGISTRAR
	D Silungwe:	Counsel for Claimant of Silungwe Law Consultants
	K Soko:	Counsel for 2 nd Defendant of Soko & Company
	1 st Defendant:	Absent (Unrepresented)
	Matchaya:	Court Clerk

SETTING ASIDE DEFAULT JUDGMENT

CM MANDALA, AR:

INTRODUCTION

This is an order pursuant to an application to set aside default judgment on the ground that it is irregular [the Summons having been served on the 2nd Defendant's branch as opposed to its principal place of business] and further that the 2nd Defendant has a meritorious defence.

BACKGROUND

This matter was commenced on 7th October 2019 by way of writ of summons. Having not received a response or defence from the Defendants, default judgment was entered on 10th January 2020. The matter was set down for assessment of damages on 30th March 2020. Counsel for the Claimant sought an adjournment to allow them to liaise with Counsel for the Second Defendant. Damages were assessed by this Court on 21st January 2021. A ruling on assessment of damages was delivered on 4th March 2021. The 2nd Defendant then engaged Counsel Soko who filed a notice of appointment on 9th April 2021. This was accompanied by an ex-parte application for suspension of enforcement of order of assessment which was granted by this Court on 9th April 2021. Counsel for the 2nd Defendant then filed an application to set aside default judgment which was heard on 10th June 2021 by this Court.

2ND DEFENDANT'S ARGUMENTS

**SWORN STATEMENT IN SUPPORT OF APPLICATION MADE BY KHUMBO BONZOE SOKO
ON 12th APRIL, 2021**

I, **KHUMBO BONZOE SOKO**, of SOKO & CO, Kwacha Chambers, P O Box 1003, Lilongwe, Make Oath and say as follows:-

1. My firm has got conduct of this matter on behalf of the 2nd defendant and by reason thereof I am duly authorized to swear this sworn statement.
2. The matters of fact to which I depone have been passed on to me by the 2nd defendant's officer namely Ms. Shirley Sibale in the course of my acting for it and the truth of which I fully believe in.
3. The Claimant herein commenced an action against the defendants by a Summons issued on 7th October 2019.
4. On 10th October 2019, the Claimant purported to serve the Summons on the 2nd Defendant branch at Nico Centre, Lilongwe.
5. I am informed by the 2nd defendant's Ms. Sibale that its principal place of business as well its registered office is at NICO House, Stewart Street, Blantyre.
6. The 2nd defendant has got a meritorious defence to the claimant's claim. It did not insure the vehicle registration number BS 744 which is alleged to have collided with the Claimant. Therefore, it cannot be liable for the actions of whoever was driving a vehicle that it did not insure.
7. Wherefore, it is my prayer that the default judgement be set aside and that the matter be resolved on its merits.

CLAIMANT'S RESPONSE

SWORN STATEMENT IN OPPOSITION TO APPLICATION TO SET ASIDE DEFAULT JUDGMENT

I, **DONVAN SILUNGWE**, a Legal Practitioner in the firm of Messrs Silungwe Law Consultants, P.O. Box 224, Lilongwe, in the Republic of Malawi make **OATH** and **SAY** as follows:-

1. **THAT** my practice has conduct of this matter on behalf of the Claimant and I am duly authorised to swear this sworn statement on the basis of information obtained from the Claimant and from my conduct of the matter which information I verily believe to be true to the best of my knowledge and belief.
2. **THAT** the Claimant opposes the 2nd defendant's application to set aside default judgment as below.
Inordinate and inexcusable delay
3. **THAT** there has been an inordinate and inexcusable delay in making this application.
4. **THAT** the Summons together with initial directions were served on the 2nd defendant on 10th October, 2019. I now produce a copy of the front page of the initial directions with the 2nd defendant's stamp on it marked "**DS 1**". A default judgement was entered on 10th January, 2020. The 2nd defendant's application to set aside the default judgement was made on 13th April, 2021, after a delay of one year three months.
5. **THAT** on 23rd March, 2020 and 27th March, 2020 the 2nd defendant accepted service of the notice of assessment of damages and bundle on assessment of damages, respectively. I now produce copies of the notice and first page of the bundle, all with the 2nd defendant's stamp on them, marked "**DS 2a**" and "**DS 2b**", respectively.
6. **THAT** on 12th January, 2021 the 2nd defendant accepted service of the notice of adjournment of assessment of damages. I now produce a copy thereof with the 2nd defendant's stamp marked "**DS 3**".
7. **THAT** on 5th March, 2021 2nd defendant yet again accepted service of the order on assessment of damages. I now produce a copy of the first page thereof with the 2nd defendant's stamp marked "**DS 4**".

8. **THAT** all along, the 2nd defendant did not refuse to accept service on account that it was not competent to accept service. Instead, it led the Claimant to keep on taking further steps in the matter.
9. **THAT** it was only when we wrote the 2nd defendant on 31st March, 2021 that we would enforce the order on assessment that the 2nd defendant took action. Ironically the said letter that prompted the 2nd defendant to take action in this matter was sent to its Lilongwe office.
10. **THAT** the 2nd defendant cannot approbate and reprobate. The delay is inexcusable. The 2nd defendant has not even bothered to explain the reason for the delay in making the application to set aside the default judgment.

Service of documents effective

11. **THAT** firstly, the 2nd defendant has not denied that its Lilongwe office is its address of service, which is one of the options of service of documents on a company, and, secondly, the 2nd defendant has not provided convincing proof that the Lilongwe office is not its principal place of business or registered office.
12. **THAT** to the contrary, the 2nd defendant's Lilongwe office has been accepting service of documents in all other matters, and that in the present case the 2nd defendant does not dispute accepting service of the documents herein at its Lilongwe office.
13. **THAT** by way of example, I now produce a set of three first pages of initial directions served together with Summons on the 2nd defendant's Lilongwe office where service was duly accepted and first pages of the defenses that were served in response thereto, altogether marked "**DS 5**".
14. **THAT** I, therefore pray that the application to set aside default judgment should be dismissed with costs.

2ND DEFENDANT'S RESPONSE

Counsel for the 2nd Defendant referred to under Order 12 rule 21 of the **Court (High Court) (Civil Procedure) Rules** of 2017 which sets the first test for setting aside Default Judgments which is that the reason for failure to defend must be provided, there must be demonstration that the Applicant has a meritorious defence. Counsel further cited the decision of Hon Justice of Appeal Chipeta, SC, JA, where the Honourable Justice of Appeal lays out two grounds for enlargement of time within which to appeal, namely: good and substantial reasons for delay, and chances of success of appeal. The Honourable Justice of Appeal went further to say considerations outside the law should not be considered – **Barnet Nansongole v National Bank of Malawi Plc** Miscellaneous Civil Application Number 1 of 2020. Counsel further submitted that failure to defend requires that the Defendant should have known of the proceedings and Counsel submitted that the 2nd Defendant was not served at all.

Counsel made further reference to Order 8 Rule 18 of the **Court (High Court) (Civil Procedure) Rules** of 2017 that provides for service of process on a body corporate. Counsel buttressed their argument by stating that service on a place other than a principal place of business is made when the party receiving service tells you of an alternate place for service. Additionally, the burden to prove every proceeding is independent of the preceeding one. Counsel opposed the contention that the 2nd Defendant's may have accepted service at a place other than the principal place of service but for the current matter the 2nd Defendant would have informed the Claimant of a similar arrangement if that was its intention.

THE LAW ON SETTING ASIDE JUDGMENT IN DEFAULT

Setting aside a judgment in default is provided for under Order 12 rule 21 of the **Court (High Court) (Civil Procedure) Rules** of 2017. Order 12 rule 21 (1) – (4) states:

- (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 no 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.*
- (4) *At the hearing of the application, the Court shall –*
 - a) *Give directions about the filing of the defence and other statements of the case;*
 - b) *Make an order about the payment of the costs incurred to date;*
 - c) *Consider whether an order for security for costs should be made; and*
 - d) *Make any other order necessary for the proper progress of the proceeding.”*

DISCUSSION

Order 12 rule 21 allows the court to set aside a judgment in default under the following circumstances: if the interests of justice require the judgment in default to be set aside, if the Defendant shows reasonable cause why the application was not defended and if the Defendant has a meritorious defence on liability or amount.

The defendant is applying to set aside the default judgment one (1) year and three (3) months after the matter was commenced. Counsel for the Claimant This is well over the 3 months prescribed by the **Court (High Court) (Civil Procedure) Rules** (the Rules). This is objectively inordinate delay. However, the Rules (O.12r21(2)(b)) allow the court to set aside a default judgment after the 3-month period to uphold the interests of justice. This court, therefore, considers the application based on the said Order 12 rule 21(2)(b) of the Rules.

Order 12 rule 21(3)(a) of the Rules provides that the Defendant ought to have reasonable cause as to why the matter was not defended. To wit, the 2nd Defendant claims that the documents were not served at their principal place of business in Blantyre. The Claimant, however, provided documentation to show that the 2nd Defendant’s has been accepting service at the regional office in Lilongwe. Counsel for the 2nd Defendant’s argument in this regard is not convincing. Often, Regional Offices exist to ease pressure on the main office and the two are often in close communication. Although this court does appreciate that communication in organisations is not always seamless, so Counsel’s contention is plausible.

Finally, for a judgment in default to be set aside, Order 12 rule 21(3)(b) of the Rules states that the Defendant must have a meritorious defence affecting liability or amount. In this case, the defendant avers that they did not insure the motor vehicle in question. Counsel for the Claimant did not oppose this contention, nor did they provide a policy document to show that the 2nd Defendant was in fact the insurer of the motor vehicle number BS 744 Nissan Civilian. If it is true that the Defendant did not insure this motor vehicle, it would be very unfortunate to make the Defendant pay compensation to the Claimant when they did not insure the car in question. This court therefore sets aside the default judgment on this ground alone, the Defendant has a meritorious defence affecting liability as they aver that they did not insure the motor vehicle in question.

DISPOSAL

The judgment in default is hereby set aside 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. If it is proved, by way of a judgment, that the Defendant was the insurer of motor vehicle BS 744 Nissan Civilian the Defendant will bear all the costs incurred by the Claimant up to the date of judgment. (See O.12 rule 21(4)(b) of the Rules).

Either party is at liberty to appeal within the requisite time frames.

Ordered in Chambers on the 2nd day of August at the High Court, Lilongwe District Registry.



C Mandala

ASSISTANT REGISTRAR