



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO. 737 OF 2021
(Before Honourable Justice Tembo)**

BETWEEN

AGNESS JOSEPH.....CLAIMANT

-AND-

CONFORZI PLANTATIONS LIMITEDDEFENDANT

CORAM: His Honour, Elijah Blackboard Dazilikwiza Pachalo Daniels,
Mickeus, Counsel for the claimant,
Chipembele Counsel for the defendant,
Mr Mbekeyani, Court Official.

RULING

1. This matter comes under Order 12 Rule 21(1) of Courts (High Court) (Civil Procedure) Rules 2017(herein referred to as CPR 17) inviting this Court to consider the application of the defendant to have a default judgment entered on 14th day of September, 2021 against the defendant set aside on the basis that the defendant has a defence on merit and a reasonable explanation on the defendant's delay in filing the defence. Obviously, counsel for the claimant thinks otherwise. In his passionate submission, counsel thinks that the defendant was not vigilant enough and that the judgement entered was a regular one and that all the defendant is doing is to frustrate the wheels of justice.

I must say, at the onset that I had an intellectual engagement with Order 12 Rule 21 of CPR 17, to its full extent and I noted that, the court has in particular also to consider the interest of justice, reasonable explanation for the delay and reasons for not defending the claim and lastly the court has

to consider whether the details of the defence indicates or shows a defence which is meritorious.

2. As it were, this court was and has been advised that the defendant has a good explanation about the delay in its filling relevant documents with the court after the commencement of these proceedings. In summary, counsel contends that, after the defendant was duly served with the originating process on 26 July, 2021, the defendant caused the documents to be served on her insurance company, which company was supposed to defend the matter according to their contract. Sadly, he submits that the originating process got mixed up at the insurance company and hence the delay. Counsel further advised the court that there was an application made before the application to set aside which he submits did not receive attention from the court. This was said without dispute from counsel for the claimant.

Again, counsel for the defendant advised this court that they take notice of the regular judgement but that the court should proceed to set aside the default judgment on the basis that they have a defence which is that the defendant does not have any detail about the claimant as its employee and indeed that the accident did not take place or that if it in the unlikely event that it did then it was solely caused by the plaintiff who in particular might not have reported it as the defendant who has a clear reporting channel of accidents when they happen.

3. As it were, several arguments were advanced by counsel for the claimant but I should not at this moment belabour myself to analyse and undress each and every argument made, suffice to say that, the unchallenged assertion that the claimant was never an employee of the defendant begs a very huge question, that should this court be strict with the rules and proceed to assessment, then perhaps the court might end up compensating someone who should not be compensated in the first place if this allegation is meritorious. Thus, if the defendant's defence holds, then proceeding to assessment would not only occasion an injustice but would be crucifying the defendant for a procedural sin other than one of substance. Be that as it may, but how would the court know if indeed this defence is indeed as alleged without proceeding to trial? Nonetheless, and indeed besides, the many arguments made by counsel for the claimant, counsel for the defendant was in my view able to convince this court that the claimant did not even show to the court that indeed the claimant was employed by the defendant.

4. Again, I have gone through the sworn statement of counsel for the defendant in support of this application and I note that there is an good explanation for the delay which is that the insurance company caused the originating process to be misplaced at their offices. It is not in my view unreasonable or indeed unusual for the defendant to rely on their insurance company over litigation claims. That is essentially why companies are insured. On this counsel for the claimant submitted that the defendant would sue their insurance company for professional negligence, well that really sounds ingenious but it is neither here nor there. The issue is whether the delay has a reasonable explanation or not. In my view it does, because the defendant would hardly control the operations of their insurance company.

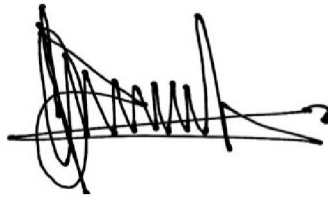
Moreover, like enunciated above and although, the record reflects that counsel for the claimant was duly served with the sworn statement of one Mr Kafukhiwe, the defendant's Division Manager, before this court heard this application, counsel did not even address in his reply, the assertion made at the threat of committing perjury, by the herein Mr Kafukhiwe that the claimant was never in the employment of the defendant. That to me sounds to be a reasonable and meritorious defence, and it raises a serious question which must be established as a matter of fact at trial.

5. Thus, I think in my view, the claimant will suffer no prejudice should this court proceed to set aside the default judgment on the basis that, the defence raised by counsel raises a serious question of fact which has to be ascertained before any finding of liability against the defendant. This should not however be mistaken to mean that this court downplays the need to adhere to rules of procedure, however the flip side of it is the one that this court is unwilling to proceed on, that is to still proceed even where there is an probability no matter how slight that, the claimant might not have been in the employment of the defendant. Those are the issues that in my view would be handled or proved or disproved at trial.
6. All in all, I am satisfied under Order 12 Rule 21 that the defendant has satisfied my mind that, the order herein be set aside but for his reasonable explanation about the delay and also having a defence which has the potency of affecting the justice of this matter. Moreover, the delay in making this application was further explained that is was not the doing of counsel but that the application was mysteriously missing on the court record besides his immediate filing and voluminous inquiries with the court registry as it were.

7. Be that as it is, in my sacred consideration, I find that the interest of justice requires that in the foregoing circumstances, the default judgement be and is hereby intently set aside. This court, further orders under Order 12 Rule 21(4) (a) that the defence be filed within 7 days from the date of this pronouncement.
8. Accordingly, pursuant to Order 12 Rule 21(4)(b) of CPR 17, this Court awards costs up to this date to the claimant but for the circumstances of this matter and the turn of events in which the claimant remains innocent. The parties are at liberty to agree on this, but should they fail to agree, this Court will be invited to do the assessment.
9. It is thus ordered as above.

Any party aggrieved by the decision of this Court has the right to accordingly appeal within 21 days from the date of this order.

Pronounced in chambers this 6th day of July, 2022, at the High Court, Blantyre Principal Registry.



Elijah Blackboard Dazilikwiza Pachalo Daniels

THE ASSISTANT REGISTRAR