

REPUBLIC OF MALAWI



IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO. 524 OF 2021

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BETWEEN

PAUL SANKHANI.....CLAIMANT

AND

PILIRANI CHIBWANA..... DEFENDANT

CORAM: A.P KAPASWICHE

ASSISTANT REGISTRAR

Kadzipatike

Counsel for the Claimant

Khonyongwa

Counsel for the Defendant

Kachilambe

Clerk/ Official Interpreter

## **RULING**

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### **BACKGROUND**

This is an application by the Defendant to set aside default judgment that was entered in favour of the Claimant on the 8<sup>th</sup> day of February 2022. The Claimant commenced the present proceedings through Summons (Specially Endorsed) on the 22<sup>nd</sup> day of December 2021 claiming payment of MK11,630,000.00 being an amount due and owing to the Claimant from the Defendant for the hiring of motor vehicle; MK300,000.00 being Sherrif fees; MK44,000.00 being transport and accommodation costs incurred by the Claimant which he claims indemnity from the Defendant; MK450, 000.00 being indemnity on legal costs and costs of the action. The said summons were served on the Defendant on the 30<sup>th</sup> day of December 2021 and the Defendant refused to acknowledge receipt and sign the documents. The process server left the documents on the floor in the Defendant's presence. Subsequently, an application for default judgment was made and granted by this Court as the Defendant failed to file a response or defence within the prescribed time.

On 6<sup>th</sup> April 2022, the Defendant appointed the Legal Aid Bureu to act for him in the present matter of which the Legal Aid Bureu proceeded to file a Defence and a Counterclaim. On the same date of 6<sup>th</sup> April 2022; the Claimant filed an application for Seizure and Sale Order and this application was granted by the Court on the 12<sup>th</sup> day of April 2022. On the 22<sup>nd</sup> day of June 2022; the Defendant filled an Ex-parte application for stay of execution of the default judgment pending an application to set aside the default judgment and this application was granted by this Court on the 24<sup>th</sup> day of June 2022. The order of stay gave the Defendant 7 days to file an application to set aside the default judgment. The Defendant proceeded to file an application to set aside the default judgment on the 4<sup>th</sup> day of July 2022. The Claimant filed an application on 5<sup>th</sup> July 2022 to vacate an order of stay of enforcement of the default judgment obtained by the Defendant and considering that the application to set aside the default judgment and the application to vacate stay are very much related in the

circumstances of the present case, this Court decided to hear the applications on the same day and subsequently a date of 2<sup>nd</sup> August 2022 was set to hear the two applications in question.

### **THE EVIDENCE**

The application to set aside the default judgment was supported by a sworn statement by Counsel Gilbert Khonyongwa acting for the Defendant. Counsel Khonyongwa stated that in around 2018, the Defendant entered in an express sale agreement with the Claimant to purchase a motor vehicle at MK3,000,000.00 and the Defendant made an advance payment of MK2,000,000.00 and remained with a balance of MK1,000,000.00. It was agreed that the Defendant should take possession of the vehicle on condition that the change of ownership would be done once the balance is paid. The Defendant failed to fulfil the obligation due to intervening factors like the matrimonial case that he had. As a result; the Claimant instructed the Sherrifs to impound the motor vehicle. Consequently, the Defendant received summons of the present matter and upon receiving the said summons; he engaged Counsel for the Claimant who assured him that there is a possibility that the matter could be settled amicably between the parties.

The Defendant started waiting for the date of a meeting between the parties to resolve the matter but the said meeting never came. The Defendant later engaged the Legal Aid Bureu to represent him in the matter but the said Legal Aid Bureu did not file a defence. Counsel Khonyongwa proceeded to state that the Claimant's legal practitioner manipulated on the Defendant's ignorance of the court process in as far as limitation periods are concerned when filling a response and defence. It was stated that the Defendant was misled into believing that the said matter would be settled amicably and out of Court. The prayer of the Defendant was that the default judgement should be set aside to as the Defendant has e defence on merits.

The Claimant did not file a specific sworn statement in opposition to the application to set aside the default judgment as he argued that the issues that he wanted to raise in opposition to the said application are already provided for in the sworn statement in support of his application to vacate the stay of execution order that was granted without notice by this

Court. The Defendant sought to object to the adoption of the sworn statement in support of the application to stay execution as evidence in opposition to the application to set aside the default judgment. I do not see a problem with proceeding as prayed for by Counsel for the Claimant as there is no irregularity in proceeding in that manner. As I indicated earlier on, the two applications before me are inter-linked and this is why I proceeded to hear them together and there is no rule of procedure that prevents proceeding as prayed for by the Claimant.

In opposition to the application to set aside the default judgment in question; Counsel for the Claimant stated that it is not true that he held the Defendant from defending the matter. Counsel Kadzipatike confirmed that he was approached by the Defendant who pleaded that the matter be settled out of Court and the response from Counsel was that his client was not interested in any discussions with the Defendant over the matter. Counsel Kadzipatike further stated that the Defendant did file a defence out of time through his previous lawyers Legal Aid Bureau hence it is not true that a defence was not filled by Legal Aid Bureau. It was further stated that the Defendant was aware that if no response was filled within 14 days and no defence filled within 28 days; a default judgment would be entered and by the time the Defendant was filling a Defence through Legal Aid Bureau, he was aware of the default judgment. It was on this basis that the Claimant argued that there is no justification for the Defendant's failure to apply for setting aside of the default judgment within three months as provided by the rules.

Counsel Khonyongwa respondent to the sentiments from Counsel Kadzipatike by stating that the Defendant proceeded to consult a lawyer at the Legal Aid Bureau after noting that the meeting with Counsel for the Claimant to settle the matter out of Court was not coming into effect. It was further stated that the Defendant was not aware that his previous Legal practitioners had filled a defence out of time in the present matter. The Claimant maintains that he has a defence on merits hence it is only fair and just that the default judgment be set aside so that he should be allowed to file his defence to the claims.

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

## ISSUES

The main issue for determination is as to whether the default judgment should be set aside and depending on the outcome of this issue the court will have to determine on the issue of vacation of the stay order granted to the Defendant.

## 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 provide 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 Defendant advanced two grounds of challenging the default judgment entered by this Court on the 8<sup>th</sup> day of February 2022. The first argument is that he was not aware of the time limits for filling a response and or defence to a claim. It was stated that when the Defendant received the summons of the present matter; he engaged Counsel for the Claimant for a possible out of Court settlement of the matter. The Defendant claims that Counsel for the Claimant told him that there was a possibility of settling the matter amicably between the parties hence the Defendant believed this and was waiting for a meeting for the parties to discuss and resolve the issue. He later realised that the discussions were not happening and thought of engaging a lawyer through the Legal Aid Bureau. Later on the Defendant proceeded to engage Counsel Khonyongwa for proceeded to make an application for stay of execution of the default judgment and then made an application to set aside the default judgment.

Counsel for the Claimant told this Court that the sentiments by the Defendant are not true. Counsel Kadzipatike told the Court that he was approached by the Defendant to have the matter settled out of Court but Counsel informed the Defendant that his client was not interested in any discussions over the matter. It was argued by the Counsel for the claimant that the Defendant was fully aware of the time frames for filling a response and a defence but failed to do so and further that there is no justification for the failure to defend the matter in time of challenge the default judgment in time.

I have carefully considered the first reason as advanced by the Defendant and I have carefully considered both arguments on this ground. In my considered opinion; the reason advanced by the Defendant is baseless and has to fail in its entirety. To begin with; the Defendant does not dispute the fact that he was served with the summons in the present case. According to the sworn statement of service of the said summon, the Defendant was personally served on the 30<sup>th</sup> December 2021. The front page of the summons had the following paragraphs;

“TO: THE DEFENDANT above -named.

**THIS SUMMONS** been issued against you by the above-named claimant in respect of the claim set out on the back.

**WE COMMAND YOU** within 28 days after the service of this Summons on you, inclusive of the day of service, you must either satisfy the claim or file with this Court a defence and list of documents. If you do not intend to contest the proceedings you must within 14 days’ after service of this Summons on you inclusive of the day of service return the accompanying Response stating therein that you do not intend to contest the proceedings but desire a stay of enforcement of judgment, if any.

**TAKE NOTICE** that if you fail to satisfy the claim or to file a defence and list of document or return the Response within the time stated, or to file a defence and list of documents or to return the response without stating an intention to contest the proceedings, the claimant may proceed with the claim and judgment may be entered against you without further notice.”

The above quoted summon was clear on the time limits of filling the defence or response and the Defendant cannot come to this Court and argue that he was not aware of the time limits. It is surprising to hear Counsel for the Defendant arguing that Counsel for the claimant took advantage of the Defendant’s lack of knowledge on time limits when the summons themselves had clearly informed the Defendant of what is required of him. In any event, ignorance of the law has never been allowed as a defence on failure to comply with the said law. Again, Counsel for the Claimant has indicated that when he was approached by the Defendant on settling the matter out of Court; he told the Defendant that his client is not interested in discussions. Even if the alleged discussions were scheduled, the Court record does not reflect anything to do with attempted discussions hence there is nothing that stopped the time as provided for filling defence and or response in the present case. The above discussion leads to the conclusion that

there is no reason at all for the Defendant's failure to do the needful after being served with the summons. The subsequent processes of obtaining default judgment and enforcement orders are not required by law to be served to a Defendant who fails to file a response or defence in a proceeding.

The second basis advanced by the Defendant is that he has a defence on merit to the claims made by the Claimant. The main argument advanced is that the parties entered into a car sale agreement and not a car rental agreement hence the claims made by the Claimant are premised on a wrongful basis. Going through the file and the sentiments of the Defendant; one would see that the Defendant has never been serious in contesting the present matter. The default judgment in the present case was entered on the 8<sup>th</sup> day of February 2022 and an application to set aside the default judgment was only made on the 4<sup>th</sup> June 2022 after about four months from the entering of the default judgment. On 6<sup>th</sup> April 2022; the Defendant engaged the Legal Aid Bureau to act on his behalf in the present matter and the Legal Aid Bureau duly filled a notice of appointment of legal practitioners. Legal Aid Bureau proceeded to attempt to file a defence without even checking on what was on the file as by this time, time for filling a defence had already elapsed and a default judgment had already been entered on 8<sup>th</sup> February 2022. A reasonable lawyer with due diligence would have checked on the status of the file before proceeding with filling a defence.

The file will further show that two months later after attempting to file a defence out of time through the Legal Aid Bureau, the Defendant engages another lawyer who proceeded to file an application for stay of enforcement and subsequently an application to set aside a default judgment in which he attached a draft defence which has different claims from the claims made in the other purported defence filled by the Legal Aid Bureau. It would seem to me that the new lawyer did not even bother to appreciate the file. If he had time to appreciate the file he would have noted that the Legal Aid Bureau filled a purported defence although way out of time which had purported counterclaims. The purported counterclaims are different from the ones contained in the draft defence and all these instructions are purportedly coming from the Defendant. My impression from the conduct of the Defendant coupled with my finding that he



has no justification at law for failure to defend the matter or his failure to challenge the default judgment in time is that the alleged defence is just aimed at frustrating the Claimant from enjoying the fruits of his litigation.

Under Order 12 rule 21 (3) of the CPR 2017; a Court will set aside a default judgement if the defendant has shown a reasonable cause for not defending; and where there is a defence on merit. It is clear from wording of the above quoted rule that a default judgment will be set aside if the two conditions under Order 12 rule 21 (3) (a) and (b) are satisfied. There is a need for provision of a “good cause for not defending” and “a defence on merit”. I must also mention that under Order 12 rule 21 (2) (b); it is provided that where an application is made more than 3 months after the default judgment was entered, the applicant has to explain the delay and that the Court shall not set the judgment aside unless it is satisfied that it is in the interests of justice to do so.

In the case of **Napuleya Teleza Chiphale v. Steven James; Land Cause No. 13 of 2020**, the Court stated that in line with **Order 12 rule 21 (2) (b) of the CPR 2017**, a defendant is required to act “promptly” meaning that he has to act with all reasonable celerity in the circumstances. It was emphasized that promptness will always be a factor of considerable significance and if there has been failure to make the application promptly, a court may well be justified in refusing relief, notwithstanding the possibility that the defendant may well succeed at trial. In **Registered Trustees of Zambezi Evangelical Church v Zambezi Evangelical Church and others Civil Cause No. 48 of 2013**, it was held that a delay of 3 months amounted to inordinate delay and the court refused to set aside a default judgment. The present case involves a delay of about four months in challenging the default judgment. I have already found that the delay in filing a defence as well as the delay in challenging the default judgment has no justification. Again, having looked at the circumstances; I have reasoned that the attempted defence is merely a way of preventing the Claimant from enjoying the fruits of the litigation and subsequently there is no basis for granting the application in question.

## FINDING

Considering the above discussion, this court proceeds to dismiss the application by the Defendant. Consequently, the stay of execution of the default judgment is also vacated as the stay was granted pending the determination of the application to set aside the default judgment which has been dismissed. Each party to pay its own costs the present application.

Pronounced this 5<sup>th</sup> Day of SEPTEMBER 2022 at LILONGWE



**ANTHONY PITILIZANI KAPASWICHE**

**ASSISTANT REGISTRAR**