

Library



**REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY**

**PERSONAL INJURY CAUSE NUMBER 171 OF 2018**

**BETWEEN:**

**EPHRAIM YOHANE JANNY KANJUNJUNJU**

(Suing as the administrator of the estate of Estate of

**KALOSI JOGI MAKHAZA JANNY KANJUNJUNJU (Deceased)) -----1<sup>ST</sup> CLAIMANT**

**FATNESS KALOSI JOGI KANJUNJUNJU**

(Suing as the administratrix of the estate of Estate of

**KALOSI JOGI MAKHAZA JANNY KANJUNJUNJU (Deceased)) -----2<sup>ND</sup> CLAIMANT**

**AND**

**ZEKA STENALA-----DEFENDANT**

**CORAM:**

**Msokera, Assistant Registrar**

Macle, of Counsel for the Claimant

Domasi, of Counsel for the Defendant

Mbekeani, Official Interpreter

**RULING**

1. The claimant, 17 days after serving the defendant with the summons of this matter, applied for a default judgment citing failure by the defendant to file a response or defence within 14 days of service. The court granted the application on the same day. Subsequently, the defendant filed his defence on the 29<sup>th</sup> day from (and inclusive of) the date of service (which is the 28<sup>th</sup> day if we do an exclusive account).

2. Hoping that he had filed his defence in time, the defendant proceeded to file his mediation bundle and indeed the court set down the matter for mediation. The claimant, on the other hand, filed a preliminary objection – that the court could not preside over the mediation while there was a default judgment which had not been set aside. The Honourable Judge proceeded to suspend the mediation proceeding so that the issue of the default judgment be dealt with by this court.
3. It is the defendant's position that the default judgment was irregularly obtained. He gives two reasons in support of that claim. He submits that the defendant misled the court by stating that the summons was served on 21 June 2018. In a sworn statement in support of another application similar to the present one, counsel for the defendant had told the court that the misleading statement was to the effect that the claimant had mentioned of the date of service as 'the 21<sup>st</sup> June on the 17<sup>th</sup> July, 2018'. According to him, this mistake made the date of service unknown as 'the 21<sup>st</sup> June on the 17<sup>th</sup> July, 2018' is not a date in our calendar.
4. This court is at pains to see the defendant and his learned counsel building their argument on this so-called misleading date to the extent of accusing the claimant of suppressing material facts. If the defendant and his counsel had properly read paragraph 4 of the sworn statement in support of the application for default judgment, they should not have been confused. They should not have seen a misrepresentation as there is none. All that the particular paragraph says is that the summons which were issued on 21 June 2018 was served on the defendant on 17 July 2018.
5. In actual fact, it is the defendant and his counsel, in their misrepresentation of paragraph 4 of the sworn statement in support of the default judgment's application, who are guilty of attempting to mislead this court. But even if the claimant had committed such a mistake, counsel should not be so pedantic as to dwell on minor issues when as a matter of fact he acknowledges that the defendant was actually served with the summons on 17 July 2018.
6. Be that as it is, the defendant still argues that the default judgment was irregular as his defence was filed within the 28 days required by Order 5 r 7 (2)(b) of the Rules. Of course, the defence was filed within that time if, as already highlighted above, we reckon the time from but exclusive of the date of service. In my view, this is the correct approach as it is in line with Order 3 r 1 of the Rules. Otherwise, as was held in *Banda v Malawi Housing Corporation*

Commercial Case No. 233/2018, the substantive provisions of the Rules prevail over Schedules and Forms derived from them. Therefore, the statement in Form 1 which says that the 28 days is inclusive of the date of service is misplaced as it conflicts with Order 3 r 1.

7. Although the defendant filed his defence within 28 days of being served with the summons, he did not file a response. This was contrary to Order 5 r 7 (2)(a). And by virtue of Order 5 r 7 (2)(d) as read with Order 12 r 6(a), the claimant was entitled to obtain a default judgment. The rationale behind this position has been well explained in the case of *Banda v Malawi Housing Corporation* such that it is unnecessary to reinvent the wheel in this ruling. The short of it is that the default judgment is regular.
8. According to Order 12 r 21(2) of the Courts (High Court) (Civil Procedure) Rules of 2017, the application for setting aside default judgment has to be made not later than 3 months after the judgment is entered. The defendant did not comply with this provision. As such, Order 12 r 21(2)(b) of the Rules demands that he should explain the delay. Thus, I must firstly be satisfied that there are good grounds which explain the application being made later than within the prescribed period. Then after, the defendant has to demonstrate that it is in the interests of justice to have the default judgment set aside.
9. It is surprising to this court that counsel for the defendant covers the reason why the application was filed late in the skeleton arguments. This ought to have been stated in the sworn statement in support of the application. Nevertheless, since there is no response from the claimant on the given reason, I will reluctantly consider it.
10. Counsel for the defendant has stated that this application was not brought within 3 months because the claimant did not serve the defendant with the judgment. From the submissions before me, the claimant has not disputed this. And it satisfies me as a sufficient reason. I will, therefore, move on to consider whether the application raises sufficient reasons for setting aside the default judgment.
11. Order 12 r 21(3) of the Rules provides two considerations which guide the court when exercising its discretion on whether to set aside a default judgment – whether the defendants had reasonable cause for not defending the application and whether they have a meritorious defence. That Order 12 r 21(3) should be read conjunctively seems obvious from the choice of

the term 'and' as opposed to 'or'. In other words, both conditions must be met before the court is satisfied that the interests of justice require the default judgment to be set aside. The assumption is that a party which has a meritorious defence cannot and should not, without reasonable excuse, file that defence later than the Rules allow. I am fortified in making this conclusion as the language used under Ord 12 r 21(2)(a) is mandatory. It reads, 'The application [for setting aside default judgment] ... **shall** set out the reasons why the defendant did not defend the application.'

12. The defendant in *Banda v Malawi Housing Corporation* had also omitted to file a response but managed to file a defence within 28 days. Still more the court held that in such circumstances the defendant could not be said to have demonstrated a reasonable cause for not defending the action. I am of the view that the present proceeding is distinguishable to *Banda v Malawi Housing Corporation*.

13. The court in *Banda v Malawi Housing Corporation* admitted that the drafting of Form 1 which has instructions on the timelines for filing a response and a defence is misleading as it contradicts the substantive Rules. Briefly, the court observed that the Form leaves an impression one does not need to file a response if they intend to defend the action. And that they have up to 28 days to file their defence. Here is a reproduction of the relevant paragraph under Form 1:

*'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?'*

14. Now, it is understandable for the court to reject the excuse from legal practitioners and corporations (like Malawi Housing Corporations), which have in house lawyers, that they were confused with the faulty wording of Form 1. Obviously, the assumption is that legal professionals should know better than to argue ignorance of the Rules. But it is unfair to extend this assumption to the laity. Otherwise, that would tantamount to punishing innocent litigants

for the sins of the draftsman. And this court will not do that because Ord 1 r 5(1) requires it to deal with proceedings justly.

15. Since the Rules demand summons to be served personally on the defendant and they were so served in this matter, I give the defendant a benefit of doubt that his laxity in filing the defence may be traced back to the mistaken wording of Form 1. This is enough reason for this court to make a finding that the defendant had reasonable cause for not defending the action.
16. As the foregoing shows, there is need for the registries to check that the summons and indeed all legal processes are complying with the substantive Rules to avoid perpetuating the confusion highlighted herein.
17. Finally, as to the issue of whether the defendant has a meritorious defence, after perusing the defence, I am satisfied that it raises triable issues with a prospect of success since the ownership of the land in dispute is in the defendant's name. While the claimants are contending that he got the land through a process tainted with misrepresentation of facts, the dispute can only be settled by examining evidence through trial.
18. In conclusion, the defendant has passed both tests. Therefore, it is my finding that the interests of justice require that the default judgment should be and is hereby set aside.
19. I exercise my discretion on costs for this proceeding in favour of the claimants. This is to remedy any prejudice they have suffered due to the unprocedural conduct of the defendant.

Made this 11<sup>th</sup> day of March 2022 at Blantyre.



C.H. Msokera  
Assistant Registrar

---