



**REPUBLIC OF MALAWI**  
**IN THE INDUSTRIAL RELATIONS COURT OF MALAWI**  
**SITTING AT BLANTYRE**  
**IRC MATTER NO. 390 OF 2019**

**BETWEEN:**

**KONDWANI KUMCHELEKANA.....APPLICANT**

**-and-**

**WORLD VISION INTERNATIOONAL.....RESPONDENT**

**CORAM: H/H PETER M.E KANDULU, AR**

Mr. Namonde, Counsel for the Applicants,

Mr. Ng'omba on brief for Soko, Counsel for the Respondent,

Mr. Dan Kanyatula, Court Clerk.

## **RULING TO SET ASIDE DEFAULT JUDGEMENT**

### **a. Introduction**

1. The applicant filed IRC form 1 on 5<sup>th</sup> July 2019 claiming unfair dismissal and severance allowance pay.
2. The Respondent filed their response on 30<sup>th</sup> day of July 2019 denying the claims against them and prayed for a declaration by the court that dismissal was fair, as the respondent followed all the procedure to dismissal the applicant.
3. The matter was then scheduled for hearing on 5<sup>th</sup> day of February 2020 by the then Hon. Assistant Registrar Innocent Nebi.
4. Service was duly served on the Respondent on 22<sup>nd</sup> day of January 2020 and was received at 15.13 hours by the respondent legal house.
5. On the date appointed by the then Hon. Assistant Registrar for the pre-conference hearing, neither the Respondent or their legal house, were present and no any reason for their failure to attend court were furnished to neither the Applicant or their legal house and equally to the court.
6. The Hon Assistant Registrar examined the duly issued Notice of Pre-hearing conference and having satisfied himself that the notice of the pre-hearing conference was duly served and received by the respondent.
7. The Hon Assistant Registrar discovered that there was no any explanation to why the respondent was not in court, and he went ahead to strike out the defence and entered Judgement in favour of the Applicant.
8. And he ordered the matter to proceed to assessment of damages for unfair dismissal and severance pay as prayed

### **b. Application to set aside the default Judgement**

9. Before me, there is an application for an order that the order striking out the respondent's defence for failure to attend to a pre-hearing conference and the default judgement entered in favour of the applicants be set aside and that the said defence be restored.
10. There is an affidavit in support of the application sworn in by counsel Khumbo Soko. In summary counsel states that the matter previously was handled by Mr. Majekete who is no longer an employee of the respondent.

11. Counsel states that he is appointed by the respondent to represent them on 26<sup>th</sup> day of October 2021. When he inquired about the file of this matter with Mr. Mnjuzi, the file previously handled by Mr. Majekete could not be located in the office previously occupied by Mr. Majekete.
12. He states that on 29<sup>th</sup> day of October 2021, he deputed Counsel Rennie Ng'omba to go to court Registry and make a copy of the court file so that he could appreciate the status of the matter.
13. He states that Counsel Ng'omba was unable to make a copy of the file as it could not be located within the Registry. The file was still missing when he attended court in Blantyre on the 2<sup>nd</sup> day of November 2021.
14. He states that he had inquired from Mr. Majekete and he had informed him that he was not communicated of the appointment for the pre hearing conference as well as the fact of the defence being struck out and that this was only known to the respondent when he inspected the file of Counsel Namonde on 2<sup>nd</sup> day of November 2021.
15. He states that although on the face of it, it would appear, as if there has been an inordinate delay in making the application, the truth of the matter is that no application could have been made by the respondent without, in the first place knowing that its defence had been struck out.
16. He therefore prayed for the restoration of the defence and the setting aside of the default Judgement entered by the Assistant Registrar as the respondent has defence on merit.

**Reply in Opposition to the Application to set aside the default Judgement**

17. The applicant opposes the application as the notice for pre-conference hearing was served on Mackenzie and Patricks who at the time, were appointed by the respondent to act on their behalf.
18. Mackenzie and Patricks had their employee Counsel Majekete stationed at the Respondent's offices.
19. When their process server tried to serve the respondent directly, he was instructed and directed to serve on Mackenzie and Patricks legal house.
20. It was only known to them when the process server went and wanted to serve Mackenzie and Patricks on the notice of damages when he was told that their lawyer was no longer in

employment with the Respondent and such notice was then served directly on the respondent on 18<sup>th</sup> day of October 2021.

21. Counsel states that it was not true to inform the court that the respondent was not aware about the appointed date of pre hearing conference she attached an exhibit in proof that service was duly accepted.
22. Counsel states that she is not aware of any law or rule under the Industrial Relations Court Rules, where it is indicated that the respondent must be informed when their defence is stricken out by the court.
23. Counsel states there is inordinate delay when she considers that the defence was stricken out in February 2020 and the application to set aside was made on 12<sup>th</sup> day of November 2021 which is 1 year and 9 months since the defence was stricken out and default was entered in favour of the applicant.
24. On that basis alone as on paragraph 23, she opposes the application and pray that the matter must proceed to assessment of damages for unfair dismissal and severance pay.

#### **The Law on Inordinate Delays**

25. In *NICO General Insurance Co. Ltd vs Tomas Munyimbiri* MSCA Civil Appeal No. 54 of 2008 the MSCA held that a delay of 5 months' amounts to inordinate delay.
26. In *Mbewe v Agricultural Development and Marketing Corporation* [1993] 16 (1) MLR 301 a delay of three months in bringing an application for enlargement of time, after the statutory period had expired, was held inordinate. It was further held that even where substantial and good causes are shown, an application may still be refused where delay is inordinate.
27. *Laston Mphembedzu and Nico General Insurance Company Ltd* Civil Cause No. 822 of 2007 Justice Kamwambe held that
28. *We are now aware about Lord Atkin's direction in Evans v Bartlam* [1937] AC 437 at 480 that the underlying principle in an application to set aside the default judgment is that unless and until the court has a judgment on merit or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.
29. Further Lord Atkin says that there is no rigid rule that the Applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, though

*obviously the reason, if any for allowing judgment and thereafter applying to set aside is one of the matters to which the court will have regard in exercising its discretion.*

30. *It ought to be noted that application to set aside a judgment should be made promptly and within reasonable time. (see note 13/9/12 (1999 Rules of Supreme Court). What is reasonable period will depend on the circumstances of the case.*
31. *In the case of **John G. Kawamba t/a Central Associates Limited v W.T.C Freight Limited Civil Cause No. 541 and 542 of 1986** it was held that six months delay after the default judgment had been entered was inexcusable. Even if there could be a meritorious defence, the Appellant would be greatly prejudiced if the judgment was set aside considering that 10 months in bringing the application to set aside judgment is inordinate and inexcusable in the circumstances.*
32. The application to set aside the default judgment and restore the defence stricken out by the Hon Assistant Registrar is coming after 1 years and 9 months. Counsel Khumbo Soko has tried to justify why the application to set aside the default judgement and restore the defence has to come to court very late. A perusal of the affidavit sworn by counsel Khumbo Soko does not state specifically who at the court registry did Counsel Rennie Ng'omba met to fish out the file for him to appreciate the status of the case.
33. He avers that counsel Majekete seized with the matter had informed him that he was not aware of the date for the pre-conference hearing. Surprisingly, the notice was duly accepted by the legal house Counsel Majekete as exhibited by Counsel Namonde.
34. Counsel have even averred that Mnjuzi had informed him that when he tried to locate the file in the office previously occupied by Majekete, he failed to get hold of the file.
35. My view, failure to locate the file from the office previously occupied by Counsel Majekete for the respondent, how could that be a matter of concern to the applicant? Is that not negligent to duty on part of the respondent's legal officer? How could negligent to duty by counsel for the respondent should affect the applicant?
36. In my view there was an admission that at least, the Respondent was aware of the proceedings through their own lawyer appointed by themselves if paragraph 34 is to be understood by a reasonable person of which I am one.
37. The court finds that there was negligence to duty in the way the respondent's lawyer handled the file. The said negligence to duty cannot be allowed and stand to prejudice the

applicant, as on his part he effected service to the respondent's duly appointed lawyers. So I hold.

38. The issue that the file in the registry was misplaced when Counsel Rennie Ng'omba was sent to appreciate the status of the file cannot be believed by this court neither. There is no disclosure of a court official, Counsel Ng'omba had met or approached to fish out the file for him. In the absence of the court official counsel Rennie Ng'omba met and asked for the file, cannot be justified to set aside the default judgement and restore the defence.
39. A perusal on the file reveal that there is no leave of the court to allow counsel Soko to access the court records for his own use.
40. When the file is at the court, it is in custody of the court and it is not a public document that any outsider would come and demand its production without leave of the court.
41. This is the reason that whenever any court documents are issued, they are issued in triplicate, for the applicants, the respondent and the court.
42. There is no justification that when a party misses its duly issued documents due to negligent to duty and they should rush and rely on other party's documents and yet they did not have permission to access it.
43. Court Judgement becomes a Public document when the Judgement is delivered to the parties by the Court either in the open court or in chambers.
44. It would be unjustifiable and unreasonable to come to court and states that the documents which was served on the respondent got missing, then I came to court to use the court document but I did not find it either. Therefore, I could not have made any move because my document was missing and the court document or the file could not be located and yet the court handling the matter was never approached to say the least.
45. It is therefore my finding that the court file never got misplaced as alleged by Counsel Soko as there is no evidence that the court handling the matter was approached or there is no leave of the court to allow counsel Soko to copy the court records in order to appreciate the status of the case.
46. I am surprised with the allegation that the court file went missing, when in fact it is the same file counsel has alleged it went missing that my court is using to deal with the application. The reasons advanced by counsel Soko are inexcusable.

47. 1 years 9 months in my view is inordinate delay and there is no reasonable excuse which is justified in law that the judgement entered by the Hon Registrar (then) should be set aside and that the defence which was stricken out be restored.
48. I am inclined to set aside the default Judgement entered in favour of the applicant and I am further inclined to restore the defence which was stricken out by the Court due to non-attendance of the respondent despite being duly served with the notice of hearing.
49. This, therefore, means that the application to restore the defence and set aside the default judgement entered in favour of the applicant is refused for inordinate delay and that there is no justification supported by law for the inordinate delay in making this application.
50. I further give directions that the matter must proceed to assessment of damages for unfair dismissal and severance pay and that the applicant must file the notice of hearing within 3 days from the date this order is delivered.
51. Delivered in chambers this 19<sup>th</sup> day of April 2022 at Blantyre.



**PETER M.E KANDULU**  
**ASSISTANT REGISTRAR**

