



REPUBLIC OF MALAWI
IN THE INDUSTRIAL RELATIONS COURT OF MALAWI
SITTING AT BLANTYRE
IRC MATTER NO. 35 OF 2022

BETWEEN:

JOSTER CHISALE.....APPLICANT

-and-

THE CENTRAL EAST AFRICAN RAILWAYS COMPANY LTD.....RESPONDENT

CORAM: H/H PETER M.E KANDULU, AR
The Applicant, Present / Unrepresented
Mr. Hara, 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 18th January 2022 claiming Reinstatement, arrears of salary, damages for unfair dismissal, annual bonus, 13th cheque, airtime, meal and transport allowances.
2. The Respondent did not file Form 2 for reply at the expiry of prescribed time provided under O. 11 r 3 of the Industrial Relations Court Rules or and did not seek leave of court to for extension of time which to deliver the reply.
3. The Court entered Judgement in favour of the applicant on 7th day of February 2022 having been satisfied that service was effected to the respondent but they had chosen not to reply to the claims.
4. On 9th day of February 2022, Counsel Hara was granted leave of the court to represent the respondent.
5. On 10th day of February 2022, the court granted order staying the execution of the default Judgement dated 7th day of February 2022 until the hearing and determination of the respondent's application for an order setting aside the default Judgement.

b. Motion for an application to set aside Default Judgement (Rule 16(1) of the IRC(P)R

6. Counsel Hara states in the affidavit in support of motion that Dalitso Mtambo, the Legal Manager of the Respondent had informed him that they were served with FORM 1 on 19th day of January, 2022, and after being served, the Respondent passed on instructions to defend the matter to his firm on 25th day of January, 2022.
7. Due to the oversight of the lawyer who was handling the matter in his office, the Respondent's IRC form 2 defence was not filed until the time within which the respondent had to file the defence has elapsed
8. Counsel avers that due to their oversight by failing to file response, the court entered a default judgement on 9th day of February, 2022 and that counsel became aware of the default Judgement when he was filling the Respondent's IRC Form 2 (defence).
9. Counsel states that the respondent has a meritorious defence to the applicant's claims. And counsel concludes that it would be in the interest of Justice that the default Judgement dated the 7th day of February 2022, be set aside so that the matter be determined on the merits.

Reply in opposition to the Respondent's application to set aside default Judgement.

10. The applicant states that it is in evidence based on the Respondent's own admission, that the applicant's Form 1 was duly served on them on 19th day of January 2022.
11. The applicant states that the respondent's lawyer did not file a response within prescribed period of time as a result a default judgement was entered.
12. The applicant states that the respondent's lawyer did come to court to seek extension out of time in which to file the response in form 2.
13. The applicant states that the respondent wants the court to set aside the default Judgement presumably in exercise of its general powers under rule 25 (h) of the IRC (procedure) rules.
14. All in all the applicant opposes the application as he states that there is no good reasons advanced by the Respondent to set aside the default judgement.

The Law to set aside default Judgement

15. ***Laston Mphembedzu and Nico General Insurance Company Ltd*** Civil Cause No. 822 of 2007 Justice Kamwambe held that
16. *"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.*
17. *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.*
18. *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."*
19. *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.

20. My understanding on the case as captioned above, is that the underlined principle in setting aside default Judgement is that there must be good reasons advanced by the applicant.
21. In this case, should I say the applicants have good reason which would compel my court to set aside the default judgement? In my view, there is no any good reason why the Respondent failed to file form 2 (defence) in response.
22. If, I read the affidavit in support of the application, the main reason advanced by the Respondent for their failure to file a response was an oversight or in another better word negligent to duty by the lawyer handling the matter.
23. Should my court conclude that negligent to duty is a good reason to compel me to set aside the default judgement? The obvious answer is no, negligent to duty or oversight cannot and shall never be a good reason which would compel the court to set aside default judgement.
24. The law has prescribed time, out which to serve documents and to provide responses. The law had good intentions that the parties shall comply with the rules religiously in order to safeguard the sanctity of the law.
25. The Court has the duty to ensure what the law or rules have provided, they must be followed to the letter by the parties in order to safeguard the proceedings at the court. It shall not be the duty of the court to encourage parties to disobey the law and rules and at the same time to allow the same parties who are failing to comply with the rules to benefit to it due to their negligent to duty called oversight.
26. It is therefore my findings that the respondent have failed to demonstrate with justifiable reasons on why they failed to file response within the prescribed time by the law.
27. To make matters worse, counsel for the respondent has not made any application to the court to seek leave, in order to extend time out of which he would have been allowed to file form 2 (defence) out of time.
28. Because there is no application to seek leave of the court or order to extend time to file Form 2 out of time, on that basis alone the court is of the view that this is the right case where the application to set aside default Judgement must be denied.

29. I am inclined to set aside the default Judgement entered in favour of the applicant and I am further inclined to grant leave of court to the applicant to file defence out of time as the same is not before the court.
30. I further give directions that the matter must proceed to assessment of damages on the prayers set out in Form 1 of the Applicant.
31. I order that the applicant must file a notice of assessment within 3 days from the date this order is delivered.
32. Delivered in chambers this 19th day of April 2022 at Blantyre.



PETER M.E KANDULU
ASSISTANT REGISTRAR

