

REPUBLIC OF MALAWI



IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO. 404 OF 2020

BETWEEN

LOWRY MBULO.....CLAIMANT

AND

ATTORNEY GENERAL..... DEFENDANT

CORAM: A.P KAPASWICHE

ASSISTANT REGISTRAR

Chihana

Counsel for the Claimant

Chirwa

Counsel for the defence

Kumwenda

Clerk/ Official Interpreter

RULING

BACKGROUND

The Claimant commenced the present proceedings through Summons (Specially Endorsed) on the 19th May 2020 and served on the Defendant on 20th May 2020. The Defendant did not file a defence within the prescribed time and a default judgment was entered on 14th July, 2020. The matter was scheduled for assessment of damages. Before, this court could proceed to hear the assessment of damages payable, the defence brought two applications, namely an application to stay the assessment of damages pending the determination of an application for setting aside the default judgment and the actual application of setting aside the default Judgment. This court heard the parties on the application to stay assessment proceedings and subsequently granted the stay. The Court then proceeded to hear the application to set aside the default judgment and this is my determination of the said application.

THE EVIDENCE

The application by the defence was supported by a sworn statement by Counsel for the Defendant. It was the evidence of the Defendant that the Claimant wrote a demand letter addressed to the Attorney General which served as a notice of his intention to commence legal proceedings against the Defendant as required under Section 4 of the Civil Procedure (Suits by or against Government and Public Officers) Act but the same came to the Defendant's attention on 1st April 2020. This meant that the Claimant had up to three months from the 1st April 2020 to commence the intended legal proceedings and the date fell on 1st July 2020. Nonetheless, on 24th April 2020 the Defendant responded to the demand letter denying liability.

It was the further evidence of the Defendant that despite the statutory requirement of three months' notice, the Claimant on 19th May 2020 commenced legal proceedings and the process was served on the Defendant on 20th May 2020. The Defendant did not file a defence and a default judgment was subsequently entered on the 14th July 2020. The Defendant testified that their failure to file a defence was mainly due to failure to timely locate the required documents due to huge and numerous documents that the Defendant's registry keeps. The

situation was also worsened by Covid-19 pandemic as staff were working on shifts and this effected the work as the file and its contents could not be properly accounted for.

The Defendant argued that they have a defence on merit justifying setting aside the default judgment granted in the present case. Firstly, it was stated that the Claimant commenced the proceedings prematurely before the elapse of the mandatory required 3 months and this is a clear contravention of Section 4 of the Civil Procedure Suits by or Against Government and Public Officers Act. It was argued that by operation of the law, there is no claim at all against the Defendant. Secondly, it was stated that the Claimant's Claim has no basis at law as the Claimant alleges that the Defendant has a statutory duty to compensate him for damages emanating from public riots but no law is cited in support of the contention. This means that the Claimant's assertions are unfounded at law.

The Defendant went further to argue that if it was to be assumed that the Claimant's claim is premised on the Riot Damages Act, the same gives discretionary powers to the Minister responsible who can choose whether to exercise them or not. As such, if one was to inquire on why the Minister did or did not exercise the said discretion, the proper way is to bring a judicial review claim and not Summons and on this basis the Claimant's claim has to be dismissed. Further, the Defendant stated that it is not aware of the angry demonstrators as alleged and it cannot be liable for their conducts in all circumstances.

The Claimant opposed the application through a sworn statement by Counsel Chihana. She stated by confirming that the notice of intention to sue the Government was served on the Government who duly responded by denying liability on the 24th April 2020. She stated that where the Government opts to deny liability in toto, the time lapses at the time such a response is made. It was stated that the problem raised of failure to manage legal documents is an administrative issue which should not be used as a basis for which a party fails to act. It was further stated that the claim has a legal basis as **Section 9 of the Riot Damages Act** places a statutory duty on the Defendant to compensate victims of Public Riots. Counsel for the Claimant stated that a reading of Section 9 one can deduce that a victim of damage suffered due to riots is entitled to compensation by Government.

The Claimant proceeded to state that claims regarding personal injury and damages to property have since time immemorial been commenced by way of summons and there is no issue with the Claimant's way of commencement of the proceedings in question. It was also stated that the Defendant cannot claim not to have knowledge of the riots as the news of violent demonstrations due to the 2019 presidential election was known to every Malawian whether living in Malawi or abroad. The Claimant pleaded that the default judgment was regularly entered and the Defendant has failed to demonstrate satisfactory reasons for their failure to defend the matter in time and further there is no demonstration of a defence on merit.

The above represents a summary of the material evidence that came before this Court.

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 rule provides 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.
- (4).At the hearing of the application, the court shall—
- (a).give directions about the filing of the defence and other statements of the case;
 - (b).make an order about the payment of the costs incurred to date;
 - (c).consider whether an order for security for costs should be made; and
 - (d). make any of their order necessary for the proper progress of the proceeding.

ANALYSIS OF THE LAW AND SUBMISSIONS

The evidence in support and in opposition to the application has already been summarized above and it is not my intention to repeat the said evidence suffice to state that in my analysis I will only refer to the relevant evidence with regard to the main contentions in the present matter. Under **Order 12 rule 21 (3) of the CPR 2017**, the court may set aside the judgment in default if it is satisfied that the defendant has shown reasonable cause for not defending the matter and has a meritorious defence, either about his liability for the claim or about the amount of the claim. The above stated considerations have to be considered together with the overriding principle of the interests of justice as provided under **Order 12 rule 21 (2) (b)** which emphasizes that the court shall not set the judgment aside unless it is satisfied that it is in the interests of justice to do so.

My appreciation of the evidence before me leads me to the conclusion that there are triable issues necessitating allowing the Defendant to file the defence and have the matter determined on merits. There is one main issue that I opine to be fundamental as raised by the Defendant. The issue has to do with the question as to whether the proceedings were prematurely commenced. **Section 4 of the Civil Procedure (Suits for or against Government and public Officers) Act** does provide that no suit shall be instituted against the Government until the expiration of three months next after notice in writing has been delivered to or left at the Office of the Attorney General. It is not in dispute in the present case that the Claimant commenced

the action before the expiry of the three months as the Claimant admitted that the notice of intention to sue was sent to the Defendant on the 27th March 2020 and the action herein was commenced on the 19th May 2020. The contention from the Claimant is that they did so because the Defendant responded to the demand letter on 24th April indicating that liability is denied.

In the understanding of the Claimant, the three months' period of notice requirement stopped operating after the response on denying liability hence the reason for proceeding to commence the proceedings. In my view, the position taken by the Claimant is not provided by the law as Section 4 does not state as to whether upon denial of liability response from the Government then the three months' requirement ceases to operate. The interpretation of Section 4 affects the legality of the proceedings in general and this is a ground enough to have the matter be referred for trial for the Judge to determine as to whether these proceedings were indeed prematurely commenced and if yes what is the implication. I should agree with the Claimant that the reasons advanced for failure to file the defence within time are not justifiable but in the interests of justice, the issue on premature commencement of the proceedings justifies setting aside the default judgment herein. This Court, therefore, proceeds to set aside the default judgment and orders the Defendant to file their defence within 14 days.

Pronounced this 31st day of March 2023 at LILONGWE



ANTHONY PITILIZANI KAPASWICHE

ASSISTANT REGISTRAR