



IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
BLANTYRE REGISTRY
COMMERCIAL CAUSE NO. 12 OF 2023
(Before Honourable Justice Msungama)

BETWEEN

ZAPAMWAMBA INVESTMENTS.....CLAIMANT

AND

KENSON FENNER DAZA.....DEFENDANT

Coram: E. M. Zidule : Assistant Registrar
M. Njobvu : Counsel for the Claimant
J. Chiundira : Counsel for the Defendant
B. Ntonya : Court Clerk

RULING ON APPLICATION TO SET ASIDE DEFAULT JUDGMENT

Background

The Claimant is a registered business entity that employed the Defendant in or around 2020. Defendant's job involved collection and delivery of products to clients within Limbe in Blantyre. However, the Claimant alleges that after about a year and a half, it discovered that the Defendant was not being honest in his sales dealings since he was not submitting all the cash collected. It is the Claimant's further allegation that the Defendant would order a number of cases of the product (the product has not been mentioned in the summons)

and report the same to the Claimant for updating. However, upon collection of the product, the Defendant was removing a certain amount of money for his own personal use. In or around March, 2022, ten clients complained that the Claimant advised them to clear their balances as they were trying to order more products. This is because Claimant's records indicated that the said clients did not pay for the products that they previously ordered from the Claimant. Later, the Claimant investigated the matter and noted that the Defendant received payments but embezzled the same. The Defendant admitted that he collected the money but did not remit to the Claimant. He promised to pay within two weeks but he failed to do so. The Claimant further states that the Defendant was willing to pay first half of the amount, MK10,934,000.00 within four months from June to September, 2022 and that the remaining amount would be repaid within three months, from October to December, 2022. The year for payment has not been indicated but the Court believes that it is 2022 since the commitment was made in 2022. Further, the Claimant alleges that the Defendant offered his property in Chilomoni as collateral for the repayment of the money which the Claimant believes was built using the money that the Defendant misappropriated. On 20th January, 2023, the Claimant commenced proceedings against the Defendant claiming;

- i. Payment of the sum of MK21,869,400.00 being the amount the Defendant owes the Claimant;
- ii. Accumulated interest;
- iii. Statutory legal collection charges;
- iv. Damages for breach of contract and costs of action.

On 18th April, 2023 a default judgment was entered in favour of the Claimant pursuant to Defendant's failure to file a defence within 28 days from the date of being served with the summons, namely, 3rd February, 2023. As the matter was about to come for hearing on assessment of interest and damages, the Defendant filed an application to set aside default judgment on 18th July, 2023. The application was supported by a sworn statement deposed by the Defendant and skeleton arguments. The Defendant argued in the application that the Claimant did not personally serve him the summons in these proceedings. The Defendant also argued that he has a meritorious defence to the claim

since he was depositing the money that he was collecting from clients in Claimant's account held with First Capital Bank and that he was sending proof of the deposit on Claimant's whatsapp group. Further, the Defendant argued that his house in Chilomoni was built using money earned through employment, an insurance claim from the death of his child and his wife's gainful employment.

The Claimant opposed the application and filed a sworn statement in opposition deponed by Counsel Mirriam Njobvu. The Claimant argued that the summons was served on the Defendant on 3rd February, 2023 through his house servant. The Defendant, therefore, neglected or ignored to file a defence nor a response since it is impossible that the Defendant could not get the summons despite the same being served on his servant. The Claimant further submitted that the Claimant admitted the claims on 19th May, 2022 and signed an agreement that he will pay the money being claimed by the Claimant through instalments. The first instalment was agreed to be paid between June to August and second instalment between October and December. The Claimant also submitted that the Claimant pledged his house as a guarantee that he will pay the money. A copy of the agreement has been exhibited to Counsel Mirriam Njobvu's sworn statement marked as "MN3". The Claimant also argued that the Defendant does not have a defence on merit, he only intends to delay the matter and deprive the Claimant fruits of its successful litigation. The Claimant further argued that setting aside the default judgment will prejudice the Claimant since there has been an inordinate and inexcusable delay to file the application. The Claimant also argued that the application is a waste of court's time, vexatious and an abuse of Court process. The Claimant concluded by submitting that the application should be dismissed with costs.

Issues for determination

- i. Whether or not the Defendant has shown reasonable cause for not defending the action.
- ii. Whether or not the Defendant has a meritorious defence.
- i. Has the Defendant shown reasonable cause for not defending the claim?

Order 12 Rule 21 of the CPR, 2017 provides that an application to set aside default judgment may be made not later than 3 months after the judgment is entered while Order

12 Rule 21 (2) (a) of the CPR, 2017 requires the Defendant to set out the reasons why he/she did not defend the application, in this matter, the claim. The default judgment in the matter herein was entered on 18th April, 2023 while Defendant's application was filed on 18th July, 2023. The application has therefore been made within the prescribed period since it was filed exactly 3 months after the default judgment was entered. On failure to defend the claim, the Defendant stated that the summons was not served on the Defendant as expected and stipulated under Order 8 Rule 3 of the CPR, 2017 which requires a copy of the summons to be served on the defendant personally, unless-

(a) Rule 20 applies; or

(b) the Court orders that the summons and the response in Form 2 may be served in another way.

Order 8 Rule 20 of the CPR, 2017 provides for substituted service where it is not practical for a party to serve a document personally and an alternative way of serving the document is reasonably unlikely to bring the document to the attention of the person to be served. The party seeking to serve a document by other means, namely, substituted service, may apply to the Court for an order of substituted service. However, there was no such application in the matter herein.

The Claimant insisted that the Defendant was duly served with the summons and that he just ignored or neglected to file a response and later a defence to the claim. In its application for default judgment, the Claimant attached a served copy of initial direction, marked as exhibit "PDM1" to show that the summons was served on the Defendant. However, the exhibit ("PDM 1") shows that the summons was *received by a Mr. Levison Biton on behalf of Kenson Daza* on 3rd February, 2023. When the Defendant made his first appearance on 13th June, 2023, he informed the court that Mr. Levison Biton is his house help. However, the Defendant denied being served with the summons. The Defendant stated that the Claimant did not leave the summons with Mr. Levison Biton when they went to his house to serve the same. A determination has to be made on what constitutes "personal service" since Order 8 Rule 3 of the CPR, 2017 uses the word "shall" which makes it mandatory for the Claimant to serve the summons on the Defendant personally. The Claimant cited Order 8 Rule 20 (2) (e) of the CPR, 2017 which provides

that the Court may order that a document be served by leaving it with an adult person at the last known address of the person to be served. However, the challenge is that the Court did not make such an order in the matter herein. The provision cited by the Claimant is, therefore, not applicable in the circumstances. Unfortunately, the Claimant did not state, in the sworn statement in support of its application for a default judgment, whether the Defendant advised them to leave the summons with his house help or not. Unless there was a directive from the Defendant that the summons be served on Mr. Levison Biton, on his behalf, which seems not to be the case since the Claimant did not state the same, there was no personal service of the summons on the Defendant as stipulated by the Rules. The Court is mindful that there are two things involved here, either the Defendant was given the summons by Mr. Levison Biton or he was not. We cannot speculate. But what is clear is that the summons was not personally served on the Defendant hence his failure to defend the claim.

ii. Whether or not the Claimant has a meritorious defence

Order 12 r 21 (3) of the CPR, 2017 provides that 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.

However, having found that the summons was not personally served on the Defendant, the court will not consider the other requirement for setting aside default judgment. It does not matter that the Defendant made a commitment to settle the sum that is being claimed within 6 months since the same was made before the matter was commenced. What matters is that the Claimant failed to serve the summons personally on the Defendant when the matter was filed with the Court. In the case of *Kondwani Kamanga v. Snowden Magonjetsa and 3 Others* Land Cause Number 18 of 2018 the Court set aside a default judgment that was entered against the 4th Defendant since it was not personally served with the summons, the same having been served on the Chief of the area where the land in dispute was located.

Conclusion

Having considered that the summons was not personally served on the Defendant which is contrary to Order 8 Rule 3 of the CPR, 2017, the Court finds it appropriate that the default judgment be set aside so that the Defendant should be afforded an opportunity to defend the matter. The Defendant has the next 14 days within which to file and serve his defence on the Claimant.

Any aggrieved party is at liberty to appeal or apply for a review of this decision within 7 days from the date hereof.

Costs shall be in the cause.

Delivered in Chambers this 4th day of September, 2023 at High Court, Commercial Division, Blantyre Registry.

E. M. Zidule

E. M. Zidule
Assistant Registrar