



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
JUDICIAL REVIEW CASE NUMBER 8 OF 2023
(Before Honourable Justice Muhome)**

BETWEEN:

**THE STATE [On the Application of The Central East African
Railways Company Limited]**

CLAIMANT

AND

**THE CHAIRPERSON OF THE INDUSTRIAL RELATIONS COURT
(Sitting in Matter No. IRC 1292 of 2022: Wongani Mtekera v
Central East African Railways Limited)**

DEFENDANT

WONGANI MTEKERA

INTERESTED PARTY

CORAM: HON. JUSTICE ALLAN HANS MUHOME

Mr Mabvuto Hara, of Counsel for the Claimant
Mr Ackim Ndhovu, of Counsel for the Interested Party
Mr Shepher Mumba, of Counsel for the Interested Party
Counsel for the Defendant, Absent

Ms Fareeda Chida, Official Interpreter

RULING

1. The Interested Party was employed by the Claimant about December 2015. Following a disciplinary hearing process, he was dismissed from employment about December 2022. The grounds for his dismissal are of no importance to the resolution of the Application herein. Suffice it to say that, the Interested Party approached the Industrial Relations Court (IRC) seeking to challenge the propriety of his dismissal and claiming compensation, among other remedies.
2. On 22nd December, 2022, the Interested Party approached the IRC *ex parte* and was granted an order staying his dismissal based on Rule 25(1)(m)(i) and (4) of the IRC (Procedure Rules).
3. The Claimant was dissatisfied with the Order of Interim Relief. It therefore approached this Court which granted an order suspending the Order of Interim Relief granted by the IRC on the 22nd of December 2022. The Order is dated 23rd March 2023.
4. On 17th April 2023, the Claimant filed a without notice application for a judgment in default of defence. Neither the defendant nor the Interested Party filed a defence herein. This Court considered the same and granted it.
5. The present Application is made by the Interested Party to set aside the 'default judgment', including the order for costs made against the Interested Party.
6. Counsel for the Interested Party submitted that judicial review proceedings are different from matters commenced through summons under Order 5 of the Courts (High Court) (Civil Procedure Rules) 2017 (CPR). Order 19 of the CPR provides for specific actions including judicial review proceedings and there is no remedy of default judgment as a decision cannot be reviewed in default. He contended that where the defendant does not enter a defence, the Court is called upon to proceed reviewing the decision of the decision maker complained of rather than condemn the Interested Party in costs. He prayed that the default judgment was irregular and ought to be set aside so that the matter proceeds to a Scheduling Conference.

7. Counsel for the Claimant is of the opposite view. He submitted that the Interested Party, having been served with the motion, he ought to have filed his defence or position, failing which the Court will be allowed to proceed in default. Under Order 2 r. 3 of the CPR, where there has been a failure to comply with the Rules, the Court may make an order that it deems fit. He argued that in the present case, the Court proceeded to enter the default judgment based on the papers filed by the Claimant. Order 19 r. 25 provides that Order 14 shall apply, with the necessary adaptation, to Scheduling Conferences. Then going by Order 14 r. 2, the filing of a defence is a condition precedent for the Court to set the matter for a Scheduling Conference. In the present matter, the Defendant did not file the defence and so the matter could not proceed to a Scheduling Conference but be dealt with as a non-compliance under Order 2 r. 3. Even if the matter proceeded to a Scheduling Conference, the Interested Party has not filed any defence or showed intention to file a defence on merit.
8. Counsel then relied on a judicial review Order in *The State (On the Application of the Malawi Law Society) v Prosecutor Levison Mangani, Chief Resident Magistrate and the Secretary to the President and Cabinet*,¹ where Tembo J. at Paragraph 27 states as follows:

... this Court sees no point in prolonging the proceedings where the defendants never filed a defence to the same. Prolonging these proceedings will not be just as it will result in unnecessary time and costs being expended on part of the claimant and this Court when the matter is undefended and uncontested. That would run counter to the overriding objectives of the Rules enshrined in Order 1 Rule 5 of Courts (High Court) (Civil Procedure) Rules which require that matters be dealt with justly, including by ensuring that matters are dealt with expeditiously whilst saving time and costs, commensurate with the nature of the matter. This Court therefore agrees with the claimant that this is an appropriate case in which it should end proceedings early and invoke Order 12 Rule 4 (1) of the Courts (High Court) (Civil Procedure) Rules and consider whether it may enter judgment for the claimant herein without a hearing but only on consideration of the documents on the claimant's application.

¹ Judicial Review Case Number 6 of 2023.

9. On the issue of costs, the Claimant's Counsel submitted that there is no case law that state that an Interested Party cannot be ordered to pay costs. The Interested Party became a party by filing papers and therefore putting the Claimant to cost. Having elected not to defend the Judicial Review proceedings, he cannot escape costs occasioned therein. Counsel relied on *The State (On the Application of Kathumba and Others) v The President of Malawi and Others*² where despite a withdrawal, Kenyatta Nyirenda, J held that the defendants 'were at all material times, parties to this case'; and therefore, the defendants were condemned to pay costs of the proceedings.
10. In reply the Interested Party's Counsel emphasised that it was the Defendant's obligation to file a defence and not the Interested Party's. He reiterated that under Order 19 of the CPR there is no provision for a default judgment and the default judgment herein is therefore irregular. In any event the application for the Default Judgment should have been heard with notice to the rest of the parties. He suggested that in the case of *The State (On the Application of the Malawi Law Society) v Prosecutor Levison Mangani, Chief Resident Magistrate and the Secretary to the President and Cabinet*,³ the Court took time to review the merits of the case, unlike herein where a default judgment was entered on the sole basis that there was no defence.
11. The Court has taken time to consider the sworn statements and skeleton arguments from both parties. The Court agrees with the Interested Party that judicial review proceedings are distinct from matters commenced through summons under Order 5 of the CPR. In *Ex Parte Atken Mtawali and Another*⁴ Kalembera J (as he was then) emphasised that:
- The remedy for judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself.*
12. This Court also agrees with the Interested Party's Counsel that under Order 19 of the CPR there is no specific provision for a 'default judgment' in judicial review proceedings as is the case for matters commenced under Order 5 of the CPR (see Order 12 r. 6 which specifically provides for judgment in default).

² Judicial Review Cause Number 22 of 2020 (Unreported).

³ Judicial Review Case Number 6 of 2023 (Unreported).

⁴ [2012] MLR 394.

13. It is also agreed that it is the obligation of the Defendant to file a defence under Order 19 r. 24. However, this Court is of the view that an Interested Party who cares about their position ought to file some defence or position securing their interest. Otherwise, why are they interested? That said, this Court is alive to the fact that failure to file such defence is not a requirement and is not specifically provided for under the CPR. It is with such consideration that the Court, still more was inclined to enter the default judgment herein, per reasons appearing below.
14. Under Order 2 r. 3 of the CPR, where there has been a failure to comply with the Rules, the Court may make an order that it deems fit. This Court proceeded to enter the default judgment based on the papers filed by the Claimant since the Defendant had failed to file their defence within the prescribed time. Neither did the Interested Party deem it useful to file any papers at all. We wish to assure the Interested Party that the default judgment was entered after a review of the papers filed by the Claimant and not simply based on the fact that there was no defence filed by the Defendant. If that were the case, the Court would have been failing in its duty to ensure a just disposal of this matter. In any event, this Court has powers, in appropriate cases, like the present case, to end proceedings early in terms of Order 12 r. 4(1) which clearly provides that 'The Court may enter judgment for the claimant without a hearing.'
15. The Court considered further that by Order 14 r. 2 of the CPR, the filing of a defence is a condition precedent for the Court to set the matter for a Scheduling Conference. In the present matter, the Defendant did not file the defence and so the matter could not proceed to a Scheduling Conference but be dealt with as a non-compliance under Order 2 r. 3. Proceeding to a Scheduling Conference without a defence or any position from the Interested Party would be uneconomic, on the facts of this case. We appreciate that in relevant cases, the High Court has proceeded to determine a judicial review matter through trial, even if there is no defence. For instance, where the impugned decision is capable of repetition (which is not the case herein). See *The State (On the Application of Esther Cecilia Kathumba and Others) and The President of Malawi and Others*.⁵

⁵ Judicial Review Cause Number 22 of 2020.

16. This Court believes that the approach taken herein is consistent with the Court's duty to further the overriding objective of the CPR (Order 1 r. 5) – to deal with proceedings justly, which includes savings expenses, ensuring that proceedings are dealt with expeditiously and fairly and active case management - See also the dictum from Tembo J (above) in *The State (On the Application of the Malawi Law Society) v Prosecutor Levison Mangani, Chief Resident Magistrate and the Secretary to the President and Cabinet*.
17. The application to set aside the default judgment is therefore dismissed.
18. Costs are in the discretion of the Court⁶ and having considered arguments made by both Counsel, the order for costs against the Interested Party is hereby set aside. Each party shall bear their own costs for all the applications for judicial review herein. The main reason for this is that the review was about a decision of a court and it would not be in the interests of public policy to order a court to pay such costs,⁷ nor indeed the Interested Party.
19. Lastly, this Court wishes to reiterate the instructive advice given by Chikopa SC, JA at page 15 in *The State (On the application of Malawi Revenue Authority) v The Chairperson of the Industrial Relations Court ex parte Roza Mbilizi*⁸ that for a speedy disposal of a matter of this kind and for better case management, parties should concentrate on the IRC matter which will resolve the actual dispute between the parties, namely the propriety of the dismissal and by necessary implication the question of reliefs interim or otherwise. Subject, of course, to appeals.

Made in Chambers this 19th day of May, 2023.



Allan Hans Muhome

JUDGE

⁶ See section 30 of the Courts Act (Cap 3:02 of the Laws of Malawi) and Order 31, rule 3 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017.

⁷ See *The State (On the application of Malawi Revenue Authority) v The Chairperson of the Industrial Relations Court ex parte Roza Mbilizi (Mbilizi Case - HC)* Judicial Review Case Number 52 of 2021 (High Court) (Unreported).

⁸ MSCA Case Number 56 of 2021 (Unreported).