Mwaungulu J.

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.706 OF 1993

BETWEEN:

LEOPARD DEVELOPMENT LIMITED ..... PLAINTIFF

- and -

KASSAM JOOMA t/a TRANSKASS TRANSPORT ..... DEFENDANT

CORAM: MWAUNGULU, REGISTRAR

Chiligo, Counsel for the Plaintiff
Mpando, Counsel for the Defendant

O R D E R

On the 21st of October, 1993, when I heard the defendant's application to set aside judgment in default of notice of intention to defend, I ordered the defendant to file a supplementary affidavit. The judgment in default of the notice of intention to defend was obtained on an action commenced by the plaintiff on the 18th of May, 1993. The plaintiff was claiming the sum of K92,927,05, the price of goods sold and delivered to the defendant at the defendant's request. The writ stipulated that the particulars had already been furnished to the defendant. The defendant was served by post on the 1st of June, 1993. Judgment in default of notice of intention to defend was obtained on the 24th of June, 1993. On the same date, the defendant took out a warrant of execution. On the 9th of July, 1993, the defendant applied and obtained an order for stay of execution pending an application to the Court under section 11 of the Courts Act to pay the debt by instalments. The application to pay by instalments came before Justice Mtegha who ordered that the defendant pay K9,000.00 per month with effect from 31st August, 1993. The defendant did not pay the K9,000.00 at the end of August. On the 7th of September the plaintiff obtained an order to vacate the order of payment by instalments.

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On the 5th of October, 1993 the defendant obtained an order to stay execution pending, this time, an application, on his part, to set aside the judgment. That application was scheduled for 15th of October, 1993 when it was further adjourned for 21st October, 1993. I heard the application on the 21st of October. I granted the order I mentioned earlier and reserved ruling.

There is an affidavit in support of the application to set aside the judgment. The material part is in paragraph 9. I should reproduce the paragraph because it is the gravemen of the application:

> "The defendant maintains that he still has such defence to the plaintiff's claim whose grounds are:-
>
> (a) the plaintiff claim is a make up and based on fraud by the plaintiff, its agents or servants,
> (b) the defendant denies owing the plaintiff the alleged or any sum,
> (c) the defendant denies ever having bought any goods from the plaintiff,
> (d) the defendant recalls that he used to buy fuel from the plaintiff on credit but he duly paid for the same. In any case such transaction was illegal and if (which is denied) any payment is out-standing therefrom, the plaintiff is barred from claiming it."

In the earlier part of the affidavit the defendant is trying to explain the reasons for the delay. I think I am stating the law correctly when I state that, in an application to set aside a regular judgment, the primary consideration is whether there is an affidavit on the merits. The reasons for the delay are important only in so far as they affect the exercise of the discretion. The primary consideration is the defendant raising a defence on the merit.

I agree with Counsel for the defendant, Mr. Mpando, that the fact that the defendant obtained an order for payment by instalment does not necessarily mean that he approbated the judgment. It is important to note that all along the defendant was acting without a Legal Practitioner. In Evans v. Bartlam (1937) A.C. 473, the case cited by Counsel, in almost the same facts, the Court held that there was no approbation of the judgment.

The issue, therefore, is where the affidavit of the defendant in support of the application to set aside discloses defence on the merit. The epithet "defence on the merit" are not terms of art. Neither are they words of an Act of Parliament. From the authories, as I have read them, the words mean that the defendant must, in his affidavit, raise facts from which the Court may infer a defence or a triable issue. The plaintiff must not just raise a defence or a triable issue perse, the affidavit must raise facts from which a defence or a triable issue can be inferred. For example, I do not think it suffices for the plaintiff to say in his affidavit that my defence is insanity without raising facts on which that defence can be inferred. Similarly, in a purely factual situation, it will not suffice for the defendant to say I was not negligent. The plaintiff must raise facts on which such inference can be made. In Farden v. Richter (1889) 23 Q.B.D. 124 Huddleston, B. said that if the judgment, as is in this case, is regular, then it is an inflexible rule that there must be an affidavit of merit to show an affidavit stating facts showing defence on the merits. At page 129 the Baron said:

> "At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason."

Looking at the affidavit sworn by the defendant, it does not raise facts on which a defence or a triable issue can be inferred. In paragraph 9(a) the defendant claims that the plaintiff's claim is a make up and based on fraud by the plaintiff, its agents or servants. There are no facts to raise the issue of fraud. Fraud is only alleged. Paragraph 9(c) conflicts with the first part of paragraph 9(d). In paragraph 9(c) the defendant denies having ever bought any goods from the plaintiff. In the first part of paragraph 9(d) the defendant alleges that he recalls that he used to buy fuel from the plaintiff on credit. Paragraph 9(b) can be read together with part of paragraph 9(d). The Supreme Court in Malawi has held in Hardware and General Dealers v. Makanianknondo, M.S.C.A. Civil Cause No.152 of 1984, that where the defence is payment, there must be stated in the affidavit in support of the application evidence of payment. This was not done in this affidavit. Further, in paragraph 9(d) the defendant pleads the defence of legality. No doubt, this would be a defence. Like the most part of the affidavit, the facts to substantiate the defence are not raised in the affidavit in support of the application. The affidavit in support of the application, therefore, does not disclose a defence on the merits.

The fact that the affidavit of the defendant does not disclose a defence on merits does not ipiso facto mean that the

defendant's application to set aside should be dismissed. As Skineer, C.J. observed in the case of Kanchunjulu v. Magaleta (1971-72) Vol.6 ALR (M) 403, 405, the case of Farden v. Richter did not decide that the rule was an absolute one. The Chief Justice said:

> "It must be remembered, however, Farden v. Richter did not decide that the rule was an absolute one; it can be derogated from. Huddlestone, B. clearly envisaged that there could be exception to the rule. He said (23 Q.B.D. at 129) "At any rate, when such an application is not thus supported, it ought not to be granted except for some very sufficient reason"."

In Kanchunjulu v. Magaleta the Chief Justice said that, in an appropriate case, the Court could still set aside the judgment in the absence of a sufficient affidavit of merit. At the very least, the Chief Justice held the defendant could be given an opportunity to file a supplementary affidavit. I actually ordered the defendant to file a supplementary affidavit.

MADE in Chambers on this 25th day of October, 1993 at Blantyre.

D.F. Mwaungulu
REGISTRAR OF THE HIGH COURT OF MALAWI