IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 131 OF 1993

BETWEEN:

MPUNGULIRA TRADING LTD. ..... PLAINTIFF

and

ACTION AID ..... DEFENDANT

CORAM: D F MWAUNGULU, REGISTRAR
Chirwa, Counsel for the Plaintiff
Chiligo, Counsel for the Defendant

ORDER

This is a summons to set aside a judgment in default of notice of intention to defend. The judgment was obtained for K359,199.09 and K12,909.95 costs. It was entered by the Deputy Registrar on the 22nd of February 1993. The defendant had not in fact lodged a notice of intention to defend in court. Although on setting aside a judgment for irregularity, the irregularity must be stated in the summons (Order 2, Rule 2 of the Rules of the Supreme Court, Moss vs Maling (1886)33 Ch.D 603), apart from the defence on merits the judgment ought to be set aside. Each party to bear its own costs.

The plaintiff took out this action on the 1st of February 1993. The action is based on two causes of action. The first cause of action relates to a contract by the plaintiff to supply goods and services to the defendant. It is alleged that the defendant has not paid the price. The second cause of action is, to my mind, not based on any contract. The plaintiff had agreed to supply goods and services to a third party, General Farming Limited. The contract was for K170,000.00. It is alleged that the defendant told General Farming Limited not to buy the goods from the plaintiff. The plaintiff is claiming K170,000.00 worth of sales. The Statment of Claim and the writ were served on the defendant personally by Mr. Nyalugwe, a process server of the plaintiff, on the 4th of February 1993.

Judgment in default of notice of intention to defend was obtained on 22nd February 1993. On the 23rd of February 1993 a warrant of execution was issued. The warrant of execution was stayed on 1st March 1993, pending hearing of this application to set aside judgment.

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This summons was taken on the 25th of February 1993. It is supported by an affidavit of Mr. Kombezi, the defendant's legal practitioner.

The first point raised in the affidavit is irregularity. The irregularity is not stated in the summons as it should. This is an irregularity and in so far as the affidavit raises it the plaintiff was aware of it. The affidavit is mentioned in the summons. The affidavit accompanied the summons. The ommission was not even raised by the plaintiff and I am subsumed not to use it to the detriment of the defendant. Under Order 2, Rule 1 the appropriate step would be to proceed with the summons to set aside so as to determine the summons before me.

The irregularity raised in the summons is that the plaintiff, after undertaking to do so on the defendant's behalf, did not lodge in Court the notice of intention to defend completed by the defendant. In fact, believing that the notice of intetion to defend had been so lodged the defendant sent defence to the Court.

What happened here may be reprehensible. It does not make the judgment of the 22nd of February 1993 irregular. In the development of the courts in the United Kingdom the plaintiffs commencement of the action and the defendant's assertion to defend did accompany a bit of pomp, fanfare and, at times, pageantry. Even when these began to disappear the defendant's step did retain a trail of verbosity and circumloguity. At one stage a simple act of expressing intention to defend was conjured as "causing an appearance to be entered". Behind this exhibitionism and loquacity was recognition that the defendant, if he wants to contest the proceedings he must clearly, promptly and circumspectively state the position to the court where the originating process has been issued. This was the defendant's duty to the court and the plaintiff. The plaintiff could not rely on previous denials by defendant to think the action will be prosecuted. It could very well be that the defendant was buying time from the threat of litigation and is now not willing to defend that the threat has become a reality. If the defendant wanted to contest the proceedings he had to show that to the court in clear terms.

The acknowledgement of service introduced in 1979 simplified the concept of appearance. Of course, it had an added advantage. It reduced spurious defences designed to buy time by giving defendants an immediate right to stay execution after judgment has been entered. The rules of practice under the acknowledgement of service have not undermined or molified the importance of this step in court proceedings. It is the duty of the defendant who wants to defend the action to lodge the documents with the court. It is also the duty of one who wants to defend the action to

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lodge his documents promptly. If he resorts to a risky mode of lodging he does so at his peril. He cannot blame the plaintiff or the court.

In the instant case the defendant relied on the plaintiffs process server to lodge the notice of intention to defend. The process server was an employee of the plaintiff's legal practitioners. It is not said that the process server was a legal practitioner, who, if it was the case, would have been capable of making the undertaking. The notice of intention to defend was not lodged with the court. There is nothing to suggest that the legal practitioner was aware of the process-server undertaking. It was the defendant's duty to ensure that the notice of intention to defend was lodged in this court. He could not rely on an undertaking from the plaintiff's process-server.

Then on the 23rd of February 1993 the defendant sent to the court defence for filing and service. There is no law or rule of practice which requires that pleadings, indeed a defence to the filed by the court. The schedule to the Courts Act Cap. 3:02, made under section 32 of the Act makes it no requirement that pleadings should be filed. Service can be effected by the court, but there is no obligation that courts should serve these processes. Order 18, Rule 2(1) puts the duty to serve defence on the defendant not the Court.

> "Subject to paragraph (2), a defendant who gives notice of intention to defend shall serve a defence on the plaintiff....."

If the defendant wants to use the court he bears the consequences if the defence is not served on the plaintiff, on who it must certainly be served, within the time prescribed. This is inevitable where, as we have seen, pleadings are not supposed to be filed with the Court.

If the defendant's contention is that the judgment was irregular because the plaintiff's process-server did not lodge a notice of intention to defend and the court was holding on to a defence I must point out, after all I have said, that the judgment here was regularly obtained. The judgment however is irregular in certain respects not argued by the defendant.

The judgment includes a claim for costs for K12,909.95. This was a default judgment. Order 6, Rule 2 1 (b) requires that before a writ is issued it must be endorsed, where the claim is for a debt or liquidated demand only, with a statement that the amount claimed in respect of the debt or demand and for costs and also with a statement that further proceedings will be stayed if, within the time limited for acknowledging service, the defendant pays the amount so claimed to the plaintiff, his solicitor or agent. The costs

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are known as "fourteen day costs". Order V, Rule 1 of the Rules of the High Court provides that the costs set forth in the second schedule shall be allowed in respect of the several matters therein mentioned in lieu of the costs laid down in the Rules of the Supreme Court. The second Schedule lays down the fourteen day costs, the amounts of costs indorsed on a writ of summons under Order 6, Rule 2 of the Rules of the Supreme Court. The amount of costs to be endorsed would be K110.00 not the amount endorsed by the plaintiff. These are the only costs the plaintiff is entitled to when judgment is obtained in default. The amount of costs claimed is more than the plaintiff is entitled to. A judgment for more than is due is bad and will be set aside Hughes vs. Justin (1894)1 Q.B. 667. This aspect was not raised in the summons or affidavit. It was not raised in argument. The plaintiff could not apply for amendment although I have power to amend such judgment as part of an order to set aside. Ban Hin Lee Bank Berhad vs. Sonali Bank, The Independent, November 28 1988.

There is an added problem because of the claim for K170,000. This is based on the defendant telling General Farming Limited not to buy from the plaintiff. The defendant is not a party to the contract between General Farming and the plaintiff. The action, in so far as it is alleging that the defendant told General Farming not to sell goods to the plaintiff, is based on tort for which the claim cannot be liquidated debt or demand in terms of Order 6, Rule 2(1) of the Rules of the Supreme Court. In Bowen vs. Hall (1881)6 Q.B. 333, 338, Lord Justice Brett said:

> "Merely to persuade a person to break his contract may not be wrongful in law or fact .... But if the persuasion be used for the indirect purpose of injuring the plaintiff or benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act and therefore a wrongful act if injury ensues from it .... The act is persuasion by the defendant of a third person to break a contract existing between such third person and the plaintiff."

The acts complained of here are tortious (Temperton vs. Russell (1893)1 Q.B. 715) The plaintiff, assuming the facts are true, would be entitled to general damages. The judgment could only be interlocutory. The plaintiff could not enter a final judgment. The damages would have to be assessed. On mere conjecture the plaintiff would not be entitled to K170,000.00 as this comprises of the total sales without taking into account what the plaintiff would have spent to acquire the goods. Just like the other aspect of irregularity, this was not raised in the summons or affidavit.

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It is important to point out these irregularities because of the submissions made for the plaintiff. It was contended in strong terms that the affidavit raises no defence on the merits and the summons should be dismissed. The practice of the courts has been greatly influenced by Huddleston, B., in Farden vs. Ritcher (1889)23 Q.B.D. 124, 129 requiring that there must be an affidavit of merits to set aside a regular judgment:

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

The Chief Justice Skinner in Kamchunjulu vs. Magareta (1971-72)6 A.L.R. Mal 412) pointed out that the Baron did not say that it is an inflexible rule. If there are good and sufficient reasons, a judgment would be set aside even if the affidavit in support of the application does not disclose merit. I think the present case is such a one as I have been trying to demonstrate. First the claim for costs is grossly wrong and exorbitant. Secondly, the judgment as to part of the claims could only be interlocutory. Further, although the defendant was indiscrete in relying on a process-server to lodge notice of intention to defend it is a sufficient reason to justify setting aside the judgment because the courts will take into account the reason for default (Evans vs. Bartlam (1937)A.C. 451, 480; Alpine Bulk Transport Co. Inc. vs. Saudi Eagle Shipping Co. Inc., The Saudi Eagle (1986)2 Lloyds Rep 221, 223.

On the other hand there is some merit in the defence exhibited in the affidavit in support of the application. The plaintiff contends in the statement of claim that he supplied various goods and services. Invoices were sent to the defendant. In his defence, the defendant says that the invoices showed undersupplying. There is a real dispute as to how much is owing. This would require investigation or enquiry into the books to ascertain the actual amount. The question is should the judgment stand in view of this uncertainity as to what is actually owing. The answer may be in the analogous cases under Order 14 of the Rules of the Supreme Court. For summary judgment, much like here, final judgment would not be had if the defendant shows good ground for defence. In Contract Discount Ltd. vs. Furlong (1948)1 All E.R. 274, 276, Lord Green M.R. said:

> "The amount owing to the plaintiffs can really only be ascertained on the taking of an account bringing contra items in respect of which the plaintiffs themselves are accounting parties .... I should have thought that in a case of this kind, relating to a claim of this character, and depending as it does must, on matters of account, that would have justified and indeed, led the court to give unconditional leave to defend. In a

> case which is essentially a matter of accounts, where the amount can only be ascertained, from the plaintiff's own accounts, it seems to me that it would be improper to deprive the defendants of their prima facie right to challenge the items in the account and insist on strict proof of them".

The defendant here insists that the plaintiffs' invoices were certified, approved and paid by the defendant while the commodities were being despatched. Strictly there should have been evidence of payment. The discrepancies in deliveries, however, can only be the subject of enquiry and investigation to ascertain the amounts. In these circumstances it would be wrong in principle to enter judgment for the amount on the plaintiff's invoices. The defendant should require the plaintiff to prove the amounts claimed. The best way to do this is through normal adjudication.

I set aside the judgment. Each party to bear its costs. The defence should be served in the next fourteen days. The parties can appeal to a Judge in chambers.

Made in Chambers this 6th day of April 1993.

D F Mwaungulu
REGISTRAR OF THE HIGH COURT