

7 M/E. Banda

HIGH COURT
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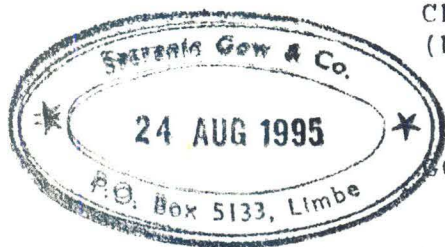
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIV. CAUSE NO. 1126 OF 1994

BETWEEN:

CHILLINGTON AGRIMAL
(MALAWI) LTD. PLAINTIFF

and

GODFREY E.J. NTHUNZI DEFENDANT



CORAM:

R R HZIKAHANDA, DEPUTY REGISTRAR
Mr. Banda, Counsel for the Plaintiffs
Mr. Msiska, Counsel for the Defendant

RULING

This is Mr. Msiska's application to have default judgment herein set aside. The application is made pursuant to Order 13, Rule 9 and Order 19, Rule 9. His application is supported by affidavit. Mr. Banda opposes the application and filed an affidavit in opposition, which is very strange indeed.

Mr. Msiska argues that if a judgment has been entered for failure to follow rules of procedure and that the other side applies to have it set aside then it ought to be set aside so that the matter is defended. What is required is an affidavit disclosing defence on the merits. He cited a number of case authorities to support his argument. The affidavit must show a triable issue and the Court may ignore lapse of time. He argued that his professed defence discloses triable issues.

Mr. Banda on the other hand contends that the judgment should remain as the defence is mere sham without merit and disclosing no triable issues. He says that the defence is self-contradictory. He cited a number of instances he regarded as contradictory in the defence. He said that the defence does not have support from the weight of the evidence.

Mr. Banda argues that there is an admission of there being pools of water in the house saying "this was a technical problem beyond out control". Yet the defence denies that there were pools of water. Problems were not corrected, no immediate repairs. Mr. Banda was emphatic



that through and through the defendant confessed the breaches and confessed that it took time to remedy them.

I must say here that it was wrong of Mr. Banda to file an affidavit in opposition to the application to set aside judgment herein. As was observed by Mr. Msiska that tantamounts to determining issues here on counsel's affidavits and this would be improper. In Malawi Book Service Vs. Blantyre Chalkmakers Ltd., Civil Cause No. 1374 of 1994 (unreported) Chimasula, Acting Judge was confronted with a similar situation. At P.4 of the judgment he said:

"I want to say that to an application to set aside a judgment in default, it is impermissible to file an opposing affidavit. That would in my view be trying the matter purely on affidavits without the opportunities of discovery and cross-examination. The law is that the defendant's affidavit must raise a triable issue or a defence on the merits. Only the defendant's affidavit ought to be considered It must further be noted that 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".

That being the position at law I will not consider the affidavit in opposition herein in determining whether the judgment in default on file should be set aside. I will only consider the affidavit of Mr. Msiska. There is no doubt that the default judgment herein was regularly obtained. If it had been irregularly obtained the defendant would have been entitled ex debito iustitiae to have it set aside. In the present case what is required on the part of the defendant is to profess a defence on the merit or to raise in the affidavit a triable issue.

The writ of summons was specially endorsed and as such it contains a statement of claim. Paragraph 3 states that the defendant covenanted that he would keep the exterior of the demised premises in good and tenantable repair and condition and paragraph 4 states that in breach of the said covenant, the defendant did not keep the exterior of the demised premises in good and tenantable repair and condition:

- (a) The roof was leaking when it was raining;
- (b) Water was seeping through the floor into the interior of the house;

- (c) The defendant's servants and or agents made a big hole through the exterior wall which was left unsealed for a long time in consequence whereof rats infested the house.

In the professed defence the defendant denies that he ever breached a covenant in the lease between the parties and avers that he has ever kept the exterior of the demises in good and tenantable repair and condition, that the leakage in the roof was immediately repaired soon after being notified of it and denies that there was ever water seeping through the floor into the interior of the house and shall demand strict proof thereof. The Defendant agrees that his contractors left a hole on the exterior of the wall but that the same was only for a short time period and it was immediately sealed off thereafter; the Defendant denies that the house was heavily infested with rats and that the same went inside because of this hole and avers that the said rats were attracted by the foodstuffs brought into the house by the plaintiff and it was the plaintiff's duty to get rid of them by rat poison or other similar chemicals; the defendant denies that there were pools of water in the house whenever it rained. In my view these and other paragraphs in the professed defence do not amount to a bare denial. They raise triable issues. Going through the defendant's affidavit and professed defence I do not see any contradictions. The contradictions which Mr. Banda appears to rely on are said to be apparent in the exhibits to the affidavit in opposition. I have already said I will not consider the affidavit in opposition. Nor will I consider the exhibits to it. After all the said exhibits are photocopies.

All in all I find that there is a defence on the merits and that the affidavit raises triable issues. The default judgment must be set aside to enable the defendant to serve his defence on the plaintiff. The default judgment is set aside and the defendant is to serve his defence within 14 days of this Order.

Made in Chambers this 29th day of March 1995, at Blantyre.



R. R. Mzikamanda
DEPUTY REGISTRAR OF THE HIGH COURT