HIGH COURT LIBRARY

# IN THE HIGH COURT OF MALAWI
# PRINCIPAL REGISTRY
# CIVIL CAUSE NUMBER 1852 OF 1994

BETWEEN:

J.L. MAMTORA BROTHERS ..... PLAINTIFF

and

HAROON G. OSMAN ..... DEFENDANT

CORAM: W.W. QOTO, DEPUTY REGISTRAR
Ng'ombe, Counsel for the Plaintiff
Manyungwa, Counsel for the Defendant

---

## ORDER

This is an application by the defendant for an order setting aside the default judgment herein which the plaintiff obtained on 24th October, 1994.

The background to the application is that by a writ of summons and a statement of claim issued on 22nd September, 1994, the plaintiffs claimed against the defendant repossession of plot No. LC/39 along Livingstone Avenue, Limbe, in the City of Blantyre. They further claimed damages or mesne profits from 1st July 1994 up to the date of delivery.

The plaintiffs averred that they were at all material times owners of the said plot and were entitled to possession of it. The defendant, they said, was tenant until 30th June, 1994. A notice to quit had been duly issued and served on him on 31st March, 1994, and he

HIGH COURT LIBRARY

was required to vacate the said plot by 30th June, 1994.

The plaintiffs further aver that he refused or neglected or ignored to accede to the notice and he has wrongfully remained on the plot as a trespasser.

The plaintiffs also averred that they have thereby been deprived of the use and enjoyment of the plot and as such they have suffered loss and damage.

There being no notice of intention to defend the action, the plaintiffs obtained the default judgment on 20 October, 1994. The defendant was adjudged to give the plaintiff possession of land described as plot number LC/39 and pay costs of the action.

In support of the application to set aside the default judgment herein, it is deponed that the letter of demand and the writ of summons were never received by the defendant. It is stated that the only documents the defendant received were the notices of assessment of damages of 8th June, and 5th October, 1995.

It is further deponed that the defendant has a good defence to the plaintiff's claim which is as follows:

> "(a) the defendant denies having ever received notice from the plaintiff to quit the premises prior to October, 1994 or at any date at all prior to October, 1994.

(b) the defendant denies having ever refused or neglected to accede to the request to vacate the premises or having unlawfully remained on the premises upon being told to do so

(c) the defendant denies owing the plaintiff any money or sums of money in respect of mesne profits from 1st day of July 1994 or from any date at all until October, 1994.

(d) if, which is denied, the defendant owed any money to the plaintiff, then the defendant contends that the same were duly paid to the plaintiff upon the defendant vacating the premises in October 1994."

It is common ground that this court has a discretion to set aside a default judgment under Order 13, Rule 9 of the Rules of the Supreme Court. The Locus clasias on the guidelines which the court must apply in exercising its discretion to set aside a judgment were laid down by the House of Lords in **Evans V Bartlam** (1937) A.C. 473. The guidelines laid down in that case have been consistently followed to the extent that it is now simply a question of applying them to different factual situations. Perhaps at this juncture, let me recapitulate those guidelines.

The House of Lords stated that in matters of discretion no one can be authority for another but,

(a) a judgment signed in default is a regular

judgment from which, subject to (b) below, the plaintiff derives rights of property;

(b) the Rules of Court give the judge a discretionary power to set aside the default judgement which is in terms 'unconditional' and the court should not "lay down rigid rules which deprive it of jurisdiction", (per Lord Atkin at p. 486);

(c) the purpose of this discretionary power is to avoid injustice which might be caused if judgment followed automatically on default

(d) the primary consideration is whether the defendant "has merits to which the Court should pay heed" (per Lord Wright at p. 489) not as a matter of law but as a matter of common sense since there is no point in setting aside a judgment if the defendant has no defence and if merits are shown the "court will not prima facie, desire to let a judgment pass on on which there has been no proper adjudication" (per Lord Russell at p. 482).

(e) Again as a matter of common sense, though not making it a condition precedent, the court will take into account the explanation as to how it came about that the defendant found himself bound by a judgment regularly obtained to which he could have set up some serious defence. "per Lord Russell".

In my view, it is important, in applying these

guidelines to be clear what the primary consideration means.

Mr. Manyungwa on behalf of the defendant argued that a defence on the merits meant an arguable case i.e. a case which ought to go to trial. This is a phrase commonly used in relation to R.S.C. Order 14 to indicate the standard to be met by a defendant who is asking for leave defend. If it is used in the same sense in relation to setting aside a judgment, it does not, in my view, accord with the standard their Lordships indicated. All of them clearly contemplated that a defendant who is asking the court to exercise in his favour should show a defence which has a real prospect of success. In Evans V Bartlam itself there was an obvious defence under the Gaming Act.

Turning to the present case, it is clear from the defendant's affidavit in support of the application that he gave up possession of the said plot in October, 1994. That was the month the judgment was obtained by the plaintiff's in default of defence. That judgment in so far as is material, was in the following terms:

> "..... it is this adjudged that the defendant do give the plaintiff possession of the land described in the statement of claim as plot number LC/39 and pay the plaintiff costs to be taxed if not agreed upon."

Admittedly in their statement of claim the plaintiffs had also claimed damages a mesne profits from the 1st

day of July 1994, up to the date of delivery of the said plot but this aspect of the matter was apparently abandoned by the plaintiffs on entering judgment. It is surprising to note that subsequent to the judgment, the plaintiffs filed notices of assessment for damages or mesne profit. The court cannot assess damages or mesne profits as there is no judgment on these. It is, of course, open to the plaintiff to amend his judgment to encompass damages or mesne profit but as it is, no assessment of the same can be made by the court.

As I have indicated above, the plaintiff vacated the premises in October, 1994. There is no need of setting the judgment aside which in terms requires the defendant to give possession of the said plot to the plaintiffs.

In so far as the defence disclosed in the affidavit relates to the defendant having paid mesne profits to the plaintiffs, this aspect of the defence is premature as there is no judgment to have mesne profits or damages assessed.

I accordingly dismiss the application with costs.

MADE IN CHAMBERS this 1st day of December, 1995, at Blantyre.

W. W. Qoto
DEPUTY REGISTRAR