



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI PRINCIPAL REGISTRY
FAMILY AND PROBATE DIVISION

PROBATE CAUSE NUMBER 136 OF 2021

(BEFORE JUSTICE J.R. KAYIRA)

BETWEEN:

LUCIENE LILONGWE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF SIMEONE
ALEXANDER LILONGWE
(DECEASED)).....CLAIMANT

-AND-

MRS. MILIKA BARNET LILONGWE (ON HER OWN BEHALF AND REPRESENTING ALL HER
CHILDREN BORN OUT OF THE MARRIAGE OF THE
DECEASED)).....1ST DEFENDANT

MRS FOLOMINA GAMA (ON HER OWN BEHALF AND ON BEHALF OF HER CHILDREN,
GRANDCHILD AND BROTHER WHO BENEFITED FROM

THE WILL OF THE DECEASED)).....2ND DEFENDANT

MOLENI MIKITALA.....3RD DEFENDANT

CORAM: HONOURABLE JUSTICE JEAN ROSEMARY KAYIRA

Counsel Mr. Robert Kadzakumanja of Counsel for the Claimant

Counsel Mr. Joseph Lihoma of Counsel for the Defendant

Patricia Chiphwanya Court Clerk and Official Interpreter

RULING ON APPLICATION TO SET ASIDE DEFAULT JUDGMENT

Kayira J

INTRODUCTION

The High Court in Lilongwe had an inter partes hearing of the Claimant's application for an interlocutory injunction on 14th December, 2020. On 6th January, 2021 the Judge transferred the matter to the Principal Registry since the deceased estate is based in Mwanza which falls within the southern judicial region. The Claimant who had obtained a summons on 16th November, 2020 in Lilongwe which was then reassigned to a Judge in Blantyre on 7th July, 2022. The Claimants obtained default judgment on 11th July, 2022 on the premise that the Claimants commenced the present legal action on 16th November, 2020 and that the summons together with the application for an injunction on 7th December, 2020. This being the case, the Claimant was of the view that the Defendants knew of the claim because they were present in court during the hearing by Judge Mwale and they did not file any defence in return. It is this default judgment which was then served on the child of the 1st Defendant. Now that the Defendants are aware of the default judgment, they have made the present application.

This is an application for an order to set aside a default judgment pursuant to Order 28 rule 3 and 6 of the Courts (High Court) (Civil Procedure) Rules of 2017 (CPR). The application is supported by a sworn statement of Joseph Lihoma and skeleton arguments. In response, the Claimants filed sworn statement in opposition and skeleton arguments. The parties addressed the Court regarding the background of the matter from commencing the matter in Lilongwe, the order of Honorable Justice Mwale transferring the matter to Principal Registry which is close to Mwanza and the summons issued in relation to the disputed administration of the deceased estate. I had reserved my ruling to today and this is the ruling.

REASONED ANALYSIS OF THE COURT

The main issue here emanates from how the summons in this case was handled. The Court is cognizant of the fact that there are explicit rules in terms of what should be the contents of a summons and how a summons is supposed to be served. Order 5 rule 1 of the CPR states that:

1. Unless otherwise provided under these Rules or any other written law, a proceeding shall be commenced by filing a summons in Form 1.
2. A summons **shall**
 - (a) specifically state the relief claimed by the claimant;
 - (b) contain a statement of case;
 - (c) **set out the address that is to be the claimant's address for service of documents; and**

It is clear that these requirements are mandatory and any omission means that there is an irregularity that must be rectified. Order 5 rule 7 of the CPR which deals with the obligations placed on the Defendants in a legal action after they have been duly served with the summons states that:

(1) A summons shall be served on the defendant personally, at his last known address or by other alternative mode as the Court may order.

(2) A summons shall contain a notice advising the defendant that

(a) he must file a response in Form 2 within 14 days of the date of service, unless the defendant files a defence within that time;

(b) he must file a defence within 28 days of the date of service;

(c) if he files a document in the proceeding, the Court shall notify the parties of the scheduling and pre-trial conferences under Order 14 where the defendant shall be required to attend or be represented in Court; and

(d) if he does not file a response or defence in the proceeding, the claimant may obtain judgment against the defendant.

(3) A summons commencing a proceeding shall have

(a) a list of documents to be relied upon verified by a sworn statement; and

(b) copies of the documents on the list.

The issue of active and proper case management is cardinal under the current rules of civil procedure and that is deliberate. This is why, any summons is supposed to contain Form 2 where the defending party has an opportunity to explain within 14 days of being personally served of the summons whether he or she is defending/contesting the claim. The requirement to make such a response is no cosmetic. It is there to ensure that all parties actively perform their part and the issues should be clear as to what the Court should take to trial and make determinations. The first question is was the summons issued with details of the address for the Defendants? The answer is in the affirmative. The second question is whether they were served? In this case, the record is clear that the application for interlocutory injunction and the summons were served on the Defendants at the time the application was being handled by the Lilongwe District Registry. In short therefore, the Claimant duly discharged their legal obligation relating to service of summons. Therefore, the second question is answered in the affirmative.

Order 12 rule 6 of the CPR allows a Claimant who has duly served a summons on the default to obtain a default judgment against the defendant who has failed to respond to a summons and even showing an

intention to defend the matter. For avoidance of doubt, the said provision states that where a Defendant

(a) does not file and serve a response or a defence within 14 days after service of the summons; or

(b) files a response within the time under paragraph (a) but does not file and serve a defence within 28 days after the service of the summons,

the claimant may file a sworn statement as a 'proof of service' that the summons and response in Form 2 was served on the defendant as required by Order 5 rule 7, and he may—

(i) apply to the Court for a judgment in default to be entered under this Order against the defendant; and

(ii) carry on the proceeding against any other party to the proceeding.

In this case, the record is clear that the application for interlocutory injunction and the summons were served on the Defendants at the time the application was being handled by the Lilongwe District Registry. In short therefore, the Claimant duly discharged their legal obligation relating to service of summons. As such, the default judgment being fought was regularly obtained.

Order 12 rule 21 of the CPR is very clear as to what a defendant can do after the Claimant has obtained a default judgment against him or her. For the avoidance of doubt, the said order states that:

(1) A defendant against whom judgment in default has been entered may apply to the Court to have the judgment set aside.

(2) The application under sub rule (1) may be made not later than 3 months after the judgment is entered and shall—

(a) set out the reasons why the defendant did not defend the application;

(b) where the application is made more than 3 months after the judgment was entered, explain the delay; and the Court shall not set the judgment aside, unless it is satisfied that it is in the interests of justice to do so;

(c) give details of the defence to the application; and

(d) have a sworn statement in support of the application.

(3) The Court may set aside the judgment in default if it is satisfied that the defendant has shown reasonable cause for not defending the application and

(a) has a meritorious defence, either about his liability for the application or about the amount of the application.

(4) At the hearing of the application, the Court shall—

- (a) give directions about the filing of the defence and other statements of the case;
- (b) make an order about the payment of the costs incurred to date;
- (c) consider whether an order for security for costs should be made; and
- (d) make any other order necessary for the proper progress of the proceedings.

I have read the application and the circumstances leading to the default judgment being issued. It is a regular default judgment whose setting aside is at the discretion of the court. I fully bear in mind the contentious issues in the summons and find it necessary that the issues must be resolved on the merit. This I do bearing in mind the provisions of Sections 17 and 187 of the Deceased Estate (Wills, Inheritance and Protection) Act since some of the defendants fall within this category. Therefore, I hereby exercise my discretion in favour of determining the issues on merit and grant the application to set aside the default judgment. Since the current situation is due to a failure to comply on the part of the Defendants, the costs of this application are for the Claimant.

It is so ordered.

PRONOUNCED IN CHAMBERS ON 6th MARCH, 2023@10:45AM

HONORABLE (MRS.) JEAN ROSEMARY KAYIRA
JUDGE

