



HIGH COURT
COMMERCIAL DIVISION
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IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

Blantyre Registry

Commercial Case No. 03 of 2019

(Before Honourable Justice Katsala)

BETWEEN

KAS FREIGHT LIMITED.....CLAIMANT

AND

JAMES WANDAWANDA t/a ELIM GENERAL TRADING.....DEFENDANT

CORAM: D.H. SANKHULANI, ESQ., ASSISTANT REGISTRAR

Mr. L. Mwantisi, of Counsel for the Claimant

Mr. C. Khondiwa, of Counsel for the Defendant

Mr. A. Nyirongo, Court Clerk

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Sankhulani, AR

RULING ON AN APPLICATION TO SET ASIDE DEFAULT JUDGMENT

Introduction

This ruling follows hearing that was held on an application by the Defendant for an order setting aside the default judgment herein on the ground of irregularity or, in the alternative, on the ground of existence of a meritorious defence.

Background Information

The Claimant commenced the present action by way of a summons, claiming the sum of K15,096,138.63 being money allegedly owed to it as payment for clearing the Defendant's goods with the Malawi Revenue Authority (MRA), statutory collection costs thereon to the tune of K2,264,420.79, compound interest and costs of this action.

The default judgment herein was entered on account of there being no response or defence filed on the Defendant's behalf. Following the default judgment, this Court issued a seizure and sale order.

Subsequently, the Defendant obtained a stay order pending an application to set aside default judgment. Accordingly, the Defendant filed the present application, which is supported by a sworn statement. The Claimant, on its part, filed a sworn statement and skeleton arguments in opposition to the present application.

The present application was heard in the presence of both parties hereto who appeared through counsel. The matter was then adjourned to today's date for ruling. Hence this ruling. It must be noted that, after the hearing, the Defendant filed submissions. I shall, in the course of this ruling, refer to the parties' respective arguments, when and where necessary.

Issues for Determination

- Whether the default judgment herein was irregularly entered.
- Whether the Defendant has shown a meritorious defence.
- Whether the default judgment herein ought to be set aside.
- Whether the Claimant should pay sheriff's fees and expenses.

Whether the Default Judgment Herein was Irregularly Entered

The first ground on which the Defendant seeks to have the default judgment herein set aside is one of irregularity. It is well settled law that where there is an irregular default judgment, a defendant is entitled to have it set aside *ex debito justitiae* (see **J.T. Chanrai (Hong Kong) Limited vs. Climax Clothing Manufacturers Limited 8 MLR 198**). According to the Defendant, the default judgment herein is irregular in that he was never served with the originating process herein.

I am, however, unable to agree with the Defendant on this. I furnish the reasons. The cause of action herein arises from transactions that took place between March 2018 and May 2018. Now, exhibited to the Claimant's sworn statement in opposition to the present application is a delivery note, marked as 'LM 7'. It was issued by the Claimant herein to J. Wandawanda of Elim Trading, P.O. Box 2000, Blantyre. The goods concerned were described to be cooking oil. 'LM 7' clearly shows that it was the Defendant herein who received the cooking oil on 11th May, 2018, since he is the one who is described to have received the cooking oil and signed for it. It is my finding, therefore, that the Defendant was involved in the transactions that found the cause of action herein, and also that his last known address at the commencement of this action was P.O. Box 2000, Blantyre. Having failed to personally serve the summons herein on the Defendant, the Claimant got, on an application, permission to serve the same by way of registered post through the above-mentioned postal address. The Default judgment herein was entered upon this Court being satisfied that the Defendant was served with the summons herein by way of registered post through the above-mentioned postal address.

On the foregoing, I find that the Defendant was properly served with the originating process herein. I, therefore, finally find that the Default judgment herein was regularly entered.

Whether Defendant Has Shown a Meritorious Defence

Under Order 12, rule 21(3)(a) and (c) of the Courts (High Court) (Civil Procedure) Rules 2017, the court may set aside a default judgment where a Defendant has shown reasonable cause for not defending and a meritorious defence.

With regard to whether the Defendant herein has shown reasonable cause for not defending, the immediately foregoing finding that the default judgment herein was regularly entered means that the Defendant has failed to show reasonable cause for not defending. I so find.

On whether the Defendant herein has shown a defence on the merits, it must be noted that the major consideration to be had at the back of the court's mind when considering this ground for setting aside a default judgment is whether the defendant has disclosed a defence on the merits. Where the judgment sought to be set aside is regular, as is the case herein, in view of the above finding, then it is an (almost) inflexible rule that there must be a sworn statement stating facts showing a defence on the merits (*Farden vs. Ritchter (1889) 23. O.B.D. 124*). In order to show a defence on the merits, the sworn statement only needs to disclose an arguable or triable issue, and once the defence is thus shown, its strength or weakness is immaterial at that stage (*Chilenje vs The Attorney General [2004] MLR 34*).

Coming to the matter at hand, I have carefully analyzed the sworn statement in support of the present application vis-à-vis the Claimant's Statement of Case herein. The essential averments as pleaded by the Claimant are what have been outline above in the background information. On the Defendant's part, what is material is its proposed defence, exhibited to the sworn statement in support of the present application and marked as 'CK 3'. As it may be appreciated from the caption herein, the defendant herein is James Wandawanda t/a Elim General Trading. Now, by paragraph 2 of 'CK 3', the Defendant denies ever having operated a firm called Elim General Trading. In paragraph 3 of 'CK 3', the Defendant avers that Elim General Trading is limited liability company. Then, in paragraph 5 of 'CK 3', the Defendant denies ever having personally or as a firm contracted the Claimant to clear goods with MRA. The Defendant, therefore, by paragraph 6 of 'CK 3', denies any liability for the Claimant's claims herein. In my most-considered opinion, the Defendant's averments as highlighted above clearly raise the issue as to whether or not he is liable to pay the Claimant's claims herein. That issue is triable or arguable such that it ought to go to trial, in my most-considered opinion. Therefore, I find that, in raising such a triable or arguable issue, the Defendant has, in that sense, shown a defence on the merits. The issue of the

Defendant's averments being general denials, as contended by the Claimant, is apposite in applications for summary judgment, and not in applications of such a nature as the present one.

Whether the Default Judgment Herein Ought to be Set Aside

In view of the immediately foregoing finding, the default judgment herein ought to be set aside on the ground of existence of a meritorious defence. I so opine and find. The rationale behind applications of such a nature as the present one, to which rationale I religiously subscribe, was well articulated by Lord Atkin in **Evans vs. Bartlam (1937) AC 473 at Page 480**, as follows:

"The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

So, bearing the above rationale in mind, the fact that the Defendant has failed to show reasonable cause for not defending the action is, in my opinion, not sufficient ground for holding otherwise than I have done above, in the circumstances of this matter.

Whether the Claimant Should Pay Sheriff's Fees and Expenses

As per the sworn statement in support of the present application, the Defendant had paid the sum of K2,459,466.00 as sheriff's fees and expenses, in order to redeem his property that was seized by the sheriff. He now claims a refund from the Claimant.

Since the merits of the Defendant's defence to be filed herein shall be determined at the trial of this matter, I order that the issue as to whether the Claimant should reimburse the Defendant sheriff's fees and expenses be determined at trial or on a subsequent application before the Honourable Judge seized of this matter. It is so ordered.

Final Order

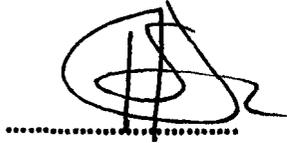
In view of the foregoing findings and reasoning, I hereby set aside the default judgment herein, and grant the Defendant leave to defend this action.

The Defendant is, in this regard, ordered to file and serve on the Claimant his defence within fourteen (14) days from the date hereof.

Costs

These usually follow the event but are always, however, in the court's discretion. Each party herein shall bear their own costs of the present application.

Delivered in Chambers at Blantyre Registry of the Commercial Division of the High Court this 28th day of January 2020.



D.H. SANKHULANI

ASSISTANT REGISTRAR

COMMERCIAL DIVISION
21/01/2020