



THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO.63 OF 2020

BETWEEN

Twaibu Temua..... Plaintiff

AND

Boira Sevice Company..... 1st Defendant

Liberty General Insurance Company Limited.....2nd Defendant

CORAM:	<i>Madalitso Khoswe Chimwaza,</i>	<i>Assistant Registrar</i>
	<i>Mwayi Banda,</i>	<i>Counsel for the Defendant</i>
	<i>C. Zude</i>	<i>Court Clerk</i>

RULING ON SETTING ASIDE DEFAULT JUDGMENT

Introduction

This is an application to aside a default judgement which was obtained on 3rd July, 2020 by the claimant. The defendant in their sworn statement in support of the application argue that they were indeed served with summons on 19th March 2020 through the 2nd defendants offices at Unit House, Ground floor in Blantyre. On 8th July, 2020 the claimant filed for assessment of damages following the default judgment. The defendant engaged the service of the Counsel on 8th October, 2020 and by the 28th October, 2020 an application to set aside was also filed.

However they failed to file a defense within the stipulated time because it took them long to investigate and gather information regarding the accident and injury. The defendant further stated that they have a defence on merit to the negligence claim to the effect that they ensure that their construction sites had safe and conducive working environment and that at all material times they provided proper trainings to its employees as required by law under Occupation Safety, Health and Welfare Act. The 2nd defendant further argue that their liability is contingent upon the 1st defendant being found negligent and the maximum policy limit to indemnify its insured is MK1,000,000.00

In the affidavit in opposition to the application counsel for the plaintiff claim that there are no reasons disclosed as to what led to the delay in the investigation and no report of the said investigation has been attached for the benefit of the court. The defendant have taken 7

months to file application for setting aside of the default judgment and their defence does not support their application. Therefore the application should be dismissed.

Issue for Determination

Whether the default judgment should be set aside on account of there being a defense on merit.

Reasoned Analysis of Law and Facts

On setting aside a default judgement, the principle is that unless and until the court has pronounced a judgment upon the merit or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained by failure to follow any of the rules of procedure. Such is the principle as it was stated in the case of *Evans vs Batlam*¹ The law and practice is that a court still has discretionary power to set aside or vary any judgment entered where there has been failure to give notice of intention to defend or to enter actual defence. **Order 12 R.21 of the HCCPR.**

The court will exercise its discretion under two scenarios where there is regular default judgement and where the default judgment is entered irregularly.

Where there is an irregularity in the manner of obtaining the default judgement, the requirement is that the irregularity has to be spelt out in the affidavit in support of the application. . Where there is an irregularity the default judgment is set aside as of right.

Where the default judgement was obtained regularly, then it can only be set aside where the application is made promptly **O12 r.21(3) HCCPR** and the defendant has to state facts that they have a defence on merit. The defence has to be clearly spelt out in the sworn statement in support of the application. If the judgment is regular, then it is an almost inflexible rule that there must be a sworn statement of merits, stating facts showing a defence on the merits. *Farden vs Richter*² . *David Whitehead & Sons (MW) Ltd vs Phiri*³

Order 12 rule 21(3) HCCPR provides that Court may set aside default judgment if it is satisfied that the defendant:

- (a) Has shown reasonable cause for not defending the matter
- (b) Has a meritorious defence either about his liability for the application or about the amount of the application.

In the case of *T. Chilinje t/a Combinado Pesqueiro De Matengula vs Attorney General (Director of Fisheries – Mpwapwe Boat Yard)* Civil cause No. 676 of 2001 the court described that a defence on merits is one that is deemed to have a reasonable prospect of success at trial.

In essence the court is supposed to be convinced that there is “prima facie’ defence. This involves looking at the defence as presented in the sworn statement. *Inde Bank Limited vs G. Mwamondwe t/a Carlitos Automobile Parts and Accessories Commercial* cause No. 11 of 2008.

¹ [1937] AC 473 at 480.

² [1889] 23 QBD 124

³ civil cause No. 395 of 1990.

According to the present proceedings, this court is satisfied that the judgment was regularly obtained as service was duly effected. This court finds no fault with the service of summons and it is satisfied that this was a regular default judgement.

This means if the defendant is to succeed in having the default judgment set aside the affidavit must demonstrate that he has a meritorious defense worth taking to trial. The main gist of the defendants defense is that the claimant was not negligent as his premises had all safety measures in place and invited the claimant to prove the injuries being claimed. As for 2nd defendant his liability is dependent on the liability of the 1st defendant and limited to paying MK1, 000,000.00. as for the delay it has been explained that they took long to file defence because they were investigating the accident.

This court looked at the statement of claim to appreciate the genesis of the claim. The specially endorsed summons filed by the claimant on 24th January, 2020 and issued on 27th January, 2020, the statement of claim thereto does not have sufficient information or particulars of the accident to enable the court appreciate what happened and how. The claimant in their sworn statement in opposition have argued that the defendants have not given reasons or submitted a report of their investigation as to why it took them long to gather information regarding the accident so that they could properly respond or file a defence. The claimants observation is correct but I am not surprised that the defendant were not able to come up with a response or proper defence, because the statement of claim did not provide sufficient information to enable a party or any other person to come up with a defence at all.

This court does not wish to condone the delay as it is clear that it has been inordinate, as O.12 R.21 (3) CPR is clear the application has to be made promptly and 7 months from the commencement of action is not prompt. But the Court would like to strike a balance by looking at the claimant's obligation according to the rules of procedure when drafting pleadings to ensure that they give sufficient particulars to enable the other party to respond to the issues being raised in the case.

This did not happen in this case and the court is aware that the defendant could have requested for further and better particulars. The fact that they did not find it as an issue does not mean that the court should pay a blind eye to the obvious insufficiency or deficiency of the statement of claim. The statement of claim was poorly drafted.

I will reproduce the statement of claim which reads as follows:

STATEMENT OF CLAIM

1. *At all material times:-*
 - a. *The claimant was employed by the defendant (what position and when?) emphasis supplied*
 - b. *The defendant is a duly registered firm working in the construction industry among other sectors.*
 - c. *The Occupational Safety, Health and welfare Act (Cap 55:07) and the Workers Compensation Act (Cap 55:03) applied to the claimants work and work place.*
2. *On or about the 19th April, 2019, the claimant whilst in the course of employment (doing what type of work? emphasis supplied) at the defendant's construction site at Lirwonde barrage, in Lirwonde was involved in an accident (what type of accident and how? emphasis supplied) and consequently suffered serious injuries.*

PARTICULARS OF THE CLAIMANTS INJURIES (see attached medical report)

-Open fracture of the distal tibia/fibula (right) with devitalization of skin tissue.

3. *The accident was neither a deliberate self-injury nor emanating from a serious and willful misconduct of the claimant rather it can be in one part to the negligence of the defendant or their agents for failing to create a safe working environment and training for their workers, the claimant in particular.*

AND THE CLAIMANT CLAIMS:

1. *Damages for pain and suffering*
2. *Damages for loss of amenities of life*
3. *Damages for disfigurement*
4. *Special damages for costs of police and medical report*
5. *Costs of the action*

Dated this 20th day of January, 2020

CTN ATTORNEYS

Legal Practitioners for the Claimant

For all intents and purposes, the above statement of claim is what was supposed to inform the defendants about the claim that is before Court and prompt them to file defence. With due respect, Counsel for the claimant could have done better than this. No wonder the defendant needed to investigate to find out what really happened, how it happened whether it was the fault of the defendant for doing or not doing what they ought to have done. The responses to these questions should have formed part of the statement of claim.

The court has also looked at the defendants proposed defence that they were not negligent and that they had provided a safe place of work and provided training to the claimant on safety. The issue of negligence and lack of training are matters of fact that can only be proven with evidence from both sides and their witnesses being subjected to cross examination. The Court finds the proposed defence to have merit and worth being tested at trial.

In the circumstances, this court would not want to shut down the defendants opportunity to present their defence on the basis of non-compliance with rules of procedure. The judgment on file is not based on the merits of the case. The matter should proceed to trial and the claimants evidence on the claims should be tested through cross examination. Therefore, the application to set aside the default judgement is successful and it is granted. The defendants should file their defence with the court within 14 days from date of this order. Matter will proceed through the normal court process of mediation and scheduling conference before Justice Kenyatta Nyirenda.

Either party aggrieved by this decision has the right to appeal.

Made in Chambers this 9th day of August, 2021 at Lilongwe.

MD29

Madalitso K. Chimwaza

ASSISTANT REGISTRAR