THE REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO.1122 OF 2016

BETWEEN

Maxon Everson Kalima.. Plaintiff

AND

Kalino Kachulu... Defendant

CORAM:	Madalitso Khoswe Chimwaza,	Assistant Registrar
	P.Maulidi,	Counsel for the Defendant
	D. Silungwe	Counsel for plaintiff
	Mpandaguta	Court Clerk

RULING ON SETTING ASIDE DEFAULT JUDGMENT

Introduction

This is a summons to set aside a default judgement filed by the defendants on the grounds that it was obtained before the writ was served on the defendant. Counsel for the defendant said that the plaintiff served the summons through P/ Bag 194, Lilongwe which was indeed the postal address for the defendants but the defendants categorically denied to have received the summons. Counsel Maulidi said he personally pleaded with counsel for the plaintiff to serve the summons on his firm since he was already representing the defendant in another matter but counsel for plaintiff ignored the request and proceeded to enter judgment in default. In the alternative the defendant claim that they have a defense on the merit in that the plaintiff action should have been commenced in the commercial court and not in the general division.

Counsel for the defendant claim that apart from the irregularity on service they also have a defense on merit worthy allowing the default judgment to set aside and allow the defendant to file defense to the claims. Counsel cites the defense to be that the money being claimed by the plaintiff is on the higher side than what is actually owed and ought to be claimed in the commercial division since it is above one Million Kwacha. Further considering the rate of interest being claimed which is 50%, it is on the higher side as such the matter cannot be maintained in the general division but the commercial division.

In the affidavit in opposition to the application counsel for the plaintiff claim that there is an affidavit of service to the postal address of the defendant Private Bag 194, Lilongwe and there is no evidence that the letter was returned back through a dead letter box. The defendant has not disputed being the owner of the above post box or to have changed his address. Therefore to claim that service was irregular is not correct.

Issue for Determination

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

Whether the matter should be commenced in the Commercial Court.

Reasoned Analysis of Law and Facts

In order for the applicant to succeed on an application to set aside such a regular default judgment, the affidavit in support of the application must establish a defence on merit. It was stated by Skinner C.J. in the case of *Kamchunjulu vs Magareta*[1],

That it was decided in the case of Farden vs Ritcher[2] that if a judgment is regular there is an almost inflexible rule that there must be an affidavit stating the facts which show a defence on the merits

Justice Skinner went on to emphasize that a person seeking to set aside a regular default judgment must show merits of his case. It is not sufficient for a party to depose in general terms that he has a good defence to the claim.

Similary in the case of *T. Chilenje t/a Combinado de Matengula vs AG[3]* Justice Kapanda, stated the law on setting aside a regular default judgment that:

> *Where a default judgment is regular, it is almost an inflexible rule that an application to set aside such judgment must be supported by an affidavit stating facts showing a defence on the merits. Where such an application is this supported, it should be granted unless there are very cogent reasons. The defence on the merits which an application must show only need to disclose an arguable or triable issue. Once a defence has thus been shown its strength or weakness at that stage is immaterial. See Hardware and General Dealers Ltd vs Makaniankhondo Building Contractors[4]*

According to the postal rule, this court is satisfied that service was duly effected as there is no evidence that the summons was returned to the plaintiff through a dead letter box. The defendant actually admitted that the postal address that was used belongs to him. The fact that counsel was already representing the defendant in another matter is not conclusive that the defendant had retained him to represent him in this matter. This court finds no fault with the service of summons and it is satisfied that service was duly effected.

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 plaintiff claim should have been commenced in the commercial court and not general division. This is for the reason that the amount being claimed is exceeding

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[1] (1971-72) 6 ALR Mal 406
[2] (1889) 23 QBD 124
[3] Civil Cause No. 676 of 2001
[4] MSCA Civil Appeal No. 15 of 1984

K1,000,000,00. He is also challenging the amount that is being claimed to be too high than the actual balance. The plaintiff is claiming a sum of K9,120,000.00 , and interest at 3% above commercial bank lending rate from date the loan repayments became due to the date of full payment.

This court looked at the statement of claim to appreciate the genesis of the claim. It is satisfied that this is a commercial matter. The claim falls within the jurisdiction of the commercial court. Further the amount being claimed is challenged and that constitutes a defense on merit worth investigating at the trial. For the above reasons this court is granting the application to set aside the default judgement. For the fact that the matter was wrongly commenced in the General Civil Division it is stayed so that it can properly be commenced in the Commercial Division of the High Court which has exclusive jurisdiction over commercial matters.

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

Made in Chambers this 28th day of April, 2018 at Lilongwe.

Madalitso K. Chimwaza

ASSISTANT REGISTRAR