JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

LAND CAUSE NO. 78 OF 2016

Between

Peter Mchenga.....**1st plaintiff**

Rex Mayelo.....**2nd Plaintiff**

And

Blanytre Water Board.....**defendant**

Coram: K .Banda, Assistant Registrar

Mrs.Jumbe of Counsel for the plaintiff

Ms. Mdolo of Counsel for the defendant

Ms. Chimang'anga, Court Clerk

Order

Introduction

This is the defendants application to set aside a default judgment entered against them by the plaintiff on 29th June,2016 for failure to file defence within the prescribe time limit. The judgment sum as per the order is MK54,120,000.00 plus interest to be assessed and MK8,811,000.00 being 15% collection fees plus 16.5% tax payable to government and costs to be taxed if not agreed.

The plaintiff did obtain a warrant of execution against the defendant. The sheriff duly executed the same and there stands costs also a subject under this application as to who

should pay the costs. The defendant informs the court that this was what alerted them. They did obtain a stay of execution later and hence these proceedings.

Brief background of the interim applications under this case.

It is pertinent that I outline the events and dates so as to be thorough in capturing the essence of the arguments herein. Firstly the plaintiff filed a writ of summons on 19th May,2016. Then it filed an affidavit of service of the summons on 14th June, 2016. It is clear from the affidavit that service was personal. It must also be stated that on the same date of 14th June,2016 the plaintiff also filed the default judgment but the court did not grant it. There being no response and no entry of appearance, the plaintiff on 29th June,2016 obtained a default judgment where the defendants were adjudged to pay: damages amounting to MK54,120,000.00 with interest to be assessed by the court; plus MK8,811,000.00 being 15 % collection fees; plus 16.5% tax payable to government and costs to be taxed if not agreed. This was followed by a warrant of execution issued by the Registrar but not dated. It only indicated that it was filed with the court on 14th June,2016 and this later led to the Sheriff visitation of Blantyre Water Board premises. Consequently on 5th July,2016 the defendants applied ex-parte to stay the order of execution and the same was granted on condition that they apply within 7 days from that date for an order to set aside the default judgment and were ordered to pay Sheriff fees. It must be stated that this the defendants avers is the very reason that brought to their attention of the existence of the claim herein.

Three days later, that is before the expiry of the 7 days earlier granted by the court, to wit on 8th July,2016, the defendant applied to vary the order of the court staying execution. The reason for the same was the erroneous amounts due to the sheriff occasioned by failure by the plaintiff to give correct and proper information as regards the claimed amounts.This was granted and consequently the 7days within which to file application to set aside given by the court started to run a new. And this order was also served on the sheriff on 11th July,2016. Consequently the defendants on 12th July,2016 complied with the order of the court by filing the application to set aside the default judgment. The documents were put on file and were not issued as the Registrars business had not been released yet.

On the 15th of September,2016 the sheriff pounded on Blantyre Water Board again after the plaintiff filed a certificate of non compliance . This resulted seizing of the Boards two vehicles. The reason of this mistake I opine being that the plaintiff did not check the court file whereas the defendant was negligent in bringing to the attention of plaintiff the situation at the court. Registry therefore could not be faulted. Consequently an order setting aside the Certificate of non-compliance was granted on 16th September, 2017.

The matter then finally after several adjournments found itself before me; now for the hearing of the actual application to set aside on the 25th July, 2017. In its application, the defendant accepts failure to file defence within the prescribed time limit and gives reasons for the same; that is to say the one who accepted service did not bring the same to the attention of the responsible person. Perhaps put correctly an administrative lapse in the organisation itself, concisely sated as an internal matter, and hence of no concern to the plaintiff. Be that as it may, the defendant states it has a defence on the merits. The plaintiff counter argues that though the defendant has defence on the merits, the delay in filing the application to set aside was inordinate and inexcusable and that therefore the court should dismiss the application. The defendant rebuts this assertion and attributes the failure to the registry in failing to fix a date in time. As earlier alluded I find no fault with the registry. And therefore to dispose of the matter, it is pertinent to examine the law in light of the earlier stated facts of the case.

The law and factual analysis

Without losing focus, I remind myself that this is an application to set aside default judgment and the overarching principles on which the same is set aside are two, namely: either the default judgment was irregularly obtained or there is a defence on the merit. However even if there is a meritorious defence, it is not unequivocal that an application to set aside would out rightly be granted where there has been inordinate and inexcusable delay. The discretion remains with the court through and through and it can chose to grant or decline. See. ***NICO General Insurance Ltd v Thomas Munyimbiri***, Civil Appeal N0.54 of 2008.

However on powers, the same is covered by order **Order 13 rule 9 of the Rules of the Supreme Court**. This rule states as follows:

" Without prejudice to rule 7 (3) and (4), the court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order"

Thus under O.13 r. 9 the court has discretionary powers to set aside a default judgment. However as alluded earlier, the same is not supposed to be arbitrary but must be exercised judiciously. And therefore the case of ***Evans V. Bartman*** (1937) AC 473 is one of the guide on how the discretion can be exercised. Lord Atkin on page 481 put it this way:

" The principle, obviously , is that unless and until the court has pronounced a judgment upon 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".

This principle has been applied with approval by our own Supreme Court of Appeal in ***The Registered Trustees of the small enterprises development organization of Malawi (SEDOM) v Waka***(2004)MLR 278.

As rightly put by counsel for the defendant where the default judgment is obtained regularly, then a major consideration, where there is an application for an order to set aside the same, is whether the party has shown that he has a defence on the merits. And the definition of a meritorious defence is one that raises triable or arguable issues. This was aptly put by the Supreme Court of Appeal in ***Chilenje v The Attorney General***[2004]MLR 34 as follows:

"The defence on merit which an applicant must show only needs to disclose an arguable or triable issue. Once a defence has thus been shown, its strenghth or weakness at that stage is immaterial".

In a more similar situation, in ***NICO General Insurance Ltd v Thomas Munyimbiri***, Civil Appeal N0.54 of 2008, The Supreme Court of Appeal, endorsed the view that a defence on merit requires more than just a general averment that one has a good claim as expound in ***Kamchunjulu v Magaleta***(1971-72)6ALR(Mal)403 and 405 and ***Majestic Cinema v Interocean Freight Services(Pty) Ltd***[1991]14 MLR 180 @184. The Supreme Court went further to state that the defence disclosed must be such as would likely succeed. And that this called for an objective test and not a subjective one. And that per justice Kamwambe in the court below, whose decision was being appealed against, "merit indicators should not come at the whim of the defendant" and in addition the court quoted Mwaungulu J (as he

then was) in ***Thindwa v Attorney General***(1997)2MLR,45 that "the defence must both have a "real prospect of success" and "carry some degree of conviction".

In short, to summarize all this, a default judgment will be set aside if the application indicates merits and is made promptly. Again merit should not be at the whim of the defendant. This essentially tells that even if there be a meritorious defence, the same does not justify that the delays in making an application to set aside should be inordinate or inexcusable. The court will decline to grant such order without considering the substantive elements of the defence. The courts readily do depart from such positions.

Reverting to the case herein, there are two issues that ought to be resolved before I make my ruling. The first issue pertains to the question whether the default judgment entered was irregular or regular.

The plaintiff argues that the default judgment is regular. This is on the premise that the defendant did not enter appearance. On the contrary, the defendant concedes that indeed it did not enter appearance and hence the plaintiff was at liberty to enter a default judgment as he did herein. However the defendant argues that it was wrong for the plaintiff to enter a final default judgment under order 13 rule 1 of the rules of the supreme court which applies only to a liquidated demand instead of an interlocutory default judgment.

Be that as it may, I must state here that it is trite law that once a writ has been filed and served on the other party, and evidence of service and acknowledgment of receipt are on the record of the court, the other party has a duty that within the stipulated period it either enters an appearance and hence show intention to defend or indeed file the defence. Failure to do so and where the plaintiff has obtained a judgment in default, the same is regular irrespective of the defects as to whether it was interlocutory or final. The deciding factor to make it regular is the non existence of the defence or the failure to show intention to defend plus the fact of due service. This is exactly what happened herein due service but no defence or entry of appearance. I therefore find that the default judgment entered herein was regular.

Secondly the defendant stated that they have a defence on the merit. The question I have to answer then is whether the fact that there is a defence on the merit, then I should ignore the plaintiff claim of inordinate and inexplicable delay and proceed to set aside the said default judgment so that the matter proceed to a substantive hearing.

The position of the law is that generally a defendant will be refused to set aside a default judgment where there has been inordinate and inexcusable delay despite there being a defence on the merits. To resolve this question,I have laboured to revisit the record so as to establish the claim of inordinate and inexcusable delay.

For a start, the default judgment was obtained on 29th June,2016 despite it being filed on 14 June,2016. A critical examination of the file record shows that the application to set aside was filed and complied with by the 12th of July,2016. This is a period of not more than two weeks. In light of this short duration, I literary fail to find proper grounds for holding that there was inordinate delay. Unlike in the case herein, in ***NICO General Insurance Ltd v Thomas Munyimbiri***, Civil Appeal N0.54 of 2008, the Supreme Court upheld the decision of the High Court by Kamwambe J that 5 months delay was inordinate and inexcusable. Again in ***Ellen Mkhweriwa and Another v Hon Lifred Nawena***[2013]MLR at 78, the court held that 13 months was inordinate and inexcusable delay. And in ***Doreen Malizani v Pride Malawi Limited***,HC,PR, Civil Cause No.691 of 2006. And the court had this to say:

It is now a settled legal principle that an application to set aside judgment must be made promptly and within reasonable time(emphasis is mine)(see Chrispo Kuleya v Evans Pullu,Civil Cause Number 37 of 1986). What is reasonable depends on the circumstances of the case. Equity would demand that one acts with promptness and diligence. Those who sleep on their cases will not be assisted. It would be unjustifiable after a long delay to reverse the situation against the plaintiff who otherwise won the fruits of his or her litigation. Justice would not wish to see the acquired or realized expectations of the plaintiff dashed all over sudden just because the defendant has a meritorious defence even after an unreasonable period of time has lapsed. Justice would demand that the defendant bears the consequences of his inordinate delay.(sic)

In the matter herein there is no doubt that the defendant acted with promptness and diligence throughout. It is therefore my finding that there was no inordinate and inexcusable delay. I therefore grant the defendants application. They are therefore to file a

defence within 14 days of this order. I however avoid touching on issues of Sheriff fees and others. I leave such matters to the trial court. Costs for this action to be in the cause.

Ordered in chambers this 31st day of January,2018 here at Blantyre.

Kondwani Banda

Assistant Registrar