



REPUBLIC OF MALAWI
IN THE INDUSTRIAL RELATIONS COURT OF MALAWI
SITTING AT BLANTYRE
IRC MATTER NO. 452 OF 2021

BETWEEN:

KONDWANI NYAMBI.....APPLICANT

-and-

MAONI BUILDING AND CIVIL ENGINEERING CONTRACTORS.....RESPONDENT

CORAM: H/H PETER M.E KANDULU, AR

Mr. Sitole, Counsel for the Applicant,

Mr. Kalanda and Chilumpha, Counsels for the Respondent,

Ms. Rose Msimuko, Court Clerk.

RULING TO SET ASIDE DEFAULT JUDGEMENT

a. Introduction

1. The applicant filed IRC form 1 on 4th May 2021 claiming withholdig of salary from September, 2020 to date, unfair and unlawful labour practices, constructive dismissal (termination of employment, withholding of graduity pay and accrued leave pay.
2. The Respondent failed to file IRC Form 2 within prescribed time by law and the applicant filed a motion to move the court to enter default judgement as of right against the respondent.
3. The court entered a default judgement on 3rd day of August 2021 and the said default judgement awarded the applicant the following:
 - a) Payment of MK1, 800, 000.00 the same being salary arrears for 6 months.
 - b) Graduity to be assessed.
 - c) Payment of accrued 21 leave days not taken during the period of employment to be assessed.
 - d) Damages for unfair labour practices to be assessed and;
 - e) Any other reliefs as the court may deem fit in the circumstances.
4. Before me there is motion to set aside the said default Judgement under order 16 r 1 and 25 rule 1 (h) of the Industrial Relations Court (Procedure) Rules. Attached to the motion is an affidavit in support of the application sworn in by Counsel Partick Kalanda.
5. The said affidavit in support reveal that IRC Form 1 was servd on a wrong law firm next to his law file hence he or his client were not served with the court process.
6. Secondly, the default judgement is irregular as entered a quantified figure of MK1, 800,000.00 which was not pleaded in the pleadings. Counsel cited the case of **Majestic Cinema v Interocean Freight Services (PTY) Ltd** (1991) 14 MLR 180,
7. In the said Majestic Cinema b INterocean Feight (PTY) LTD (supra) Justice Mwaungulu held that allowing the defandants application on both merits-the judgement had been obtained irregularly because whether the judgement sum enetered was payable and it would be very unjust if the judgement was to stand in its present form as it way above the agreed sum.
8. The motion to set aside default judgement was opposed by the applicant. The applicant has filed an affidavit in support of the opposition to the application.

9. I will not labour to re-state what is in the affidavit of the applicant's opposition for bravery purposes only suffice to mention that the court will revert to the affidavit when need arises.
- 10. The only legal issue here is whether the default judgement entered against the respondent should be set aside?**

The Law on Inordinate Delays

11. In *NICO General Insurance Co. Ltd vs Tomas Munyimbiri* MSCA Civil Appeal No. 54 of 2008 the MSCA held that a delay of 5 months' amounts to inordinate delay.
12. In *Mbewe v Agricultural Development and Marketing Corporation* [1993] 16 (1) MLR 301 a delay of three months in bringing an application for enlargement of time, after the statutory period had expired, was held inordinate. It was further held that even where substantial and good causes are shown, an application may still be refused where delay is inordinate.
13. *Laston Mphembedzu and Nico General Insurance Company Ltd* Civil Cause No. 822 of 2007 Justice Kamwambe held that
14. *We are now aware about Lord Atkin's direction in Evans v Bartlam* [1937] AC 437 at 480 that the underlying principle in an application to set aside the default judgment is that unless and until the court has a judgment on merit 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.
15. Further Lord Atkin says that there is no rigid rule that the Applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, though obviously the reason, if any for allowing judgment and thereafter applying to set aside is one of the matters to which the court will have regard in exercising its discretion.
16. It ought to be noted that application to set aside a judgment should be made promptly and within reasonable time. (see note 13/9/12 (1999 Rules of Supreme Court). What is reasonable period will depend on the circumstances of the case.
17. In the case of *John G. Kawamba t/a Central Associates Limited v W.T.C Freight Limited* Civil Cause No. 541 and 542 of 1986 it was held that six months delay after the default judgment had been entered was inexcusable. Even if there could be a meritorious defence, the Appellant would be greatly prejudiced if the judgment was set aside considering that

10 months in bringing the application to set aside judgment is inordinate and inexcusable in the circumstances.

18. The court is of the view that there is inordinate delay by the respondent to have the default judgement set aside 10 months after the default judgement was entered against them.
19. If there was no any other compelling reasons supporting the motion to set aside the default judgement, my court could have declined to grant the same because of inordinate delays.
20. However, there is another dimension, especially, on some of the awards in the default judgement which were not part of the reliefs in the pleadings of the applicant.
21. Counsel has cited two such examples like MK1, 800, 000.00 and 21 accrued leave days against the 15 accrued days pleaded in the pleadings.
22. Counsel for the applicant have failed to rebut the assertion raised by counsel for the respondent.
23. In fact there is no justification from counsel for the applicant on why he had asked the court to enter sum of MK1, 800,000.00 and 21 accrued leave days when the same was not of the pleadings.
24. In my view, counsel for the respondent has made persuasive arguments which has convinced the court that despite that there was inordinate delays to make an application to set aside the default judgement, this is the right case where the default judgement obtained irregularly must be set aside.
25. I therefore set aside the default judgement entered on 3rd day of August 2021.
26. I direct the respondent and the applicant to settle this matter out of court within 7 working days.
27. I further order the parties to file minutes, if they fail to agree at the lapse of 7 working days. The minutes should contain the legal or factual issues which should be referred for full trial before the Deputy Chairperson.
28. The minutes must be filed with the court 7 working days from the date they shall fail to reach settlement out of court.

29. Delivered in chambers this 25th day of July 2022 at Blantyre.



PETER M.E KANDULU
ASSISTANT REGISTRAR

