



**REPUBLIC OF MALAWI
IN THE SUPREME COURT OF APPEAL
SITTING AT BLANTYRE
MSCA CIVIL APPEAL NUMBER 12 OF 2023**

(Being High Court, Commercial Division. Blantyre Registry, Commercial Cause No. 459 of 2018)

BETWEEN:

**ROADS AUTHORITY.....1ST APPELLANT
ROADS FUND ADMINISTRATION.....2ND APPELLANT
AND
AL-ABDULHADI ENGINEERING CONSULTANCY.....RESPONDENT**

CORAM: HON. THE CHIEF JUSTICE R.R. MZIKAMANDA SC, JA

- : HON JUSTICE L.P. CHIKOPA SC, JA**
- : HON. JUSTICE F.E. KAPANDA SC, JA**
- : HON. JUSTICE S.A. KALEMBERA JA**
- : HON. JUSTICE D. MADISE JA**
- : HON. JUSTICE R. MBVUNDULA JA**
- : HON. JUSTICE nyaKAUNDA KAMANGA JA**
- : Mr Likongwe, Counsel for the Appellant**
- : Mr Kalampa, Counsel for the Respondent**
- : Mr Luzu, Co-Counsel for the Respondent**
- : H/H Shaibu, Judicial Research Officer**
- : Mr Chinkono/Mr Minikwa, Court Clerks**
- : Mr Mutinti/Mrs Banda, Court Reporters**

JUDGMENT

Kalembere JA

This is the Appellant's Appeal against the decision of the High Court, Commercial Division of 4th May 2023 dismissing the Appellant's applications to vary the order for stay of enforcement to include a paragraph that the sum of US\$1,481,948.30 that NBS Bank plc sent to Ecobank Malawi Ltd be preserved by Ecobank Malawi Ltd until the determination of the application to set aside the default judgment, and an application to set aside a Default Judgment.

On the 9 December 2022, the Respondent (claimant in the Court below), commenced an action against the Appellants, (defendants in the Court below) through summons. The Respondent's claim included various aspects, including damages for breach of contract amounting to US\$1,071,000.00, representing the outstanding balance of the price; and interest, computed according to the terms of the contract, on delayed payment. Furthermore, the claim included US\$39,092.00, attributed to short payment on an invoice due to erroneous deductions. Another component of the claim comprised the value of an invoice totaling US\$178,500.00. Interest, as stipulated in the contract, was also claimed on the sum of US\$39,092.00 from the date it fell due to the date of actual payment and statutory legal costs, amounting to 15% of the sums claimed, were sought, along with Costs of the claim itself.

On the same day of 9 December 2022, the Respondent made a without notice application for freezing injunction. This application was subsequently granted by the Court below on 14 December 2022. On 9 January 2023, the Respondent served the summons on the 2nd Appellant (the 2nd defendant in the Court below and on 1st Appellant (the 1st defendant) on the 11 January 2023.

On the 8 February 2023, the Respondent filed an application for a default judgment, which was subsequently granted by the Court below. On 9 February 2023 the Respondent's lawyers, Ritz Attorneys wrote a letter to NBS Bank plc demanding immediate payment of the sum US\$1,481,948.30 into the bank account of Ritz Attorneys by 10:00am on the same 09 February 2023. NBS Bank plc paid the said sum of US\$1,481,948.30 into Ritz Attorneys bank account at Ecobank Malawi at about 16:10 pm on the same 09 February 2023.

The Appellants filed an application for stay of enforcement of the default judgment before 2:00pm on 09 February 2023, and the application was set down for 3:00pm

on 9 February 2023. The order for stay of enforcement was granted on 10 February 2023 without the paragraph requiring that the money taken to be returned.

Then the Financial Intelligence Authority (FIA), on its own initiative issued a freezing directive against the bank account of Ritz Attorneys at Ecobank. Therefore, the money remained at Ecobank.

On 10 February 2023, the Appellants filed an application to set aside the default judgment on the grounds of irregularity and on further ground that the Appellants have defences on the merits. The defences were exhibited to the sworn statement in support of the application. The Appellants filed skeleton arguments again detailing their defences.

Then the Appellants filed a without notice application to vary the order for stay of enforcement to include a paragraph that the sum of US\$1,481,948.30 that NBS Bank plc sent to Ecobank Malawi Ltd be preserved by Ecobank Malawi Ltd until the determination of the application to set aside the default judgment. The order was issued on 29 March 2023. The applications to set aside the freezing injunction and set aside the default judgment were heard on 21 February 2023. The Appellants having complained that they were not served, the Court below then ordered the Respondent to file submissions within 7 days and that the Appellants would file their submissions 7 days thereafter. The hearing of the applications henceforth proceeded.

The Court below, delivered its ruling on the two applications on 4 May 2023, but the parties were given on 5 May 2023. The ruling dismissed the Appellants' two applications with costs.

The Appellants being dissatisfied with the said decision of the Court below have filed this Appeal.

The Appellant filed a notice of appeal on the following grounds:

- i. The Court below erred in law in not holding that the Default Judgment was entered prematurely before the expiry of 28th days from the effective date of service of the Summons.
- ii. The Court below erred in failing to hold court processes filed and prosecuted by a person who did not have a valid Legal Practitioner's practising licence at the time he made the application aye invalid and void ab initio and all such

processes and orders obtained by a person without a valid practicing licence must be set aside.

- iii. The Court below erred in law in failing to find that a Default Judgment ordering a third party to pay a judgment debt without following the process for obtaining a Third Party Debt Order is irregular and must be set aside.
- iv. The Court below erred in law in failing to find that the Default Judgement for an amount more than the amount claimed by the Claimant in its summons is irregular and must be set aside *ex debito justitiae*.
- v. The Court below erred in law and in fact in ignoring and not considering the Defendants' Defences on the merits.
- vi. The Court below erred in law in failing to set aside the default judgment when the Defendants had shown good and arguable defences on the merits.
- vii. The Ruling was against the weight of evidence presented in Court.

The main and only issue which remained for the Court's determination was:

Whether a default judgment irregularly entered should be set aside by the discretion of the Court or *ex debito justitiae* (as a matter of right);

We are grateful to Counsel from both sides for their detailed documentation filed in support of their respective positions. Having heard from Counsel from both sides, and having considered the detailed documentation before us, we were of the view that the appeal hinged on our determination of the first ground of appeal. The first ground of appeal is that the Court below erred in law in not holding that the Default Judgment was entered prematurely before the expiry of 28th days from the effective date of service of the Summons. If that ground succeeds, there would be no need to deal with the rest of the grounds of appeal as that would be an academic exercise. Hence the main issue for the Court's determination is whether a default judgment irregularly entered should be set aside by the discretion of the Court or *ex debito justitiae* (as a matter of right).

We are mindful that under Order 12 rule 21 of the CPR, the law allows the Court below to set aside a default judgment entered regularly. There see s to be no provision about setting aside judgment irregularly entered. Order 12 rule 21 of the CPR stipulates as follows:

“21. — (1) A defendant against whom judgment in default has been entered may apply to the Court to have the judgment set aside.

(2) The application under sub rule (1) may be made not later than three months after the judgment is entered and shall—

(a) set out the reasons why the defendant did not defend the application;

(b) where the application is made more than three months after the judgment was entered, explain the delay; and the Court shall not set the judgment aside unless it is satisfied that it is in the interests of justice to do so;

(c) give details of the defence to the application; and

(d) have a sworn statement in support of the application.”

Rule 21 seems to be general in that it could incorporate both a default judgment entered regularly or irregularly, whereas rule 2 seems to qualify and state *inter alia* that the defendant shall set out the reasons why he did not defend the application (action). When setting aside an irregular default judgment the question to be determined by the Court should not be why the defendant did not defend the action, the question ought to be how the Court entered such an irregular default judgment. Thus the Court should not be concerned with whether the defendant has a good and arguable claim. Hence in this matter the question should not have been why the defendant did not defend the action, as time had not yet elapsed. The question ought to have been why a default judgment was entered before time to file a defence had not lapsed.

We have further considered some case authorities that are persuasive enough when it comes to setting aside a default judgment irregularly entered. The Court of Appeal in *James Kanyita Nderitu V Maries Philotas Ghika & Another [2016]eKLR* held:

“We shall first address the ground of appeal that faults the learned Judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had

failed to enter appearances or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such as the reason for the failure of the defendant to file his Memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer (see Mbogo & Another V Shah (supra); Patel V EA Cargo Handling Services Ltd [1975] EA 75, Chemwolo & Another V Kubende [1986] KLR 492 and CMC Holdings Vs Nzioki [2004]1 KLR 173).

In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo V Attorney General [1986 – 1989] EA 456). The Supreme Court of India forcefully underline the importance of the right to be heard as follows in Sangram Singh V Election Tribunal, Kotch, AIR 1955 SC 664, at 711:

“There must be never present to the mind the fact that ours of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be

reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.” [Emphasis added]

The approach of the courts, from the *James Kanyita Nderitu v Maries Philotas Ghika & Another case (supra)*, where an irregular default judgment has been entered is demonstrated and followed in the following cases:

In *Frigonken Ltd v Value Park Food Ltd, HCC No. 424 of 2010*, the High Court stated:

“If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process”.

In *Kabutha v Mucheru HCC No. 82 of 2002 Nakuru* (Musinga J, (as he then was) had expressed the principle thus:

“[with] respect to the trial magistrate, she had no discretion to exercise in the circumstances of the case since there was no service at all and as earlier said, the default judgment had to be set aside as a matter of right. Discretion would have arisen if service was proper and there had been for example delay in entering appearance. Where there is no service of summons to enter appearance, an applicant does not have to show that he has an arguable defence so as to persuade the court to set aside an ex parte judgment. In such circumstances, the court is under a duty to remedy the situation and uphold the integrity of the judicial process.” [Emphasis added]

Of course the cases may be distinguishable in that in those cases the defendant was not served with the summons. In the present matter the Appellants were duly served and therefore time started running. However, the effect of the irregularities in the matter at hand and in the above cases, is the same. In either scenario the defendants were not given the right to be heard. In the case at hand, the Appellants still had time within which to file a defence, but before such a defence could be entered the

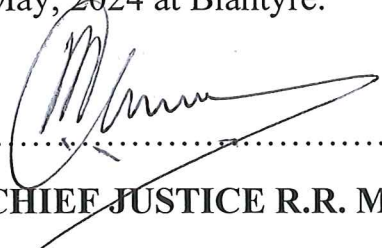
Respondent decided to file an application for default judgment which was on the very same date granted by the learned judge in the Court below. Discretion would have therefore arisen if the application for default judgment was properly done and entered within the time required. However, the Appellants were under no duty to start demonstrating to the Court in an application to set aside an irregular default judgment that they had a good and arguable defence, because it was the very Court that did not afford them that right to demonstrate by wrongly entering a default judgment before the time for filing a defence had lapsed.

We have carefully considered this appeal, especially on the ground of entering a default judgment irregularly, and we are deeply concerned with the following factors, which leave no doubt in our minds that the default judgment in this case was entered irregularly. The Respondent commenced proceedings on 9 December 2022 against the appellants and summons were served on the 1st appellant on 11 January 2023. This means that the 1st appellant had up to 8 February 2023 to file its defence and the default judgment was entered on 8 February, 2023. Indeed, any application for default judgment could only have been competently brought before Court on 9 February 2023 or later.

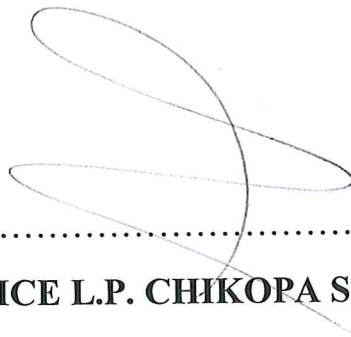
It is therefore our considered view that the application for default judgment leading to the default judgment being entered, was in itself premature and irregular. An irregular judgment is amenable to being set aside *in limine*. The Appellants did not have to show that they had a good and arguable case. After demonstrating the above facts which the Court below clearly agreed in its judgment, the Court below should have only proceeded to set aside the default judgment. Consequently the appeal succeeds in its entirety on the first ground of appeal and the default judgment is hereby set aside with costs for the Appellants. We further direct that all sums of money paid to the Respondent be paid back to the Appellants within 21 days with interests. Further, that the money paid into Court be paid back to the Appellants within 21 days. We further direct that the matter proceed to trial before another trial judge.

All in all the appeal succeeds with costs for the Appellants.

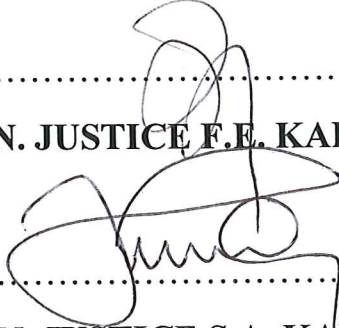
MADE this 7th day of May, 2024 at Blantyre.



.....
HON. THE CHIEF JUSTICE R.R. MZIKAMANDA SC, JA

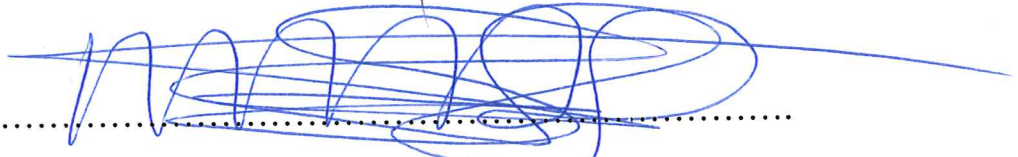


.....
HON JUSTICE L.P. CHIKOPA SC, JA



.....
HON. JUSTICE F.E. KAPANDA SC, JA

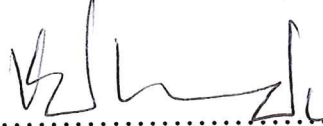
.....
HON. JUSTICE S.A. KALEMBERA JA



.....
HON. JUSTICE D. MADISE JA



.....
HON. JUSTICE R. MBVUNDULA JA



.....
HON. JUSTICE nyaKAUNDA KAMANGA JA