Chiyembekezo Missi t/a Good Hope General Dealers v George Macheka and Rachael Fatchi

Court:	High Court of Malawi
Registry:	Commercial Division
Bench:	Honourable Justice Trouble Kalua
Cause Number:	Commercial Cause Number 181 of 2025
Date of Judgment:	November 06, 2025
Bar:	Mr. Semphani, counsel for the Claimant Mr. Bentry Nyondo, counsel for the 1st Defendant Mr. Nkhunda, counsel for the 2nd Defendant

Head Notes

Civil Procedure – Collection Costs – Applicability – Collection costs are applicable to the both the collected debt and the assessed interest on the collected debt.

Civil Procedure – Default Judgment – Setting Aside – Application to suspend enforcement pending application to set aside – Court's discretion to grant a stay.

Summary

The 1st Defendant sought an order from the High Court, Commercial Division, to suspend the enforcement of a default judgment entered against him on 15th

September 2025, pending the determination of a substantive application to set aside that default judgment. The default judgment was entered because the 1st Defendant had failed to enter a response or file a defence within the time prescribed by the rules of procedure. The Court considered three main arguments advanced by the 1st Defendant in support of the stay: first, that the default judgment was irregular; second, that the failure to file a defence was counsel's inadvertence; and third, that the 1st Defendant possessed a defence on the merits.

On the alleged irregularity, the Court held that the default judgment was **not irregular**. The 1st Defendant had argued that the award of collection costs on the interest awarded was contrary to law . The Court reasoned that since the interest, when assessed, translates into an amount of money that will have been collected, collection costs are applicable to that collected interest . Regarding counsel's fault, the Court reiterated its firm position from previous cases that a client is not insulated from the consequences of their legal practitioner's negligence . However, the Court was ultimately convinced by the 1st Defendant's assertion that he had a **defence on the merits**. Specifically, he denied being a party to the maize sale agreement and denied receiving the maize, raising an issue about the exact parties to the contract that justice required to be resolved. Consequently, the application for a stay was **allowed** . The Court ordered that enforcement of the default judgment be suspended pending the determination of the 1st Defendant's application to set it aside. Ancillary to the order, the 1st Defendant was condemned to pay the Claimant's costs incurred up until this point, and these costs must be paid before the contemplated application to set aside the default judgment is determined.

Legislation Construed

Subsidiary Legislation

Courts (High Court) (Civil Procedure) Rules, 2017 (Order 10 rules 1, 2 and 3)

Legal Education and Legal Practitioners (Remuneration) Rules, 2025

Judgment

1. The 1st Defendant took out this application for an order suspending the enforcement of judgment pending the hearing of an application to set aside default judgment herein under **Order 10 rules 1, 2** and **3** of the **Courts (High Court) (Civil Procedure) Rules, 2017 [CPR 2017]**. The application was supported by the sworn statement of Bentry Nyondo, of counsel. The Claimant opposes the application and filed two sworn statements in opposition deponed to by Chiyembekezo Missi, the Claimant and Barney Semphani, of counsel.

2. On 15th September 2025 this Court entered judgment in default in favour of the Claimant against the 1st Defendant. By the time the default judgment was entered, the 1st Defendant had not entered a response nor filed a defence to the claim within the time set down by the rules of procedure. In the instant application, the Claimant raises three main arguments in support of the application. Firstly, that the default judgment is irregular and therefore liable to be set aside *ex debito justitiae*, secondly that the failure to file a defence was as a result of inadvertence on the part of counsel for which the client must not be punished and thirdly that the 1st Defendant has a defence on the merits to the Claimant's claim.

3. We quickly remind ourselves that this is not an application to set aside the default judgment herein. It is an application to suspend enforcement of the default judgment pending the application to set aside that default judgment. The distinction is important. The arguments sound similar. But they are not exactly the same. The Court, at this stage, is being invited to exercise its discretion to order a stay pending that application. As a general rule, the Court does make it a practice of depriving a successful litigant of the fruits of his litigation. But of course, the Court does retain the powers to suspend enforcement of execution of a default judgment or indeed to even set aside it aside altogether. In the famous words of **Lord Atkin** in **Evans v Bartlam [1937] AC 473 at 480**:

"The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have 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"

4. We were particularly intrigued by the 1st Defendant's first argument that the default judgment herein was irregular. The judgement provided as follows:

(a) Payment of the outstanding purchase price amounting to K747,406,400.00

(b) Interest on the sum of K747,406,400.00 at the rate applicable at National Bank of Malawi from the date due to the date of payment

(c) Collection charges by way of indemnity, amounting to K112,110,960

(d) Further collection charges on the interest awarded on the said sum of K747,406,400.00

(e) Costs *[emphasis supplied]*

The alleged irregularity was said to be in the award of collection costs on the interest awarded. It was argued by the 1st Defendant that the law does not provide for collection costs on interest on a debt and on that basis alone the default judgment was irregular. With due respect, we do not see how that can be so. Collection costs are claimable on collection of monies. The rate, under the **Legal Education and Legal Practitioners (Remuneration) Rules, 2025**, is 15% of the amount collected. The interest claimed and awarded herein will be assessed, obviously. When assessed it will translate into an amount of money that will then have been collected by the Claimant's legal practitioners on behalf of the Claimant in these proceedings. Being an amount collected we do not see how collection costs would not be applicable. We are of the view that collection costs are claimable even on the interest awarded and collected. On that basis we hold that the default judgment herein is, in fact, not irregular.

5. The 1st Defendant argues further that the non-filing of the defence in this case was the fault of counsel for which the party must not suffer any consequences. We have previously expressed our clear views on this argument. In **Commercial Cause Number 83 of 2024: Careson Malika v Mary Blessings Zulu Malasha** we said:

"We have decided before that the mere fact that counsel, and not the client, was at fault does not insulate the client from the consequences of that fault. In

Commercial Cause Number 164 of 2023: Kamayirese Bangamwabo and Emmanuel Musa Mulamba v Ishmael Onani *we made the following remarks:*

Often times, for counsel's conduct, the Courts have shied away from making appropriate orders so as not to punish the "innocent" client. Perhaps it is time we

reconsidered this position. Whilst not wanting to hurt an "innocent" client may be one of the factors to be considered, it must never be the major consideration

for the Court. Whether the "innocent" client will be hurt should not really be our main concern. When a client obtains a favourable order from the Court on

account of counsel's industry and great work we do not "complain", as it were, that the "innocent" client has won the case because of counsel's good work. It is

not in our place to do so. Similarly, where the "innocent" client loses his case owing to counsel's negligence, ineptitude or incompetence, it is not for us to

complain about the adverse order that has befallen the "innocent" client. We may sympathize with them, but no more. It is what it is. The "innocent client"

enjoys the fruits of the good work by counsel in the same way that he suffers for the results of counsel's shoddy work. He takes in the good and the bad in equal

measure. He cannot be expected to reap the rewards only without suffering the pain, as and when it comes. The "innocent" client, in the event of negligence on

the part of counsel, has remedies against counsel, we believe.

That said, in our view, the client is not "innocent" at all, as a matter of fact. He is guilty of non-compliance through the conduct of his legal practitioner. In that

regard, the non-compliance is by the client. The client appears in Court through the legal practitioner. The summons taken out by the Claimant, for instance,

was drawn, filed and served by the legal practitioner. But it is the Claimants' summons. The defence was prepared, filed and served by the legal practitioner on

behalf of the Defendant. It remains the Defendant's defence, not the legal practitioner's. And so on and so forth. Similarly, the non-compliance is committed by

the legal practitioner but it is the relevant party's non compliance. The party cannot escape sanctions for his legal practitioner's conduct unless under the

exceptions known to law, such as those applicable in cases involving a principal and his agent. As a Court we must, therefore, in appropriate circumstances,

punish the client for the sins of the legal practitioner. That is why a party would, in certain instances, be condemned to costs, for instance, for causing an

unmerited adjournment of a matter, for example, even though it would be, strictly speaking, the legal practitioners fault for, say, filing appropriate documents

late.

We would not, in appropriate cases, shy away from making an adverse order against a party on account of counsel's 'misconduct' as it were. From the sworn

statements, we find the conduct of the Defendant's previous counsel appalling. Downright unprofessional. If counsel were still on record, we would have expressed

our views to him more strongly. For now, we would repeat the advice we have given before to legal practitioners to constantly take their professional duty serious. To

jealously guard the standards of this, our noble profession. The lackadaisical manner in which some counsel attend to Court business will one day land someone in

serious professional trouble. And we ain't just saying. Beware, the 40th day. The chickens always come home to roost on day 40. Have we not been taught before

that after 40 days, the thief's luck runs out? Whence then cometh this apathetic attitude with which we approach Court business? And the danger with day 40 is that

it comes up unexpectedly and unannounced, like a thief in the night. Sometimes, even on day 3! We do not desire to be alarmist or the harbinger of doom. But we

honestly believe that one of these days a serious, but totally avoidable, suit for professional negligence will befall one of our learned members of the bar."

We can say no more. When it is necessary to make the orders that the rules permit us to, it won't count for much to argue that the fault was the advocate's and not the client's. The client is at fault through the advocate. It is his fault.

6. The above notwithstanding, the 1st Defendant argues that he in fact has a defence on the merits to the Claimant's claim. He denies being a purchaser in the maize sale agreement that forms the basis of these proceedings. He denies to ever have received any of the maize allegedly sold and delivered under the agreement. We have examined the documents in support of the claim, including the maize sale agreement and the delivery notes. The 1st Defendant's submission that he has a defence on the merits does seem to hold. The issue about who are the exact parties to this contract need to be resolved. In our view the justice of the matter would demand that both parties be heard. We can only begin to do so by hearing both the parties on an application to set aside the default judgment entered herein.

7. In the circumstances, we are convinced that this is an appropriate case in which we must exercise our discretion to make the order sought. Enforcement of the default judgment entered herein is hereby suspended pending the determination of the 1st Defendant's application to set aside the default judgment. The 1st Defendant is hereby ordered to file such an application within 7 days from the date hereof.

8. The 1st Defendant is condemned to pay to the Claimant costs incurred up until this point, such costs to be paid before the determination of the contemplated application

to set aside default judgment.

9. It is so ordered.

Pronounced in Chambers at Lilongwe this **6th** day of **November 2025**.