

# Alinafe Banda & Another v Jericho Chimoto Banda

## Judgment

<b>Court:</b>	High Court of Malawi
<b>Registry:</b>	Civil Division
<b>Bench:</b>	Honourable Justice William Yakuwawa Msiska
<b>Cause Number:</b>	Civil Review Cause No. 170 of 2021 (Being Civil Cause Number 170 of 2018 in the Senior Resident Magistrate's Court sitting at Lilongwe)
<b>Date of Judgment:</b>	November 15, 2021
<b>Bar:</b>	None
	None

## ORDER ON REVIEW

### Introduction

This matter was brought before this Court by way of reference from the comi of the Senior Resident Magistrate in Lilongwe for review pursuant to section 26 of the Comis Act, Cap. 3:02 of the Laws of Malawi. The matter was referred to this Court for the exercise of its supervisory and revisionary powers. The revision pertains to the default judgment that was entered by the Senior Resident

Magistrate court sitting at Lilongwe.

## **Facts**

The Plaintiffs commenced proceedings in the court of the Senior Resident Magistrate by way of Default Summons claiming possession of land and usufruct rights (rights of use) in their favour, damages for malicious damage to property and costs of the action. The Default Summons were duly issued on 23rd February, 2018. The Defendant was duly served with the Default Summons. On 24th April, 2018, the 2nd Plaintiff was deponent to the affidavit of service in which he stated that on 30th March, 2018 he personally served the Defendant with a Default Summons but that the Defendant refused to sign on a copy of the Default Summons as a way of acknowledging service. Whereupon, the 2nd Plaintiff left the Default Summons with the Defendant at his house.

Counsel for the Plaintiffs then filed a default judgment on 28th June, 2018 which the court issued on 4th July, 2018. Consequent to the judgment, the Plaintiffs on 20th September, 2018 filed a notice to show cause why the Defendant should not be committed to civil prison or be fined for contempt pursuant to Order XXXI of the Subordinate Court Rules. On reflection, the court noted that it had inadvertently issued a default judgment when for all purposes and intents it was not, by law, required to do so. Hence, this referral for review.

## **Law and Analysis**

Pursuant to section 26 (1) of the Courts Act, this Court is granted, as part and parcel of its jurisdiction, the power to review orders, judgments and proceedings

in the subordinate court as to regularity and legality of the process. Section 26 (1)

reads as follows-

*"(1) In addition to the powers conferred upon the High Court by this or any other Act, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts and may, in particular, but without prejudice to the generality of the foregoing provision, it appears desirable in the interest of justice, either of its own motion or at the instance of any party or person interested at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof and may remove the same into the High Court or may give to such subordinate court such direction as to the further conduct of the same as justice may require.*

It should also be acknowledged that procedure in the subordinate courts is governed by the Subordinate Court Rules. Of relevance to the present referral is Order XIX, in particular, Rule 3 which deals with the effect of the absence of parties on the date appointed for trial. The relevant parts of the Rule are reproduced for proper appreciation of the matters herein.

*"(1) If, when any action is called on, neither party appears the action may be dismissed.*

*(2) If the defendant does not appear, the Court may, on proof of due service, hear and determine the action in his absence.*

*(3) If the plaintiff does not appear, the claim may be dismissed and the Court may hear and determine the counterclaim.*

*(4) The Court may in its discretion and in any such case order a adjournment. "*

Generally, Order XIX, governs trial or hearing of an action. Rule 3 reproduced above specifically addresses what the court should do in circumstances where a party to the action is absent for trial. The provisions of Rule 3 are clear and unambiguous and therefore no need for any further clarifications.

This Court notes that for a matter to reach the stage of trial under Order XIX, it means that all the required and necessary chronological steps or procedure has been complied with from the time the matter was commenced in court. For the sake of clarity, the procedure is such that under Order VI rule (1) and (2) an action is commenced by summons. At the back of the summons, there should be endorsed a statement of claim which statement of claim should comply with the requirements of Order X rules 1 and 2. After the summons has been issued under Order VI rule 3, it should be served in accordance with provisions of Order VIII. Upon service of the summons and the defendant desires to defend the claim he shall comply with Order X rule 3 (1) and (3) by filing and serving on the plaintiff and affidavit of defence or the defence, as the case may be. Where the defendant complies with rule 3 (1) or (3), as the case may be, the Court under rule 3 (5) is required to fix a date for hearing and to inform the parties of the date so fixed.

Failure by the defendant to comply with Order X rule 3, the plaintiff may, under rule 4, enter judgment in default of affidavit or defence against the defendant for the amount of the claim and costs on the scales set out in the Second Schedule, and the Court fees paid on the summons and the judgment.

Pausing here, it is worthy to note that according to law, the judgment being entered against the defendant is for an ascertained amount of the claim by the plaintiff. From the reading of rule 4, there is only one conclusion to be drawn which is that in the subordinate courts, default judgments are only entered where the claim is for a specified amount of money and not otherwise.

In this matter, the claim in the subordinate court was for possession of land and declaration of usurfruct rights, damages for malicious damage to property and costs. Clearly, this is not a claim for a specific amount to warrant the entering of a default judgment. This Comi agrees with the lower comi that the judgment in default of affidavit or defence was inadvertently entered.

## **Determination**

In the circumstances and by reason of the foregoing, this Court finds that the judgment in default was wrongly entered and in the interest of justice ought to be set aside. The upshot is that the default judgment that was entered and issued by the subordinate court on 4th July, 2018 is set aside. It is so ordered. The Senior Resident Magistrate Court sitting at Lilongwe is directed to hear the parties.

**MADE IN** Chambers this 15th day of November, 2021.