

KAOLE CONTRACTING AND ENGINEERING COMPANY LIMITED v
MINDECO SMALL MINES LIMITED (1980) Z.R. 91 (H.C.)

HIGH
MOODLEY,
23RD NOVEMBER, 1979
1979/HN/201

COURT

J.

Flynote

Civil procedure - Judgment - Judgment in default of appearance - When entered.
Civil procedure - Summons - Place of service - Limited Company - Proper place to serve.

Headnote

A writ of summons was issued on 21st March and a summons served on the General Manager of the defendant company. Subsequently, judgment in default of appearance was obtained by the plaintiff and a writ of fifa was issued on 16th May, 1979. The defendant applied to set aside the default judgment on grounds that it had been irregularly obtained, but the District Registrar rejected the application.

It was established by evidence which was not disputed that the District Registrar had signed the judgment on the 16th May, 1979, although the application for the judgment had been filed on the 15th May, 1979. It was argued therefore that the Registry was in error in declining to accept the defendant's notice of appearance for purpose of filing which he had presented on the 10th May, 1979. It was also argued that summons having been served on the General Manager of the company service had not been effected.

Held:

- (i) The effective date of judgment would be the date it was pronounced subject to any directions given by the master or in this case the District Registrar.
- (ii) The writ of summons have to be served at the registered office of the defendant since this was a limited company.

Legislation

R. S. C., referred to: O. 42/3/1 and O. 13/1/4.

This is an interlocutory appeal from a decision of the District Registrar at the High Court, Ndola, who had on the 12th July, 1979, rejected an application by the defendant to set aside judgment on the grounds of irregularity.

For the appellant defendant: Mr C. A. Stacey of Lloyd Jones and Collins.
For the respondent plaintiff: Mr M. Mwamba of Moses Mwamba and Company.

Judgment

MOODLEY, J.:

The writ of summons in this matter was issued on the 21st March, 1979, and according to the certificate of service it would appear that the summons had been served on the General Manager of the Defendant Company. Subsequently, judgment in default of appearance was obtained

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by the plaintiff and a writ of *fifa* was issued on the 16th May, 1979. The matter came up before the learned District Registrar at Ndola on the 11th July, 1979, at the instance of the defendants who had applied to set aside the default judgment obtained by the plaintiff. The learned District Registrar rejected the application by the defendants and awarded costs to the plaintiff.

In this appeal Mr Stacey takes as his first point that the defendants had attempted to file notice of appearance on the 15th May, 1979. The Registry declined to accept the notice of appearance on the grounds that default judgment had already been entered against the defendants. Mr Stacey submits that according to the judgment on the file, it would appear that the learned District Registrar had signed the judgment on the 16th May, 1979, although the application for the judgment had been filed on the 15th May, 1979. Mr Stacey submits that since judgment had been signed on the 16th May, 1979, the Registry was in error in declining to accept the defendant's notice of appearance for purposes of filing. Accordingly, he submits that the defendants were prejudiced by the failure of the Registry to accept notice of appearance and in the result the default judgment had been irregularly obtained. The next point that Mr Stacey submits is the question of service of the writ on the defendants. He says the writ was never served at the registered offices of the defendant company. He submits that the writ was served to the General Manager of the defendant company at Sheki Sheki Road in Lusaka. However, the registered offices of the defendant company were at ZIMCO House, Cairo Road, Lusaka and in view of the fact that service had not been effected at the registered office, there was no proper service and the default judgment was therefore irregularly obtained.

Mr Mwamba for the respondent plaintiff submits that the learned District Registrar was right in refusing to grant the application to set aside judgment. He submits that in the summons or notice of motion that judgment was irregularly obtained, the defendants did not show a defence on the merits. In the absence of a defence on the merits there would be no point in allowing the application. He further submits that the copy of the judgment was filed on the 15th July and signed on the 16th May, 1979. It must be presumed that the default was entered when filed even though the learned District Registrar could have signed the judgement a day or two later. There was in this respect no irregularity in obtaining default judgment.

Mr Mwamba submits that entry of the judgment should take effect from the moment it was filed and not necessarily the day it was signed by the District Registrar. I have called for the Register kept in the District Registry which reports the dates on which default judgments had been signed. I notice from the Register that the date on which this judgment had been entered is recorded as the 16th May, 1979, the date on which the District Registrar had in fact signed the judgment. I accept that the application for default judgment was filed on the 15th May. But the fact remains that judgment was entered and signed on the 15th May and recorded in the District Registry on the 16th

May.

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view, it would appear that this would be the date of the entry of the judgment in the Register and therefore this would be the effective date of the judgment.

Order 42, r. 3 of the Rules of the Supreme Court states that: "(1) A judgment or order of the Court or of an official or special referee takes effect from the day of its date." O. 42, r. 3 (2) states: "Such a judgment or order shall be dated as of the day on which it is pronounced, given or made, unless the Court or referee, as the case may be, orders it to be dated as of some other earlier or later day, in which case it shall be dated as of that other day." R. S.C., O. 42/3/1 provides: "that a judgment when entered relates back to the day on which it was pronounced". Orders made in Chambers must be dated on the day they were actually made, unless the court or referee otherwise orders. If the Master adds to his judgment or order the words "not to be entered or drawn up before seven days". This means that the judgment or order cannot be entered or drawn up until that date, but it is then entered or drawn up as of the day it was pronounced. In Q.B. D. where judgment is pronounced in Court for an amount to be ascertained by a Master or an Official Referee, or otherwise, the judgment should be dated as of the day it was pronounced, and the finding of the Master or Official Referee be entered upon it afterwards. In terms of R. S.C., O. 13/1/4, the recording or the time for entering judgment in default of appearance is that a certificate of non-appearance will not be given nor judgment be allowed to be signed in default until the morning post of the fifteenth day after service of the writ has been opened. Otherwise, of course, judgment in default may be signed at any time after the time for appearance has expired provided the defendant in the meantime has not entered appearance but if a year has elapsed, since writ served, and the plaintiff has taken no step, a month's notice to proceed must be given before signing the judgment. Order 13 r. 8, provides: "Where by virtue of Order 12, Rule 2 (4) a defendant may at his option enter an appearance in the Central Office or in the District Registry, judgment shall not be entered under this order against that defendant until after such time as a letter addressed to the plaintiff would, in the ordinary course of the post would have been delivered to him, if it had been posted in London early enough on the day on which the time limited for appearing expires for delivery to him on the following morning." The effect of this rule or order is to prevent judgment being entered by the District Registry in default of appearance until there is time for a letter posted in Lusaka on the last day for appearing to reach the plaintiff in the Registry on the following morning.

Thus it would appear from a review of the Rules of the Supreme Court that the default judgment would be entered on the date it was pronounced subject to any directions given by the Master or in this case the District Registrar. Now it is clear that the application for judgment in default was filed on the 15th and the appearance by the defendants was attempted to be filed on the 15th May, 1979. Judgment, however, was not signed till the 16th May and in fact was recorded in the Register as

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being pronounced on the 16th May. In the result therefore, I would hold that the proper date on

which the default judgment was entered was the 16th May, 1979. Quite clearly, the error in this case was that of the District Registry. The plaintiff very properly applied for default judgment after the last day of appearance which was 14th May, 1979, had expired. If judgment had therefore been entered by the District Registrar and recorded in the Register as being obtained on the 15th May, 1979, that would have been the end of the matter and the default judgment would have been properly obtained. This was not so in this case. Accordingly the defendants ought to have had their appearance filed since at the material time default judgment had not been entered. In the result therefore, the judgment in default through no fault of the plaintiff has been irregularly obtained.

However, even if I am found to be incorrect in my finding in this regard, I would still hold that the default judgement had been irregularly obtained because the writ of summons had not been properly served on the defendants at their registered office since they were a limited company. As a result of perusing the documents subsequently submitted by the defendants, I find that the Endorsement of service on the writ shows that the writ had been incorrectly served at the wrong address and not at the defendant's registered offices which are at Zimco House, Cairo Road, Lusaka, and this has been so since the formation of the defendant company since 18th February, 1972.

I would allow the appeal by the defendants in this matter and set aside the default judgment on the grounds of irregularity. In all the circumstances of the case I would order costs be in the cause.

Appeal allowed