

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY

2009/HK/569

(Civil Jurisdiction)

BETWEEN:

**CHILANGA DAVID MWENDA
IRVIN CHILUFYA
JUSTINE LOMBE
EVANS CHIBANDA
THOMSON MALITI**

**1ST PLAINTIFF
2ND PLAINTIFF
3RD PLAINTIFF
4TH PLAINTIFF
5TH PLAINTIFF**

AND

**COMMISSIONER OF LANDS
ATTORNEY GENERAL
KITWE CITY COUNCIL**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT**

Before the Honourable Mrs. Justice R.M.C. Kaoma in Chambers this 22nd day of February, 2013

For the Plaintiffs: Mr. F. Mr. Chalenga - Freddie & Co.

For the 1st and 2nd Defendant: N/A

For the 3rd Defendant: Mrs. S.K. Kaela - Director of Legal Services

RULING ON PRELIMINARY POINT OF LAW

Authorities and works referred to:

1. Order 35 rule 2 RSC 1999
2. Order 35 rule 5, High Court Rules, Cap 27
3. High Court Act, Cap 27, section 2
4. Supreme Court Act, Cap 25, section 2
5. Black's Law Dictionary, 8th Edition, Bryan A. Garner, Editor-in-Chief pp 117, 440, 858, 1129 and 1592
6. The Free Legal Dictionary.com
7. Criminal Procedure Code, Cap 88, section 298 (1)
8. "Arrest of Judgment Whether Known to Nigerian Law", Journal of Public and Private Law, University of JOS, by J.O Alemede, Esq

The 3rd defendant, by counsel has applied under Order 35 rule 2 RSC 1999 to arrest judgment scheduled to be delivered on 22nd February, 2013. When the matter came up for hearing on 15th January, 2013, Mr. Chalenga, counsel for the plaintiffs, raised a preliminary point of law whether this application is properly before me.

He said the application is misconceived at law in that under Order 35 rule 2 there is no such procedure in a civil action to arrest delivery of judgment. He said the 3rd defendant is attempting to comply with the Practice Direction and the case of *Belamano* (no citation given) that require the applicant to cite the order and the rule under which an application is made. He contended that Practice Direction No. 15 of 2010-2011 amplified this Supreme Court decision by requiring an applicant to provide a List of Authorities to be referred to in the High Court proceedings. Counsel further submitted that Order 35 rule 2 relates to setting aside a judgment or order made in the absence of a party. He said the gist of the 3rd defendant's application is to stay delivery of the judgment and to apply to re-open the case which application cannot be brought under the said order as there is no judgment delivered yet after closure of the trial; and that the application is brought under wrong provisions of the law and is misconceived. Counsel also stated that a party is at liberty to seek the inherent jurisdiction of the court to stay the delivery of judgment and re-open the case. He urged that the application be dismissed with costs.

Mrs. Kaela responded that the application is properly before me as Order 35 rule 2 makes reference to the setting aside of a judgment and the reopening of the case; and that the explanatory notes set aside facts or examples that are akin to this case. She said in the affidavit in support, the 3rd defendant has set out facts that fall under the said order. Counsel conceded that the Practice Direction referred to by Mr. Chalenga, requires provision of a List of Authorities. But she submitted that the absence of the List does not disqualify a meritorious application; and that the plaintiffs have not shown what prejudice they have suffered as a result of non-provision of a List of Authorities. She urged that the plaintiff's preliminary objection should be dismissed.

In reply Mr. Chalenga insisted that the provisions of Order 35 rule 2 can only be invoked where there is a judgment, order or verdict obtained in the absence of a party and that this Court merely closed the case and adjourned the matter for judgment. He said there is no ground on which to invoke the provisions of the said order and that the application to arrest judgment is only applicable to criminal matters.

I have considered the preliminary point of law raised. Order 35 rule 2 RSC 1999 provides that any judgment, order or verdict obtained where one party does not appear at the trial may be set aside by the court on the application of that party on such terms as it thinks just. There is a similar provision under Order 35 rule 5, High Court Rules, Cap 27 of the Laws of Zambia. It is also clear to me that the trial court has jurisdiction to order a new trial if the judgment had been obtained in the absence of a party.

Two questions must be decided. The first is whether there is a judgment in this matter which the 3rd defendant seeks to arrest. The second is whether arrest of judgment is available in civil proceedings in Zambia. In the White Book no meaning is assigned to the word "judgment." Section 2 of the High Court Act, Cap 27, simply states that "judgment" includes a decree. Section 2 of the Supreme Court Act, Cap 25, states that "judgment" includes decree, order, conviction, sentence and decision. Black's Law Dictionary, 8th Edition, Bryan A. Garner, Editor-in-Chief defines judgment, *inter alia*, as a court's final determination of the rights and obligations of the parties in a case. It includes an equitable decree and any order from which an appeal lies. In simple law terms a judgment is the final court decree or order given by the Judge based on all the facts and evidence presented by the parties that resolves all the contested issues and terminates the law suit and signifies the end of the court's jurisdiction in the case.

A decree is the judgment of a court of equity, and is, to most intents and purposes, the same as a judgment of a court of common law. It is also a court's final judgment or any order of a court. An order is defined as a written direction or a command delivered by a court or judge. It embraces final decrees as well as interlocutory directions or commands. Verdict is defined as the finding or decision of a jury on the factual issues of the case, but in a nonjury trial, a judge's resolution of the issues of a case.

In this case when Mr. Chalenga said that there is no judgment yet delivered by this Court, he simply means the final decision that should resolve the contested issues and terminate the action or the decision that states who wins the case and what remedies the winner is awarded. Counsel is right that there is no such judgment in this case.

However, there is an order or decision made by this Court on 12th December, 2012. The order was couched in the following terms:

“Since the 3rd defendant has failed to attend proceedings again and there is no reason or explanation advanced to this Court, I deem that the 3rd defendant does not wish to adduce any evidence in defence and that it has closed its case. I shall proceed to render judgment on the evidence on record.”

This was the order made in the absence of the 3rd defendant at the trial which under Order 35 rule 2, RSC 1999 and Order 35 rule 5 High Court Rules may be set aside on application on such terms as the court thinks just. However, this is not the order that counsel for the 3rd defendant seeks to arrest. Counsel seeks to arrest the delivery of the final judgment on the grounds set out in the affidavit in support. In paras 4 to 7 of the said affidavit Mrs. Kaela has deposed that due to administrative inadequacies of the 3rd defendant, coupled with the fact that she was recently retained, the matter was not brought to her attention in time; that she only learnt after the Court had already arisen that the matter was reserved for final judgment; and that the Court in its inherent jurisdiction has power to order that the matter be re-opened so as to enable the 3rd defendant be heard during trial.

This brings me to the second question of whether arrest of judgment is available in civil proceedings. Black's Law Dictionary defines arrest of judgment as the staying of a judgment after its entry, especially a court's refusal to render or enforce a judgment because of a defect apparent from the record. It is stated at page 117 that at common law, courts have the power to arrest judgment for intrinsic causes appearing on the record, as when the verdict differs materially from the pleadings or when the case alleged in the pleadings is legally insufficient. It is further stated that today this type of defect must typically be objected to before trial or before judgment is entered, so that the motion in arrest of judgment has been largely superseded. The Free Legal Dictionary defines arrest of judgment as the postponement or stay of an official decision of a court, or the refusal to render such a determination, after a verdict has been reached in an action at law or a criminal prosecution, because some defect appears on the face of the record, that if a decision is made, would make it erroneous or reversible.

In criminal proceedings, a defendant must make a motion for arrest of judgment when the indictment or information fails to charge the accused with an offence or if the court lacks jurisdiction over the offence charged. In arrest of judgment, the court withholds the pronouncement of the judgment, upon the application of a party to the dispute who claims to prove a material error in the record or trial, which can make the entire proceeding invalid.

I quite agree with Mr. Chalenga that the phrase “arrest of judgment” is not used in Order 35 rule 2, RSC or Order 35 rule 5 of the High Court Rules, nor does it appear anywhere in the White Book or in the High Court Act. However, section 298 (1) of the Criminal Procedure Code, Cap. 88 provides for arrest of judgment by the accused at any time before sentence, whether on his plea of guilty or otherwise, on the ground that the information does not, after any amendment which the court is willing and has power to make, state any offence. In an article titled “Arrest of Judgment Whether Known to Nigerian Law”, Journal of Public and Private Law, University of JOS, J.O Alemede, Esq, considered the extent, if any to which arrest of judgment applies in Nigeria. At pages 143 to 144 he states:

“Going through the length and breadth of our local civil procedure rules of courts there appears to be no provision empowering the court to arrest judgment in a civil matter. The same applies under the English Rules of court. This is because in a civil matter there is no accused, no indictment, no offence, no conviction and no sentence.

It is however not uncommon to see applicants and counsels purport to move the court to arrest judgment in a civil matter. Such motions are often brought before judgment in a case that has been reserved but before it is delivered. For example in *Okocha v Unicross (No1.)*, the defendant/applicant brought an application to “arrest judgment in default of appearance of the defendants in this matter intended to be delivered on 21/590”. Sequel to an objection by the plaintiff/respondent that the court has no jurisdiction to arrest judgment, the Court per Honourable Justice J.J. Umoren held thus:

I think I can say that an arrest of judgment which must take place between conviction and verdict is not available in civil matters where there is no accused, no indictment and no offence. It can therefore be said that there is no provision in our law or rules of court or in the practice and procedure in the High Court of England that admits of an arrest of judgment in civil matters.

In fact a recourse to the inherent jurisdiction of the court would not avail an applicant nor the court in importing arrest of judgment in civil matters as the court’s inherent power is only exercisable as part of the judicial powers of the court and not otherwise.”

The conclusion of the learned author of the article is clear; that arrest of judgment is not applicable to civil matters in Nigeria. Does this then mean that “arrest of judgment” does not apply to civil proceedings even in Zambia? I am inclined to hold that it does. I have already indicated that there is no provision for arrest of judgment in a civil matter under the White Book or the High Court Rules. But it seems to me that under common law the procedure applies to both civil and criminal matters. I have already indicated what is stated at page 117 of Black’s Law Dictionary (supra) that at common law, courts have the power to arrest judgment for intrinsic causes appearing on the record. Therefore it cannot be entirely true as the learned author from Nigeria has said in his article that in England arrest of judgment is only applicable in criminal matters or that a recourse to the inherent jurisdiction of the court would not avail an applicant nor the court in importing arrest of judgment in civil matters as the court’s inherent power is only exercisable as part of the judicial powers of the court and not otherwise.

I conclude in agreement with Mr. Chalenga that there is no provision for arrest of judgment under Order 35 rule 2 RSC, but for me the court has inherent jurisdiction under common law to import arrest of judgment in civil matters. It follows that in Zambia, unlike Nigeria, arrest of judgment applies to civil matters.

The next question is whether arrest of judgment is available in this particular matter. Although I have disagreed with the conclusion by the Nigerian author that arrest of judgment does not apply to civil matters in England, I find helpful the statement he makes in answer to the question whether a party is without remedy after judgment in a case that has been reserved, but before it is delivered? He says as follows at page 145:

“The answer appears to be that in place of arrest of judgment a party in civil causes who intends to move the court not to give judgment at a date fixed for it may bring an application asking the court among others to discharge the court’s early order adjourning or fixing the matter for judgment and allow the Applicant leave to defend the suit on the merit, put its house in order or regularise the proceedings before judgment is given or set aside the whole default proceedings and order a retrial of the case.

Adopting the procedure suggested above would save time, cost, enable all controversy to be completely and finally determined and avoid multiplicity of proceedings which would have arisen had the applicant allowed the court deliver its judgment only to wait to exercise the right to set aside later.”

The learned author further writes in his article at pages 146 to 147 as follows:

“.....In fact the proper order for a trial court before which an order to arrest judgment is brought in a civil cause is to strike out the application as any court order suo moto purporting to amend the prayer sought or granting it would be null and void.

Also, the defect is not cured by recourse to the often stated view that a client shall not be punished for the negligence of his counsel or that the use of the word “arrest of judgment” was a mistake or accidental slip that should not upset the grant of the application to arrest judgment.”

I quite agree with the principle that the Nigerian author has expounded in his article that the proper procedure is to bring an application asking the court among others to discharge the court’s early order adjourning or fixing the matter for judgment and allow the applicant leave to defend the suit on the merit, put its house in order or regularise the proceedings before judgment is given or set aside the whole default proceedings and order a retrial of the case. I think that this is the proper meaning of Order 35 rule 2 RSC. Therefore, instead of arrest of judgment, the 3rd defendant ought to have brought an application asking this Court not to arrest judgment, but to discharge the earlier order, adjourning or fixing the matter for judgment and allow it to defend the matter on the merit. To the extent stated in my ruling I allow the preliminary point of law.

It seems to me that the proper order for me to make is to strike out the application because an application to arrest judgment cannot be brought under Order 35 rule 2, RSC. However, I have gone further to consider whether I would have granted the relief sought if the application was properly before me. I have already said that arrest of judgment is an act of staying a judgment or refusing to enter it because of some defect in the record of the case. In the present case counsel for the applicant has not shown, in her affidavit in support, any material error or defect on the face of the record or in the trial that if a decision is made would make it erroneous or reversible. Consequently I dismiss the application with costs to the plaintiff to be taxed if not agreed.

Delivered in Chambers at Kitwe this 22nd day of February, 2013

R.M.C. Kaoma
JUDGE