

**IN THE HIGH COURT FOR ZAMBIA     2014/HP/0534**  
**AT THE PRINCIPAL REGISTRY**  
**HOLDEN AT LUSAKA**  
**(Civil Jurisdiction)**



**BETWEEN:**

**JEFFERSON KUNDA MBEBA**

**PLAINTIFF**

AND

**EDDIE SIMWANZA**

**1<sup>ST</sup> DEFENDANT**

**RUTH BUSIKU NABUYANDA**

**2<sup>ND</sup> DEFENDANT**

**Before the Hon. Mrs. Justice J.Z. Mulongoti**  
**in Chambers on the 26<sup>th</sup> day of June, 2015.**

*For the Plaintiffs:*

*Mr. K.I. Mulenga of Kumasonde  
 Chambers*

*For the Defendants:*

*Mr. D. Bwalya of Lloyd Jones and  
 Collins*

## **R U L I N G**

**Cases referred to:**

1. *Water Wells Limited V Wilson Samuel Jackson (1984) ZR 98*
2. *Chazyia Silwamba V Lampa Simpito (2010) ZR 475 vol. 1*
3. *Premesh Bhai Megan Patel V Rephidim Institute Limited (S.C.Z. Judgment No. 3 of 2011)*
4. *John W.K. Clayton V Hybrid Poultry Farm Limited (2006) Z.R. 70*

**Legislation referred to:**

1. *Order XII Rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia*

This is an appeal against the ruling of the Deputy Registrar dated 5<sup>th</sup> December, 2014 refusing the defendants' application to set aside the Judgment in Default of Appearance and Defence dated 2<sup>nd</sup> May, 2014.

The brief background to this Appeal is that the plaintiff commenced this action on 4<sup>th</sup> April, 2014 claiming the sum of K140,000.00 being a refund of the deposit paid to the defendants for the purchase of Subdivision No. 33C/8/52 of Stand No. 4586, New Chilenje, Lusaka. The plaintiff also claimed interest and costs. The plaintiff obtained a Judgment in Default of Appearance and Defence on 2<sup>nd</sup> May, 2014. The defendants applied to set aside the default judgment on 18<sup>th</sup> June, 2014. The application was supported by an affidavit dated 18<sup>th</sup> June, 2014 sworn by the defendants Eddie Simwanza and Ruth Busiku Nabuyanda Simwanza.

They deposed, inter alia, that they were informed by the plaintiff's wife that the plaintiff died on 18<sup>th</sup> October, 2013 prior to commencement of the action. On that basis, they believe that the proceedings are irregular and the default judgment is equally irregular.

The plaintiff opposed the application stating that he is alive and exhibited a copy of his National registration

Card Number 624330/11/1. He further stated that he believes that the defendants' application is misconceived because they have not complied with the rules of the Court.

The defendants filed an affidavit in reply dated 21<sup>st</sup> August, 2014. They deposed that they contracted to sell subdivision No. 33C/8/52 of Stand No. 4586 New Chilenje, Lusaka to one Jefferson Kunda Mbeba Senior. They stated that the said Jefferson Kunda Mbeba senior passed away on 18<sup>th</sup> October, 2013 prior to commencement of the action. They exhibited a notice of his death dated 17<sup>th</sup> July, 2014 issued from the University Teaching Hospital death registry. That the deponent to the affidavit in opposition is known to them as the son of the late Jefferson Mbeba Senior and has no *locus standi* as he was not a party to the contract of sale.

The learned Deputy Registrar found that the plaintiff had failed to demonstrate that they have a defence on the merits and that they contracted with the deceased and not the plaintiff as alleged. On that basis, he found that there was no ground to set aside the default Judgment. Accordingly, the application was dismissed with costs.

Dissatisfied with the Ruling of the Deputy Registrar, the defendants appealed to the Judge at Chambers.

On appeal, learned counsel for the defendants, Mr. Bwalya, relied on the affidavit in support of the application to set aside the default judgment and the affidavit in reply. Mr. Bwalya submitted that the writ of summons was irregular as it was issued after the plaintiff's death. As such, the default judgment was also irregular. He added that the defendants do have a defence but that they could not join issue with the plaintiff on an irregular writ.

Mr. Bwalya went on to state that the defendants filed a notice to raise a preliminary issue on a point of law to determine whether the Court could admit on its record an affidavit verifying facts sworn by the plaintiff filed on 2<sup>nd</sup> September, 2014. The said affidavit was filed without leave subsequent to the defendants' affidavit in opposition. He prayed for an order that the default judgment be set aside.

The plaintiff contested the Appeal. Learned counsel for the plaintiff, Mr. Mulenga, relied on his arguments dated 16<sup>th</sup> April, 2015. The gist of his arguments was that the defendants have failed to meet the conditions upon

which a default judgment may be set aside. He cited the case of **Water Wells Limited V Wilson Samuel Jackson (1)** in support of his argument. He submitted that in the present case the defendants did not disclose any defence and can therefore be said to have admitted the plaintiff's claim. He relied on the case of **Chazya Silwamba V Lamba Simpito (2)** wherein the Court held that if a defendant fails to address an allegation, he is deemed to admit it.

Learned counsel further argued that as there was no defence to the plaintiff's claim, the appeal lacked merit. He submitted that the Court should therefore invoke the principle that it is in the public interest that there should be an end to litigation. He urged the Court to dismiss the appeal.

I have considered the proceedings before the Learned Deputy Registrar, the affidavit evidence and the arguments by both counsel. The defendants seek an order to set aside the Judgment in Default of Appearance and Defence dated 2<sup>nd</sup> May, 2014. The application is made pursuant to Order XII Rule 2 which provides that:

*"Where judgment is entered pursuant to the provisions of this Order, it shall be lawful for the Court or a Judge to set aside or vary such judgment upon such terms as may be just."*

However, the principles upon which a default judgment may be set aside have been laid down in a number of cases. In the case of **Water Wells Limited V Wilson Samuel Jackson, supra**, cited by Mr. Mulenga, the Supreme Court held that:

*“although it is usual on an application to set aside a default judgment not only to show a defence on the merits, but also to give an explanation of that default, it is the defence on the merits which is the more important to consider.”*

In **Premesh Bhai Megan Patel V Rephidim Institute Limited (3)**, it was held that:

*“We agree that no defence on the merits was disclosed to warrant this matter going to trial. The learned judge in the Court below was therefore on firm ground when he declined to set aside the default judgment.”*

Further, the Supreme Court in **John W.K. Clayton V Hybrid Poultry Farm Limited (4)** had this to say:

*“Simply put, an applicant does not have to concentrate on why he failed to enter appearance and file a defence as the appellant tried to do in this case. An applicant has to show that he has an arguable defence on the merits by providing prima facie evidence, such as documentary proof...In this appeal, we find that the appellant lamentably failed to show that he had an arguable defence on the merits so as to entitle the learned trial judge to set aside the judgment in default.”*

In view of the foregoing, the Court has the power to set aside a default judgment if the defendants can show that they have an arguable defence on the merits by providing prima facie evidence to that effect. Although it is

necessary for the defendants to give an explanation for their failure to file a defence, the more important consideration for the Court is that they must show that they have an arguable defence on the merits.

The defendants' explanation is that they believe that the writ was issued irregularly because the plaintiff whom they entered into the contract of sale with died prior to commencement of the action. I find that the reason given by the defendants is not adequate to explain their failure to enter appearance. It is trite that proceedings can be instituted on behalf of the deceased by another person such as the administrator of his estate or beneficiary. The fact of death does not absolve the defendants of liability as counsel is well aware that all assets, liabilities including creditors and debtors of the deceased have to be taken into account at the time of distributing his estate. In casu, therefore, if at the time of his death the deceased allegedly paid K140,000.00 as deposit towards the purchase of the defendants' piece of land, which the plaintiff is demanding the defendants repay, which they have neglected to do so and or refused to complete the transaction, the plaintiff was entitled to issue the writ in his name but I hasten to state he should have disclosed that he was doing so as a beneficiary or son of the

deceased. However, this is curable and cannot cause dismissal of the case. And since the plaintiff has maintained that he was the one that transacted with the defendants and not his late father who had same names, the defendants should have entered a conditional memorandum of appearance to secure their interest pending an application to set aside the writ for irregularity, if at all but as aforementioned the issues highlighted are curable. It was not enough for them to simply say that the writ was irregular and sit back. Since they did not file a conditional memorandum, I opine that the defendants disregarded the rules of the court to their detriment. It is also worth noting that had the deceased sued before his death, he would have been substituted by his administrator or other interested person and the matter would have continued to its logical conclusion. The case would not have died with the deceased's death as the defendants seem to be purporting.

Further, upon a careful consideration of the affidavit evidence on record, I am of the considered view that the defendants have failed to demonstrate that they have a defence on the merits to the plaintiff's claim for the refund of K140,000.00. The learned Deputy Registrar



was on firm ground in holding that the death of the other party does not amount to a meritorious defence to warrant an order to set aside the default judgment. The onus was on the defendants to show that they have an arguable defence to the plaintiff's case in order for the Court to set aside the default judgment. I am fortified by the decisions of the Supreme Court in the cases cited above. Having failed to disclose a defence on the merits, the learned Deputy Registrar cannot be faulted for dismissing the application to set aside the default judgment.

For these reasons, the appeal is unsuccessful and is dismissed with costs to the plaintiff.

Leave to appeal is granted.

Delivered at Lusaka this 26<sup>th</sup> day of June, 2015.



**J.Z. MULONGOTI**  
**HIGH COURT JUDGE**