

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
AT LUSAKA**

2015/HPC/0040

(Civil Jurisdiction)

BETWEEN:

JOHN KAKUNGU KAITE

PLAINTIFF

AND

CHARITY MALAMA (*Administrator of the estate
of the late George Mukaya*)

1ST DEFENDANT

SAWYERS KATENGU (*Administrator of the
estate of the late George Mukaya*)

2ND DEFENDANT

**BEFORE HON. MR. JUSTICE NIGEL K. MUTUNA ON THE 23RD DAY OF
JUNE 2015**

For the Plaintiff : **Mr. Mbambara, agent for Messrs
John
Kaite Legal Practitioners**

For the First Defendant : **N/A**

For the Second Defendant : **Ms M. Kalela, Legal Aid Board**

R U L I N G

Authorities referred to:

- 1) *High Court Act, Cap 27*
- 2) *Supreme Court Practice 1999 Vol. 1*

This is the Plaintiff's application for entry of judgment in default of pleadings. It is made pursuant to Order 20 rule 11 of the **High Court Act**. The application is supported by an affidavit sworn one John Kakungu Kaite and skeleton arguments. The Second Defendant has opposed the application by way of an affidavit sworn by himself Sawyers Katengu.

The gist of the evidence in support of this application is that the Defendants were aware of these proceedings because they were served with process. This is as is evidenced by the affidavit of service filed herein. Further that notwithstanding the said service, the Defendants have failed and or neglected to file pleadings in response to the originating process.

The gist of the evidence in the affidavit in opposition was that, the Second Defendant, despite process being served upon him did not know how to respond to the process. That he did not have enough money to enable him engage counsel from private practice. Further that, he has since engaged Legal Aid Counsel who have accordingly filed an appearance and defence on his behalf.

The evidence also reveals that the Defendants have a defence on the merits and are therefore desirous of defending the action.

The matter came up for hearing on 3rd June 2015. Counsel for the Plaintiff Mr. Mbambara argued that Order 20 of the **High Court Act** makes provision for a court to enter judgment against a person who defaults in settling pleadings. Counsel argued that this case is appropriate for entry of such judgment in view of the provisions of order 20 rule 11. He prayed that the application should be granted.

Counsel for the Second Defendant Ms Kalela argued that the defence filed on behalf of the Second Defendant raises triable issues and as such the matter should be heard on the merits by way of trial. She prayed that the application should be dismissed.

In the reply Mr. Mbambara argued that the excuses given for failure to file a defence are not acceptable at law. Further that, although the defence appears to disclose triable issues, the same was filed irregularly and as such the Plaintiff should be allowed to enter judgment in default. Arguing in the alternative, counsel submitted that if the court is inclined to order that the matter proceed to trial, the Second Defendant should be ordered to pay costs.

Although I am in agreement with counsel for the Plaintiff that the **High Court Rules** (as amended) make provision for entry of judgment in default under Order 20 rule 1 and not Order 20 rule 11 where a party fails to file a notice to defend i.e. a defence, within the prescribed time, I do not think that this is a case warranting entry of default judgment against both Defendants. The reason for this is that prior to the hearing of this application, the Second Defendant filed an appearance and defence on 29th April 2015. The defence as counsel for the Plaintiff has conceded, *prima facie* does reveal triable issues justifying the matter going to full trial. In making the foregoing findings I am alive to the fact that the defence was filed late, but that fact, in and of itself, cannot in, my considered view, render it irregular or amenable to being stuck off. Further there is provision in our practice providing for the curing of a defect such as the late filing of a defence. This is in accordance with Order 2 rule 1 of the white book which states as:

“Where in beginning or purporting to begin any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein”.

Based on the foregoing Order I find that the defence is properly before me because the filing of the defence, albeit late cured the omission. As such this application should be dismissed as it relates to the Second Defendant. In so doing I direct that the scheduling conference be held on 9th July 2015 at 15:00 hours.

As regards the fate of the First Defendant, there being no defence filed on his behalf, I grant leave to the Plaintiff to enter default judgment in accordance with the endorsement on the writ of summons.

As for costs, I award same to the Plaintiff as against both Defendants.

Dated at Lusaka this 23rd day of June 2015

**NIGEL K. MUTUNA
HIGH COURT JUDGE**