

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2014/HP/0665

BETWEEN:

KELVIN KAPELWA MUBITA

AND

LUSIYA NYONDO



BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 30TH OCTOBER, 2017 - IN CHAMBERS

For the Plaintiff : *Messrs - Imasiku & Company*
For the Defendant : *Messrs - Legal Aid Board*

RULING

CASES REFERRED TO:

1. ***Covindbhal Baghabhal Patel and Vallabhal Patel V Monile Holding Company Limited***
2. ***Mwambazi v Morester Farms Limited***
3. ***Ladup V Siu (1983) unreported***
4. ***Nahar Investment Limited v Grindlays Bank International (Zambia) Limited (1984) Z.R. 81***

AUTHORITIES REFERRED TO:

1. ***Order 25 rule 1(6)***
2. ***Constitution of Zambia, Chapter 1 of the laws of Zambia*** directs in ***Article 118***

This is an appeal from the ruling of the Deputy Registrar dismissing an application by the Defendant to set aside a default judgment. The Deputy Registrar ruled that the Defendant had

not demonstrated a defence on the merit for the court to set aside the default judgment.

This matter was commenced by writ of summons and statement of claim filed on the 5th May, 2014 where the Plaintiff claims for-

1. *The sum of K60,000.00, being money paid towards the purchase of the property known as house number 647 Bulangililo, Kitwe.*
2. *Return of the sum of K34,404 paid on behalf of the estate administered by the Defendant.*
3. *Damages for breach of the agreement dated 9th September, 2013.*
4. *Damages for misrepresentation;*
5. *Costs*
6. *Any other relief the court will deem fit*
7. *Interest.*

The Plaintiff filed an affidavit of service on the 15th May, 2014 exhibiting a letter of acknowledgement signed by the Defendant acknowledging that he had received the writ of summons and statement of claim.

On the 11th August, 2014 the Plaintiff was granted Judgment in default of appearance and defence pursuant to **Order 12 Rule 1 (1) of the High Court Act Chapter 27 of the Laws of Zambia.**

The default judgment was served on the Defendant's Advocates, Legal Aid Board on 8th October, 2014, and an acknowledged copy was exhibited in an affidavit of service by the Plaintiff.

On the same day of 8th October, 2014 the Plaintiff obtained a writ of fieri facias.

On the 10th October, 2014 the Counsel for the Defendants filed an ex-parte summons for an order for stay of proceedings and Judgment in default pursuant to **Order XLI Rule 4 Chapter 27 of the Laws of Zambia** together with an affidavit in support of the same.

The application to have the Judgment in default set aside was granted to enable the case be determined on its merits and that the Defendant was directed to file his defence and application for joinder within twenty one days from the date of the order dated 10th October, 2014.

On the 12th December, 2014 the Defendant's application was heard. The Learned Deputy Registrar denied the application stating that the Defendant has not at all demonstrated a defence on the merit for the court to set aside the Judgment and therefore found no basis to set aside the default judgment.

The Defendant being dissatisfied with the decision of the Deputy Registrar filed an inter parte summons for an order for leave to

file appeal out of time pursuant to **Order III Rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia** and an affidavit in support of the same on the 30th December, 2014. One ground of appeal was cited that the Learned Deputy Registrar misdirected himself in law and infact when he failed to set aside the Judgment in default of defence and appearance to enable the case be determined on its merit.

The Defendant was granted leave to file appeal out of time and appeal was to be processed in 14 days failure to which status quo would be restored.

On 3rd February, 2015, Counsel for the Defendant filed Heads of arguments where it was pointed out that it is trite law that the nature of a default Judgment entails that it can be set aside if there are facts disclose triable issues which should warrant the case to be determined on its merits.

According to Counsel the case shows that there are triable issues raised in respect of the claim. The court was referred to the case of **Covindbhal Baghabhal Patel and Vallabhal Patel V Monile Holding Company Limited¹** which he states is illustrative of the principle that:

“A default Judgment should be set aside if a triable issue is disclosed.”

Counsel disclosed that the Defendant is sued in her personal capacity.

Two reasons were advanced firstly that the Defendant is sued in her personal capacity and being requested to account for monies transacted on behalf of the estate of the late Overtone Zacheus Nyondo. That the Plaintiff claims amongst other reliefs, damages for breach of contract as well as misrepresentation which Counsel submits are triable issues and the Defendant must be heard and the case decided on its merits. Secondly, that the delay in filing a defence was not intentional nor aimed at wasting the court's time nor to disrespect the Honourable court. It came to Counsel's attention that the Defendant was no longer the personal representative of the aforementioned estate and that the four other individuals namely Chisomo Nyondo, Barbra Nyondo, Janet Nyondo and Tamara Nyondo were appointed by the Kitwe High Court as Administrators for the estate of the late Overtone Nyondo to replace the Defendant and one Victor Nyondo and which persons were likely to be affected by the outcome of any decision in this matter.

Counsel pointed out that the Administrator by the name of Janet Nyondo is the one with the certificate of title relating to the property in contention.

The court was referred to the case of *Mwambazi v Morester Farms Limited*² in which the Supreme Court stated that:

“It is the practice in dealing with bona fide interlocutory applications for courts to allow triable issues to come to trial despite the default of the parties; where a party is in default he may be ordered to pay costs, but it is not in the interest of justice to deny him the right to have his case heard. For this favourable treatment to be afforded there must be no unreasonable delay, no mala fides, and no improper conduct of the action on the part of the Applicant.”

The court of Appeal of England in the case of *Ladup V Siu (1983)* *unreported*³ stated 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 the default, it is the defence on the merits which is the more important point to consider. We agree with them that, it is wrong to regard the explanation for the default, instead of the arguable defence as the primary consideration. If the Plaintiff would not be prejudiced by allowing the Defendant to defend the claim then the action should be allowed to go on trial.”

Counsel prayed that this court allows the appeal as there will be no prejudice occasioned to the Plaintiff. That it will be in the interest of justice for the default Judgment to be set aside to enable the Defendant to file his defence and the case be tried on its merit.

On the 10th February, 2017 Counsel for the Plaintiff filed summons to dismiss Appeal for want of prosecution pursuant to ***Order 25 Rule 1 (4) and (6) of the Supreme Court (1999) Edition*** and an affidavit in support of the same.

Counsel pointed out that from the time the Defendant lodged the appeal no steps have been taken to prosecute the matter. The Plaintiff has been denied the fruits of the judgment for that period of time while the Defendant has relied on the appeal and used it as a weapon against the Plaintiff.

It was submitted that the Plaintiff's contention is that since the Defendant has not prosecuted the claim but has sought to rely on the appeal her actions amount to inordinate delay and is contumelious and as such the appeal must therefore be struck out for want of prosecution.

Counsel cited ***Order 25 rule 1(4) Rules of the Supreme Court*** as expressly empowers the Court to dismiss any action for want of prosecution if the Plaintiff does not issue the summons for directions within the proper time.

It was further submitted that in addition to these express provisions the court has inherent jurisdiction to dismiss an action for want of prosecution if there has been default in

complying with the rules or excessive delay in the prosecution of the action.

Counsel pointed out that in accordance with **Order 25 rule 1(6)** the requirements are:

- (a) That there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers; and*
- (b) That such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendant either as between themselves and the plaintiff and the plaintiff or between each other or between them and a third party.*

It was submitted that there has been inordinate and inexcusable delay by the Plaintiff or her lawyers in prosecuting this matter. The Defendant has been denied the enjoyment of the land subject to the injunction. As such the writ and injunction obtained herein is at peril of being struck out.

I was referred to the case of **Nahar Investment Limited v Grindlays Bank International (Zambia) Limited (1984) Z.R. 81⁴** in defining inordinate delay and what action is likely to occur to an individual who commits such an action as follows:

“If the delay has been inordinate or if in the circumstances of an individual case it appears that the delay has resulted in the respondent being unfairly prejudiced in the enjoyment of any judgment in his favour, or in any other manner, the dilatory appellant can expect the appeal to be dismissed for want of prosecution, notwithstanding that he has a valid and otherwise perfectly acceptable explanation.”

Counsel acknowledged that the authority relates to an appeal in the Supreme Court but submitted that the principle pronounced in the authority is applicable to this matter. It was Counsel’s prayer that the matter be struck out as prayed.

From the record it is clear that there has been inordinate delay on the part of the Defendant and this has not been disputed. Counsel for the Defendant insisted that there are triable issues which can only be resolved at trial. The authorities cited point me to the fact that it is in the interest of justice that matters should be resolved on their merit.

The *Constitution of Zambia, Chapter 1 of the laws of Zambia* directs in *Article 118* as follows:

(2) In exercising judicial authority, the courts shall be guided by the following principles:

(e) Justice shall be administered without undue regard to procedural technicalities; ...

Ordinarily in such applications as the Defendant’s, it is important to exhibit a defence on the merit, which the Defendant has not done. This too is procedural; I am satisfied with the

submissions of the Defendant that the Defendant has a defence on the merit.

I will allow this appeal with costs to the Plaintiff.

The Defendant should file their defence within 7 days herewith failure to which this matter shall stand dismissed.

Leave to appeal is granted.

DELIVERED AT LUSAKA THIS 30TH DAY OF OCTOBER, 2017.


G.C. CHAWATAMA
JUDGE