

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**

**2016/HPA/0009**

*(Civil Jurisdiction)*



**BETWEEN:**

KABINDIMA WOTELA

**APPELLANT**

**AND**

ACKSON PHIRI

**1<sup>ST</sup> RESPONDENT**

ROSEMARY KANGUYA

**2<sup>ND</sup> RESPONDENT**

***BEFORE THE HONOURABLE MADAM JUSTICE P. K. YANGAILO,  
IN CHAMBERS ON 8<sup>TH</sup> JUNE, 2017.***

*For the Appellant: Mr. C. Hamwela - Messrs. Nchito & Nchito*

*For the 1<sup>st</sup> Respondent: Mr. Ackson Phiri - In Person*

*For the 2<sup>nd</sup> Respondent: N/A*

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**R U L I N G**

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**LEGISLATION REFERRED TO**

1. *The High Court Act, Chapter 27 of the Laws of Zambia*

The 1<sup>st</sup> Respondent Ackson Phiri made an application before the Court to set aside my Judgment of 2<sup>nd</sup> November 2016, out of time. He did not cite any particular law pursuant to which he brought

this application contrary to the requirements of Practice Direction re-issued on 16<sup>th</sup> July, 2002. The application is supported by an Affidavit sworn by the 1<sup>st</sup> Respondent dated 15<sup>th</sup> February, 2017.

Ackson Phiri, the 1<sup>st</sup> Respondent herein deposed that he had failed to file an application to set aside the Judgment owing to the fact that he was not served with Court process relating to this matter or the Judgment. That the 1<sup>st</sup> Respondent only learnt of the existence of the said Judgment on 27<sup>th</sup> December 2016 when it was enforced and since it was executed during the time that the Court had gone on recess, it was difficult for him to file an application to set aside the Judgment pending hearing. Further, that the failure to respond to the Court process and to appear before this Court was not deliberate thus he urged the Court to set aside the Judgment so that the Respondents can file the necessary responses to the Appellant's appeal and appear before the Court.

The Appellant filed an Affidavit opposing the application sworn by Kabindima Wotela, the Appellant. It was averred that the Respondents were aware of all Court proceedings, but would either refuse to acknowledge service or simply ignore the Court process. In support of this averment, the Appellant exhibited various Affidavits of Services, including a certificate of publication of Notice of Hearing in the Zambia Daily Mail, which was published after the Court Ordered service of the process by substituted service. It was further averred, that given that the Judgment had been executed, allowing the Respondents' application would be an injustice to the



Appellant. The Appellant urged this Court to dismiss the Respondents' application.

I set the matter down for hearing of the 1<sup>st</sup> Respondent's application on 31<sup>st</sup> May, 2017. At the scheduled hearing, only the 2<sup>nd</sup> Respondent was absent and no reasons were advanced for her absence. All the parties were notified of the scheduled date of hearing and accordingly, I proceeded to hear the 1<sup>st</sup> Respondent's application.

At the hearing, the 1<sup>st</sup> Respondent relied on his Affidavit in Support of his application and submitted that he wanted this Court to set aside the Judgment so that he can be heard on why he was evicted from the property in dispute. He further submitted that he wanted this Court to send back this matter to the Lands Tribunal.

The Appellant, through his Counsel Mr. Hamwela, vehemently opposed the application and relied on the Appellant's Affidavit in Opposition. Mr. Hamwela, in argumentation, submitted that the Affidavit in Opposition showed that proper service was effected on the Respondents prior to the Judgment and that the Respondents did not advance any reasonable excuse for their non-attendance at the hearings. He referred this Court to **Order 35 Rule 5** of **The High Court Act**<sup>1</sup>, which provides for instances where a Judgment obtained in the absence of a party may be set aside. It was his contention that the 1<sup>st</sup> Respondent has not shown the Court any cause sufficient or otherwise to set aside its Judgment and thus the application ought to be dismissed with costs. On the 1<sup>st</sup>

Respondent's prayer that the matter be sent back to the Lands Tribunal, Mr. Hamwela submitted that the Lands Tribunal rendered a Judgment in this matter and is therefore *functus officio*. He therefore prayed that the 1<sup>st</sup> Respondent's application be dismissed with costs.

I have considered the application by the 1<sup>st</sup> Respondent to set aside the Judgment of this Court dated 2<sup>nd</sup> November, 2016 and the issues raised by both the 1<sup>st</sup> Respondent and the Appellant's Counsel in their submissions along with the authority cited by Counsel for the Appellant, for which I am indebted. I have further considered the Affidavit in Support and Affidavit in Opposition of the application.

Firstly, indeed, the hearing of the Appeal had proceeded in the absence of the Respondents precisely because they had not reasonably or sufficiently excused their absence. In my humble opinion, before I consider setting aside my judgment or decision, I must first consider whether the Respondents had good reason for having absented themselves at the hearing of the Appeal.

The record will show that the Notice of Appeal in this matter was lodged at the Principal Registry of the High Court on 2<sup>nd</sup> March, 2016. On 11<sup>th</sup> March 2016, my elder brother Justice Kondolo issued a Notice of Hearing of the Appeal on 11<sup>th</sup> May, 2016. At the hearing on 11<sup>th</sup> May, 2016, the Respondents were not in attendance. The Appellant's Counsel Mr. Hamwela applied for an order of substituted service on the basis that the Appellant has had



difficulty in locating the Respondents and the Order for substituted service was granted as prayed. Thereafter, the record in this matter was re-allocated to this Court following the elevation of Justice Kondolo to the Court of Appeals. I scheduled the matter for hearing of the Appeal on 26<sup>th</sup> August, 2016. On 26<sup>th</sup> August 2016, the Respondents were absent and there was no compelling reason advanced for their absence. Being satisfied that the Respondents had been notified of the scheduled date of Hearing through substituted service as ordered by the Court, I proceeded to hear the Appeal. This is the brief history of this matter.

It is trite that the Court is empowered to proceed to hear any matter, upon proof of service of notice of hearing. **Order 47 Rule 16** of the **High Court Rules**<sup>1</sup>, provides that: -

*"If the respondent fails to appear, in person or by professional representative, when the appeal is called on for hearing, the Court shall, on proof of the service upon him of notice of the hearing, proceed to hear the appeal ex parte."*

In the case in *casu*, the Respondents were served with notice of the hearing of the appeal via substituted service as ordered by the Court. Proof that the Respondents were served is on the Court Record and accordingly, this Court was in order to proceed to hear the Appeal *ex parte*.

I will now determine the 1<sup>st</sup> Respondent's application to set aside the Judgment before determining the issue of whether the matter can be sent back to the Lands Tribunal, as prayed by the 1<sup>st</sup>

Respondent. The 1<sup>st</sup> Respondent's request to this Court to set aside my Judgment may be done in terms of **Order 35 Rule 5** of the **High Court Rules**<sup>1</sup>, which stipulates as follows: -

***“Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the Court, upon such terms as may seem fit.”*** (emphasis mine)

It is my considered view that in dealing with applications to set aside a Judgment, the Court must determine whether or not the Applicant has shown sufficient cause, to warrant setting aside the Judgment. In the case in *casu*, the 1<sup>st</sup> Respondent has implored this Court to set aside the Judgment on the basis that he was not aware that there was an Appeal against the Judgment of the Lands Tribunal and that the matter had been set down for hearing of the Appeal by this Court. The 1<sup>st</sup> Respondent also submitted that he brought this application to set aside the Judgment late because it was executed during the festive season when the Court was on vacation and thus it was difficult for him to file his application into Court. It was thus his prayer that the Judgment be set aside and the matter be sent back to the Lands Tribunal.

I rendered my Judgment in issue on 2<sup>nd</sup> November, 2016. The record will show the Appellant sealed a *Praecipe* for Writ of Possession and Writ of Possession on 28<sup>th</sup> November, 2016. The Record will also show exhibit "LP1" attached to the 1<sup>st</sup> Respondent's Affidavit in Support of this application, which is a Sheriff's seizure form, that bears the official stamp of Sheriff's Office dated 27<sup>th</sup> December, 2016. The 1<sup>st</sup> Respondent only applied to set



aside the Judgment on 21st March, 2017 as can be seen from the High Court date stamp on the Summons for leave for an application to set aside Judgment out of time. This clearly shows that it took the 1<sup>st</sup> Respondent close to three (3) months after enforcement of the Judgment, for him to make the application to this Court. Delay in applying to set aside is relevant particularly if during the period of delay, the successful party has acted on the Judgment, as has happened in the case in *casu*. The Appellant has executed the Judgment. Therefore, I find the 1<sup>st</sup> Respondent's argument that the Court was on vacation lacks merit. This was clearly inordinate delay on the part of the 1<sup>st</sup> Respondent.

It is imperative for this Court to inquire into the other reason given by the 1<sup>st</sup> Respondent to ascertain if it amounts to “**sufficient cause shown**” as envisaged by **Order 35 Rule 5** of the **High Court Rules**<sup>1</sup>. In the case of Judgment obtained where the Appeal was heard *Ex Parte*, a party that did not appear at the hearing of the Appeal ought to give compelling reasons for his non-attendance. Once sufficient cause has been shown to the satisfaction of the Court, it then proceeds to assess, if on the face of the record the party, who has advanced reasons of his non-attendance, has meritorious reasons as to why the Appeal should be refused, in whole or in part and, if so, to grant the application to set aside the judgment obtained *Ex Parte*. In the case in *casu*, the other reason given by the 1<sup>st</sup> Respondent for applying to set aside the Judgment is that he wants this Court to send back the matter to the Lands Tribunal so that it can be heard afresh. The 1<sup>st</sup> Respondent, being

a lay person has failed to understand that the Lands Tribunal, after rendering its Judgment, became *functus officio*. The 1st Respondent, needs to appreciate that the Appellant appealed against the Judgment of the Lands Tribunal and through this Appeal process, the Appellant sought to change partially the Judgment of the Lands Tribunal by bringing it for reconsideration to this Court. If the 1<sup>st</sup> Respondent did not want the Appeal to succeed, he should have filed a statement of any reasons why the Appeal should be refused, in whole or in part. The 1<sup>st</sup> Respondent generally had the option of filing a Respondent's notice if he was seeking permission to cross-appeal the Judgment of the Lands Tribunal or if he wished to ask this Court to uphold the Judgment of the Lands Tribunal, but he did not do so. The 1st Respondent must also appreciate that the Appeal hearing was limited to a review of the decision of the Lands Tribunal. It was merely a consideration of the relevant material that was before the Lands Tribunal only in such depth as was necessary for this Court to understand the case and to address the criticisms that the Appellant had raised. Thus there was no need to receive oral evidence or any other form of evidence that was not previously before the Lands Tribunal. Accordingly, there is no need to send this matter back to the Lands Tribunal as the Lands Tribunal's role in this matter is now *functus officio* so far as it relates to the Judgment in issue.

In the instance case, having perused the 1<sup>st</sup> Respondent's Affidavit in support of this application and considered his submissions, I am



not at all satisfied as to the reason for the absence of both the Respondents, as well as, the reasons advanced in support of the application to set aside this Court's Judgment. In the circumstances, I do not find any cause at all, let alone sufficient cause for setting aside my Judgment of 2<sup>nd</sup> November, 2016. The application is accordingly dismissed. The Appellant shall have his costs, said costs to be taxed if not agreed.

Leave to appeal is granted.

**Dated the 8<sup>th</sup> day of June 2017**



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**P. K. YANGAILO**  
**HIGH COURT JUDGE**