

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

**2016/HP/1444**



BETWEEN:

**GORDON JAMES GRAY**

**1<sup>st</sup> PLAINTIFF**

**G & J GARDENING ENTERPRISES LIMITED**  
(T/A First Step Nursery School)

**2<sup>nd</sup> PLAINTIFF**

AND

**THE SECRETARY GENERAL OF EUREKA PARK  
RESIDENTS ASSOCIATION**

**1<sup>st</sup> DEFENDANT**

**Lt Col MIKE REEVE-TUCKER OBE**  
(Sued in his capacity as Chairperson of EPRA)

**2<sup>nd</sup> DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 29<sup>th</sup> DAY OF  
NOVEMBER, 2017**

*For the Plaintiffs : Mrs D. Chibombe, Mumba Malila and Partners*

*For the Defendants : Mr C. Chonta, Chonta, Musaila and Pindani Advocates*

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

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CASES REFERRED TO:

- 1. Samuel Mwambazi V Morester Farms Limited 1977 ZR 108**
- 2. Waterwells Limited V Wilson Samuel Jackson 1984 ZR 98**

LEGISLATION REFERRED TO:

- 1. The Rules of the Supreme Court, 1999 edition**
- 2. The High Court Rules, Chapter 27 of the Laws of Zambia**

This is a ruling on two applications made by the Defendants to stay execution of the judgment, and to set aside the default judgment, made pursuant to

Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia, as read together with Order 45 Rule 11 of the Rules of the Supreme Court, 1999 edition, and Order 20 Rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia.

Counsel relied on the affidavit filed in support of the application, and stated that the judgment obtained in this matter was highly irregular, as the court would note that among the reliefs obtained were three declaratory orders, and an order of interim injunction. It was stated that the law is clear on which reliefs can be obtained in default of defence, and reference was made to Order 12 Rule 1 of the High Court Rules particularly sub rules 1 to 7, as providing for the same. Counsel further referred to Order 12 Rule (1) 8 of the said High Court Rules, submitting that the said provision provides the recourse that is available to litigants where the matters are beyond those provided in sub rules 1 to 7.

That the recourse where injunctive or declaratory relief is sought, and there is no defence, is to proceed as though appearance and defence had been entered. Further in the submissions, Counsel stated that the Defendants have a defence on the merits to the claims which defence had been exhibited to the affidavit.

As regards the costs of the application, Counsel stated that they would not have ordinarily asked for costs, but they were asking for the same, as the application had been unnecessarily opposed.

In response, Counsel for the Plaintiffs relied on the affidavit in opposition filed on 9<sup>th</sup> October, 2017, as well as the skeleton arguments. It was stated that the writ whose default judgment the Defendants sought to set aside was filed on 21<sup>st</sup> July, 2016, and was served on them on 28<sup>th</sup> July, 2016, and they acknowledged the process. That when the Plaintiffs conducted a search on the record on 16<sup>th</sup> October, 2016 they found that the Defendants had not entered their appearance or filed any defence. Further that on 12<sup>th</sup> May, 2017 the Defendants were served a notice of hearing to appear before Hon Mr Justice

Siawwapa who had conduct of the matter then, and they still did not enter appearance or file a defence, hence the default judgment being entered.

Counsel referred to the case of **WATERWELLS LIMITED V WILSON SAMUEL JACKSON 1984 ZR 98** submitting that the case held that where there was delay, and the same could be compensated by costs, a default judgment may be set aside. That however in this case the Defendants did not do anything for a year after being served, and therefore an award of costs would not be sufficient. Further reference was made to the case of **SAMUEL MWAMBAZI V MORESTER FARMS LIMITED 1977 ZR 108** which held that in dealing with bonafide applications, matters should be allowed to proceed to trial where triable issues are disclosed, despite the default of the parties, if there is no unreasonable delay or malafides.

Counsel's submission was that the delay by the Defendants in this matter was unreasonable, and on that basis the court was urged not to set aside the default judgment, and that in the event that the court was inclined to do so, the Plaintiffs asked for costs.

Counsel for the Defendants in reply maintained that this court has no powers to grant a default judgment where the claim is for injunctive or declaratory relief, and therefore the Plaintiffs should have proceeded as provided in Order 12 Rule 8 of the High Court Rules, Chapter 27 of the Laws of Zambia. As regards the delay, Counsel stated that paragraphs 5, 7 and 26 of the affidavit in support of the summons to set aside the default judgment states that the same was inadvertent.

It was further Counsel's submission that in any event the 1<sup>st</sup> Plaintiff in this matter is deceased, and the default judgment was obtained when he had already died. Counsel also stated that the Plaintiffs could not ask for costs when the judgment obtained was irregular, adding that they should have consented to setting aside the default judgment, and would have thereby

avoided the costs that they now claimed. Counsel prayed that the Plaintiffs be condemned in costs.

I have considered the application. Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia provides that;

***“Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not.”***

Order 45 Rule 11 of the Rules of the Supreme Court, 1999 edition on the other hand states that;

***“Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just.”***

In the affidavit in support of the summons to stay execution dated 14<sup>th</sup> September, 2017 the basis for the application is stated in paragraph 5 as being that the judgment was irregularly obtained, and the Defendants have a defence on the merits. Further that the Plaintiffs may proceed to execute the judgment, hence the application. No affidavit in opposition to that application was filed, and seeing that there is a threat that the judgment may be executed if not stayed, the ex-parte stay of execution of the judgment granted on 25<sup>th</sup> September, 2017 is hereby confirmed.

With regard to the application to set aside the default judgment, the Defendant's contention as outlined in the affidavit filed in support of the application on 14<sup>th</sup> September, 2017 is that the 2<sup>nd</sup> Defendant had between 11<sup>th</sup> May, 2017 and 29<sup>th</sup> July, 2017 travelled out of Zambia on business and

holiday as shown by extracts from his passport exhibited as 'TMRT1' to the affidavit.

That upon his return, he learnt that his daughter in law had been served a notice of hearing for 19<sup>th</sup> May, 2017, when he was away. He further deposes that prior to that he had engaged the 1<sup>st</sup> Plaintiff with a view to resolving the matter amicably, but the 1<sup>st</sup> Plaintiff died on 12<sup>th</sup> October, 2016. The 2<sup>nd</sup> Defendant also avers in the affidavit that he had erroneously thought that the matter had abated on the death of the 1<sup>st</sup> Plaintiff, as the suit was mainly to enforce quiet enjoyment of his property, which he claimed had been interfered with. Therefore the failure to enter appearance and file a defence was inadvertent. The Defendants also claim that they have a defence on the merits.

In the affidavit in opposition to the application, the Plaintiffs aver that after the writ of summons was issued on 21<sup>st</sup> July, 2016, it was served on the Defendants on 28<sup>th</sup> July, 2016, and was duly acknowledged. However the 2<sup>nd</sup> Defendant ignored the process served on him, and did not enter appearance or file a defence, as evidenced on the search conducted on the record on 6<sup>th</sup> October, 2016.

That the Defendants had more than enough time to respond to the court process, and that by a letter dated 12<sup>th</sup> May, 2017, the 2<sup>nd</sup> Defendant was served with a notice of hearing returnable on the 19<sup>th</sup> May, 2017, before Hon Mr Justice Siavwapa, which was acknowledged as shown on exhibit 'JM3' to the affidavit in opposition. The affidavit further states that the 2<sup>nd</sup> Defendant did not indicate that he would be unavailable for the hearing, and that the matter could not have abated following the death of 1<sup>st</sup> Plaintiff, as there are two Plaintiffs in this matter. That there is therefore no justifiable reason to set aside the default judgment.

Order 12 of the High Court Rules makes provision for the entry of judgment in default of appearance and defence to a claim. Rules 1 (1) to (7) of that Order specify the instances in which default judgment may be entered, and these

cover claims for liquidated amounts, damages, claims for possession of land, and mense profits. Where the claim is not covered by the said sub rules, sub rule 8 of Rule 1 of the said Order 12 states that where the Defendant does not enter appearance or file a defence, the Plaintiff shall proceed as if appearance and a defence had been filed.

Further Order 13/6/2 of the Rules of the Supreme Court, 1999 edition provides that;

***“If, therefore, there is indorsed on the writ a claim for an account, injunction, specific performance, declaration or rectification or other remedy or relief which falls outside the descriptions specified in rr.1-4, the plaintiff cannot enter judgment in default of notice of intention to defend, unless he expressly and finally abandons every such remedy or relief.”***

In this matter the Plaintiffs claims are for declaratory reliefs and an order of injunction. As the Defendants did not enter appearance or file a defence to the claims, going by the provisions of Order 12 Rule (1) (8) of the High Court Rules, Chapter 27 of the Laws of Zambia, the Plaintiffs should have proceeded as if the Defendants had entered appearance and filed a defence. It follows therefore that a default judgment could not have been properly entered in this matter, and it was therefore irregularly obtained, and I accordingly set it aside.

As to whether the Plaintiffs should be granted costs, the Defendants argued that because the judgment was irregularly obtained, no costs should be awarded. However the Plaintiffs in the affidavit in opposition reviewed the events leading up to the obtaining of the default judgment. These events show that the Defendants after having been served the process on 28<sup>th</sup> July, 2016 sat back and did nothing. Even when the 2<sup>nd</sup> Defendant was served a notice of hearing for 19<sup>th</sup> May, 2017, which he acknowledged on 12<sup>th</sup> May, 2017, he did not indicate that he would be unavailable for the hearing.

This resulted in the default judgment being obtained. A person called N. Reeve Tucker received the notice of hearing for 19<sup>th</sup> May, 2017 on 12<sup>th</sup> May, 2017, and exhibit 'TMRT1' to the affidavit in support of the summons to set aside the default judgment has an endorsement dated 11<sup>th</sup> May, 2017 in a passport. Therefore the 2<sup>nd</sup> Defendant did not receive the notice of hearing for 19<sup>th</sup> May, 2017 personally, and having been out of jurisdiction during the period, he cannot be faulted for not attending the matter on 19<sup>th</sup> May, 2017.

It has been seen that no action was taken to respond to the court process from the time that it was filed, and such the Defendants showed indifference to the same. However as the reliefs sought cannot be obtained by way of a default judgment, I will order that costs be in the cause. The application for misjoinder of a party shall come up on 15<sup>th</sup> January, 2018 at 11:45 hours. Leave to appeal is granted.

**DATED THE 29<sup>th</sup> DAY OF NOVEMBER, 2017**



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**S. KAUNDA NEWA  
HIGH COURT JUDGE**