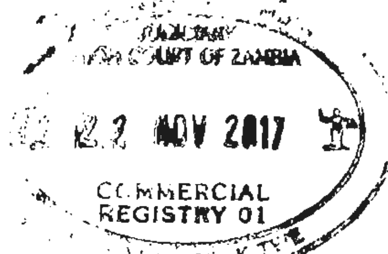
IN THE HIGH COURT FOR ZAMBIA **2017/HKC/0008**
AT THE COMMERCIAL COURT DIVISION
HOLDEN AT KITWE
(CIVIL JURISDICTION)



BETWEEN:

PULSE FINANCIAL SERVICES LIMITED **APPLICANT**
T/A ENTREPRENEURS FINANCIAL CENTRE

AND

ENOCK MUSAIWALE PHIRI **1ST RESPONDENT**
PETER MWANSA KATELE **2ND RESPONDENT**

CORAM: Hon. Madam Justice Dr. W.S. Mwenda in Chambers at Kitwe on the 22nd day of November, 2017.

For the Applicant: Mr. H. Pasi of Messrs. Pasi Advocates

For the Respondents: Ms. N. Nyangu of Messrs. Magubbwi and Associates

RULING

Cases referred to:

1. *Stanley Mwambazi v. Morrester Farms (1977) ZR 108.*
2. *Leopold Walford (Z) Limited v. Unifreight (1985) Z.R. 203 (S.C).*
3. *Dsane v. Hagan and Another [1961] 3 All ER 385.*

4. *Access Bank (Z) Limited v. Group Five/Zcon Business Park Joint Venture SCZ/8/52/2014.*
5. *National Westminster Bank v. Kitch [1996] 1 W.L.R. 1310.*

Legislation referred to:

1. *Order 20 Rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia.*
2. *Article 118 (2) (e) of the Constitution of Zambia.*
3. *Order 3 Rule 2 of the High Court Rules.*
4. *Order 11 Rule 22 of the High Court Rules.*
5. *Order 12 Rule 1 (9) of the High Court Rules.*
6. *Orders 14 and 27 of the Rules of the Supreme Court, 1999 Edition ("The White Book").*
7. *Order 53 Rule 9 (1) of the High Court Rules.*
8. *Order 88 of the White Book.*
9. *Orders 13 and 19 of the White Book.*
10. *Order 28 of the White Book.*
11. *Order 88 Rule 6 (1) and (2) of the White Book.*

Publication referred to:

1. *Halsbury's Laws of England, 5th Edition, Volume 12 [RELX (UK), 2015], paragraphs 535 and 537.*

This is an application by the Respondents for an order to set aside a default judgment (hereinafter called the "Application"). The Application is made pursuant to Order 20 Rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia.

The background to the Application is that the Applicant took out an Originating Summons against the Respondents, on 20th July, 2017, claiming the following relief:

(a) payment by the Respondents of all monies and interest due and owing to the Applicant under loan agreements dated 29th October, 2015, secured by a Third-Party Mortgage over Subdivision 145 of Subdivision L of Farm No. 842, Kitwe which monies stood at K276,945.51 as at 31st May, 2017, but will continue to accrue interest at an agreed rate of 4.25% per month until payment;

(b) an order that the Third-Party Legal Mortgage on Subdivision 145 of Subdivision L of Farm No. 842, Kitwe may be enforced by foreclosure and sale;

(c) an order for delivery of vacant possession of the mortgaged property by the 2nd Respondent to the Applicant;

(d) further or other relief; and

(e) costs and other charges incurred by the Applicant.

The Originating Summons was supported by an affidavit sworn by one Huntley Ng'andu in which he deposed that on 16th October, 2015, the 1st Respondent had applied for a loan from the Applicant. In support of this, the deponent has produced exhibit "HN1" which is a copy of a business loan application form.

The deponent also deposed that by a loan agreement dated 29th October, 2015, the Applicant agreed to advance the 1st Respondent loan amounts of up to K215,000.00. To this end, the deponent produced exhibit "HN2", being a copy of the said agreement.

The deponent further deposed that by a Specific Guarantor Agreement ("SGA") dated 29th October, 2015, the 2nd Respondent guaranteed the payment of the sum of K215,000.00, and all the sums due and owing from the Respondent to the Applicant in the event of the 1st Respondent's default. As evidence of this averment, the deponent produced a copy of the said SGA as exhibit "HN3".

It is the deponent's further testimony that by the SGA, the 2nd Respondent pledged as collateral, Subdivision 145 of Subdivision L of Farm No. 842, Kitwe, pursuant to which he executed a Legal Third-Party Mortgage over the said property. In this respect, the deponent produced exhibit "HN4", being a copy of the said mortgage.

The deponent also deposed that by virtue of clause 2(b) of the loan agreement, the interest rate applicable to the loan facility was 4.25% per month and that the said interest rate would apply in the event of a default to the total principal amount and interest due at the time of default.

It was deposed that the 1st Respondent's account as at 31st May, 2017 had an outstanding balance of K211,103.19, the particulars of the

which are detailed in a copy of the statement of account exhibited as "HN5".

The deponent also exhibited a copy of a notice of default (marked "HN6"), to support his testimony that the said notices were sent to the Respondents, who acknowledged receipt of the same.

It is also the deponent's testimony that a demand for payment was made by the Applicant in a letter dated 23rd November, 2016 and that the Respondent acknowledged receipt of the same. To fortify this assertion, the deponent produced exhibit "HN7", being a copy of the said demand.

It is the deponent's final testimony that the Applicant has not received any sums due under the loan agreements.

The Affidavit in Support of the Originating Summons was further accompanied by a List of Authorities and Skeleton Arguments, also filed into court on 20th July, 2017, the core of which is that the 1st Respondent failed to settle his indebtedness on a secured loan facility advanced to him by the Applicant; and that the Applicant seeks the court's assistance in recovering or securing the repayment of the loan plus interest, by way of granting an order for foreclosure, possession and sale of the property pledged as security.

On 4th August, 2017, the Applicant filed an Affidavit of Service, sworn by one Kaminda Zulu, whose deposition was that he had effected service of the Originating Summons, the affidavit in support thereof;

and the List of Authorities and Skeleton Arguments, on the 1st Respondent, on 24th July, 2017; and on the 2nd Respondent (through the 1st Respondent) on 2nd August, 2017. To support this testimony, the deponent produced exhibits "KZ1" and "KZ2", respectively.

The matter was scheduled for hearing on 11th August, 2017. On the said date, none of the parties turned up and neither was there any affidavit in opposition to the Originating Summons on the court record. The matter was consequently struck off the active cause list with liberty to restore within thirty (30) days from the date of the order. On the application of the Applicant, the matter was restored back to the active cause list and a fresh date of hearing was issued, being 21st August, 2017.

It is the testimony of Joseph Syachinene, the deponent in the Affidavit of Service filed on 21st August, 2017, that he served the 1st Respondent with the Notice of Hearing post restoration of the matter, on 16th August, 2017. The deponent has, to this end, produced exhibit "JS1", being a copy of the letter of service evidencing the 1st Respondent's acknowledgement of receipt of the documents.

It is also the deponent's testimony that he effected service on the 2nd Respondent. However, the deponent has not exhibited any proof to show that the said notice was received by the 2nd Respondent.

The matter was finally heard on 21st August, 2017 with the parties in attendance being the Applicant and the 1st Respondent. The 2nd

Respondent was not in attendance and Counsel for the Applicant affirmed, at the said hearing, that he had effected service on the 2nd Respondent, who was unable to make it.

There was still no Affidavit in Opposition to the Originating Summons on the court record at the said time of hearing, but being in attendance, the 1st Respondent made verbal submissions.

Following the hearing, Judgment was delivered on 22nd August, 2017, in favour of the Applicant as follows:

(a) Foreclosure Nisi: That the Respondents shall within 90 days from the date of Judgment, pay the Applicant the outstanding balance of K211,103.19 owing as at 27th June, 2017. The Judgment Debt of K211,103.19 shall attract contractual interest up until the date of Judgment. Thereafter, interest shall accrue at the Bank of Zambia short term lending rate until date of full and final settlement.

(b) Foreclosure Absolute: In the event that the Respondent fails to liquidate the Judgment Debt within 90 days from the date of Judgment, foreclosure relating to the mortgaged property will automatically be rendered absolute, upon which the 2nd Respondent's right to redeem in equity and at law shall stand extinguished.

(c) Possession: Since the record reflects that the 2nd Respondent is in possession of the mortgaged property, the *status quo* shall be

preserved until foreclosure is rendered absolute. That is, the 2nd Respondent shall deliver up vacant possession of the mortgaged property to the Applicant in the event that and upon foreclosure being rendered absolute.

(d) Sale: The Applicant may exercise its right of sale any time after foreclosure has been rendered absolute.

(e) Costs incidental to these proceedings shall be borne by the Respondents, such costs to be taxed in default of agreement.

It is in respect of the foregoing Judgment that the Respondents have made this Application. Pending the hearing of this Application on 11th October, 2017, an *ex parte* Order for Stay of Execution of Judgment was granted on 3rd October, 2017.

The Application before this court is one for an order to set aside default judgment and is made pursuant to Order 20 Rule 3 of the High Court Rules, which provides as follows:

> *"Any judgment by default, whether under this Order or under any of these Rules, may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as the Court or Judge may think fit."*

The Application is supported by an affidavit (hereinafter called the "Affidavit in Support"), sworn by the 1st Respondent and filed into court on 3rd October, 2017.

It is the 1st Respondent's testimony that he did not file his Affidavit in Opposition, by the time the matter came up for hearing on 21st August, 2017, as he was still arranging resources to retain Counsel. He further deposed that this was due to the fact that at the time the Applicant effected service of the Originating Summons on the Respondents, the 1st Respondent was traveling out of jurisdiction. The 1st Respondent also deposed that at the hearing of the matter on 21st August, 2017, the court refused to grant him an adjournment to allow him a chance to retain Counsel, but instead proceeded to hear the matter and subsequently deliver judgment in favour of the Applicant.

The deponent also testified that by the court proceeding to hear the matter in the said manner, he was not given the chance to adduce evidence against the Applicant. In this regard, the 1st Respondent deposed that pursuant to clause 5 as read together with clause 12 of the loan agreement, the Applicant omitted to deduct the value of the collateral assets in the value of K136,300.00, which were seized from the possession of the 1st Respondent. Further, he deposed that, pursuant to clause 4 of the same agreement, the Applicant omitted to deduct the sum of K21,500.00 from the amount claimed. To support this, the deponent exhibited a copy of the loan agreement as "EMP1".

The deponent also exhibited a copy of a deposit slip, marked "EMP2", to fortify his assertion that the Applicant had not taken into

consideration the sum of K17,600.00 which was subsequently deposited into their account prior to commencement of this matter.

The deponent further deposed, that he has a defence on the merits, and to this end, produced exhibit "EMP3", being his intended Affidavit in Opposition.

It is the deponent's testimony that his failure to file his intended Affidavit in Opposition, therefore, is inadvertent.

The Application is augmented by Skeleton Arguments, the crux of which is that it is desirable for a court to determine matters on their merits. In this regard, Counsel for the Respondents referred the court to the case of *Stanley Mwambazi v. Morrester Farms*[1].

Counsel for the Respondents also cited Article 118 (2) (e) of the Constitution of Zambia to contend that justice must be administered without undue regard to procedural technicalities.

Counsel also cited Order 3 Rule 2 of the High Court Rules to demonstrate the wide discretionary powers that the court possesses in interlocutory applications. The said Order provides as follows:

> *"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."*

At the hearing of the Application, Counsel for the Respondents indicated that she would rely on the Affidavit in Support and the Skeleton Arguments.

In response, Counsel for the Applicant submitted that this Application is misplaced as the only judgment in this cause is not a default judgment because the Respondent was in court at the hearing of the main matter and that he was heard.

Counsel for the Applicant further submitted that the Judgment was final, reasoned and one in which the court considered the issues on the merits of the Applicant.

Counsel also referred the court to Order 11 Rule 22 of the High Court Rules regarding how a party served with an originating summons may enter appearance. The said Order provides as follows:

> *"The parties served with an originating summons shall, save as otherwise provided, before they are heard, enter appearances, and give notice thereof. A party so served may appear at any time before the hearing of the summons. If he appears at any time after the time limited by the summons for appearance he shall not, unless the Court or a Judge shall otherwise order, be entitled to any further time for any purpose, than if he had appeared according to the summons."*

Counsel for the Applicant also referred the court to Order 12 Rule 1(9) of the High Court Rules to contend that in a matter commenced

by originating summons, the court must first grant leave in order to grant a default judgment. The said Order provides as follows:

"In any action in which the plaintiff is claiming any relief of the nature or kind specified in Order XXX, rule 14, no judgment shall be entered in default of appearance without the leave of the Court or a Judge who may require the application for leave to be supported by such evidence as might be required if relief were being sought on originating summons under Order XXX, rule 14, and may require notice of such evidence to be given to the defendant and to such other person (if any) as the Court or a Judge may think proper."

In reply, Counsel for the Respondents referred the court to page 2 of the Respondents' Skeleton Arguments, where portions of the Judgment were quoted as follows:

"It is clear from the unopposed affidavit evidence..."

and

"There being no tangible data on record to counter the affidavit evidence before this court, I find that the 1st Respondent is in default."

Counsel for the Respondents, thus, submitted that it was on the basis of the above portions of the Judgment that she contended that the Judgment was granted in default of the Respondents' Affidavit in Opposition as it was clear that the court indicated that there was no tangible data on record and that there was unopposed evidence.

It was also Counsel's submission that in any case, the Respondents had since caused to be filed into court, their intended Affidavit in Opposition and that from the said affidavit, it was clear that there are triable issues that need to be determined on their merits.

Counsel for the Respondents referred the court to the case of *Leopold Walford (Z) Limited v. Unifreight*[2] to advance the contention that a breach of procedure is not fatal, but curable.

Counsel finally submitted that the Respondents were not denying their indebtedness to the Applicant, but that their bone of contention was that they were disputing the amount claimed by the Applicant and in that respect, sought to be heard by the court.

I have carefully considered the parties' affidavits on record; the Lists of Authorities and the Skeleton Arguments augmenting the Application and the response.

In my view, the most basic issue that arises for determination in this Application is whether or not the Judgment sought to be set aside in this Application is a default judgment. Therefore, this calls for a clear understanding of what a default judgment is.

According to Halsbury's Laws of England, *5th Edition,* Volume 12, paragraph 535, a default judgment is defined as:

> *"Judgment without trial where a defendant has failed to file either:*
>
> *(1) an acknowledgment of service; or*
>
> *(2) a defence."*

In terms of procedure for obtaining a default judgment, paragraph 537 of Halsbury's Laws of England states that:

"A default judgment may be obtained by the claimant either:

(1) by filing a request, which is dealt with by a court officer who enters judgment by means of an administrative act without any judicial involvement; or

(2) .... by issuing and serving an application notice that seeks an order for a default judgment, which is dealt with judicially with or without a hearing."

In construing the provisions above together, it is clear that a default judgment may only be obtained at the instance or request of a party in whose favour it is be anticipated to be given, if successfully granted.

Counsel for the Respondents submitted that the portions of the Judgement quoted in the Respondents' Skeleton Arguments were the basis on which they contended that the Judgment was a default one. However, based on the foregoing provisions, I am inclined to disagree with that position.

In this regard, I find Buckley J's explanation of a default judgment, in the case of *Dsane v Hagan and Another*[3], very enlightening. In the said case, an interpretation was sought regarding whether judgments given under Orders 14 and 27 of the Rules of the Supreme Court, 1999 Edition (hereinafter called the "White Book"), may properly be called default judgments. This is what Buckley J had to say:

"In my judgment, the words "judgment by default" in this rule indicate a judgment obtained by a plaintiff in reliance on some default on the part of the defendant in respect of something which he is directed to do by the rules. A judgment obtained in default of appearance under RSC, Ord 13 (dealing with a party's failure to give notice of intention to defend) would, I think, clearly be such a judgment."

My view, based on the above, is that for a judgment to qualify as a default judgment, the following conditions must be satisfied:

(a) there must be a requirement for a respondent or defendant to enter appearance, file a defence or file affidavit in opposition;

(b) such requirement must be breached by the said respondent or defendant;

(c) time within which such requirement is to be complied with must have expired;

(d) the applicant, plaintiff or claimant must move the court to grant judgment and such an application must be based on the breach or default of the requirement.

It would appear to me that, what Counsel for the Respondents is contending, is that a court can grant a default judgment on its own motion or that simply because somewhere in its consideration of issues before it, the court uses the word 'default', then the judgment that follows is a default judgment. I do not agree with this line of thought by Counsel for the Respondent.

Judgment in this matter was given after a hearing ordered by the court and not one occasioned by any application by the Applicant for a default judgment. The Applicant's success owes nothing to the fact that the Respondents had not entered an appearance; and the Respondents' default in entering an appearance is not a circumstance on which the Applicant had relied for obtaining the Judgment. I agree with Counsel for the Applicant that this matter was heard on its merits and, therefore, the Judgment cannot properly be described as a 'default judgment'.

Counsel for the Respondents also pointed the court to the evidence adduced by the 1st Respondent that he had applied for an adjournment of the matter at the hearing on 21st August, 2017, which application was denied.

Counsel is reminded that the Commercial Court is a fast track court, intended to deal with matters expeditiously and in this respect, Order 53 Rule 9 (1) of the High Court Rules is very clear in its provision as follows:

> *"A judge shall not grant an application for an adjournment except in compelling and exceptional circumstances."*

A perusal of the record reveals that the Respondents were first served with the Originating Summons on 24th July, 2017. The record further shows that the said service was duly and personally acknowledged by the 1st Respondent. At this instance the Respondents did not cause to be filed any affidavit in opposition to

the Originating Summons. Further, a notice of hearing was served on the 1st Respondent on 16th August, 2017, putting the Respondents on notice of the hearing that culminated into the Judgment. The 1st Respondent was present at the hearing, but there was still no affidavit in opposition on record.

In my view, the account of the events above reveals that the Respondents conducted themselves with laxity. Indeed, they had ample time from the moment they were served with the Originating Summons to the day of hearing, on 21st August, 2017 to file an opposing affidavit and thus, the Respondents' assertion that their failure to file in an affidavit in opposition was inadvertent, does not hold any water.

Counsel for the Respondents also submitted that the inability of the Respondents to enter appearance was a mere breach of procedure that is curable. In this regard Counsel relied on Article 118 (2) (e) of the Constitution of Zambia. I will direct Counsel to the Supreme Court case of *Access Bank (Z) Limited v. Group Five/Zcon Business Park Joint Venture*[4], where it was settled as follows:

> *"We do not intend to engage in anything resembling interpretation of the Constitution in this judgment. All we can say is that the Constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts."*

It is also important to note that this is a mortgage action commenced by way of Originating Summons. Mortgage actions are extensively

provided for under Order 88 of the White Book and their nature is described under the explanatory notes in 88/6/2 of the same Order as follows:

> *"Mortgage actions in the ChD are normally commenced by originating summons...Even if the only claim is for payment, the prohibition on entering judgment in default without leave applies if the action is a "mortgage action" within the meaning laid down in National Westminster Bank v. Kitch*[5]*, i.e. if the writ relies upon the mortgage. However, an application for payment is only a "mortgage action" so long as the monies claimed remain "secured by the mortgage"... Therefore, a claim for payment of a debt which was formerly secured by a mortgage or charge but is no longer so secured (e.g., where the mortgaged property has been sold but the proceeds of sale have been insufficient to discharge the debt in full) is not a mortgage action and is outside O.88, so judgment in default can be entered without leave in the ordinary way."*

In respect of default judgments, the White Book draws a distinction between an action commenced by way of writ and that commenced by way of originating summons. The prominent Orders that deal with default judgment are Order 13 (*Failure to Give Notice of Intention to Defend*) and Order 19 (*Default of Pleadings*) of the White Book. The unambiguous distinction which is given when default judgment is discussed in the said Orders is that provisions relating to judgment in default are excluded from applying to matters commenced by way of originating summons.

Order 28 of the White Book (which is the Order dedicated to procedure relating to Originating Summons) specifically excludes Order 13 from applying to proceedings begun by originating summons.

From the foregoing, it is apparent that a judgment in default may not be entered where the action in question is a mortgage action commenced by way of originating summons. However, that is not to suggest that a default judgment cannot be entered in a mortgage action at all. Order 88 Rule 6 (1) and (2), (headed '*Action by writ: judgment in default*') provides as follows:

> *"Notwithstanding anything in Order 13 or Order 19, in a mortgage action begun by writ judgment on failure to give notice of intention to defend or in default of defence shall not be entered except with the leave of the Court.*
>
> *An application for the grant of leave under this rule must be made by summons and the summons must be served on the defendant."*

It goes without saying, from the provisions above, that judgment in default may be entered in a mortgage action, provided the said action is commenced by way of writ. Further, prior to the grant of such default judgment, it is imperative for the party seeking the said judgment to seek leave of the court.

My examination of the record has led me to the inescapable conclusion that the facts and evidence on record do not justify the

submission by Counsel for the Respondents that the Judgment rendered was a default judgment.

In view of the foregoing, I dismiss this Application with costs and the *ex parte* order for stay of execution of judgment is accordingly discharged. Leave to appeal is granted.

Dated at Kitwe the 22nd day of November, 2017.

W.S. MWENDA (Dr)
HIGH COURT JUDGE