

**IN THE HIGH COURT FOR ZAMBIA**

**2014/HN/315**

**HOLDEN AT NDOLA**

*(Civil Jurisdiction)*

**BETWEEN:**

**MOPANI COPPER MINES PLC**

**PLAINTIFF**

**AND**

**PETRODA ZAMBIA LIMITED**

**1<sup>ST</sup> DEFENDANT**

**THE ATTORNEY GENERAL**

**2<sup>ND</sup> DEFENDANT**

**KITWE CITY COUNCIL**

**3<sup>RD</sup> DEFENDANT**

BEFORE THE HONOURABLE MADAM JUSTICE M.C. MULANDA IN  
CHAMBERS.

**FOR THE PLAINTIFF : Mr. A. Gondwe - Legal Counsel,  
Mopani Copper Mines PLC**

**FOR THE 1<sup>ST</sup> DEFENDANT: Ms. N. Nyangu - Messrs. Magubbwi  
& Associates, (Agents for Messrs.  
Tembo Ngulube & Associates)**

**FOR THE 2<sup>ND</sup> DEFENDANT: N/A**

**FOR THE 3<sup>RD</sup> DEFENDANT: Mr. Kayombo Lukama - Legal  
Assistant, Kitwe City Council**

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**R U L I N G**

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CASES REFERRED TO:

1. ***Stanley Mwambazi Vs Morrester Farms Limited (1977) Z.R. 108.***
2. ***Lafarge Cement Zambia Limited Vs. Peter Sinkamba (Suing for and on Behalf of Citizens for a better environment) Appeal No. 169/2009.***
3. ***Chikuta Vs. Chipata Rural Council (1974) ZR 241.***
4. ***Leopold Walford (Z) Limited Vs. Unifreight (1985) Z.R. 203 (S.C.).***
5. ***Photo Bank (Z) Limited Vs. Shengo Holdings Limited (2008) Z.R. 108, Vol. 1.***
6. ***Tata Zambia Limited Vs. Shilling Zinka (1986) Z.R. 51.***
7. ***Water Wells Limited Vs. Wilson Samuel Jackson (1984) Z.R. 98.***
8. ***Samuel Mwape Sapi Vs. Finance Building Society SCZ/8/357/2013 or Appeal No. 67/2014.***
9. ***Hayat Communications Zambia Limited Vs Naprode Services Limited SCZ/8/149/2009.***

LEGISLATION REFERRED TO:

1. ***Order 3 Rule 2, Order 12 Rule 1 Sub-Rules 6 and 2; Order 20 Rule 3 High Court Rules, Cap. 27 of the Laws of Zambia.***

**2. Rules of the Supreme Court, 1999 Edition (White Book)  
Order 2 Rule 2 of Laws of Zambia.**

OTHER MATERIALS REFERRED TO:

**1. Halsbury's Laws of England, Volume 37, 4<sup>th</sup> Edition.**

On 11<sup>th</sup> January, 2017, the Plaintiff issued a writ of summons accompanied by a statement of claim, from the District Registry at Ndola, claiming the following reliefs:

- (i) A declaration that Stand No. 8732 forms part of Farm No. 840, Kitwe and Farm No. 1469, Kitwe;
- (ii) A declaration that Farm No. 840 and Farm No. 1469, Kitwe belong to the Plaintiff;
- (iii) A declaration that the Certificate of Title relating to Stand No. 8732, Kitwe was wrongfully issued;
- (iv) An order that Certificate of Title relating to Stand No. 8732, Kitwe be cancelled;
- (v) Damages for loss of use of the said piece of land by the Plaintiff and its licensees;
- (vi) Interest on damages; and
- (vii) Costs.

The gist of the Plaintiff's contention as contained in its Statement of Claim is that Stand No. 8732, Kitwe, which was issued to the 1<sup>st</sup> Defendant was created from the Plaintiff's remaining extents of

Farm No. 840 and Farm No. 1469, Kitwe. The Plaintiff further contends that the alienation of the said land to the 1<sup>st</sup> Defendant was done by fraud or mistake and that the Certificate of Title relating to Stand No. 8732, Kitwe, was wrongfully or mistakenly issued by the Commissioner of Lands.

On 28<sup>th</sup> February, 2017, the Advocates for a 1<sup>st</sup> Defendant entered what was purported to be a conditional memorandum of appearance on behalf of the 1<sup>st</sup> Defendant. However, a perusal of the said conditional memorandum of appearance shows the Plaintiff, Mopani Copper Mines Plc, as the party who had entered a conditional memorandum of appearance. After filing this purported conditional memorandum of appearance, no further action was taken by the 1<sup>st</sup> Defendant in this matter.

On 29<sup>th</sup> March, 2017, the Plaintiff filed a Default Judgment against the 1<sup>st</sup> Defendant after the 1<sup>st</sup> Defendant did not enter a Memorandum of Appearance and Defence to the Writ of Summons and Statement of Claim within 21 days of being served with the process. The Court only came to sign the Default Judgment on 10<sup>th</sup> April, 2017.

Meanwhile, on 6<sup>th</sup> April, 2017, the 1<sup>st</sup> Defendant filed the Memorandum of Appearance and Defence. The 1<sup>st</sup> Defendant contended that it was the lawful and beneficial owner of Stand No. 8732, Kitwe, as it had a valid Certificate of Title for the said parcel

of land. In addition to the Defence, the 1<sup>st</sup> Defendant also counter-claimed as follows:

- (i) An order against the Plaintiff and its agents restraining them from trespassing on the 1<sup>st</sup> Defendant's property.
- (ii) Damages for trespass.
- (iii) Interest
- (iv) Costs.

The said Defence and counter-claim was only served on the Plaintiff on 24<sup>th</sup> April, 2017 (see the affidavit of service sworn by Given Ngoma filed into Court on 2<sup>nd</sup> May, 2017).

On 9<sup>th</sup> June, 2017, the 1<sup>st</sup> Defendant filed an *ex-parte* application for an order to stay execution of Judgment in Default of appearance and defence and/or further execution pending determination of an application to set aside Judgment in Default of appearance and defence for irregularity. The application is supported by an affidavit sworn by Richard Ngulube, Counsel for the 1<sup>st</sup> Defendant. The Deponent averred that on 6<sup>th</sup> April, 2017, the 1<sup>st</sup> Defendant entered appearance and duly filed its Defence and effected proper service of the same upon the Plaintiff. He further deposed that despite the 1<sup>st</sup> Defendant having entered appearance and defence, the Plaintiff filed and obtained Judgment in Default of Appearance and Defence against the 1<sup>st</sup> Defendant.

The Deponent went on to depose that the said Judgment in Default of Appearance and Defence was irregularly entered and should, therefore, be dismissed by this Court. He further deposed that the 1<sup>st</sup> Defendant's Defence discloses a meritorious and arguable defence warranting trial.

He concluded by deposing that the 1<sup>st</sup> Defendant stands to be prejudiced and lose out if the Judgment in Default of Appearance and Defence was not stayed; and further if the Plaintiff was to proceed to execute the said Judgment in Default.

In further support of the application, the 1<sup>st</sup> Defendant filed Skeleton Arguments. It was submitted that Order 3 Rule 2 of the High Court Rules, Cap. 27 of the Laws of Zambia, gives the Court jurisdiction to stay the execution and/or further execution of the Judgment in Default of Appearance and Defence. The 1<sup>st</sup> Defendant contended that the Court has sufficient jurisdiction to set aside for irregularity the default judgment obtained by the Plaintiff in this matter, dated 10<sup>th</sup> April, 2017. Order 12 Rule 2 of the High Court Rules and Order 2 Rule 2 of the Rules of the Supreme Court, (White Book) 1999 Edition, were cited as authorities for the submission. The said Order 12 Rule 2 of the High Court Rules reads as follows:

**“Where judgment is entered pursuant to the provisions of this Order, it shall be lawful for the Court or Judge to set aside or vary such judgment upon such terms as may be just.”**

Further, Order 20 Rule 3 of the High Court Rules provides that:

**“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.”**

Additionally, Order 2 Rule 2 of the Rules of the Supreme Court, 1999 Edition, provides that:

**“An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.”**

It was further submitted that the issues between the parties having not been determined on their merits, this was a proper case where the execution and/or further execution of the default judgment can be stayed and set aside. The case of **STANLEY MWAMBAZI Vs. MORRESTER FARMS LIMITED** <sup>(1)</sup>, was relied on. In that case the Supreme Court held 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 interests of justice to deny him the right to have his case heard.”

Further reliance was made on the case of **LAFARGE CEMENT ZAMBIA LIMITED Vs PETER SINKAMBA (SUING FOR AND ON BEHALF OF CITIZENS FOR A BETTER ENVIRONMENT)** <sup>(2)</sup>, wherein the Supreme Court opined that:

“It must be emphasized that it is not in every case that a Plaintiff is entitled to enter a default judgment simply because the Defendant has failed to file memorandum of appearance and defence. It is not an automatic entitlement. At the stage of entering a default judgment, it is the duty of the trial court or Deputy Registrar, as the case may be, to examine the claims endorsed by the Plaintiff on the writ of summons and statement of claim in order to determine whether a default judgment should be entered or not.”

In conclusion, the 1<sup>st</sup> Defendant urged the Court to set aside the default judgment entered and allow the matter to be determined on its merits.

On 27<sup>th</sup> June, 2017, this Court granted the 1<sup>st</sup> Defendant an *ex-parte* order to stay the execution of the default judgment dated 10<sup>th</sup>

April, 2017. The Court only signed the said *ex-parte* Order for Stay of Enforcement of the default judgment on 30<sup>th</sup> June, 2017.

The Plaintiff did not file an affidavit in opposition. However, on 5<sup>th</sup> July, 2017, the Plaintiff filed an affidavit in support of an application to discharge the *ex-parte* order of stay of execution of the default judgment, which was sworn by Mr. Alick Gondwe, the Legal Counsel for the Plaintiff Company. A perusal of the said affidavit shows that what was averred is actually in effect a response to the 1<sup>st</sup> Defendant's affidavit in support of its application. For purposes of simplicity of the issues raised in this application, I will deem the affidavit of Mr. Alick Gondwe to be to be an affidavit in opposition rather than consider it as a separate application. It is my considered view that the relief sought by the Plaintiff can be effectively considered in the main application by the 1<sup>st</sup> Defendant which was heard *inter-partes*.

In his affidavit, Mr. Alick Gondwe deposed that after the Plaintiff commenced this action on 11<sup>th</sup> January, 2017, personal service of the originating process was duly served by the Plaintiff on all the Defendants. On 28<sup>th</sup> March, 2017, he personally conducted a search on the record. He found that none of the Defendants had entered their respective appearances and defences as required by the rules of this Court. He further deposed that 76 days had elapsed from the time personal service of the process was effected on the Defendants.

Mr. Gondwe went on to depose that on 29<sup>th</sup> March, 2017, the Plaintiff filed a Default Judgment against the 1<sup>st</sup> Defendant which Default Judgment was only signed by the Court on 10<sup>th</sup> April, 2017. It was the Deponent's further averment that following the entry of the Default Judgment, the same was served on all the Defendants after which he proceeded to register it against the 1<sup>st</sup> Defendant's Certificate of Title at the Ministry of Lands. As per the terms of the Default Judgment, the Ministry of Lands cancelled the 1<sup>st</sup> Defendant's Certificate of Title. Copies of the letter from the Ministry of Lands confirming the cancellation of the Certificate of Title were exhibited and collectively marked "AG1". Mr. Gondwe further deposed that following the cancellation of the said Certificate of Title, the records at the Lands and Deeds Registry have been altered to reflect that Stand No. 8732 was now part of Farms No. 840 and 1469, Kitwe, whose legal owner was the Plaintiff. It was Mr. Gondwe's deposition that despite the 1<sup>st</sup> Defendant being aware that the Certificate of Title had been cancelled and records at Ministry of Lands altered; it dubiously concealed this material fact when making its application for stay of execution. Further that this non-disclosure was fatal to the 1<sup>st</sup> Defendant's application.

It was the Deponent's further deposition that it was shocking for the Plaintiff to have been served with an *ex-parte* summons by the 1<sup>st</sup> Defendant for an Order to Stay execution of the default

Judgment pending determination of the application to set aside the said Default Judgment for alleged irregularity when the said Judgment had long been fully executed and this Court had become *functus officio*. It was Mr. Gondwe's deposition that the Court having become *functus officio*, it cannot, therefore, legally entertain any purported further proceedings in this matter.

On the 1<sup>st</sup> Defendant's averment that the Plaintiff entered judgment in default knowing very well that the 1<sup>st</sup> Defendant had entered appearance and defence in the matter, Mr. Gondwe deposed that the 1<sup>st</sup> Defendant only entered its appearance and defence on 6<sup>th</sup> April, 2017, after noticing that the Plaintiff had on 29<sup>th</sup> March, 2017 filed the Default Judgment which was waiting to be signed by the Court and which Judgment was eventually signed on 10<sup>th</sup> April, 2017. Further that the Plaintiff was only served with the said appearance and defence on 24<sup>th</sup> April, 2017. Mr. Gondwe further averred that at the time that the 1<sup>st</sup> Defendant was filing its appearance and defence, 80 days had passed from the date of service of the process.

It was further deposed that the 1<sup>st</sup> Defendant did not obtain leave of the Court to file its appearance and defence out of time. He deposed that it was insincere for the 1<sup>st</sup> Defendant to claim that the default judgment was entered irregularly and that it should, in the circumstances, be set aside. Mr. Gondwe further deposed that even in the event that this Court was not *functus officio*, the 1<sup>st</sup>

Defendant's claim that its defence disclosed a meritorious and arguable defence warranting trial was flawed. He went on to itemise the issues which would make the 1<sup>st</sup> Defendant's claim flawed. I note that the issues raised are highly contentious. It is highly undesirable for Counsel to depose to matters which are highly contentious (See the case of **CHIKUTA vs. CHIPATA RURAL COUNCIL** (3)).

In conclusion, Mr. Gondwe deposed that it was in the interest of justice that the *ex-parte* Order of Stay of Execution granted by this Court on 27<sup>th</sup> June, 2017, be discharged and that all further proceedings should be halted as they are incompetently before the Court which was now *functus officio*.

On 26<sup>th</sup> October, 2017, when the matter came up for hearing of the application, Mr. Gondwe relied on his affidavit in support of the application to discharge the *ex-parte* order for stay of execution and augmented it with oral submissions. He reiterated that there cannot be a stay of execution of the default judgment entered on the 10<sup>th</sup> April, 2017, the same having been fully executed by way of cancellation of the Certificate of Title by the Ministry of Lands. Further that there was, consequently, nothing to be stayed. He repeated that the default judgment having been fully executed, the Court had become *functus officio* and cannot, therefore, legally entertain any purported proceedings in this matter.

Mr. Gondwe further contended that there was no irregularity, whatsoever, in the manner the default judgment was entered to warrant the Court which had become *functus officio* to grant a stay of execution.

Mr. Gondwe further submitted that Order 12 Rule 1 Sub-Rule 6 of the High Court Rules Cap. 27 of the Laws of Zambia clothes the Court with power to enter in a judgment default of appearance and defence when the issue involves the recovery of land.

It was Counsel's submission that it was pursuant to this Order 12 Rule 1 Sub-Rule 6 that, on 10<sup>th</sup> April, 2017, this Court entered the judgment in default. Counsel contended that the 1<sup>st</sup> Defendant's remedy did not lie in applying for the setting aside of the default judgment, but that the correct procedure was for the 1<sup>st</sup> Defendant to commence fresh proceedings for the recovery of the land whose certificate of title had been cancelled and was now vested in the Plaintiff.

On the 1<sup>st</sup> Defendant's submission in its Skeleton Arguments that the Court had jurisdiction to order the Commissioner of Lands to reverse the entry made on the Lands Register in respect of the Certificate of Title relating to Stand No. 8732, Kitwe, Mr. Gondwe submitted that ordering the Commissioner of Lands in the manner suggested would never at law amount to a stay of execution. He contended that such action would amount to an order of mandatory

injunction or indeed an order of mandamus. Counsel argued that in the unlikely event that the Court orders the Commissioner of Lands as prayed by the 1<sup>st</sup> Defendant, it would result in a great degree of chaos and confusion if at the conclusion of the trial the Plaintiff succeeds and the Commissioner of Lands is again required to reverse the entries in favour of the Plaintiff.

Mr. Gondwe went on to submit that the 1<sup>st</sup> Defendant's case lacks merit to warrant setting aside the default judgment as the 1<sup>st</sup> Defendant had failed to show the two principles governing setting aside of default judgments, namely:

- (1) The Defendant had to show that it has good reasons for not entering appearance in time.
- (2) That the Defendant has a meritorious defence to this action.

In conclusion, Counsel urged the Court to discharge forthwith the *ex-parte* order of stay of execution granted and further to dismiss, with costs, the underlying application to set aside default judgment as it was an abuse of court process.

Mr. Gondwe informed the Court that the 2<sup>nd</sup> Defendant had no objection to his application.

In response Ms. Nyangu, Counsel for the 1<sup>st</sup> Defendant, submitted that based on the fact that the 1<sup>st</sup> Defendant had entered

appearance and defence on 6<sup>th</sup> April, 2017 and the default judgment was entered on 10<sup>th</sup> April, 2017, the said default judgment was irregular. She contended that at the time of the entry of the default judgment, there was already a memorandum of appearance, defence and counter-claim filed. She denied that the 1<sup>st</sup> Defendant concealed some facts relating to the execution of the default judgment.

Ms. Nyangu further submitted that based on the decision in the case of **LEOPOLD WALFORD (Z) LIMITED Vs UNIFREIGHT** <sup>(4)</sup>, breach of regulatory procedure as was the case in this matter, was not fatal. Counsel submitted that despite being aware of the 1<sup>st</sup> Defendant's defence and counter-claim, the Plaintiff went ahead to execute the default judgment thereby prejudicing the 1<sup>st</sup> Defendant's case.

Counsel went on to submit that from the defence and counter-claim filed by the 1<sup>st</sup> Defendant in this case, it was clear that there were triable issues in this matter. She urged the Court to set aside the default judgment so that the issues can be determined on their merits.

The 3<sup>rd</sup> Defendant submitted that it had no objection to the application to have the *ex-parte* order of stay of execution discharged.

In response, Mr. Gondwe dismissed the 1<sup>st</sup> Defendant's submission that the Plaintiff filed a default judgment while there was a defence and counter-claim on record. He repeated his earlier submission as regards the dates when the default judgment was filed on 29<sup>th</sup> March, 2017; signed by the Court on 10<sup>th</sup> April, 2017; and how the 1<sup>st</sup> Defendant filed its appearance and defence on 6<sup>th</sup> April, 2017 when there was a default judgment pending to be signed by the Court. He contended that despite 80 days having passed from the time the Plaintiff served process on the 1<sup>st</sup> Defendant, no leave was obtained to file the defence and counter-claim. He maintained that the Court lacks jurisdiction to entertain any further proceedings insofar as this matter was concerned.

I have carefully considered the application and the submissions by Counsel for the parties, as well as the authorities cited. The two issues calling for the determination of the Court are:

- (i) Whether the *ex-parte* order for stay of execution of the default judgment granted by the Court on 27<sup>th</sup> June, 2017, should be discharged.
- (ii) Whether the default judgment entered in this matter should be set aside for irregularity.

I intend to deal with these issues in the sequence listed above.

Mr. Gondwe's contention was that there can never be a stay of execution of a default judgment which had already been fully executed. He submitted that as per terms of the default judgment, the Commissioner of Lands had cancelled the 1<sup>st</sup> Defendant's Certificate of Title for Stand No. 8732, Kitwe. Further that the records were, as a result, altered and now reflect that Stand No. 8732 forms part of Farm No. 840, Kitwe and Farm No. 1469, Kitwe, belonging to the Plaintiff. On the other hand, the 1<sup>st</sup> Defendant did not dispute that the default judgment had fully been executed.

I agree with the submission by Mr. Gondwe that there is nothing to stay in this matter as the default judgment was already fully enforced. There is undisputed evidence on record that following the registration of the default judgment at the Ministry of Lands, the 1<sup>st</sup> Defendant's Certificate of Title for Stand No. 8732 was cancelled and the records were consequently altered. Accordingly, the *ex-parte* order for stay of enforcement of the default judgment dated 30<sup>th</sup> June, 2017, is hereby discharged.

As regards the application to set aside the default judgment, dated 10<sup>th</sup> April, 2017, it was contended, on behalf of the 1<sup>st</sup> Defendant, that it has an arguable and meritorious case which should go to trial. Whereas, Mr. Gondwe, Counsel for the Plaintiff, submitted that the 1<sup>st</sup> Defendant had failed to show that it has a meritorious case. He urged the Court to dismiss the application to set aside the default judgment.

It is not in dispute that the 1<sup>st</sup> Defendant did not file a memorandum of appearance and defence within the prescribed 21 days of being served with the process. It is further not in dispute that the Plaintiff effected service of the said process on the 1<sup>st</sup> Defendant and the other two Defendants. An affidavit of service was filed to show the service of the process. There is no dispute that on 29<sup>th</sup> March, 2017, when the Plaintiff entered judgment in default of appearance and defence, the 1<sup>st</sup> Defendant had not yet filed its memorandum of appearance and defence. As the default judgment was being awaited to be signed, the 1<sup>st</sup> Defendant sneaked in its memorandum of appearance, defence and counter-claim on 6<sup>th</sup> April, 2017. Just as was rightly noted by Mr. Gondwe, 80 days had elapsed from the date of service of process to the time when the 1<sup>st</sup> Defendant purported to have entered appearance, defence and counter-claim. The 1<sup>st</sup> Defendant needed to obtain leave of the Court to file out of time which they did not do. I, therefore, do not agree with the submission of Ms. Nyangu, on behalf of the 1<sup>st</sup> Defendant, that the Plaintiff entered the default judgment when there was already a memorandum of appearance, defence and counter-claim filed in the matter.

However, Mr. Gondwe made a startling submission that this Court was *functus officio* and, therefore, had no jurisdiction to determine the matter any further. He implored the Court to halt any further proceedings stating that the default judgment, the subject of these proceedings, had already been fully executed after which the Court

had become *functus officio*. This submission was not backed by any authority in law. There is a plethora of decisions where the court had determined an application to set aside judgment in default of appearance and defence even after a party had gone ahead to enforce it. One such case is the case of **PHOTO BANK (Z) LIMITED Vs SHENGO HOLDINGS LIMITED** <sup>(5)</sup> wherein the Supreme Court stated *inter alia* that:

“After obtaining judgment in default of appearance, the respondent went ahead to enforce it and issue Warrant of Distress and the same was executed by the Bailiff and only then did the appellant react to the action. They applied, *ex-parte*, to the Court below for stay of execution of the Warrant and the same was granted on 22<sup>nd</sup> February, 2006. This stay of execution was granted after the Warrant of distress had been executed on 16<sup>th</sup> February, 2006. The appellant then applied to the High Court to set aside the judgment in default and in support of this application, the affidavit in support of the application did not dispute the fact that rent was owing and due but put up a counter-claim to the tune estimated at “over US\$ 55, 460 and at least K20, 650,000 in other costs”. The counter-claim by the appellant arose from the alleged damage to their property through seepage of water into the rented premises and which seepage was alleged due to non-maintenance of the property by the respondent. The learned trial Judge heard this

**application and in his short ruling dismissing the application, the learned trial Judge said that the appellants admitted the claim of respondent but in their defence, raised a counter-claim.”**

The foregoing Supreme Court decision clearly shows that a Court does not become *functus officio* simply because the default judgment rendered in the matter has been fully executed.

Further, in the case of **TATA ZAMBIA LIMITED Vs SHILLING ZINKA** <sup>(6)</sup>, the Supreme Court held that:

**“There is no law preventing the setting aside of a default judgment which appears to have been perfected.”**

The determining factors on which to set aside or not to set aside a judgment in default of appearance and defence were ably set out in the case of **WATER WELLS LIMITED Vs WILSON SAMUEL JACKSON** <sup>(7)</sup>, in which the Supreme Court held 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 that default, it is the defence on the merits which is the more important point to consider.”**

The preceding authority clearly demonstrates that the primary consideration in an application to set aside a default judgment is whether a defendant has an arguable defence on the merits.

Before I determine whether or not the 1<sup>st</sup> Defendant has an arguable defence on the merits, I will consider whether the Default Judgment was irregularly entered. It is trite law that where a defendant does not enter an appearance and defence within the time prescribed, the Court is clothed with jurisdiction to enter a judgment in default against such defendant. Order 12, Rule 1, Sub-Rules 1-8 gives instances when a default judgment may be entered against a defendant who has not filed an appearance and defence. According to Mr. Gondwe, the default judgment in this matter was entered pursuant to Order 12, Rule 1, Sub-Rule 6 of the High Court Rules, Cap. 27. I will come back to this Order later in this ruling.

A perusal of the reliefs which the Plaintiff is seeking, as endorsed in the Writ of Summons, shows that the judgment sought is declaratory in nature. For the avoidance of doubt, I have decided to again reproduce the reliefs, as follows:

- (i) *A declaration that Stand No. 8732 forms part of Farm No. 840, Kitwe and Farm No. 1469, Kitwe;*
- (ii) *A declaration that Farm No. 840 and Farm No. 1469, Kitwe belong to the Plaintiff;*
- (iii) *A declaration that the Certificate of Title relating to Stand No. 8732, Kitwe was wrongfully issued;*

- (iv) *An order that Certificate of Title relating to Stand No. 8732, Kitwe be cancelled;*
- (v) *Damages for loss of use of the said piece of land by the Plaintiff and its licensees;*
- (vi) *Interest on damages; and*
- (vii) *Costs.*

It follows, therefore, that the default judgment dated 10<sup>th</sup> April, 2017, granted in this matter, was in essence a declaratory judgment. The question I need to resolve is whether a declaratory judgment can be obtained by default. To resolve this question, I am ably guided by the decision of the Supreme Court in the case of **SAMUEL MWAPE SAPI Vs FINANCE BUILDING SOCIETY** <sup>(8)</sup>, where, in dealing with the subject, the Court opined as follows:

**“Indeed, *Atkin’s Court Forms*, cited by the appellant clearly states that the court will not grant a declaration unless all the parties affected by and interested in it are before the court and that a declaratory judgment cannot be obtained by default even in the face of a default by a defendant and that a plaintiff who seeks a declaratory judgment must proceed to trial and give evidence. This is the trite position.”**

In the present matter, a declaratory judgment was obtained by default after the 1<sup>st</sup> Defendant did not enter appearance and defence. The matter neither proceeded to trial nor did the Plaintiff give evidence. Further, not all the parties that were interested or

likely to be affected by the declaratory judgment which the Plaintiff obtained by default, were before the Court.

It was Mr. Gondwe's submission that the default judgment was obtained pursuant to Order 12, Rule 1, Sub-Rule 6 of the High Court Rules. The said Order 12, Rule 1, Sub-Rule 6 enacts as follows:

**"In case no appearance shall be entered in an action for the recovery of land within the time limited by the writ for appearance, or if an appearance be entered but the defence be limited to part only, the plaintiff shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply."**

My understanding of the foregoing Order is that where a defendant does not enter appearance or an appearance is entered, but the defence is limited to some part only, the Plaintiff will be free to enter a default judgment and, if a plaintiff asserts in the writ to have title, he shall recover possession of the land or of the part thereof to which the defence does not apply. In this matter, the Plaintiff stated in its Statement of Claim that the Certificate of Title for the land in dispute had not been issued to the Plaintiff. On the other hand, it was not disputed that the 1<sup>st</sup> Defendant had the Certificate of Title for Stand No. 8732, Kitwe. Therefore, there was no way the Plaintiff

could have obtained a default judgment pursuant to Order 12, Rule 1, Sub-Rule 1, and subsequently recover possession of the disputed land, without asserting in the Writ of Summons that it had title to the disputed land.

For these reasons, I find that the default judgment dated 10<sup>th</sup> April, 2017 which was entered for the Plaintiff, was irregularly granted. The learned authors of Halsbury's Laws of England Volume 37, 4<sup>th</sup> Edition, at paragraph 403 opined that:

**“In the case of an irregular judgment, the defendant is entitled to have it set aside *ex debito justitiae*, and the court should not impose any terms whatever upon the defendant.”**

Accordingly, I set aside, for irregularity, the default judgment dated 10<sup>th</sup> April, 2017, and the matter is, therefore, set to be tried on its merits.

Even in the event that I was inclined to find that the default judgment was not obtained irregularly, I was still going to set it aside. This is so because, the fact that the 1<sup>st</sup> Defendant stated in its defence which was 'sneaked' in, that it has a Certificate of Title for Stand No. 8732, Kitwe, only goes to show that it has an arguable meritorious case. The Plaintiff did not dispute that indeed the 1<sup>st</sup> Defendant has the Certificate of Title for the land in question. The Plaintiff's contention that the said Certificate of Title was obtained

fraudulently or by mistake, are matters that can only be determined at the conclusion of the trial.

As to whether a court can consider a defendant's 'sneaked in' defence in determining whether to set aside a default judgment, the Supreme Court in the case of **HAYAT COMMUNICATIONS ZAMBIA LIMITED Vs NAPRODE SERVICES LIMITED** <sup>(9)</sup> had occasion to deal with such an issue. In that case, the trial Judge dismissed the application to set aside a judgment in default of appearance and defence on the ground that *"it was unprocedural, misconceived and an abuse of the court process. This was so because, according to the learned judge, the defendant should have appealed against her refusal to grant a stay of execution of the judgment. She stated that it was not in order for the defendant to sneak in a defence on merits, through the back door, after having earlier applied to stay execution of the default judgment."*

The Supreme Court went ahead to consider the 'sneaked in' defence which the Court said *"was exhibited to the affidavit in support of the summons to set the default judgment aside and found that it disclosed that there were triable issues which the trial Judge should have allowed to come to trial by setting aside the default judgment."*

Coming to the present matter, having found that the default judgment was irregularly entered, the 1<sup>st</sup> Defendant's cancelled Certificate of Title for Stand No. 8732, Kitwe, is hereby restored. I order the Commissioner of Lands to, accordingly, restore the said Certificate of Title to the 1<sup>st</sup> Defendant. The *status quo* at the

commencement of this action shall be maintained until the matter is conclusively dealt with after trial. I do not see how this order can result into chaos and confusion as claimed by Mr. Gondwe. In the event that the Plaintiff succeeds at trial, an appropriate order will be made. Costs of this application shall be in the cause.

Leave to appeal to the Court of Appeal is hereby granted.

DATED AT NDOLA THIS <sup>30<sup>th</sup></sup>..... DAY OF *November* ....., 2017.

  
M.C. MULANDA  
JUDGE

