



LEGISLATION AND OTHER WORKS REFERRED TO:

1. ***The High Court Rules, Chapter 27 of the Laws of Zambia***
2. ***The Rules of the Supreme Court, 1999 edition***
3. ***Patrick Matibini: Zambian Civil Procedure Commentary and Cases VOL 2***

This is a ruling on an application made by the Plaintiff to set aside the affidavit filed by the Defendants for irregularity, pursuant to Order 2 Rule 2 of the Rules of the Supreme Court, 1999 edition. Counsel stated that they relied on the affidavit filed on 25<sup>th</sup> January, 2018, and sworn by Edna Mwansa, as well as the skeleton arguments filed. It was Counsel's submission that the law relating to the setting aside of consent orders is very clear.

She stated that consents judgments are governed by the ordinary principles of contract, and can only be set aside in circumstances that would afford a ground for varying or rescinding a contract between parties, such as on grounds of fraud, mistake or even misrepresentation. To this effect the case of ***MAUREEN SIMPAMBA V ABRAHAM KAMALAMBA AND CHIBWE MULENGA 2013 VOL 2 ZR 279*** was relied on.

That in that case reliance was placed on the case of ***MUNSTER V COX 1884-1885 10 AC 680*** where Lord Fitzgerald stated that "***I have always understood it as a settled rule that where parties withdraw the answers from the jurisdiction and do not wish to obtain a judgment according to the law, but to substitute it for a judgment by their own consent, the court has no power to alter that consent. If a consent has been obtained by fraud or surprise it may be set aside. And if proceedings upon it have been improvident, it may vacate the proceedings***".

Counsel further submitted that a consent judgment operates as an estoppel, which can only be raised if fresh proceedings are brought before court alleging matters comprised in the compromise. Further that the court cannot set aside a consent judgment where there is nothing to prove that Counsel for the defendant entered into the same without instructions, and even if counsel had no instructions to enter into such a consent judgment, but had general instructions to act for the defendant, the position would not change for so long as counsel still acted for the defendant, as he had apparent instructions which had not been terminated.

To this effect the case book by **PATRICK MATIBINI: ZAMBIAN CIVIL PROCEDURE COMMENTARY AND CASES VOL 2** at pages 1140-1141 was relied on. Counsel stated that the Defendant's application before the court was incompetent, irregular and misconceived, and should be expunged with costs.

In response, counsel for the Defendants stated that they relied on the application in support of the summons for non-service, and stated that the Plaintiff's application was unjust. That in as much as the Defendants consented under mediation, the procedure thereafter should have been adhered to, in that service of the consent judgment once filed before the court should have been served on them.

That after the Plaintiff filed the consent order in or about May or June, 2017, it should have served it on the Defendants but did not do so, and that it was only when a search was conducted on the record on 15<sup>th</sup> January, 2018, that the Defendants discovered that there was a writ of possession that had been filed.

That had the Defendants been served the consent judgment, they would have been aware of the execution of the said judgment. It was further stated that the Defendants are willing to settle the matter. On that basis, Counsel prayed that their application be heard on its merits.

In reply, it was stated that rules of procedure should not hinder the Plaintiff from enjoying the fruits of its judgment. That the Defendants do not dispute having duly and competently executed the consent judgment at mediation, and were therefore aware of its terms. Counsel reiterated that a consent judgment can only be set aside by commencing a fresh action, and that if the Defendants were to be allowed to raise issues pertaining to the consent judgment in this action, it would defeat the principle of *res judicata*. Further that there is no law governing the setting aside of a consent judgment for non-service, but on grounds of misrepresentation, fraud or indeed mistake. Counsel reiterated the earlier prayer that the Defendants application be set aside with costs.

I have considered the application. On 18<sup>th</sup> May, 2017 the parties herein executed a mediation consent settlement judgment, in which the Defendants agreed to settle the outstanding loan amount of USD292, 829.20 on or before 31<sup>st</sup> December, 2017 and the balance of USD292, 829.20 six months later, not later than 30<sup>th</sup> June, 2018. Further that from 1<sup>st</sup> July, 2017, the Defendants would service the loan in monthly instalments of US22, 525.32, and that if there was default on any payment, the Plaintiff would be at liberty to foreclose on the mortgaged properties.

It is clear from the affidavit evidence that the Defendants did not honour the terms of the consent judgment, and the Plaintiff proceeded to file a writ of possession on 5<sup>th</sup> January, 2018. On 19<sup>th</sup> January, 2018, the

Defendants filed an application to set aside the mediation consent settlement order, pursuant to Order 10 Rule 1 (3) and Order 12 Rule 4 (1) of the Rules of the Supreme Court, 1999 edition. The Plaintiff on 25<sup>th</sup> January, 2018, filed the application subject of this ruling to set aside the affidavit for irregularity, pursuant to Order 2 Rule 2 of the Rules of the Supreme Court, 1999 edition. The said Order provides that;

***“(1) 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.***

***(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.”***

From the arguments advanced by the Plaintiff it is clear that their submission was that the Defendants application to set aside the consent order on the ground of non- service is irregularly before the court, even though the summons that they filed on 25<sup>th</sup> January, 2018 states that the application is to set aside the affidavit for irregularity. The contention by the Plaintiff was that the only way to challenge a consent order is to start a fresh action, and that this is on the basis that a consent order or judgment is governed by the ordinary principles of contract law. That factors such as fraud, mistake or indeed misrepresentation would be grounds on which a consent order or judgment may be set aside.

In terms of how a party may challenge a consent order, the case of ***ZAMBIA SEED COMPANY LIMITED V CHARTERED INTERNATIONAL***

