

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

2017/HP/0430

**BETWEEN:**

MOSES SAKALA

PLAINTIFF**AND**

ABACUS 360 CORPORATE LIMITED

DEFENDANT

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 16th day of
March, 2018**

For the Plaintiff : *Mr. H.A. Chizu, Chanda Chizu & Associates*
For the Defendant : *Mr. B. Bwalya, Kanswata & Company*

R U L I N G

Cases Referred To:

1. *Waterwells Limited v Wilson Samuel Jackson* (1984) ZR 98
2. *Industrial Finance Limited Company v Jacques and Partners* (1981) Z.R 75
3. *Mobil Zambia Limited v Msiska* (1983) ZR 86

Legislation Referred To:

1. *High Court Act, Chapter 27*

This is the Defendant's appeal against the Order of the Learned Deputy Registrar, which struck out its application for further and better particulars. It is filed pursuant to Order 30 Rule 10(1) of the High Court Rules. A sole ground of appeal has been fronted as follows:

- 1. That the Learned Deputy Registrar misdirected herself on a point of law and fact when she struck out the application for further and particulars without taking into consideration all the material on record, including that there was no proof of service of the notice of hearing and that the absence should have triggered an inquiry into the veracity of the service of the notice of hearing.**

The facts leading to the appeal stem from the Defendant's application for further and better particulars filed on 3rd April, 2017, after it was served with the Writ of Summons and Statement of Claim by the Plaintiff. The Defendant alleged that the Plaintiff's Statement of Claim was cast in very general terms and devoid of particulars. This rendered it impractical for the Defendant to raise a defence and it entered Conditional Appearance on 3rd April, 2017, which was endorsed by the Deputy Registrar on 11th April, 2017. The Defendant stated that its application was initially scheduled for hearing on 2nd May, 2017, but the hearing was adjourned to 2nd June, 2017.

The Defendant further stated that on 2nd June, 2017, both Learned Counsels for the parties attended Court. However, the hearing did not take off as the Deputy Registrar was unavailable. The Marshall to the Deputy Registrar advised the parties that the

next date of hearing would be communicated. The Defendant discovered that on 5th June, 2017, the Plaintiff entered Judgment in Default of Appearance and Defence. It summoned the Deputy Registrar to set aside the default judgment on 25th July, 2017 but she declined. The result of her decision has given rise to this appeal.

The appeal was supported by an Affidavit sworn by **Kabwita Kanswata** the Defendant's Counsel. He states that the Defendant's application for further and better particulars was struck out with liberty to restore within fourteen days. That the period for restoration lapsed without the Defendant's knowledge. He deposes that the Plaintiff went ahead to obtain a default judgment, which the Deputy Registrar declined to set aside. He avers that the default judgment has an effect on its application because it was obtained before its application was disposed of.

In the Skeleton Arguments, Counsel for the Defendant contended that the source of the appeal is on the default judgment, which if not set aside, would grant the Plaintiff a right to execute judgment. He submitted that the default judgment would give the

Plaintiff an unfair advantage because the matter was not contested in a trial. Counsel beseeched the Court to grant the Defendant an opportunity to be heard on the merits and submitted that the Defendant's failure to appear before the lower Court was not intentional but had been caused by lack of notice. Counsel went on to cite the case of **Waterwells Limited v Wilson Samuel Jackson**¹, where the Supreme Court stated that:

“Although it is usual on application to set aside a default judgment not only to show a defence on merits but also to give an explanation of that default, it is the defence on merits which is the more important point to consider.”

Counsel further submitted that the matter pending before the lower Court was one which required the Plaintiff to provide further and better particulars so that it could prepare a defence. Counsel prayed to Court to reverse the Order of the lower Court and to allow the appeal.

The Plaintiff did not file an Affidavit in Opposition.

Counsel for the Plaintiff filed Skeleton Arguments where he contended that the Defendant's appeal lacked merit because it was wrong and irregular in law. Counsel submitted that the default judgment on record was filed on 5th June, 2017 and executed by the

Deputy Registrar on 20th June, 2017. The Defendant attempted to set aside the default judgment by an application dated 28th June, 2017. However, the application was dismissed with costs.

Counsel went on to state that the Order dismissing the Defendant's application was filed on 26th July, 2017 and signed by the Deputy Registrar on 1st August, 2017. It was not challenged or appealed by the Defendant, but instead it appealed the Order dismissing its application for further and better particulars.

Counsel argued that in view of the default judgment, it was undesirable that the Defendant should pursue an appeal on a dismissed application. Counsel submitted that the Learned Deputy Registrar rightfully dismissed the Defendant's application for further and better particulars because it did not show up for the hearing and in any case the application did not amount to a defence.

Counsel cited the case of **Industrial Finance Limited Company v Jaques and Partners**², where the Supreme Court held that:

“where a party to the proceedings of this nature is given time and ample opportunity to oppose entry of judgment, and does not do so, so as to disclose a defence whether that defence is acceptable by the Court or not, the party is entitled to have judgment entered.”

Counsel submitted that the Plaintiff's entry of a default judgment after the Defendant did not prosecute its application for further and better particulars was legally justified. He referred me to the case of **Mobil Zambia Limited v Msiska**³, where the Supreme Court held that:

“Obtaining a tactical advantage by taking steps which are available in law is not an abuse of the Court's process.”

Counsel averred that the Defendant's adventurous appeal was strange and an abuse of Court process. Further, its submissions departed from the ground of appeal filed into Court. He prayed to Court to dismiss the appeal and for costs.

In response, Counsel for the Plaintiff submitted that the default judgment was entered before its application for further and better particulars was heard. He insisted that there was need to determine this matter on merit and it would be a misapplication of justice to conclude it on default orders. He prayed to Court to allow the appeal.

I have paid the closest attention to the ground of appeal and the submissions filed herein. The appeal attacks the Learned Deputy Registrar's Order which struck out the Defendant's application for further and better particulars following its non-attendance at the hearing of 30th May, 2017.

The Defendant's Counsel claimed that he appeared before the Deputy Registrar with opposing Counsel on 2nd June, 2017 and the Deputy Registrar was not available. Her Marshal assured the parties that a notice of hearing would be issued but did not do so. As a result, the Defendant's Counsel was not aware of the next hearing date and failed to attend Court.

The record shows that the Deputy Registrar sat on 30th May, 2017 to hear the Defendant's application and none of the parties were present on that date. She struck out the matter on 30th May, 2017 and gave a restoration period of 14 days, after which the matter would stand dismissed. I therefore find it strange that the Defendant's Counsel appeared on 2nd June, 2017, when the matter was not scheduled for hearing. On 1st June, 2017, I called for a status conference and none of the parties appeared before Court.

On 5th June, 2017, the Plaintiff obtained a default judgment against the Defendant and on the same date, the Deputy Registrar signed the Order striking out the Defendant's application for further and better applications.

The record further shows that the Defendant only took steps on 29th June, 2017 to stay execution of the default judgment and to set it aside. On 25th July, 2017, the Deputy Registrar dismissed the Defendant's application to set aside the default judgment. On 11th August, 2017, the Defendant filed this appeal before Court. On 29th August, 2017, the Deputy Registrar stayed execution of judgment pending this appeal.

On 6th October, 2017, I dismissed the Defendant's appeal for non-appearance and re-entered it for hearing on 26th October, 2017. On 15th November, 2017, the parties appeared before me for a status conference and informed me that they are attempting an ex curia settlement. I adjourned the matter for another status conference to 7th February, 2018 at 08.45 hours.

On that date, the Defendant's Advocate Mr. Bwalya did not appear. The Plaintiff's Advocate Mr. Chizu informed me that the Defendant did not avail itself to ex curia settlement negotiations and no progress had been made since 15th November, 2017. As a result, I dismissed the Defendant's appeal for non-appearance. I re-entered the appeal on 15th February, 2018 and proceeded to hear the matter.

The Defendant's argument is that it was misinformed of the hearing date of its application before the Deputy Registrar. However, the parties never attended the hearing on 30th May, 2017. It never took steps to restore its application. A default judgment was obtained against the Defendant on 5th June, 2017.

The Defendant's Counsel almost misled me by asserting that the parties were supposed to appear before the Deputy Registrar on 2nd May, 2017, when in fact not. I find this totally unacceptable as the history of Counsel's appearance before this Court confirms that he does not take Court dates very seriously. He only has himself to blame for the sanctions the Defendant is faced with. Consequently, I find nothing wrong with the Deputy Registrar's Order of 30th May,

2017. Further, the Deputy Registrar was on firm ground when she dismissed the Defendant's application. As rightly canvassed by Counsel for the Plaintiff, the Defendant's appeal is wrong in civil procedure. The Defendant slept on its rights and is by this appeal abusing the process of Court.

Accordingly, I hold that this appeal is frivolous, vexatious and a waste of the Court's time. It is dismissed forthwith. Costs are for the Plaintiff to be taxed in default of agreement.

Dated this 16th day of March, 2018.

M. Mapani

M. Mapani-Kawimbe
HIGH COURT JUDGE