IN THE HIGH COURT FOR ZAMBIA **2016/HP/A007**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Between:

ALICK KAMIZA VINYOTINTO CHIKULA **APPELLANT**

AND

PG PROPERTIES ZAMBIA LIMITED **RESPONDENT**

(T/A PAM GOLDING PROPERTIES LIMITED)

BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 27TH MAY, 2020 - IN CHAMBERS

For the Appellant : *Mr. Zulu- Messrs. Zulu & Company*

For the Respondent : *Mr. A. Banda – Messrs. L.M. Chambers*

JUDGMENT

CASES REFERRED TO:

1. *Stanley Mwambazi v Morester Farms Limited (1977) ZR 108*
2. *TATA Zambia Limited v Shilling Zinka (1986) ZR 51*
3. *Covindbhai Baghabhai Patel and Vallabhai Baghabhai Patel v Monile Holding Company Limited(1993) S.J. 19 (S.C.)*
4. *Stanley Mwambazi v Morester Farms Limited (1977) Z.R. 108 (S.C.)*
5. *Waterwells Limited v Jackson (1984) Z.R. 98*

AUTHORITIES & OTHER WORKS REFERRED TO:

1. *Order 31 rule 4 & 6 of the Subordinate Court Rules, Cap 28 of the Laws of Zambia*

This is an appeal from the ruling of the Honourable Magistrate dated 19th March, 2015. In that ruling the court ruled that when the court delivers a judgment in the absence of one of the parties,

such a judgment may be set aside on sufficient reasons and in that regard the application by the defendant for a stay of execution and setting aside of the judgment were properly before the court.

The appellant filed three grounds of appeal and filed heads of argument on 25th July, 2016. The respondents also filed submissions on 19th September, 2016.

When the matter came up on 29th March, 2019, Mr. Zulu informed me that the respondents had been served with the notice of hearing but there was no response. He requested that I proceed to determine the matter on the strength of the heads of argument filed on 25th July, 2016 and the skeleton arguments filed in the Subordinate Court.

Ground one was that the Learned Senior Resident Magistrate misdirected himself by holding that he was of the view that the applications by the defendant for stay of execution and setting aside of the judgment were properly before court when no sufficient cause was shown by the defendant for absenting itself from trial due notice having been given.

It was contended under this ground that at pages 68 and 69 of the record Messrs. Malipenga & Company, the then advocates of the defendant acknowledged receipt of the notices of hearing returnable on 20th June, 2014. They were absent on that day. Again, at pages 70 and 71 Messrs. Malipenga & Company were

served with the notice of hearing returnable on 5th August, 2014; they still did not appear in court. Further that on 30th September, 2014 when the matter came up for hearing, Messrs. Malipenga & Company had been served with the notice of hearing as per document on pages 72 and 73. The plaintiff testified on 30th September, 2014 after the defendant and its lawyers failed to attend court for the third time.

It was submitted that it was a misdirection by the Learned Senior Resident Magistrate to allow the judgment entered by the trial Magistrate to be stayed and set aside on the ground that the defendant was absent at the trial. A defendant who does not wish to be heard on trial date, notice having been served, may not be forced by the court.

Ground two was that the Learned Senior Resident Magistrate was wrong at law to intend to proceed to hear the defendant's application for stay of execution of judgment and setting aside the said judgment when he had before him the plaintiff's affidavit showing that the defendant through its advocates Messrs. Malipenga & Company received notice of trial on three occasions and the trial was to be heard on 20th June, 2014, on 5th August, 2014 and 30th September, 2014 and the defendant's advocates were absent on those dates without excuse.

It was contended that Messrs. Malipenga & Company filed notice of appointment as advocates for the defendant on 13th January,

2015 as is shown at page 67 on the record. However, the trial Magistrate's notes of the Record of Appeal show that on 20th June, 2014, a representative from Messrs. Malipenga & Company appeared before Hon. Musukwa, Principal Resident Magistrate and applied for an adjournment.

It was submitted that the defendant should have appealed against the judgment by the trial Magistrate and not to try to set aside the judgment which was delivered after the matter was heard and determined in open court.

Ground three was that the Learned Senior Resident Magistrate misdirected himself by holding that he would proceed to hear the applications for stay of execution of judgment and to set aside the said judgment when there was no judgment to stay or to set aside on the ground that on 12th December, 2014 a writ of fieri facias was issued and executed on 16th December, 2014. The defendant on 16th December, 2014 following the execution of writ of fifa paid Messrs. Zulu & Company K16,590.43.

It was contended that after judgment was delivered, a writ of fifa was issued on 12th December, 2014 as at page 75 of the record and executed on 16th December, 2014 and the defendant paid the judgment debt as at page 77 of the record.

The defendant filed summons and affidavit to stay execution and set aside judgment on 12th December, 2014 as shown on page 54

of the record. That was the same day on which the writ of fifa was issued. However, the time the application was to be heard on 19th March, 2015, execution of the judgment had already been done. It was submitted that the defendant may proceed to appeal out of time against the trial Magistrate's judgment.

The respondent filed submissions on 19th September, 2016.

In addressing the issues raised in the appeal, Counsel for the respondent argued grounds one and two together because they are interrelated, according to them.

It was contended that the Honorable Magistrate's position was one provided for under ***Order 31 rule 6 of the Subordinate Court Rules, Cap 28 of the Laws of Zambia***, which states the following:

> *"Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the court, upon such terms as may seem fit."*

It was contended that the judgment in issue was obtained after hearing of the matter was allowed pursuant to ***Order 31 rule 4 of Subordinate Court Rules*** which provides:

> *"If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the court may, upon proof of service of the summons proceed to hear the cause or matter and give judgment on the evidence adduced by the plaintiff, or may postpone the*

hearing of the same and direct notice of such postponement to be given to the defendant."

It was submitted that it is very clear therefore that when the court delivers judgment in the absence of one of the parties as was the case in this matter such a judgment can be set aside on meritorious reasons, which reasons are as espoused in the affidavit in support of the summons for stay of execution and to set aside default judgment.

It was further submitted that the submission by the appellant that the respondent should have appealed against that judgment is contrary to the above provisions of the law.

Counsel cited the case of ***Stanley Mwambazi v Morester Farms Limited (1977) ZR 108***[1] where it was held that:

> ***"At this stage 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. The situation is different from that which obtains when there has been a trial and there is default in connection with a proposed appeal because then it cannot be said that the parties have been denied the right to a trial. Where a party is in default he may be ordered to pay costs, but it is not in the interest of justice to deny him the right to has his case heard."***

It was submitted that grounds one and two have no merit.

In the third ground Counsel referred the court to the case of ***TATA Zambia Limited v Shilling Zinka (1986) ZR 51***[2] where it was held that:

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

It was submitted that even a perfected judgment can be set aside. In this case, the appellant seems to suggest that this judgment cannot be set aside, or he concludes that the ruling of the magistrate cannot be set aside.

It was further contended that authorities have shown that the primary consideration in deciding an application to set aside a default judgment is whether there is an arguable defence on the merits. Counsel further wished to put it on record that the respondent has an arguable case as demonstrated in the affidavit in support of summons to set aside.

It was submitted that the issues in the main matter can only be resolved if both parties are heard. Further the appellant would not suffer any irreparable prejudice if this matter is allowed to go to trial so that all the issues are determined and the defendant is given an opportunity to defend his case.

It was further submitted that setting aside the judgment would be in the interest of justice and therefore urged this court to dismiss the appellant's appeal with costs for lack of merit.

I will also address the first two grounds of appeal together. The contention in ground one was one of setting aside judgment without sufficient cause being shown. The second ground was the setting aside default judgement when the affidavit was showing that the defendants had notice of trial on three occasions.

The law concerning judgment in default of appearance is contained in ***Order XXXI or the Subordinate Court Act, Cap 28 of the Laws of Zambia; rule 4*** of this Order provides as follows:

> *"If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the court may, upon proof of service of the summons, proceed to hear the cause or matter and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the same and direct notice of such postponement to be given to the defendant."*

Furthermore, rule 6 allows for setting aside a judgment obtained in the absence of a party. It provides:

> *"Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the court, upon such terms as may seem fit."*

The wording of the foregoing Order shows that it gives discretion on the court to proceed with the hearing and granting the plaintiff a judgment and then at the same time it gives the court discretion to set that judgment aside. The condition is upon sufficient cause being shown. The appellant's argument is that there was no

sufficient cause that was shown by the respondent for not attending court on three occasions.

The primary cause of setting aside of a default judgment, seems to be, where the defendant can show that there are, warranting the parties being heard at trial. In the case of ***Covindbhai Baghabhai Patel and Vallabhai Baghabhai Patel v Monile Holding Company Limited (1993) S.J. 19 (S.C.)***[3] the court noted that:

> ***"We appreciate that, according to the note to Order 13/9/5 of the Supreme Court Practice (The White Book) 1988 Edition, even if a Defendant tells a lie about his reasons for delay, a default judgment should be set aside if a triable issue is disclosed; but in this case, apart from the Appellant's presumed lie to his advocate, the appellant took no step at all when he knew from past experience the result of failure to enter appearance."***
>
> ***"...the evidence of the merits of his defence would have to be strong indeed to justify the setting aside of the Judgment."***

The court held that:

> ***"A default judgment should be set aside if a triable issue is disclosed."***

In that case the court refused to set aside the default and stated that:

> ***"For the reason we have given we do not accept the bona fides of the appellant and we do not consider that he has discharged the onus on him to show that there is a triable issue."***

In a much earlier case of ***Stanley Mwambazi v Morester Farms Limited (1977) Z.R. 108 (S.C.)***[4] the court held the following:

> ***"It is the practice in dealing with bona fide inter-locutory 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, hut it is not in the interests of justice to deny him the right to have his case heard.***
>
> ***For this favourable treatment to be afforded there must be on unreasonable delay, no mala fides and no improper conduct on the action on the part of the applicant."***

I have perused the ruling of the Honourable Magistrate dated 19th March, 2015. I note that the Learned Magistrate quoted Order 31 rules 4 and 6, and proceeded to rule that he was of the firm view that the applications by the defendant for stay of execution and setting aside of the judgment are properly before the Magistrate.

For the court to dismiss or uphold an application, there should have been an opportunity accorded to the applicant to present the case. In fact Order 31 provides that a judgment obtained in the absence of the party may be set aside on sufficient cause being shown, it means that the applicant has to be heard for the court to determine whether the reasons given warrant setting aside the default judgment. I do agree that the Learned Magistrate has jurisdiction to entertain this application.

The third ground is that the Magistrate ruled that he would hear the application to stay and set aside the judgment when there was not judgment to stay or set aside.

The case of ***TATA Zambia Limited v Shilling Zinka*** is still good law that even when a judgment has been perfected it can be set aside. In that case the emphasis was that Order 20 allows for any default judgment whatsoever to be set aside. It was stated that in that case, quoting the case of ***Waterwells Limited v Jackson (1984) Z.R. 98***[5] that:

> ***"Order 20 as a whole, make it abundantly clear that any default judgment whatsoever may be set aside . . ."***

Therefore, in this case there was a judgment to stay and set aside. The appellant cannot argue that the judgment having been perfected, there was no judgment to stay or set aside.

This appeal fails in toto (on all three grounds).

Leave to appeal is hereby granted.

DELIVERED AT LUSAKA THIS 27TH DAY OF MAY, 2020

G.C. CHAWATAMA
JUDGE