

IN THE HIGH COURT FOR ZAMBIA

2018/HP/0962

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

MICHELO MUYABALA MUNACHITOMBWE PLAINTIFF

AND

ZIBUSISO CHOONGA DEFENDANT

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN
CHAMBERS, ON 5TH JUNE, 2020.**

For the Plaintiff: N/A

For the Defendant: N/A

RULING

CASE REFERRED TO:

1. *Simeza and Others vs. Mzyeche (APPEAL NO. 87/2011) [2011] ZMSC 3 (24 November 2011).*

LEGISLATION REFERRED TO:

1. *The High Court Act, Chapter 27, Volume 3 of the Laws of Zambia.*

1 INTRODUCTION

1.1 Upon Considering that Zambia is currently faced with Covid-19, a global pandemic which demands social distancing and that the Defendant has filed an application to set aside Judgment, which can be disposed of on Affidavit evidence whilst adhering to the social distancing guidelines given by the Judiciary and relevant

government authorities, the Court has dispensed with hearing submissions *viva voce* and will consider and render its Ruling based on the Affidavit evidence.

2 BACKGROUND

- 2.1 On 29th January, 2020, this Court delivered a Judgment in which it found and held *inter alia* that the Contract of Sale executed by the parties herein is valid and enforceable and that the Plaintiff is the registered owner of Stand No. 11343/CL/6, Lusaka.
- 2.2 The Defendant has filed an application to set aside Judgment pursuant to **Order XXXV, Rule 5** of **The High Court Rules**¹.
- 2.3 On 20th March, 2020, the Defendant was directed to serve the application on the Plaintiff and file proof of service herein. To date no such proof of service has been filed herein. This application has been pending on the active cause list since it was filed in 4th February, 2020, for reasons that are on record. Accordingly, I have proceeded to consider the matter *Ex Parte* and render this Ruling.

3 AFFIDAVIT EVIDENCE

- 3.1 The application is supported by an Affidavit sworn by the Defendant Zibusiso Choonga, in which it is deposed *inter alia*, that this Court cause listed the matter herein for trial on 18th April, 2019, during which time the Plaintiff testified, but the Defendant did not have an opportunity

to cross examine him as he was absent during examination in chief of the Plaintiff. That owing to the absence of the Defendant's witnesses at this hearing, the Defendant sought an adjournment, which was granted by the Court.

- 3.2 It is further averred that on the return date, owing to a prolonged traffic police hold up, the Defendant only made it to Court after the hearing had commenced and he was not allowed to walk into the Judge's Chambers. That it was at this hearing that the case was closed and Judgment rendered in the absence of the Defendant.
- 3.4 It is also averred that had the Defendant been accorded an opportunity to cross-examine the Plaintiff and call his witnesses to testify, this Court would have formed a different opinion of the matter. That this is a proper case in which this Court ought to set aside the Judgment in order to ensure that the ends of justice are met.

4 THE LAW

- 4.1 The application is brought pursuant to **Order XXXV, Rule 5** of **The High Court Rules**¹, which provides for instances where a Judgment obtained in the absence of a party may be set aside. It is couched as follows: -

"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." (Court's emphasis)

5 ANALYSIS AND FINDINGS

- 5.1 I have considered the application by the Defendant to set aside the Judgment of this Court delivered on 29th January, 2020 and the Affidavit evidence.
- 5.2 Firstly, indeed, trial commenced on 18th April, 2019, at 11:30 hours, in the absence of the Defendant, precisely because he had not reasonably or sufficiently excused his absence. In my humble opinion, before I consider setting aside my Judgment, I must first consider whether the Defendant had good reason for having absented himself at trial.
- 5.3 The record will show that the Notice of Hearing in this matter was issued out of the Principal Registry of the High Court on 26th February, 2019. On 1st March 2019, the Defendant was served with the Notice of Hearing and proof of service was filed herein on 7th March, 2019.
- 5.4 At commencement of trial on 18th April, 2019, at 11:30 hours, the Defendant was not in attendance and only arrived at Court at 12:35 hours, when the Plaintiff's second witness was on the stand. Due to shortages of Court rooms, the Court had constituted itself in Chambers, with the door wide open. The record will show that the Defendant walked in and apologised for arriving late. He stated that his late arrival was due to the fact that he got lost within the Court premises as he did not know where the Court was sitting. The record

will also show that the Defendant was given the opportunity to cross-examine the Plaintiff's second witness who was still on the stand.

- 5.5 When the Plaintiff closed its case, the Defendant opened his case. He testified in examination in chief and was cross examined. He further testified in re-examination and thereafter applied for an adjournment to enable him to bring his witnesses to Court. The application was granted and a return date issued in his presence. The record will show that the Defendant was directed to ensure that all his witnesses are present at the next hearing. In addition to this, a Notice of Hearing was issued and served on the parties.
- 5.6 On the return date for continued trial on 6th June, 2019, at 11:00 hours, only the Plaintiff was in attendance. The Defendant was absent and there was no compelling reason advanced for his absence. Being satisfied that the Defendant had been aware of the scheduled date of hearing, I proceeded to close the case and directed the parties to file their written submissions, if any, within 30 days thereof. This is the brief history of this matter.
- 5.7 It is trite that the Court is empowered to proceed to hear any matter, upon proof of service of notice of hearing. ***Order XXXV, Rule 3 of The High Court Rules***¹, provides that: -

"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 notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant."

- 5.8 In *casu*, the matter was adjourned on 18th April, 2019, at 14:05 hours, in the presence of the Defendant and at his request. The Defendant was also directed to ensure that his witnesses were present on the return date. Before he left the Court premises, the Defendant was also served with the notice of the hearing for continued trial. The Defendant having not tendered any reason to justify his absence, this Court was in order to proceed with the hearing and close the matter.
- 5.9 I will now determine the Defendant's application to set aside the Judgment. The Defendant's request to this Court to set aside my Judgment is made pursuant to **Order XXXV, Rule 5** of **The High Court Rules**¹, which is reproduced in paragraph 4.1 above.
- 5.10 It is my considered view that in dealing with applications to set aside a Judgment, the Court must determine whether or not the Applicant has shown sufficient cause, to warrant setting aside the Judgment. In *casu*, the Defendant has implored this Court to set aside the Judgment on the basis that he was not given an opportunity to cross examine the Plaintiff and to call his

witnesses. He further states that on the date for continued trial, he was held up in traffic and when he arrived at Court, the hearing had commenced and he was not allowed to walk into the Judge's Chambers. It was thus his prayer that the Judgment be set aside.

5.11 It is imperative for this Court to inquire into the other reason given by the Defendant to ascertain if it amounts to "*sufficient cause shown*" as envisaged by **Order XXXV, Rule 5 of The High Court Rules**¹. As already stated above, in the case of Judgment made in absence of a party, that party ought to give compelling reasons for his non-attendance. Once sufficient cause has been shown to the satisfaction of the Court, it then proceeds to assess, if on the face of the record the party, who has advanced reasons of his non-attendance, has meritorious reasons as to why the Judgment should be set aside.

5.12 As mentioned above, I rendered my Judgment in issue on 29th January, 2020. As can be seen from the record, the Defendant was given an opportunity to present his case and call his witnesses, but chose to absent himself on the return date, without advancing any reason for his absence. At no time did the Defendant make an application to recall the Plaintiff to the stand. In fact, the Plaintiff's case was closed in the presence of the Defendant and the Defendant opened his case. Further, the Defendant chose not to file any written submissions

in support of his case as directed by the Court. Therefore, I find the Defendant's argument that he was not given an opportunity to cross examine the Plaintiff and call his witnesses lacking merit.

5.13 My decision is fortified by the case of ***Simeza and Others vs. Mzyeche***¹, where the Supreme Court in highlighting "general indications" that are to be taken into account when considering to set aside the judgment stated as follows: -

"...We restate the relevant ones in this case. These are:

(1) Where a party with notice of proceedings has disregarded the opportunity of appearing and participating in the trial, he will normally be bound by the decision..." (Court's emphasis)

5.14 In the instance case, having perused the Defendant's Affidavit in Support of this application, I am not at all satisfied as to the reason for the absence of the Defendant at the subsequent hearing for continued trial, which date was set in the presence of the Defendant and at his request, as well as, the reasons advanced in support of the application to set aside this Court's Judgment.

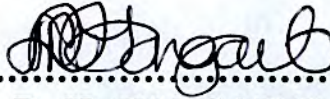
6 CONCLUSION

6.1 In the circumstances, I do not find any cause at all, let alone sufficient cause for setting aside my Judgment of 29th January, 2020. The application is accordingly dismissed.

6.2 I make no order as to costs.

6.3 Leave to Appeal is granted.

Dated the 5th day of June, 2020.



.....
P. K. YANGAILO
HIGH COURT JUDGE