

TRIM

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**
(Commercial Jurisdiction)

2019/HPC/0211

BETWEEN:



RITESH MOHABHAI PATEL

1ST PLAINTIFF

MINAKSHIBEN MOHANBHAI PATEL

2ND PLAINTIFF

DARSHNA MOHANBHAI PATEL

3RD PLAINTIFF

AND

CAMRAN FOODS LIMITED

DEFENDANT

**Before the Honourable Mr Justice Bonaventure C. Mbewe in
Chambers on the 29th October, 2019.**

RESEARCHER : **Mwiche Ntinda**

MARSHAL : **Esther Ng'uni**

For the 1st, 2nd & 3rd Plaintiffs : *Mr. M. Desai with Mr. K. Daka
from Messrs Christopher Russel
Cook and Company*

For the Defendant : *Mr. E. Kaluba from Messrs Isaac
and Partners*

RULING

Cases and Authorities referred to:

1. *Charles Mambwe and Others and Mulungushi Investments Limited (In Liquidation), Mpelembe Properties Limited Selected Judgment No. 36 of 2016;*
2. *Kumasonde Chambers v. Zambia Development Agency 2015/HP/2430;*
3. *Keating and Another v. Siame and Others 2014/HPC/0428;*
4. *Henry M. Kapoko v. The People (2016/CC/0023);*
5. *The Rules of the Supreme Court 1965 (White Book), 1999 Edition;*
6. *The High Court Rules, Chapter 27 of the Laws of Zambia;*
7. *Practice Direction No. 4 of 1977;*
8. *The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia;*
9. *Constitution of Zambia, Chapter 1 of the Laws of Zambia.*

INTRODUCTION

This is an application by the Plaintiff filed on 7th June, 2020 to set aside the conditional memorandum of appearance for irregularity and/or want of jurisdiction and for an order for leave to enter judgment in default of appearance and defence. The application is made pursuant to **Order 2, Rule 2 of the Rules of the Supreme Court 1965 (White Book), 1999 Edition** as read together with **Order 12, Rule 1 of the High Court Rules** and also **Order 3, Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.**

The Plaintiff's summons seeks an Order to set aside the Defendant's conditional memorandum of appearance for irregularity and for leave to enter judgment in default of appearance on the grounds that;

- 1. The Conditional Memorandum of Appearance has been filed beyond the prescribed time of 14 days as contained in the writ of summons without leave of court;*
- 2. That the Defendant has consequently not filed a defence or memorandum of appearance within the prescribed period as aforesaid.*

ARGUMENTS AND EVIDENCE

The Plaintiff's application is supported by an affidavit deposed to by one Khonzani Daka which deposes that he Plaintiffs on 16th May, 2019 issued against the Defendant originating process which was served on the Defendant on 17th May, 2019 and an affidavit of service therefore was filed into Court on 21st May, 2019. That the Defendant entered conditional appearance on 31st May, 2019 outside the 14 days period prescribed on the writ, which fact came to the Plaintiff's attention on 31st May, 2019 when they intended to enter judgment in default of appearance. The affidavit posits that the period the Defendant is required to enter appearance in 14 days inclusive of the day of service starting from 17th May, 2019 and ending on 30th May, 2019. The deponent states that he believes that the Conditional Memorandum of Appearance is irregular and this Court does not have the jurisdiction to

consider it or any subsequent application thereon. The affidavit exhibits the respective documents filed herein.

The Plaintiffs skeleton arguments rely on **Order 3, Rule 2 of the High Court Rules** and the case of **Charles Mambwe and Others and Mulungushi Investments Limited (In Liquidation), Mpelembe Properties Limited (1)** to confirm this Court's jurisdiction to hear the matter.

Order 3, Rule 2 reads;

“Subject to any particular rules, the Court or a Judge may, in all causes and matters, make anu interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not”

The powers of a Court under this Order were summarized as follows in the cited case;

“...The effect of this Order is that it gives a Judge of the High Court and Court, such as the Deputy Registrar, wide discretionary powers to grant any interlocutory order that the

justice of the case deserves. Such an interlocutory order may be given whether or not the beneficiary party has requested for it. This demonstrates how wide the powers of the Judge and Court are in this regard.....”

The Plaintiff relies on **Practice Direction No. 4 of 1977** which states;

“It is hereby notified for the information and guidance of practitioners, the Registrar, District Registrars and Assistant Registrars, that the time within which appearance must be entered on Court Writs shall be as follows;

- 1. Where a writ is to be served as a place less than 100 kilometres from the issuing Registry, the time within which an appearance must be entered shall be fourteen days.”**

The parties being within 100kms radius from the Issuing Registry, the Defendant was required to enter appearance within 14 days from 14 days which is inclusive of the day of service. The Plaintiff submits that the Defendant required to enter appearance within 14 days as prescribed by law. The Plaintiff relies on the case of **Kumasonde Chambers v. Zambia Development Agency (2)** a case before her

Ladyship, the Hon Lady Justice Kawimbe in which she considers **Order 6, Rule 4 of the High Court Rules**. The Order states;

“Every writ of summons shall be endorsed with a statement of the nature of the claim made, or the relief or remedy required and shall, subject to other provisions of these Rules, state a time (to be fixed by the Registrar) within which appearance must be entered by the party sued or served.”

The Court in the **Kumasonde Chambers** case.

In support of their application for leave to enter Judgment in default, the Plaintiffs rely on **Order 12, Rule 1(1) of the High Court Rules** which provides;

“Where the Writ of Summons is endorsed for a liquidated demand and the defendant fails or all the defendants if more than one fail to appear, the plaintiff may enter final judgment signed by the Deputy or District Registrar for any sum not exceeding the sum endorsed on the writ together with interest and costs upon an affidavit or certificate as the case may be, or the due service being filed.

The Plaintiff submits that this Court should grant the Plaintiffs an order to for leave to enter judgment in default of appearance and defence against the Defendant. It is the Plaintiffs prayer that this Court grants the Plaintiffs an order to set aside the conditional memorandum of appearance and an order for leave to enter judgment in default of appearance.

The Defendant filed an affidavit in opposition and skeleton arguments in opposition to the Plaintiffs application on 18th June, 2019. The affidavit of one Jason Randee deposes that the Plaintiffs served the Defendant the originating process on 17th May, 2019 and it filed its conditional memorandum of appearance on 31st June, 2019 (I assume that the deponent meant to say 31st May, 2019 as that is the date of the Commercial Court Registry stamp on the exhibit “JR1”). The Defendant’s affidavit attests that it has been informed by its Counsel that the time within which it was required to enter appearance was 14 days after the day of service and it therefore did enter appearance within the prescribed period. That the Plaintiff’s application is therefore misconceived.

The Defendant’s skeleton arguments argue that the **Section 35 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia** states as follows;

“In computing time for the purpose of any written law (a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happened or the act or thing is done.”

The Defendant submits that following from the above provision of the law, the date of the happening of an event is not reckoned and in the matter *in casu*, the last date for entering appearance was 31st May as the writ was served on 17th May, 2019, which appearance was endorsed by the Hon. Deputy Registrar. The Defendant goes on to submit that once appearance is entered, a default judgment cannot be entered against it and relies on the case of **Keating and Another v. Siame and Others (3)** wherein it was held that;

“once appearance has been entered, a party cannot enter default judgment.”

The Defendant cites **Article 118 (2) (e) of the Constitution of Zambia** which states;

“In exercising judicial authority, the courts shall be guided by the following principles; (e) justice shall be administered without undue regard to procedural technicalities.”

The Defendant relies on **Article 118 of the Constitution** cited above and the case of **Henry M. Kapoko v. The People, (4)** plus a couple other cases to argue that this case should be determined on the merits and submits that even if this Court finds that the period within which the Defendant entered appearance was outside the prescribed time, it should allow the matter to be determined on the merits and not on a technicality of lapse of 14 days within which to enter appearance.

The Plaintiffs filed an affidavit in reply and further skeleton arguments in support of the affidavit in reply. I will not set out these herein.

RULING

I thank the parties for their arguments and submissions in this matter and I find that the Plaintiffs application is correctly laid before this Court, which Court does have the jurisdiction to hear the Plaintiffs application.

The Defendant's submission, that once appearance is entered, a default judgment cannot be entered against it and its reliance on the case of **Keating and Another v. Siame and Others (3)** would stand if the appearance is not impugned. The Plaintiffs have applied to set aside the conditional appearance, which application if granted by the Court will pave way for entry of judgment in default, and if not granted will allow the appearance to stand. Further In the matter *in casu*, the Defendants

relied on **Section 35 of the Interpretation and General Provisions Act**, as the correct law to use in computing the period for entering appearance. I find that **Section 35 of the Interpretation and General Provisions Act**, is the wrong law to rely on in computing time for entering appearance and it is the Plaintiffs who have cited the correct law that applies in entering appearance, which is **Order 6, Rule 4 of the High Court Rules** which reads;

“Every writ of summons..... and shall, subject to other provisions of these Rules, state a time (to be fixed by the Registrar) within which appearance must be entered by the party sued or served

as read with **Practice Direction No. 4 of 1977** wherein the Hon. Registrar fixed the time as follows;

“It is hereby notified for the information and guidance of practitioners....., that the time within which appearance must be entered on Court Writs shall be as follows;

- 1. Where a writ is to be served as a place less than 100 kilometres from the issuing Registry, the time within which an appearance must be entered shall be fourteen days.”**

A careful reading of the Writ of Summons which is **Form 2 of the First Schedule of the High Court Rules** itself guides on the matter when it states the following;

“You are commanded in the Presidents name within 14 days after service of this writ on you, inclusive of the day of such service, you do cause appearance to be entered for you....”

In a case, such as this, one does not have to go to **the Interpretation and General Provisions Act** as there is no lacuna or ambiguity to resolve. **Section 2 of the Interpretation and General Provisions Act** is clear that the provisions of that Act “....**shall apply unless a contrary intention appears in this Act or in the written law concerned.**” How much more clearer does the period for computing time have to be when it is specified in the **High Court Act** and the Rules promulgated thereunder?

Furthermore, how is “appearance” entered before the Court? The record shows that the Defendant filed a Conditional Memorandum of Appearance on 31st May, 2019 and it later filed its defence on 13th June, 2019 over a week later.

Order 11, Rule 1(1) and (2) of the High Court Rules, Chapter 27 of the Laws of Zambia dealing with how or the mode of entering appearance is to be entered provides as follows;

“(1) A defendant shall enter appearance to a writ by delivering to the proper officer sufficient copies of memorandum of appearance in writing dated on the day of their delivery, and containing the name of the defendant’s advocate, or stating that the defendant is defending in person. The defendant shall at the same time deliver to the proper officer sufficient copies of the defence and counterclaim if any:

Provided that before delivering the memorandum and defence, the defendant shall be at liberty to apply for further and better particulars...”

(2) A memorandum of appearance not accompanied by a defence shall not be accepted.”

The 2nd Defendant herein settled a conditional memorandum of appearance but did not settle a defence as required by the above Rule at the same time as it was filling the memorandum of appearance. The appearance and defence filed by the Defendant herein were therefore filed in breach of **Order 11** above and thus the entry of appearance was defective, which this Court, in exercise of its discretionary powers, has the power to strike it out or set it aside.

The Defendant argues that **Article 118 of the Constitution** and the Constitutional Court Review case of **Henry M. Kapoko v. The People, 2016/CC/0023** oblige this Court to adjudicate this matter on the merits and submits that even if this Court finds that the period within which the Defendant entered appearance was outside the prescribed time, it should allow the matter to be determined on the merits and not on a technicality.

In the **Henry Kapoko case** which the Defendants cited, the Constitutional Court held;

“(5) Article 118 (2) (e) is not intended to do away with the existing principle, laws and procedures, even where the same may constitute technicalities. It is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality.

(6) Whether a particular provision is a technicality may be determined from its form, its content and its application in the peculiar circumstances of the issue before the Court.”

Therefore, much as the Constitution is the supreme law of the land and it is desirable that matters should be decided on their own merits, the Constitutional Court has guided in its holding, that **“Whether a particular provision is a technicality may be determined from its**

form, its content and its application in the peculiar circumstances of the issue before the Court.” I therefore find that the default by the Defendant in entering appearance within 14 days and not filing its defence with the memorandum of appearance are not mere technicalities as they are matters prescribed by Statute for the orderly administration of justice which the Defendant should have adhered to.

I therefore hereby grant the Plaintiffs’ application to set aside the conditional memorandum of appearance for irregularity and/or want of jurisdiction and grant the Plaintiffs an Order for leave to enter judgment in default of appearance and defence as prayed for.


The Conditional Memorandum of Appearance is therefore hereby set aside for irregularity. Having set aside the conditional appearance, I hereby enter judgment in default of appearance and defence in favour of the Plaintiffs for the following;

1. Rental arrears in the sum of ZMW1,152,161.14 up to 5th April, 2019;
2. Rentals accruing and payable after 5th April, 2019 at a monthly rate of US\$3,778.00 accrued thereafter until date of termination of the Defendant’s tenancy or until date of final payment to the Plaintiff which are to be assessed by the Registrar;
3. Interest on all sums due at the Bank of Zambia short term deposit rate from the date the rentals became due to the date of the Writ

- of Summons and at the Judgment Act, Chapter 81 interest rate from the date of Judgment to date of final payment;
4. Costs of and incidental to these proceedings to be taxed in default of agreement.

I refuse to grant the Defendants leave to appeal this Ruling.

Delivered at Lusaka this 15th day of July, 2020.



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Bonaventure C. Mbewe
HIGH COURT JUDGE