

IN THE HIGH COURT FOR ZAMBIA

2020/HPC/0191

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

NATIONAL PENSION SCHEME AUTHORITY

PLAINTIFF

AND

CLEMENT SINKAMBA

DEFENDANT

Before Hon. Mrs. Justice Irene Zeko Mbewe

For the Plaintiff: Ms. S. Aongola In House Counsel, NAPSA

For the Defendant: Mr. T. Ngausi of Messrs Sukwana Mweemba & Partners

R U L I N G

Cases referred to:

1. *Water Wells Limited v Wilson Samuel Jackson (1984) ZR 98*
2. *S. Mwambazi v Movester Farms Limited (1977) ZR 108*

Legislation referred to:

1. *High Court Rules, Cap 27 of the laws of Zambia*

This is the Defendant's application to stay execution of the default Judgment and to set it aside pursuant to Order 12 Rule 2 *High Court Rules, Chapter 27 of the Laws of Zambia*.

The background to the application is that on 18th March 2020 the Plaintiff commenced an action by way of writ of summons and statement of claim. On 2nd June 2020, a default Judgment was filed into Court and signed on 8th June 2020.

In the supporting affidavit deposed to by the Defendant herein, he reveals that he was never served with the writ of summons and statement of claim and only became aware of the court process on 16th June 2020 when he was served with the default Judgment. For that reason he never entered an appearance nor did he file a defence. The Defendant is desirous of defending the action and has attached the proposed defence (“Exhibit “CS1”).

It is further deposed that having applied for an Order to set aside the default Judgment a stay of execution of the default Judgment be granted pending the determination of the application to set it aside.

The application is opposed by the Defendant by way of affidavit deposed to by Butele Kaliye, Head of Real Estate. According to the deponent, the Defendant was fully aware of the matter as the writ of summons and statement of claim were duly served at his residence on 19th March 2020 and received by the Defendant’s wife as stated in the affidavit of service filed into Court on 2nd June 2020.

According to the deponent, the Defendant was aware of the Court proceedings as he visited the Plaintiff’s office to meet the Director of Investment for purposes of negotiating payment of the purchase price and settlement of outstanding debts as his application for a mortgage from Zambia National Building Society was under

consideration. It is the deponent's belief that the Defendant's proposed defence reveals no triable issues on the merit.

A further affidavit in opposition to summons to set aside default Judgment was filed into Court on 14th July 2020 without leave of this Court and I shall discount it.

At the hearing, the parties relied on their respective affidavit evidence, skeleton arguments, list of authorities and made oral submissions which I have considered in the determination of the application.

A default judgment is not cast in stone as the Court has discretionary powers under Order 12 Rule 2 *High Court Rules, Cap 27 of the laws of Zambia* to set it aside. I set out relatively uncontroversial propositions of the law relating to setting aside a default Judgment as espoused in the case of *Water Wells Limited v Wilson Samuel Jackson (1984) ZR 98* where it was held that:

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

These principles were stated in the case of *Stanley Mwambazi v Morester Farms Limited (1977) ZR 108* cited by Counsel for the Defendant.

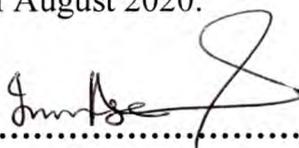
The Defendant's explanation for failure to enter an appearance and file a defence is that court process was not personally served on him but on his wife. As a general rule, service of process has to be effected personally.

However, in a case like the present one, the primary consideration is whether there is a defence on the merits. The defence should not be a sham aimed at keeping litigants out of the fruits of enjoyment of their Judgment. I have perused the proposed defence annexed to the supporting affidavit and find there are triable issues that need to be determined at trial.

For the foregoing reasons, the default Judgment dated 8th June 2020 is hereby set aside. The Defendant to file his defence within 14 days herein.

Costs in the cause.

Dated at Lusaka this 26th day of August 2020.



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IRENE ZEKO MBEWE
HIGH COURT JUDGE