HIGH COURT FOR ZAMBIA **2010/HP/446**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

SEVENTHDAY ADVENTIST ASSOCIATION IN ZAMBIA REGISTERED TRUSTEES **PLAINTIFF**

AND

APOSTLES CHURCH **DEFENDANT**

Before: ***The Hon. Mr. Justice Charles Zulu.***

For the Plaintiff: Mr. L.C. Ng'onga, of Messrs P.M. Kamanga and Associates.

For the Defendant: Mr. F. Mutale, and Mr. M. Chewe of Messrs F.M. Legal Practitioners.

RULING

Cases referred to:

1. ***Mayo Transport v. United Dominions Corporation Limited (1962) R and NR 22.***
2. ***Tata Zambia Limited v. Willing Zimka (1986) Z.R. 51.***
3. ***Vas Sales Agencies Ltd v. Finsburay Investments Ltd & Another (1999) Z.R. 11.***

Legislation referred to:

1. ***The High Court Rules (HCR) Chapter 27 of the Laws of Zambia.***
2. ***The Rules of the Supreme Court (RSC) (England) (White Book 1999 Edition).***

This ruling is in respect of an appeal against the decision of the learned Registrar of the High Court dated April 14, 2020. The grounds of the appeal by the Defendant are:

1. ***The learned Deputy Registrar misdirected herself both in law and fact when she held that the Appellant's application to set aside judgment in default of appearance and defence was improper and misplaced.***

2. ***The learned trial Judge*** (sic) ***misdirected herself in law and fact when she held that the Appellant's Application to set aside the judgment in default of appearance and defence was an attempt to circumvent the decision of the Honourable Judge.***

3. ***The learned trial judge*** (sic) ***misdirected herself both in law and fact when she held that the Respondent could not be denied the right to enjoy the fruits of its judgment.***

A brief history of this case is that, on May 6, 2010, the Plaintiff took out a writ of summons against the Defendant claiming the following:

1. ***An Order that the Plaintiff is the bona fide owner of Plot No. CH94/400.***
2. ***A mandatory injunction to remove and retrain the Defendant from interfering with the Plaintiff's development plans it may put in place.***
3. ***An order of repossession and vacation from the plot.***
4. ***Any other relief the court deems fit; and***
5. ***Costs.***

On August 23, 2010, the Plaintiff was granted an interlocutory injunction restraining the Defendant from carrying out any activity, development or interfering with development carried on by the Plaintiff on the said plot, Plot No. CH94/400, John Howard Compound, Lusaka.

On or around December 6, 2010, an Order for Direction was issued, *inter alia,* the Defendant was directed to file its defence within fourteen (14) days from the date of the Order, and that the matter was to be set down for trial before a judge sitting at Lusaka.

Consequently, the Plaintiff by way of discovery filed its List of Documents. However, on September 30, 2011, the Plaintiff filed a notice of intention to enter judgment by default of appearance and defence. And on October 26, 2011, judgment by default of appearance and defence was entered by the Deputy Registrar. It was declared that the Plaintiff was the *bona fide* owner of the plot in dispute and was granted vacant possession.

It appears unbeknown to Judge Banda-Bobo that a *default* judgment was entered; the matter was listed for hearing on March 26, 2012, and both parties were absent, and the Judge made the following comment and observation:

> ***File shows a judgment in default was entered on 26th October, 2011 the same notified to the other party on 24th November, 2011 by way of a letter and an affidavit of service filed to that effect, matter closed.***

In view of the above observation, the Defendant on January 7, 2014, misguidedly took out summons for special leave to review the above observation. The summons was addressed to the Judge to review her "decision" given on March 26, 2020 aforesaid. By then it was purported that the Defendant was represented by Legal Aid Board. On March 20, 2014, the application for special leave to review was struck out for non-attendance, and thereafter the Defendant sought to restore the application. A Ruling in respect of an application for restoration was rendered on April 4, 2014. Judge

Banda-Bobo refused to have the application restored, and at the end of her Ruling she noted that: *The matter remains determined by way of the judgment in default, dated 26th October 2011.*

It was purported that the Defendant was represented by Legal Aid Board, but Judge Banda-Bobo in her Ruling dated April 4, 2014, noted that one Sylvester Suswani Sakwiba Mubita masquerading as a Legal Aid Assistant was not an employee of the Legal Aid Board, and that there was no notice of appointment filed by the Legal Aid Board.

On January 6, 2020, F.M. Legal Practitioners filed a notice of appointment representing the Defendant, and filed a notice of intention to proceed; the matter having been idle for over a year. And on January 21, 2020, the Defendant filed an application to set aside the judgment entered in default of appearance and defence, dated October 26, 2011. However, the application to set aside the judgment by default could not be heard, because the Plaintiff raised a preliminary issue, couched as follows:

> ***Whether the Defendant's application to set aside the judgment in default is properly before the Honourable court there being a further ruling of court on the same deeming the matter closed dated 26th March, 2012 and 4thApril 2014 in favour of the Plaintiff.***

And in her Ruling on the preliminary issue, dated April 14, 2020, the learned Registrar held as follows:

> ***The Honourable Judge Banda-Bobo delivered a Ruling on 4th April, 2014, where she categorically stated as follows:***
>
> > ***"This matter is not a case in which I can order a restoration...".***

> ***Therefore, if the matter was not restored what is there to be set aside? It is my considered view that the Defendant's application is improperly before this court and it is an attempt to circumvent the decision of the Honourable Judge.***
>
> ***Based on the reasons stated above, the Defendant's application to set aside Default Judgment which was granted almost nine years ago is improper and misplaced.... The Plaintiff's application to raise preliminary issue on a point of law is successful.***

The above Ruling is the subject of this appeal. And I am mindful that an appeal from the Registrar of the High Court to a Judge at Chambers is a rehearing of the application.

I have accordingly perused the skeleton arguments filed in support of the preliminary issue. It was argued by the Plaintiff's Counsel that in the light of the "decision" dated March 26, 2012, and the Ruling dated April 4, 2014, deeming the matter closed, the Defendant's application to set aside the *default* judgment was improper and misplaced. It was also argued that the decision to deem the matter closed could only be challenged by way of an appeal. Reference was made to the case of ***Mayo Transport v United Dominions Corporation Limited (1962) R and NR 22***, wherein it was held:

> ***The general rule as to amendment and setting aside of Judgment and Orders after a judgment or order has been drawn up was follows:***
>
> ***Except by way of Appeal, no court, Judge or Master has power to re-hear, review, alter or vary any Judgment after it has been drawn up, respectively, either in application made in the original action or matter, or in fresh action brought to review such judgment or order. The object of this is to bring litigation to finality....***

It was, therefore, argued that the Judge's "decision" dated March 26, 2012, and the Ruling of April 4, 2014, could only be set aside on appeal.

It was also argued by the Plaintiff's Counsel that the application to set aside *default* judgment was inordinately delayed, having being made after nine years, and was out of time. It was submitted that the application was out of time, the Defendant having not complied with Order 35 r. 2(1) and (2) of the ***Rules of the Supreme Court (RSC) (White Book 1999 Edition)*** which provides:

> ***2(1) Any judgment, order or verdict obtained where one party does not appear at the trial may be set aside by the Court, on the application of that party, on such terms as it thinks just.***
>
> ***(2) An application under this rule must be made within 7 days after the trial.***

It was thus argued that failure to comply with the above Order, in terms of the time frame or make an application for extension of time, rendered the application to set aside *default* judgment invalid, improper, and an abuse of the court process.

To counter the preliminary issue or objection, the Defendant's Counsel argued that the Plaintiff's application was misconceived. According to Counsel, the Judge's comments to the effect that the matter was closed were not a court order.

It was argued that, our ***High Court Rules, Chapter 27 of the laws of Zambia*** in particular and Order XII r. 2, and Order XX r. 3 respectively dealing with setting aside a default judgment did not prescribe a time frame within which an application to set aside a *default* judgment should be made.

It was also contended that, the Plaintiff's argument to the effect that the Judge's comments confirming the *default* judgment can only be set aside by way of an appeal was misleading. The case of ***Tata Zambia Limited v. Willing Zimka (1986) Z.R 51*** was vouched wherein it was held:

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

Accordingly, it was submitted that even where a judge makes comments on the matter coming to an end, a *default* judgment can still bet set aside, especially when triable issues are proved.

And as regards the argument suggesting the need to first seek the leave of court to file an application to set aside a *default* judgment out of time; the Defendant's Counsel argued that the Plaintiff's reliance on Order 35 rules 2 (1) and (2) RSC was inappropriate to our present practice and procedure for setting aside a *default* judgment.

It was further argued that decisions of the Court on a matter not heard on its merit cannot been appealed against. Reference was had to the case of ***Vas Sales Agencies Ltd v. Finsburay Investments Ltd & Another (1999) Z.R. 11,*** in which the Supreme Court held:

> ***We wish to observe that the application before the Deputy Registrar was not heard on merits and ordinarily no appeal lies against a decision not on merits.***

It was finally argued that the preliminary issue was without merit.

In determining this appeal, I have also considered the arguments raised on appeal. In my determination, I will restrict myself to the preliminary issue that was raised, and the Ruling thereof. I will not delve in the merits or demerits of setting aside a *default* judgment because that application was not heard on its merits, but was terminated by the Ruling, the subject of this appeal. And depending on the outcome of this appeal, litigation on the application; whether to set aside the judgment by default or not may still remain open for adjudication. Hence ground three of the appeal will not be considered in this appeal. Instead I will jointly deal with ground one and two. And it must be stated that the reference to "trial Judge" instead of Registrar in grounds two and three of the appeal was a misnomer; for all intent and purpose, the appeal was against the decision of the Registrar, dated April 14, 2020.

It is my considered resolve that, it was wrong for the learned Registrar to uphold the preliminary issue/application on some grounds not advanced in the notice to raise preliminary issue. The gravamen of the issue raised in the preliminary objection was whether Judge Banda-Bobo's remarks in her observations dated March 26, 2012 and her Ruling of April 4, 2014, to the effect that the Court deemed the matter closed on the ground that the Plaintiff had obtained a judgment by default, forbade or prevented the Defendant from making and filing an application to set aside the said judgment obtained by default of appearance and defence. However, the learned Registrar strayed away and instead held that there was nothing to set aside because the matter was not restored.

As chronicled hereinbefore regarding events herein, and upon perusal of the record, it should be appreciated that, what Judge Banda-Bobo struck out on March 20, 2014, was an application by the Defendant for special leave to review the Court's "decision" of March 26, 2012 to deem the case closed in view of the *default* judgment. Indeed after that application was struck out, it was never restored. However, the whole action was not struck out, what was struck out was a specific matter relating to an application for special leave to review. Therefore, there was nothing to specifically stop the Defendant to file an application to set aside the *default* judgment. It follows, the application to set aside the *default* judgment was not meant to circumvent the decision of the Judge, neither was it an abuse of the Court process because the refusal by the Judge to restore the matter was only in reference to an application for the Judge to review her "decision"dated March 26, 2012.

And in fact, there was nothing to review, because when the matter came up for trial, on March 26, 2012, the Judge merely noted the status of the matter that, there was a *default* judgment, that was entered on October 26, 2011, and as such the matter was closed, meaning there was nothing to litigate on, and let alone to adjudicate on as regards the substantive claims or action.

I wish to restate that, the Judge's observation that the matter was closed given the entry of the *default* judgment, must be understood in the context in which the remarks were given, thus, there was no need for litigation on the substantive reliefs sought since the case was determined by default procedure. Those observations, made on March, 26 2012, and repeated in the Ruling dated April 4, 2014

to the effect that: *The matter remains determined by way of the Judgment in default, dated 26th October, 2011*, cannot be construed to mean that, the learned Registrar was divested of jurisdiction to hear and determine the application to set aside the judgment obtained by default of appearance and defence.

Order XII r 2 and Order XX r 3 of our High Court Rules, provides for setting aside judgments obtained by default of appearance and defence, and the same respectively provides:

> ***Order XII r 2: Where judgment is entered pursuant to the provisions of this Order, it shall be lawful for the Court or a Judge to set aside or vary such judgment upon such terms as may be just.***
>
> ***Order XX r 3: Any judgment by default, whether under this Order or under any of these Rules, may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as the Court or Judge may think fit.***

And under the Rules of the Supreme Court (White Book 1999 Edition) similar provisions are to be found in Order 19 r. 9, RSC which provides:

> ***Setting aside judgment: The Court may, on such terms, as it thinks just, set aside or vary a judgment entered in pursuance of this order.***

Clearly, the three Orders which respectively and specifically provide for setting aside a judgment obtained by default of appearance and defence provides no limitation of time within which such an application ought to be made. I agree with the Defendant's Counsel that reference to Order 35 r. 2 RSC was misconceived. It is evident that Order 35 r. 2 RSC relates to setting aside a judgment obtained in the **absence of a party after trial**. Order 35 r. 2 RSC is inapplicable to setting aside a judgment

obtained by **default of pleading**, in particular in default of appearance and defence to a writ of summons and statement of claim, to which Order XII r 2 and Order XX r 3 of our High Court, including Order 19 r. 9 RSC applies.

The argument by the Plaintiff's Counsel suggesting that the only avenue available to the Defendant was to appeal, and the citation of the case of ***Mayo Transport v United Dominions Corporation Limited*** (supra) was misconceived; in the sense that, the Defendant was in no way seeking to challenge or set aside the Judge's comments that the matter was deemed closed following the entry of judgment by default, neither did the Defendant seek to review the said observations, but to set aside the *default* judgment. In any event such observations no matter how they were expressed, they are not a judgment or an order of the Court amenable for review, neither can it relied on by the Plaintiff to stop nor prevent the Defendant from making an application to set aside the *default* judgment.

In view of the foregoing, the appeal is allowed, the application to set aside *default* judgment was properly filed, and must be heard and determined on merits by the learned Registrar. The preliminary issue is therefore dismissed with costs.

DATE THIS 7TH DAY OF AUGUST 2020.

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THE HON. MR. JUSTICE CHARLES ZULU