

IN THE HIGH COURT FOR ZAMBIA

2012/HPC/0381

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Commercial Jurisdiction)



BETWEEN:

ALAN MULEMWA KANDALA

PLAINTIFF

AND

ZAMBIA NATIONAL COMMERCIAL BANK

1st DEFENDANT

**EDGAR HAMUWELE (sued as Receiver and Manager
of Top Star Breweries Limited
(in Receivership)**

2nd DEFENDANT

**CHRISTOPHER MULENGA (sued as Receiver and
Manager of Top Star Breweries
Limited (In Receivership)**

3rd DEFENDANT

*Before the Honourable Justice B.G. Lungu on the 18th day of April, 2017 in
Chambers.*

*For the Plaintiff : Messrs M J Katolo and M Mwituma, Messrs
Milner & Paul Legal Practitioners & Messrs Mukande
Chambers*

For the Defendant : Mr L. Phiri, Messrs Chonta Musaila Pindani Advocates.

R U L I N G

CASES REFERRED TO;

1. *Waterwells Limited v Jackson (1984) Z.R. 98*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *Order 14A, rule 2 of the Rules of the Supreme Court, 1965, Supreme Court Practice, 1999 Edition*
2. *Order 30, rule 10 of the High Court Rules, High Court Act, Cap 27 of the Laws of Zambia*
3. *Order 35, rules 1 and 2 of the Rules of the Supreme Court, 1965, Supreme Court Practice, 1999 Edition*
4. *Order 12 rules 1 and 2 of the High Court Rules, High Court Act, Cap 27 of the Laws of Zambia*
5. *Order 53, rule 10 of the High Court Rules, High Court Act, Cap 27 of the Laws of Zambia*
6. *Black's Law Dictionary, Bryan A. Garner, 10th Edition, at page 120*

This Ruling addresses a preliminary issue raised orally on the part of the Plaintiff at the hearing of an application on the part of the Defendant for an order to set aside the Judgment in Default of Appearance and Defence entered against the 1st Defendant.

The Default Judgment was entered by the Deputy Registrar on 20th March, 2017.

The question that was raised by the Plaintiff was whether the application to set aside the Default Judgment entered by the Deputy Registrar was properly before a Judge in chambers.

I allowed the Plaintiff to raise the preliminary issue orally on the authority of *Order 14A, rule 2 of the Rules of the Supreme Court, 1965, Supreme Court Practice, 1999 Edition*, which provides as follows:

"An application under rule 1 may be made by summons or motion or (notwithstanding Order 32, rule 1 (»»text)) may be made orally in the course of any interlocutory application to the Court."

Rule 1 of Order 14A provides:

"The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein."

Having examined Order 14A, rules 1 and 2, I took that view that a question relating to the jurisdiction of this Court to hear the application to set aside the Default Judgment was a question suitable for my determination as a preliminary issue.

The gist of the argument presented on behalf of the Plaintiff was that an application to set aside a default judgment entered into by the Deputy Registrar ought to be made before the Deputy Registrar.

It was contended, therefore, that the application to set aside the Default Judgment of 20th March, 2017 was irregularly before this Court as the same ought to have been made to the Deputy Registrar that granted the Default Judgment. It was further argued that a Judge in chambers could only get involved by way of appeal in terms of ***Order 30, rule 10 of the High Court Rules, High Court Act, Cap 27 of the Laws of Zambia.***

Counsel for the Plaintiff supplemented their submission by referring to the provisions of **Order 35, rules 1 and 2 of the Rules of the Supreme Court** and the case of **Waterwells Limited v Jackson (1984) Z.R. 98¹**

As regards Order 35 of the Rules of the Supreme Court, Counsel submitted that the Order made it clear that an application for an order to set aside any order made in the absence of a party should first be made to the Court that made the order sought to be set aside.

With respect to the **Waterwells** case, Counsel's position was that the case showed that the procedure to be followed in seeking to set aside a default judgment was to first make the application to the Deputy Registrar, which if unsuccessful opened the door to an appeal before a Judge in chambers.

Counsel for the 1st Defendant was at odds with the preliminary issue raised on behalf of the Plaintiff. Although Counsel acknowledged that the Deputy Registrar was mandated to sign default judgments on the authority of **Order 12 rule 1 of the High Court Rules**, it was argued that **Order 53 of the High Court Rules**, provided specific procedure for interlocutory applications in the Commercial Division.

In that vein, Counsel for the 1st Defendant contended that **Order 53, rule 10 of the High Court Rules** required all interlocutory applications in the Commercial Division to be made to a Judge in chambers.

In essence, Counsel took the view that an application to set aside the Default Judgment was an interlocutory application which

required to be heard by a Judge in chambers pursuant to Order 53, rule 10 of the High Court Rules.

In rebuttal, Counsel for the Plaintiff argued that the term interlocutory application referred to an application made between commencement and judgment. Counsel observed that in the case at hand, Judgment had already been rendered.

Having heard the submissions of both parties, I examined the law cited by the parties, initially Orders 12, 30 and 53 of the High Court Rules.

Before considering Orders 12 and 30, I took hiatus to consider whether the application to set aside the Default Judgment could be classified as an interlocutory application under Order 53, rule 10 of the High Court Rules.

The term "*interlocutory application*" is defined by the Learned authors of ***Black's Law Dictionary, Bryan A. Garner, 10th Edition, at page 120*** as "***a motion for equitable or legal relief sought before a final decision.***"

It can be discerned from the above definition that an interlocutory application seeks to yield relief of an intermediate nature for the period between the commencement and termination of a cause of action. Therefore, the question that begs to be answered is whether an application to set aside a default judgment obtained pursuant to Order 12, rule 1 of the High Court Rules seeks to yield a relief of an intermediate nature. This brings me to a closer examination of Order 12, rule 1(1).

Order 12 rule 1(1) provides as follows:

"Where the writ of summons is endorsed for a liquidated demand, and the defendant fails, or all the defendants if more than one, 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 at the rate specified, if any, to the date of the judgment and costs, upon an affidavit or certificate, as the case may be, of due service being filed." (court emphasis)

Clearly, a judgment signed by the Deputy Registrar pursuant to Order 12, rule 1 is a final judgment as prescribed therein. As a result, an application to set aside such a final judgment cannot be regarded as one that seeks any relief of an intermediate nature. The relief sought is final in nature as its objective is to quash the default judgment.

Moreover, since the judgment is prescribed to be a final judgment, the application to set it aside is necessarily made after the entry of the said final judgment. At that stage, the application cannot be classified as interlocutory. In view of the foregoing, I am of the settled view that Order 53, rule 10 of the High Court Rules does not apply *in casu*, on the basis that the application to set aside a default judgment under Order 12, rule 1 is not an interlocutory application.

I now move to consider the apparent dichotomy created by Order 12, rule 2 in light of the existence of Order 30, rule 10 of the High Court Rules.

Order 12, rule 2 provides as follows:

"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."

My interpretation of Order 12, rule 2 is that a judgment entered in default of appearance and defence by the Deputy Registrar may be set aside by the Court (defined as the High Court) or a Judge.

This provision for setting aside judgments is, however, clearly restricted to default judgments entered under Order 12 and does not extend to other types of decisions, orders or directions of the Registrar.

On the other hand, Order 30, rule 10 (1) provides as follows:

"Any person affected by any decision, order or direction of the Registrar may appeal therefrom to a Judge in chambers..."

Order 30 rule 10 (1) unequivocally prescribes the right of appeal from the Registrar (*defined to include a Deputy Registrar and a District Registrar*) to a Judge in Chambers with respect to any decision, order or direction of the Registrar. Unlike Order 12, rule 1, this provision is not restricted to default judgments. As such, any decision of the Registrar, including one rendered under Order 12, rule 1, may be the subject of an appeal from the Registrar to a Judge in chambers.

I have also examined the ***Waterwells*** case, which Counsel contended showed the procedure for setting aside a default judgment.

In that case the Supreme Court held, *inter alia*, that Order 30, rule 10 of the High Court Rules conferred a right of appeal from a Registrar to a Judge in chambers. However, contrary to the

insinuation that the **Waterwells** case serves as an authority for the procedure to be adopted in setting aside a default judgment, the Supreme Court neither commented on, prescribed nor affirmed the procedure to be adopted for setting aside a default judgment. It just so happened that in that case, the litigant first applied to the Deputy Registrar to set aside the default judgment.

In view of the above, it hazily appears to me that a Defendant faced with a default judgment obtained pursuant to Order 12, rule 1 has two options. One option is to apply to have the judgment set aside by the Court or a Judge pursuant to Order 12, rule 2 and the second option is to appeal against the decision of the Deputy Registrar to a Judge pursuant to Order 30, rule 10.

In view of the haze, I accepted the invitation to consider Order 35, rule 2 of the Rules of the Supreme Court for purposes of clarity. In doing so, I cautioned myself on the status of the Supreme Court Rules as being a default mechanism.

Order 35, rule 2 of the Rules of the Supreme Court provides as follows:

"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."

The explanatory notes to Order 35, rule 2 of the Rules of the Supreme Court expound that the application to set aside the judgment should be made, if possible, to the Judge who tried the case. I equate this to the Court, Judge or Registrar who issued the Default Judgment under the High Court Rules.

The notes further elucidate that a refusal of such an application by the attending Judge would lie to the Court of Appeal. Similarly, I

equate this to there being a right of appeal from the Registrar to a Judge in Chambers in the event that the Deputy Registrar who granted the default Judgment refuses to set aside the said Default Judgment. In my view, the existence of the jurisdiction of the Deputy Registrar to set aside its own default judgment does not negative the jurisdiction of Judge, on appeal, to set aside the default judgment.

Having considered the Rules of the Supreme Court, the miasma in my mind has been cleared. There is no actual inconsistency between Order 12, rule 2 and Order 30, rule 10 of the High Court Rules. This Court has Jurisdiction to preside over an application to set aside the default judgment obtained pursuant to Order 12 rule. It also has jurisdiction to preside over an appeal which lies from the decision of the Deputy Registrar.

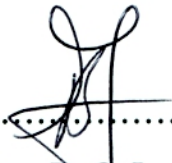
However, on the erudition of the explanatory notes to Order 35, rule 2 of the Rules of the Supreme Court, I am persuaded that it is desirable that where possible, the Defendant should first apply to set aside the default judgment before the Deputy Registrar who issued the default judgment. This provides order and transparency in procedure. Should the application fail, the Judge will have occasion, if meritorious, to set aside the default judgment on appeal.

In casu, there is nothing before me to show that such an application was attempted before the Deputy Registrar or was for some reason not possible. This being the case, I consider that the Defendant's application to set aside the Default Judgment signed by the Deputy Registrar on 20th March, 2017 before this Court is premature.

In view of the foregoing, I dismiss the application on the basis of its prematurity and refer the said application to set aside the Default Judgment to the Deputy Registrar for consideration on the merits.

Costs to the Plaintiff, to be taxed in default of agreement.

Leave to appeal is granted.



Justice B.G.Lungu

HIGH COURT JUDGE