TATA ZAMBIA LIMITED v SHILLING ZINKA (1986) Z.R. 51 (S.C.)

SUPREME COURT
CHOMBA, AG. C.J., GARDNER AND SAKALA, JJ.S.
29TH MAY, 1986
(S.C.Z. JUDGMENT NO. 13 OF 1986)

Flynote

Civil Procedure - Judgment debt paid in full on execution - Setting aside of judgment - Whether possible

Civil Procedure - Summons - Withdrawal of - Whether bar to later issue of similar summons.

Headnote

The defendant appealed against the refusal of a judge in chambers to grant an appeal against a judgment in default of defence passed by the district registrar. An application had been made to set aside judgment before the district registrar but was withdrawn upon the basis that judgment had been perfected. A later application to set aside judgment was refused by the district registrar on grounds that since the earlier application had been withdrawn, a second one was an abuse of the process of court.

On appeal the Commissioner observed that this was no bar to the resuscitation of a claim; however, refilling the same application was an abuse of court process.

Held:

(i) There is no law preventing the setting aside of a default judgment which appears to have been perfected.

(ii) There is no rule of procedure preventing a party from with drawing and then taking out a summons in exactly the same terms. It is therefore neither harassment nor an abuse of court process.

Case referred to:

(1) Waterwells Ltd v Jackson (1984) Z.R. 98

Legislation Referred to:

High Court Rules, Cap. 50. 0.20
Rules of the Supreme Court, 0.320 r. 1-6 note 10, para. 3346.

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For the appellant: C.K. Banda, Lisulo and Co.
For the respondent: I.C.T. Chali, Mwanawasa and Co.

Judgement

GARDNER, J.S., delivered the judgment for the court.

This is an appeal from a judgment of a High Court commissioner sitting in his appellate capacity in chambers on an appeal from an order of the district registrar refusing an application to set aside a judgment in default of defence. In this judgement we will refer to the appellant and the respondent as the defendant and the plaintiff respectively.

The history of this case is that a statement of claim was served on the defendant on the 24th of August, 1983 and, in accordance with the order for directions, the defence should have been delivered by the 14th of September, 1983. On the 21st September, 1983, judgment in default of de fence was entered against the defendant on the basis of an affidavit by the plaintiffs advocates to the effect that the defence had not been received. No application for leave to enter such judgment was made to the court or served upon the defendant's advocates in accordance with Order 20 of the Zambia High Court Rules. The defence was eventually sent to the plaintiffs advocates by post and received by them on the 3rd October, 1983. Thereafter the plaintiffs advocates proceeded by way of execution against the defendant's goods and on the 8th of December, 1983, the defendant's advocates filed an application to set aside the judgment in default of defence. On the 5th of January, 1984, the advocates for both parties appeared before the district registrar and, before the hearing of the summons to set aside was commenced, the district registrar pointed out to both parties that a debit advice note dated the 12th December, 1983, had been received from the sheriff indicating that the money had been paid in full by the defendant.

Counsel for both parties today have said that they received the impression from the district registrar that he was indicating that there was a law to the effect that no application to set aside a default judgment can be entertained if the judgment had been perfected by the levying of execution. In fact the district registrar's note reads:

> "Judgment has thus been perfected."

Thereupon the advocate for the defendant said that he wished to withdraw the application and the district registrar noted on the record "application withdrawn".

In this court Mr Banda on behalf of the defendant has referred to paragraph 8 of the defence which was filed, albeit out of time. This-paragraph clearly indicates that there is a triable issue and Mr Chali on behalf of the plaintiff very properly has indicated that he does not seek to deny that there is a triable issue in this case.

Mr Banda also pointed out that there was an application made on the 3rd of May, 1984, to the district registrar to set aside the judgment in default. The district registrar in his ruling said that in view of the fact that

the original application, which was the same, had been withdrawn the second application

was an abuse of process of court, because the situation had not changed and the judgment was still perfected. No authority was cited for the ruling that the second application was an abuse of the process of the court.

On appeal to the learned commissioner in chambers the commissioner in his ruling gave as his opinion that a withdrawal of an interlocutory application was the same as the withdrawal of a claim or part thereof and no bar to its resuscitation. However he went on to say that in his view the refilling of the same application was an abuse of the process of the court and he dismissed the appeal against the district registrar's ruling. Again no authority was cited for saying that the second application was an abuse of the process of the court and it is from that judgment of the learned commissioner that this appeal is now brought.

0.32 r. 1-6 note 10 in the White Book contains the following words:

"There is no power to re-hear an application after any order made oil the hearing has been perfected . . ."

It appears to us that both the district registrar and the learned appellate commissioner were of the opinion that the second application to set aside a default judgment was to be treated as a rehearing within the terms of that note. In fact the first summons on the 5th of January was not heard at all; it was withdrawn after a very strong indication by the district registrar that it could not be made. The reference to a judgment having been perfected therefore does not apply. As we said in the case of Waterwells Limited v Jackson (1):

"The parallel which Mr Gani sought to draw from Order 32, Rule 5 (3) of the Rules of the Supreme Court of England (which it was said distinguishes a perfected judgment from an interlocutory one) does not even arise when our own Rules, in Order 20 as a whole, make it abundantly clear that any default judgment whatsoever may be set aside . . ."

So far as the reference to an abuse of process is concerned paragraph 3346 of the White Book Vol. 2(1976 Edition) contains a note which reads as follows:

"The Court has inherent jurisdiction to stay proceedings which are an abuse of its process, such as frivolous, vexatious or harassing proceedings or those which are manifestly groundless or in which there is clearly no cause of action in law or in equity . . ."

In supporting the findings of the district registrar and the learned appellate commissioner, Mr Chali has conceded that the filing of the second application to set aside the default judgment was not frivolous or vexatious or manifestly groundless; but he does maintain that to take out one summons, withdraw it and then to take out another in the same

terms is a harassing procedure, and, as the learned appellate commissioner pointed out, there has to be a finality to proceedings somewhere.

We might agree with Mr Chali were it not for the fact that he has also very properly conceded that at the hearing of the first summons the district registrar himself pointed out to the parties that he was of the opinion that there was a law preventing the setting aside of a default judgment which appeared to have been perfected. In fact no such law exists. In the circumstances we cannot agree that there was any harassment by taking out the second summons. Whilst we consider that advocates should be capable of standing on their own feet and knowing the law, we take note that where the presiding officer of a court indicates his opinion of the law it must weigh heavily with the parties who are appearing before him. We therefore find that there was no harassment in the taking out of the second summons and there was therefore no abuse of the process of the court. There is no rule of procedure which provides that a party may not withdraw a summons and later take out a fresh summons in exactly the same terms. In the event of such an occurrence the party duplicating the summons can always be penalised in costs. In some circumstances such as this one, it might well be held that he has caused unreasonable delay, and such delay is one reason under 0.2 r. 2 of the White Book for refusing to set aside a judgment on the grounds of irregularity. In this particular instance the first summons was withdrawn on 5th January, 1984, and the second application was filled on the 23rd January, 1984. Having regard to all those circumstances and the erroneous indication by the district registrar at the hearing of the first summons we do not consider that there was any unreasonable delay.

We are satisfied that the delay of nineteen days in delivering the defence was not so great that any reasonable court could have refused to set aside the default judgment on that ground. Applying the principle, which has on many occasions been accepted by this court, that actions, should come to trial and should not be prevented from so doing by irregularities which can be cured without injustice (see Waterwells Ltd v Jackson (1), the district registrar would have set aside one default judgment and penalised the defendant in costs.

For these reasons the appeal is allowed, the judgment in default of defence is set aside. The defence which has been received by the plaintiff's advocates will be treated as having been served within time and the case will proceed in accordance with the order for directions.

Costs to the plaintiff up to and including the hearing of the first summons to set aside the default judgment. Costs to the defendant there after up to and including this appeal.

Appeal allowed.