IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 72/2000**
HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

CHARLES BANDA	1ST APPELLANT
FOSTER BANDA	2ND APPELLANT
JOHN MWALE	3RD APPELLANT
CONSTANTINE ZULU & ALL OTHERS	4TH APPELLANT

AND

FAITH MTEWA RESPONDENT

Coram: Ngulube CJ, Chirwa and Chibesakunda, JJS
on 7th June 2000 and 7th September 2000.

For the Appellants: Ms Makungu of Messrs. Makungu & Company
For the Respondent: Mr Kasonde of Messrs V K Mwewa & Company

JUDGMENT

Chibesakunda JS, delivered the judgment of Court

Cases referred to:

1. Chikuta vs Chipata Rural Council 1974 (ZR) P241
2. Water Wells Limited Vs Wilson Samuel Jackson 1984 (ZR) 98
3. Fanny Muliango and Samson Muliango Vs Namdou Magas and Murus Transport and Farms Limited 1988/89 (ZR) 209
4. Stanley Mwambazi Vs Morester Farms Limited1977 (ZR) 1

Acts Referred to:

(1) Intestate Succession Act, Cap 59 of the Laws of Zambia

This is an appeal against judgment of the lower court in favour of the respondent against four appellants. The respondent had applied in the lower court for:-

a) An order of interim injunction;

b) A declaration and an order that the appointment of the 1st Appellant as Administrator of the Estate of Arthur Chales Mtewa is Null and void;

c) A declaration and an order that the said appointment be revoked forthwith;

d) A Declaration and an order that she be appointed administratrix of the said Estate;

e) A declaration and an order that the estate be distributed in accordance with the Intestate succession Act.

f) Any other relief the court may deem fit;

g) Costs.

The respondent had filed a writ of summons on 18th June 1999 with a statement of claim attached to it as provided by the law. Neither the memorandum of appearance nor the defence was filed within the 30 days as stipulated in the law. On the 21st of July 1999 the learned Deputy Registrar entered judgment in default of appearance on behalf of the respondent. The appellant appealed to the High Court to set aside this judgment in default. The application was supported by an affidavit deposed by the learned counsel for the respondent. There was an affidavit filed in opposition in which a preliminary point was raised in accordance with **Chikuta Vs Chipata Rural Council** (1) submitting that the affidavit contained hearsay and as such was ineffective. The learned High Court Judge accepted that argument and confirmed the lower court's judgment in favour of the respondent.

The brief facts of this case are that the respondent is a daughter of the deceased Arthur Charles Mtewa who died intestate on 4th April 1999. He left the respondent her, mother Sara Mtewa and immediate children. The contention before the lower court was that after the death of Charles Arthur Mtewa the local court in Chipata appointed the 1st appellant as administrator. The respondent as one of the daughters has been contesting this appointment of the administrator as according to her she, her late mother and her sisters were not consulted.

Now before us the learned counsel for the appellant has argued that although the affidavit in support of the appeal to set aside judgment in default was deposed by the learned counsel for the appellant and was thus improper, the learned Judge at the lower court should have applied the ratio decided in **Water Wells Limited Vs Wilson Samuel Jackson** (2) which was that an important consideration which must be taken into account must always be that all issues must be resolved by having a full trial and that procedural irregularities must not be used to hinder trial. The learned Judge should have upset the default judgment. She made references to the case of **Fanny Muliango and Samson Muliango Vs Namdou Magas and Murus Transport and Farms Limited**(3) which also underscored this principle by holding that: "where there is a defence to an action it is preferable that a case should go for trial rather than be prevented from so doing by procedural irregularities." She emphasized that point by citing one of the bench mark case:-

> **"Stanley Mwambazi vs Morester Farms Limited** (4) where this court held that: "It is the practice in dealing with bonafide

interlocutory applications for courts to allow triable issues to come to trial despite the default of the parties".

The learned counsel for the respondent Mr Kasonde in response supported the lower court's refusal to set aside the default judgment because according to him there were three grounds on which the court refused to do so. These are:-

a) That the affidavit which was deposed by the learned counsel for the appellants contained hearsay evidence before the court and has remained as such;
b) That the appellants did not present to court a reasonable explanation for their non filing of the memorandum of appearance and the defence;
c) That looking at the proposed memorandum of appearance and defence that there was no merit presented to court.

We have looked at the record and the arguments before us. It is a well established principle of law by a plethora of authorities that as much as possible procedural irregularities must not prevent triable issues to be fully adjudicated upon in court unless by so doing that would occasion prejudice to the other party. Also as cited supra it is a practice in dealing with bona fide interlocutory applications for courts to allow triable issues to come to trial even if there are defaults of parties. The only consideration is that the defaulting parties must bear costs. So in this case we accept that in accordance with this legal principle the lower court misdirected itself in not allowing triable issues to come to court.

According to the record, a memorandum of appearances and defence were filed later than the provisions stipulated. But they were filed when the application to enter judgment in default was pending before the court.

Our view, therefore, is that the lower court should have assessed the affidavit although defective, and the defence to see the points raised in controversy. There is a contention by the appellants, for example, that Arthur Charles Mtewa, the deceased, had a polygamous marriage to three wives and the **Intestate Succession Act** (1) recognizes such marriages in distribution of assets after death. The other issue raised was the contention by the respondent that the appellants were improperly appointed as administrators these were issues which could only be resolved by full trial. The learned Judge failed to take that into account. Therefore the learned Judge misdirected himself in confirming the judgment in default. We therefore quash his judgment. We substitute summons for direction that the matter should now go back to the High Court for trial as the appellants have already filed in defence. Costs to be borne by the appellants.

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M M S W Ngulube
CHIEF JUSTICE

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D K Chirwa
SUPREME COURT JUDGE

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L P Chibesakunda
SUPREME COURT JUDGE