IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 237/2013**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

DR. KENNETH KAUNDA **1ST APPELLANT**

UNITED NATIONAL INDEPENDENCE PARTY **2ND APPELLANT**

AND

CENTRAL CHAMBERS AND 5 OTHERS **RESPONDENTS**

CORAM: **Mwanamwamba, DCJ (RTD), Musonda, DCJ, Malila, Kajimanga and Mutuna JJS on 19th May 2016 and 14th July 2020**

For the Appellants: Mr. L. Mwanabo of Messrs L. M. Chambers

For the Respondents: Mr. E. B. Mwansa SC, of Messrs EBM Chambers

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J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

1. **Waterwells v Jackson (1984) Z.R. 98**
2. **Patel and another v Monile Holdings Ltd SCZ Judgment (1993 – 1994) Z.R. 20**
3. **Attorney General v Marcus Kampamba Achiume (1983) Z.R. 1**
4. **Eagle Charalambous Transport Limited v Gideon Phiri (1993 - 1994) Z.R. 180**
5. **National Tobacco Company Limited and Tobacco Board of Zambia v Walter Harthoon - Appeal No.43/1998**

6. **CUSA Zambia Limited v Zambia Seed Company Limited - Appeal No.47/2000**
7. **Stanley Mwambazi v Morester Farms Ltd (1977) Z.R. (Reprint) 144**

Legislation and other works referred to:

1. **High Court Act Chapter 27 of the Laws of Zambia; Order 12 rule 2, Order 35 rule 5 and Order 50 rule 2**
2. **Legal Practitioners Act Chapter 30 of the Laws of Zambia; sections 76 and 83 (2)**
3. **Rules of the Supreme Court, 1999 Edition; Order 27 rule 3**
4. **Halsbury's Laws of England, 4th Edition, paragraph 559**

[1] Preliminary

[1.1] We regret the delay in delivering this judgement. When we heard this appeal, Mwanamwambwa DCJ (as he then was) was a member of this panel. He has since retired. This judgment is therefore by the majority.

[2] Introduction

[2.1] This appeal questions a decision by the learned High Court Judge, Sichinga J, (as he then was) refusing to set aside a default judgment on the ground that there was inordinate delay in presenting the application. The appeal also addresses the considerations that should be

made by a court in deciding whether or not a default judgment should be set aside. Lastly, it deals with a problem that continues to plague our courts of conduct unbecoming of counsel.

[3] Background

[3.1] It is a matter of public notoriety that the 1st appellant was the first Republican President of Zambia. He was also a freedom fighter who spearheaded the liberation struggle of the country. The significance of the foregoing will become apparent in the course of this judgment.

[3.2] The 2nd appellant is a political party, which formed government at the time the 1st appellant was President of the Republic of Zambia. The 1st appellant was also the president and member of the 2nd appellant. He continued to be such President and member for some time after he vacated the office of Republican President in 1991. The respondents are and were at all relevant times firms of legal practitioners.

[3.3] Some time in the year 1998, after the 1st appellant had vacated office, he was embroiled in various legal disputes. One such dispute involved an incident where he was arrested on charges of misprision of treason. This resulted in his need to engage legal counsel to act on his behalf.

[3.4] For this reason, on 28th February and 4th March 1998, the 2nd appellant's Central Committee held meetings at which a query was raised as to what measures had been put in place for the purpose of ensuring that there was an early hearing of the 1st appellant's case.

[3.5] The meetings also sought to find out if funding had been sourced to cater for his legal fees. At this point, Mrs. Frances Mwangala Zaloumis (Mrs. Zaloumis), a legal practitioner practicing under the name and style of Dove Chambers, one of the respondents in this appeal and plaintiff in the court below, indicated that a group of lawyers had offered to represent the 1st appellant on a *pro*

bono basis. She was speaking in her capacity as a member of the Central Committee and Secretary for Legal, Political, Constitution and Parliamentary Affairs of the 2nd appellant. She named the lawyers, most of whom included the proprietors of the six respondents including herself.

[3.6] Some of these proprietors of the respondents were/are former freedom fighters who had fought and worked side by side with the 1st appellant, under the umbrella of the 2nd appellant in liberating the Republic of Zambia from the yoke of colonial rule. They were, therefore, trusted colleagues of the 1st appellant. The others were, as a matter of public notoriety, along with being counsel, members or sympathizers of the 1st and 2nd appellants.

[3.7] The meetings referred to in paragraph 3.4 above also resolved to direct Mrs. Zaloumis to co-ordinate the assembly of all the lawyers offering the free legal services.

[3.8] The six respondents and others undertook legal services for and on behalf of the two appellants in various cases and later sued them for payment for the work done.

[4] The action in the High Court

[4.1] On 20th November 1998, the six respondents and two other law firms took out an action against the two appellants. The action was by way of writ of summons and statement of claim. The claim as it is endorsed on the writ is for the following relief:

> **"The sum of USD1,208,026.25 for professional services rendered in various civil and criminal cases in courts of law and outside, plus interest and costs."**

The particulars of the claim were listed as follows:

"1) Misprision of treason case	***- USD171,726.25***
2) Citizenship case	***- USD150,000.00***
3) Black Mamba case	***- USD 90,475.00***
4) Kabwe assassination attempt	***- USD 45,825.00***
5) Presidential Petition	***- USD750,000.00***
TOTAL	***- USD1,208,206.00"***

[4.2] Interestingly, although the claim was described as being in respect of professional services rendered, the endorsement on the writ makes no mention of the bills or fee notes which the professional services related to, nor does the endorsement state when the bills or fee notes were rendered. The statement of claim is also devoid of such information.

[4.3] On 8th December 1998, the respondents obtained a default judgment against the appellants. By an order of the Deputy Registrar dated 27th April 1999, the default judgment was set aside and the judgment debt was varied to US$645,526.25 at the instance of the then Secretary General of the 2nd appellant, one Sebastian Saizi Zulu, SC.

[4.4] The learned Deputy Registrar also directed that the appellants be granted unconditional leave to defend in respect of the claim for the sum of $562,500.00. Pursuant to this order, the appellants made a part payment towards the judgment debt in the sum of K80,000,000.00

(now K80,000.00). They, however, failed to settle the balance, prompting the respondents to obtain a charging order for securities against the 2nd appellant's companies.

[4.5] The relationship between the parties was still cordial at this point so they engaged in various attempts at an at an ex curia settlement. In doing so, Mrs. Zaloumis, despite being a party to the proceedings, represented the appellants in these negotiations and in court on a number of occasions.

[4.6] The charging order was later set aside, following an application by one of the appellants, alleging that the writ of summons was issued by the respondents with the understanding that it would assist the appellants in raising money from their friends outside the country. Further, at the time the billing was done, it was merely an estimation of the work done and the fees as some of the cases had not yet been concluded.

[4.7] On 19th November 2004, the respondents issued

a writ of *fifa* against the appellants and upon execution of the same, the sum of K820,000.00 (now K820.00) was realized. Subsequently, the respondents obtained a garnishee order nisi by which monies held in any bank accounts belonging to the 2nd appellant and monies due or accruing to the 2nd appellant from its companies were attached to the proceedings to the extent of the judgment debt. On 15th June 2007, the garnishee proceedings were discontinued after it was discovered that the garnishees neither owed nor held any monies for the 2nd appellant.

[4.8] Later in 2012, the appellants filed a summons to set aside the varied default judgment before the acting Registrar. The affidavit evidence in support of the application disclosed that the 2nd appellant's then Secretary General, Mr. Sebastian Saizi Zulu SC, acted without the knowledge, consent and instructions of the appellants when he had the default judgment varied and that he used his law firm to represent the 2nd appellant

without its approval or authority.

[4.9] It was also contended that process was never served on the 1st appellant and that he, and the 2nd appellant, had an arguable defence on the merits in that, the respondents were not engaged with a view of payment of legal fees but that they voluntarily offered their services on a *pro bono* basis. Further, it was contended that the judgment failed to segregate and apportion the judgment sum to the two appellants.

[4.10] In response, the respondents contended that the part payments made by the appellants towards the judgment debt in the sum of K80,000,000.00 and K820,000.00 respectively, confirm that the appellants were truly indebted to the respondents. That despite having made these part payments, the appellants never took steps to set aside the default judgment and instead waited for 14 years from the date of the entry of the judgment to make such an application.

[4.11] In a ruling dated 23rd July 2013, the learned acting Registrar of the High Court found that there had been unreasonable and inordinate delay on the part of the 1st appellant in making the application to set aside the default judgment and she attributed the same to the 1st appellant not having a defence on the merit. She opined that no triable issues had been raised in the defence exhibited to the application as the 1st appellant could not claim that the services rendered to him by the respondents were *pro bono* when he in fact made a payment of K80,000,000.00 towards the legal fees.

[4.12] Further, the 1st appellant could not argue that he never instructed the respondents whilst admitting that services were rendered to him by them. She concluded that the appellants had no arguable case and that the application lacked merit. The application was accordingly dismissed with costs. The appellants then appealed against the ruling to a judge of the High Court.

[5] Grounds of appeal to the Judge at Chambers and decision

[5.1] The appellants advanced three grounds of appeal as follows:

[5.1.1] That the Honourable Acting Registrar misdirected herself when she dismissed the Defendants' application to set aside default Judgment by holding that the same had no merit;

[5.1.2] That the Honourable Acting Registrar erred in law and in fact when she held that the Defendants had not raised triable issues and that they had no defence on the merit;

[5.1.3] That the learned Acting Registrar misdirected herself when she made a finding of fact on the Affidavit evidence that the services rendered by the Plaintiffs herein were not [on a] *pro bono* basis [as] this was an issue to be determined at trial.

[5.2] The submissions by counsel for the appellants were that triable issues had been raised which justified the matter going to trial. It was argued that these issues revealed that: the respondents had volunteered the legal services they provided and were not engaged by the appellants: and, the services were to be provided on a *pro bono* basis.

[5.3] In addition, the contention that the services were

provided on a *pro bono* basis is crucial for determination because the respondents had not exhibited any bills. Further, the circumstances leading up to the payment of the K80,000,000.00 were never explained. As such, the matter needed to be determined at trial.

[5.4] Counsel went on to argue that some of the issues which the case raised can only best be determined through cross-examination of witnesses at trial. That it is not disputed that at the commencement of the action there was no acrimony between the parties and as such, the appellants can be excused for not taking remedial steps earlier by way of setting aside the judgment. In advancing the foregoing argument reference was made to the duty of counsel as contained in the Legal Practitioners Act Chapter 30 of the Laws of Zambia, Orders 20, rule 15 and 35, rule 3 of the High Court Act Chapter 27 of the Laws of Zambia and also the cases of *Water Wells vs Jackson*[1] and *Patel and anothrer vs Monile*

Holdings Co. Ltd[2].

[5.5] The submissions opposing the appeal revealed that the respondents were relying on the affidavit of one Nelly Butete Kashumba Mutti, the proprietor of Lukona Chambers, one of the respondents, which was filed in opposition to summons to set aside default judgment before the acting Deputy Registrar.

[5.6] The evidence traced the history of this matter and explained how the default judgment in the sum of USD1,208,026.25 had been entered against the appellants. It also explained how the said judgment sum was varied by an order of the Deputy Registrar to the sum of USD645,526.25 and that the appellants had agreed to settle the said judgment sum by installments. In furtherance of the said undertaking, the appellants made a part payment in the sum of K80,000,000.00. Subsequently, there was default by the appellants, prompting the respondents to issue a writ of *fifa*, which resulted in execution

and collection of the sum of K820,000.00.

[5.7] The evidence also explained the other options pursued by the respondents to realize the judgment sum and the omission by the appellants in making the application to set aside the default judgment, which default, it was contended, was for a period of thirteen years. It concluded by stating that there was no defence on the merits because the fact that the appellants had made payment towards the adjudged sum confirmed that the legal services rendered were not on a *pro bono* basis as alleged by the appellants.

[5.8] The thrust of the arguments by the respondents was that the appeal lacked merit for the following reasons: the fact that the appellants paid the sum of K80 million towards liquidation of the adjudged sum indicates that they accepted the judgment in default; by an affidavit dated 25th July 2001 the 1st appellant undertook to settle the sums of money under the claims arising from instructions

given to the respondents for the misprision of treason, citizenship and Kabwe assassination attempt, cases as reflected by the varied default judgment; there was no agreement to confirm the contention by the appellants that the legal services provided were on a *pro bono* basis; there was inordinate delay in presenting the application to set aside the default judgment; and, the defence exhibited had no merits to warrant the setting aside. With regard to the last reason, the Respondent relied on the case of *Waterwells Limited vs Wilson Samuel Jackson*[1].

[6] Decision by the learned High Court Judge

[6.1] After considering the appeal and evidence of the parties, the learned trial judge found that on the totality of the arguments before him, it was clear from the record that the appellants had instructed the respondents to represent them in various matters in court. Thus, the question whether the respondents represented the appellant did not arise.

[6.2] According to the learned trial judge, the issue that arose for determination was whether the respondents were engaged by the appellants to represent them on a *pro bono* basis. He held that the proposition that the respondents were engaged on a *pro bono* basis flies in the teeth of the averments of the 1st appellant in his affidavit deposed to on 25th July 2001 in which he stated in paragraph 4 that he personally instructed the respondents to represent him in his personal capacity. In the opinion of the trial judge, the defence could have raised triable issues if such an unequivocal admission was not stated at all. He found that there was an admission (which was now being denied by the 1st appellant) that he instructed the respondents.

[6.3] The trial judge also noted that it had been 15 years since the judgment in default was entered. He considered the prejudice that may have been occasioned to the respondent which he said was quite real. He, therefore, declined to set aside the

default judgment as the appeal lacked merit.

[7] Grounds of appeal to this court and arguments

[7.1] The appellants now appeal against this decision advancing the following grounds:

[7.1.1] The learned judge erred in law and in fact when he refused to set aside the default judgment and held that the application lacked merit without adjudicating on the evidence adduced before him that the basis of filing the action in issue was meant to help the appellants raise money from well-wishers and that the amounts indicated in the action were based on estimates: ALTERNATIVELY, the learned judge erred in law in not ordering taxation of the costs claimed by the respondents in view of the evidence before him that the amounts claimed were estimates only and that some cases never even went to court.

[7.1.2] The learned judge in the lower court erred in law and fact in not appreciating the fact that the alleged admission by the 1st appellant to have instructed the respondents was contextualized and had to be read with other affidavits explaining the background and issues surrounding the matter in their entirety. Moreover, the said admission was not an admission as to the amounts claimed.

[7.1.3] The learned judge in the lower court erred in law and fact in refusing to set aside [the]

ruling without adjudicating on whether the action by the respondents was in compliance with the Legal Practitioners Act Cap 30 of the Laws of Zambia and the Rules thereof as well as ORDER 50, RULE 2 OF THE HIGH COURT RULES CAP 27 OF THE LAWS OF ZAMBIA which stated as follows:

"No practitioner shall commence any suit for the recovery of any fees for any business done by him until the expiration of one month after he shall have delivered to the party to be charged therewith...."

[7.1.4] The evaluation of the evidence by the court below was not balanced because only evidence against the appellants was analysed and relied on while evidence in favour of the appellants was not analysed in the ruling such as the fact that the filing of the action herein was to be used as a fundraising venture, that the amounts in issue were estimates only and the fact that one of the lawyers whose firm is one of the respondents herein was also part of the appellants' central committee.

[7.1.5] The court below erred in law in refusing to set aside the default judgment by finding that there was inordinate delay.

[7.2] The parties filed heads of argument in support of and against the appeal which they briefly augmented at the hearing. The learned counsel for the appellants, Mr. Mwanabo, argued grounds

one, two and three together. He submitted that it was practice of the courts to set aside a default judgment if a defence on the merits exists in the application. He referred us to order 12, rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia which provides that:

> **"Where judgment is entered pursuant to the provisions of this order, it shall be lawful for the court to set aside or vary such judgment upon such terms as may be just."**

[7.3] We were also referred to order 35, rule 5 of the High Court Rules which provides as follows:

> **"Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the court, upon such terms as may seem fit."**

Counsel also relied on the case of *Waterwells v Jackson*[1] and paragraph 559 of the Halsbury's Laws of England, 4th Edition. He contended that the appellants had ably demonstrated that there was an understanding that the respondents offered to represent the 1st appellant on *pro bono* basis and that the amounts advanced to the respondents were meant to take care of

administrative and transport costs. We were referred to paragraphs 6 - 11 of the affidavit of Mrs. Zaloumis in the record of appeal which, counsel submitted, clearly shows that the present action was commenced as a fundraising venture and the amounts claimed were not based on the services rendered.

[7.4] According to the learned counsel, the affidavit was deposed to by counsel for one of the respondents' law firm of Dove Chambers and it was clear from its contents that there are serious factual disputes as regards the cause of action in the matter. He also referred us to exhibits "KDK2" to "KDK5" of the 1st appellant's affidavit in the record of appeal and contended that the same gave the appellants' explanation of how the respondents were engaged and that it was for voluntary services and on *pro bono* basis.

[7.5] In addition, he argued that the respondents on the other hand, rely heavily on factual issues that

happened after commencement of the action. Therefore, it was his submission that in the event that this court is inclined not to set aside the whole default judgment, the amount contained in the default judgment must be set aside, and the matter of costs be subjected to taxation.

[7.6] Counsel went on to submit that the argument that the costs claimed herein are not based on the actual services rendered, and also that the action was for fundraising purposes, is further fortified by the fact that the respondents did not issue any bills against the appellants before commencement of the action. He invited us to consider the provisions of order 50, rule 2 of the High Court Rules which provides as follows:

> **"No practitioner shall commence any suit for the recovery of any fees for any business done by him until the expiration of one month after he shall have delivered to the party to be charged therewith or sent by registered letter to or left for him at his office, place of business, dwelling-house or last known place of abode a bill of such fees, such bill either being signed by such practitioner (or, in the case of a partnership, by**

> **any of the partners, either in his own names or in the names of the partnership) or being enclosed in or accompanied by a letter signed in like manner referring to such bill."**

Counsel therefore submitted that the action for recovery of legal costs must be preceded by the issuance of a bill for the services rendered which must be served on the party charged and that an action for the recovery of the same can only be commenced after 30 days of service of the bill.

[7.7] He contended that throughout this action there is no indication of the respondents having complied with order 50, rule 2 of the High Court Rules. Our attention was also drawn to section 83 (2) of the Legal Practitioners Act, Chapter 30 of the Laws of Zambia which provides that:

> **"Subject to the provisions of this Act, no action shall be brought to recover any costs due to a practitioner until one month after a bill thereof has been delivered in accordance with the requirements of any of the rules of court."**

He argued that the court below ought to have considered these provisions and ascertain

whether this action was properly premised at law.

[7.8] It was his contention that the whole action was a nullity at law. As such, counsel argued, it was highly irregular for the court below to refuse to set aside the default judgment when the appellants advanced plausible grounds as to why the default judgment should be set aside.

[7.9] In arguing ground four, counsel submitted that the evaluation of the evidence by the court below was not balanced because it only analysed and relied on evidence against the appellants while evidence in their favour was not analysed, such as: the fact that the commencement of this action was to be used as a fundraising venture; that the amounts in issue were estimates only; and, the fact that one of the lawyers whose firm is one of the respondents was also part of the 2nd appellant's Central Committee.

[7.10] Counsel contended that the court is required to give a balanced evaluation of evidence adduced

the same principle still applies when analysing affidavit evidence. He prayed that this ground too be upheld.

[7.12] In arguing ground five, counsel submitted that as far as the law stands, inordinate delay in applying to set aside a default judgment is not a basis for refusing the application. He cited the case of *National Tobacco Company Limited and Tobacco Board of Zambia v Walter Harthoon*[5] in support of his argument. Counsel, therefore, submitted that the court should not have considered inordinate delay in applying to set aside the default judgment as part of its reason for refusing the application as this has to date never been a basis for refusal of such an application, provided that a defence on the merits is established. He, accordingly, urged us to uphold the appeal and set aside the default judgment.

[7.13] In the respondents' heads of argument, Mr. Mwansa SC, submitted in response to ground one, that the diction of this ground of appeal

implied that the appellants knew and accepted that the legal services provided by the respondents to the appellants were to be paid for, hence the agreement to issue the writ of summons to recover such fees. Therefore, he contended, it was wrong and unfair for the appellants to blame the judge in the court below that he failed to adjudicate on the evidence before him to the effect that the issuing of the writ of summons was meant to raise money from well-wishers.

[7.14] It was contended that the issuing of the writ of summons was not for pleasure but for the respondents to recover their legal fees and this is supported by the fact that the appellants made part payments towards the said fees. To support this argument, State Counsel referred us to the affidavit in opposition to summons for charging order on securities sworn by one Mulondwe Kajilo Muzungu in the record of appeal. He contended that the said affidavit was filed in September

2000 after the order varying the sum due to the respondents was sealed by the Deputy Registrar on 27th April 1999, for the appellants to pay the respondents the sum of US$645,526.25.

[7.15] State Counsel also argued that paragraph 6 of the affidavit talked about the principal sum of US$1,208,026.25, which amount is reflected in the writ of summons issued by the respondents. He therefore submitted that the issuing of the writ of summons by the respondents was not meant to help the appellants raise money from well-wishers and that the amounts indicated in the action were not based on the estimates but the Deputy Registrar's award to the respondents in the sum of US$645,516.25 and the claim contained in the writ of summons.

[7.16] In further support of the argument, in the preceding paragraph, State Counsel referred us to the 1st appellant's affidavit in support of summons to set aside an order making charge on securities absolute filed in July 2001 appearing

in the record of appeal. He also referred us to the affidavit in support of summons to stay execution of garnishee order nisi dated June 2007 in the record of appeal sworn by Dr. Chosani Njobvu on behalf of the 2nd appellant in which he admitted to the appellants having made some part payments towards the varied order in the sum of US$645,526.25.

[7.17] State Counsel relied on the case of *CUSA Zambia Limited v Zambia Seed Company Limited*[6], where it was held as follows:

> **"The evidence on record shows quite clearly that the appellant did not dispute its indebtedness to the respondent and even attempted to settle by monthly instalments without success. The only dispute which arose much later after the judgment had been entered was on the rate of interest and as pointed out by the learned judge below, the rate of interest was mutually agreed by the parties. The judgment under Order XIII was entered on 8th August 1994 and the application to set it aside was filed on 31st July 1996. The appellant slept on its rights and there must be an end to litigation, we find the appeal to be devoid of merit and we dismiss it with costs."**

He submitted that in the present case, the appellants made some part payments as they were desirous to settle the indebtedness with the respondents, and they wanted to settle the debt by entering into a programme of repayment with the respondents.

[7.18] State Counsel argued that since the amount ordered by the court to be paid to the respondents is known (being US$645,526.25) and the appellants made some part payments and are desirous to settle the said indebtedness, the learned judge did not misdirect himself in law by not ordering taxation of the costs/fees claimed by the respondents.

[7.19] In response to ground two, State Counsel submitted that in April 1999, the appellants applied to set aside the default judgment and the respondents' claim of US$1,208,026.25 was varied to US$645,526.25 at the instance of the appellants by the Deputy Registrar. That the said varied judgment spelt out the sum of

US$645,526.25 as the admitted sum by the appellants.

[7.20] Further, in the 1st appellant's affidavit in support of summons to set aside an order making a charge on securities absolute filed in July 2001, two years after the varied order, he (the 1st appellant) confirmed that he would settle the total claim arising from the misprision of treason case, citizenship case and the assassination attempt case, which claims are contained in the varied order of April 1999. State Counsel argued that the 1st appellant was not forced by the respondents to admit that he instructed the respondents and to agree to settle the sum in the varied order, being the respondents' legal fees. The learned judge was, therefore, on firm ground when he held that the 1st appellant admitted the claims and should settle the same.

[7.21] In response to ground three, State Counsel submitted that the learned trial judge cannot be faulted for refusing to set aside the default

judgment because the first default judgment was varied by the parties and the appellants made some part payments towards the varied judgment and expressed the desire to settle their indebtedness with the respondents. He argued that there are no merits which this court can consider to set aside the varied judgment or consider that the services were *pro bono* as the affidavits on record and part payments made show that the services were not *pro bono.* Further, the principal sum of the legal fees as varied by the parties was known to the appellants and as such it could not be *pro bono.*

[7.22] State Counsel went on to submit that section 76 of the Legal Practitioners Act allows an advocate and his clients to agree on legal fees. In the present case, he argued, the letter of demand for agreed fees appearing on page 31 of the record appeal was written by Central Chambers in February 1998 to the appellant and the writ of summons was issued in November 1998. As

such, order 50, rule 2 of the High Court Rules was complied with as more than 8 months expired or passed before issuing the writ against the appellants and yet, the said order only requires one month to expire or pass before issuing the writ.

[7.23] Further, even assuming that there was no default or varied judgment, the admission by the appellant in various affidavits; the desire to settle the indebtedness by instalments; and, by making part payments entitles the respondents to judgment on admission as spelt out in order 27, rule 3 of the Rules of the Supreme Court, 1999 Edition which provides that:

> **"Where admissions of fact or of part of a case are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties and the court may give such judgment as it thinks just..."**

In view of the foregoing authority, State Counsel submitted that the lower court could not be faulted.

[7.24] In response to ground four, State Counsel repeated the arguments advanced in ground one and submitted that the *Achiume*[3] and *Eagle Charalambous*[4] cases cited by the appellants can be distinguished from the present case. In the present case, he contended, the appellants admitted that legal services were rendered to them by the respondents and the amount of fees was agreed upon by the parties. He argued that it did not matter whether the agreed amount was an estimate or not and whether it was meant for fundraising purposes in order to meet the respondent's legal fees as the fact remained that the writ of summons was issued to recover legal fees. That even the alleged fundraising purpose was meant to meet the respondents' legal fees.

[7.25] State Counsel submitted that the evaluation of

the affidavit evidence by the court below was well balanced because the alleged fundraising was meant to meet legal fees, the parties agreed on the amount of fees and the appellants made some part payments towards the legal fees and promised through affidavit evidence, to liquidate the balance by instalments. Therefore, he argued, this court should not interfere with the lower court's findings and instead order the appellants to pay the judgment sum, interest and costs.

[7.26] In response to ground five, State Counsel submitted that the court below was on firm ground to have considered inordinate delay as one of the reasons for refusing to set aside the default judgment because the delay in the present case was for 13 years from April 1999, when the varied judgment was entered, to June 2012, when the application to set aside the default judgment was filed. He argued that while parties may generally be heard on the merits, litigants who sleep on their rights must expect

the wheels of justice to turn in their absence for the sake of expedition and finality.

[7.27] State Counsel advanced his argument by submitting that in the *National Tobacco Company*[5] case cited by the appellants, the delay was for 5 years from 1992 to 1997, whereas in the present case it was for 13 years and: the appellants made some part payments towards the varied judgment; swore affidavits admitting the debt; and, undertook to pay the balance by instalments. Therefore, State Counsel contended, there were no triable issues to go to trial. Further, he argued that this court has on a number of occasions, refused to set aside default judgments or join a party to the proceedings because of inordinate delay and lack of merit.

[8] Consideration of the appeal by this court and decision

[8.1] We have considered the record of appeal and arguments by counsel. We will begin by addressing ground 5 which attacks the learned High Court Judge's finding that there was

inordinate delay in making the application to set aside the default judgment. The Judge's finding in this respect is as follows:

> **"Further, it has been 15 years now since the default judgment was made. I have considered the prejudice which would be occasioned as against the Plaintiff[s]. I am of the view that the prejudice is quite real".**

[8.2] It was Mr. Mwanabo's argument that in accordance with the case of *National Tobacco Co. Ltd and Tobacco Board of Zambia vs Walter Harthoon*[5], which refers to our decision in the case of Stanley *Mwambazi v Morester Farms Limite*[7], inordinate delay is not a factor upon which an application to set aside default judgment can be refused. He argued that the determining factor was whether or not there are triable issues, and if so, they should go to trial.

[8.3] Mr. Mwansa SC, on the other hand, argued that there was inordinate delay in making the application to set aside and that there were no triable issues to justify the matter going to trial.

[8.4] There is consensus by counsel that there was inordinate delay by the appellants in making the application to set aside default judgment. The issue is, does inordinate delay justify the refusal to set aside a default judgment where there is a defence on the merits? In the *Mwambazi*[7] case we determined this issue in the following terms at page 144 of the reprinted version of the law report:

> *"(1)...*
>
> *(2) It is the practice in dealing with bona fide interlocutory applications for courts to allow triable issues to come to trial despite the default of the parties; where a party is in default he may be ordered to pay costs, but it is not in the interest of justice to deny him the right to have his case heard.*
>
> *(3) For this treatment to be offered, there must be no unreasonable delay, mala fides and no improper conduct on the action on the part of the Applicant".*

[8.5] The effect of the foregoing holding is that a defaulting party will not be denied an opportunity

to a full trial where he has raised triable issues warranting a full trial. However, he is only entitled to such privilege where there has been, *inter alia,* no inordinate delay, malafide or improper conduct on the part of an applicant. In other words, the court should also ascertain whether the delay is inexcusable.

[8.6] In this case, we have no difficulty in holding that there was inordinate delay and that this fact is not disputed by the appellants. Further, to their counsel, Mr. Mwanabo's credit, he did concede at the hearing of the appeal that there was inordinate delay. The matter, however, does not end there. The learned High Court Judge found further that the respondents would be prejudiced if he set aside the default judgment. While we agree that prejudice would have been occasioned to the respondents, we strongly feel that he should have gone further to determine what indeed caused the inordinate delay.

[8.7] The record of appeal as we have demonstrated

earlier, shows that it was the responsibility of one of the respondents as counsel for the appellants to apply to set aside the default judgment. Counsel neglected to carry out these instructions and has benefitted from her default. In addition, the *Mwambazi*[7] case emphasizes the need for an applicant to act properly and without *mala fide* if he or she is to benefit from setting aside. What about where the respondent (as in this case) acts with *mala fide* and improperly? Does the applicant suffer as a consequence of such improper conduct on the part of the respondent? We think not.

[8.5] The *Mwambazi*[7] case and indeed all the cases we have decided based on inordinate delay have not encountered the facts with which we are confronted which reveal the appellants' inordinate delay arising from the conduct of one of the respondents, a party to the very case in which the default judgment was sought to be set aside. We cannot, therefore, apply the principle in

Mwambazi[7] narrowly to these very unique facts, and we find merit in ground 5 of the appeal.

[8.9] We now turn to consider grounds 1, 3 and 4, which we shall consider together because they raise the same issues. These grounds question the learned High Court Judge's failure to consider the evidence that questions the propriety of the claim for the legal fees. Alternatively, the court's failure to refer the matter to taxation of costs in view of the evidence suggesting that the fees were based on estimates as opposed to an actual bill.

[8.10] The three grounds also question the Learned High Court Judges' failure to consider whether the action taken out by the Respondents was in compliance with Order 50, rule 2 of the High Court Act. Lastly, they question the unbalanced consideration of the evidence by the Learned High Court Judge in favour of the respondents.

[8.11] Mr. Mwanabo, counsel for the appellants, argued that the affidavit of Mrs. Zaloumis reveals that the action in the court below was commenced

solely as a fund raising venture and the amounts claimed are not based on the services rendered. It was counsel's argument that this raises a serious dispute as regards the cause of action in this matter. He argued further that the position taken by the appellants is fortified by the fact that the respondents did not issue bills to the appellants before commencement of the action in the court below. Counsel argued that in accordance with Order 50, rule 2 of the High Court Act and section 83(2) of the Legal Practitioners Act, an action for recovery of legal fees must be preceded by issuance of a bill for services rendered. Further, that the right to an action on such a bill only accrues to a practitioner after a month has elapsed following delivery of the bill.

[8.12] Mr. Mwansa SC, counsel for the respondents, denied that the writ of summons was issued as a fundraising venture but that it was issued as a consequence of work done. He argued that the evidence on record clearly shows that the moneys

claimed were based on the judgment of the court and that the appellants had not denied that the moneys were payable and actually paid towards the debt.

[8.13] As regards compliance with order 50, rule 2 of the High Court Act and section 83(2) of the Legal Practitioners Act, Mr. Mwansa SC, argued that the letter of demand in respect of the agreed fees was sent by the first respondent to the appellants in February 1998, while the writ of summons was only issued in November 1998. It was his argument that there was an eight month gap between the two events and, as such, the provisions of Order 50, rule 2 of the High Court Act and section 83(2) of the Legal Practitioners Act were complied with. Arguing in the alternative, he submitted that the respondents were, in any event, entitled to enter judgment in accordance with Order 27, rule 3 of the High Court Act because there was an admission of indebtedness on the part of the appellants.

[8.14] The evidence that gives rise to the issues in the three grounds is that of Mrs. Zaloumis, the proprietor of Dove Chambers. She is one of the respondents and was indeed a member of the second appellant's Central Committee. It is contained in the affidavit in support of summons to set aside order making charge on securities and appoint receiver in the record of appeal. The affidavit under paragraphs 7 and 8, states as follows:

> ***"7. That at the time the writ of summons was issued it was the understanding of all the Plaintiffs that it would help the Defendants raise money from their friends outside the country and that is why the billing was done in United States Dollars***
>
> ***8. That at the time the billing was done, it was merely an estimation as some of the cases had not yet been finalized for instance the citizenship case, Kabwe assassination attempt, attached and exhibited as "FM21"***

[8.15] What is apparent from the foregoing evidence is that the respondents issued the writ of summons to enable the appellants use it to solicit for money from sympathizers and well wishers from outside

the country.

[8.16] It is also evident that the amount charged to the account of the appellants was not based on actual work done but rather, estimates. As counsel for the appellants has argued, the basis upon which a legal practitioner renders a bill is prescribed under Order 50, rule 2 of the High Court Act which states that a claim for fees should be preceded by a bill. It states in this respect as follows:

> ***"No practitioner shall commence any suit for the recovery of any fees for any business done by him until the expiration of one month after he shall have delivered to the party to be charged therewith or sent by registered letter to or left for him at his office, place of business, dwelling-house or last known place of abode a bill of such fees, such bill either being signed by such practitioner (or, in the case of a partnership, by any of the partners, whether in his own name or in the name of the partnership) or being, enclosed in or accompanied by a letter signed in like manner referring to such bill".*** [Emphasis added]

The effect of the foregoing order is that before a

legal practitioner can claim for legal fees he needs to render a bill to his client. Such a bill will explain the work done, the basis of the billing and the amount to be paid as remuneration for legal services rendered. Further, the legal practitioner's right to institute a claim arises only after the expiry of a month of service of the bill upon the client.

[8.17] The facts of this case and the documents on the record of appeal do not reveal that a bill, as envisaged by order 50, rule 2 was rendered and delivered to the appellants. Further, the endorsement on the writ of summons which is at pages 13 and 14 of the record of appeal makes no reference to bills rendered nor does it reveal that the claim is in respect of certain bills. There is in fact no such bill on the record of appeal.

[8.18] The absence of the bill reinforces the argument by Mr. Mwanabo that the amounts claimed and judgment amount is an estimate and indeed a fund raising venture. This fact is confirmed in the

evidence we have reproduced from the affidavit of Mrs. Zaloumis. The view we take is that a legal practitioner cannot base his claim for fees on estimates for work to be concluded or as a means to helping his client to raise money from well wishers.

[8.19] The act of instituting a claim against the appellants, which is not supported by a bill does not only fall below the standard required of the respondents as counsel but also against the best interests of the appellants. This fact was confirmed by Mr. Mwansa SC at the hearing who, when the contents of Mrs. Zaloumis' affidavit were brought to his attention, agreed that it was misconduct on her part.

[8.20] Further, the entire claim for the fees which is not supported by a bill was premature. We take this view because a claim can only be maintained a month after a bill has been delivered to a client. The facts of this case do not reveal that a bill was sent to the appellants a month before

commencement of the action. Mr. Mwansa SC's arguments to the effect that a letter of demand was written eight months prior to the commencement of the action does not, in our view, satisfy the requirements of Order 50, rule 2 of the High Court Act.

[8.21] Equally, his argument that the fees were agreed is also flawed because, subsequent to agreeing fees, a fee note should be issued. No such fee note was issued in this matter. The need for a fee note must not be trivialized, because it is the basis upon which: counsel accounts to his client; the recipient of fees is taxed by the Zambia Revenue Authority (ZRA): and, is the basis upon which taxation of costs is done.

[8.22] Mrs. Zaloumis' predicament is compounded by the fact that she was, as we have stated earlier, a member of the 2nd appellant's Central Committee, as Secretary Legal, Political, Constitution and Parliamentary Affairs. She was therefore in-house counsel for the 2nd appellant. As such counsel,

she mobilized the respondents and other legal practitioners who acted for the appellants along with her. She also negotiated terms of engagement for the legal practitioners. The evidence on record reveals that the said terms of engagement were on a *pro bono* basis. This is evident from the extracts of the minutes of the Central Committee meetings held on 28th February and 4th March 1998 in the record of appeal.

[8.23] The minutes read in part as follows:

> ***"12. The Secretary for legal, Political, Constitution and Parliamentary Affairs (LPCPA) informed the meeting that the group of lawyers representing Dr. K. D. Kaunda namely, Mr. Daniel Lisulo, Mr. Mainza Chona, Prof. Patrick Mvunga, Mr. Sakwiba Sikota, Mrs. Frances M. Zaloumis and Mrs. Nelly Mutti were offering free legal services and the party was not meeting any lawyers fees or other legal costs.***
>
> ***13. After a long discussion on lawyers' fees and other legal costs it was proposed and seconded by the vice Secretary General and the Party Treasurer Mr. Fenwick Chifinda, MCC and Mr. Dominic Mbangu, MCC respectively that the Secretary for Legal Political Constitution and***

Parliamentary Affairs Mrs. Frances M. Zaloumis to co-ordinate the assembly of all lawyers offering services in the case with the Central Committee and that their free Legal Services be accepted by the Party.

CONCLUSION

1. ***The offer for free legal services from the group of lawyers were accepted***
2. ***Secretary for Legal, Political Constitution and Parliamentary Affairs was appointed to co-ordinate the assembly of all the lawyers offering services in the case with the Central Committee".*** [Emphasis added]

[8.24] The extract we have set out in the preceding paragraph clearly shows that the services offered by the respondents and others were on a *pro bono* basis. They cannot, therefore, now turn around and say that they are entitled to payment for the legal services rendered. The view we take is that a legal practitioner can only benefit from the provisions of Part IX of the Legal Practitioners Act, by way of remuneration, if he had agreed with his client from inception to be remunerated and the rate chargeable. There is no evidence of

such agreement. The evidence only points to *pro bono* services.

[8.25] The attempt, therefore, by the respondents of claiming remuneration and indeed obtaining a judgment for the said claim, amounts to misconduct under section 52(b) of the Legal Practitioners Act. The provision states as follows:

> ***"No practitioner shall ...***
>
> ***mislead or allow any court to be misled so that such court makes an order which such practitioner knows to be wrong or improper".***

The facts we have alluded to show that there was an agreement for *pro bono* services to be offered to the appellants by the respondents and others. The affidavit by the first appellant to the contrary does not change this fact because it was prepared by Mrs. Zaloumis, one of the respondents in any event.

[8.26] Further, the record of appeal reveals that Mrs. Zaloumis, despite being one of the plaintiffs, continued to represent the appellants for a while during the life of the matter in the court below.

This prompted the court to wonder who she was representing and express its discomfort at the fact that, as plaintiff who had sued the appellants, Mrs. Zaloumis was still acting for them. This is as is evidenced by the record of proceedings in the record of appeal.

[8.27] The view we take is that this action also amounts to misconduct especially that she acted for the appellants at a crucial point when they required to take appropriate remedial action against the default judgment. Counsel for the respondents, Mr. Mwansa SC, did, in fact, concede at the hearing of the appeal that Mrs. Zaloumis' acts amounted to misconduct.

[8.28] The decisions we have made in the preceding paragraphs reveal that there was sufficient evidence laid before the court below which raises serious doubt as to the Respondents' entitlement to the legal fees. Although, we agree that it was too late in the day to set aside the default judgment on account of the principles we laid

down in the *Mwambazi*[7] case, we are of the firm view that the circumstances of this case are that he should have set aside the default judgment because the delay was excusable.

[8.29] Further, the court below should still have exercised its jurisdiction under Order 3, rule 2 of the High Court Act. The said order states as follows:

> ***"Subject to any particular rules, the court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not".***

The effect of this order is that it gives the court below wide powers to grant any order it deems fit to meet the justice of the case. The view we take is that in exercising its powers under Order 3, rule 2 at the very least, the court below should have ordered the determination of the following questions along with determining the application to set aside default judgment:

[8.29.1] Whether or not the originating process was properly issued in view of the revelation that it was meant as a fund raising venture;

[8.29.2] Whether or not the originating process should have been issued at all in view of the fact that the evidence on record points to the fact that no fee note or bill was rendered and served on the appellants in accordance with Order 50, rule 2 of the High Court Act and section 83(2) of the Legal Practitioners Act;

[8.29.3] If indeed a fee note or bill was issued, was this the proper course of action. Should the court below not have ordered taxation of the bill in view of the objection raised by the appellants on the amount;

[8.29.4] Were the appellants properly represented in view of the fact that the record of appeal reveals that Mrs. Zaloumis, the proprietor of one of the respondents represented them while she was a Plaintiff in the matter at the crucial point of the matter;

[8.29.5] If the answer to 8.29.4 is in the negative, what effect did the fact that the appellants were represented by a plaintiff in the action against them have on the eventual outcome of this case;

[8.29.6] Should the default judgment stand in view of the fact that it is clearly tainted with irregularities?

[8.30] The answers to all these questions would no doubt be in favour of the appellants and point to the need to set aside the default judgment. Of equal importance is the other

consideration we have made that in the ordinary course of things, where a party's default is as a consequence of an omission by his/her counsel, that party's recourse lies with counsel and not the court. Our view is that this principle does not apply to this case because the erring counsel was also a party in the proceedings. We take the view that only the court can atone the injustice suffered by the appellants as a result of the actions by counsel. The case, once again, is unique and does not follow the usual precedent.

[8.31] The other issue to be considered is the penalty to be meted out to the respondents as counsel for the misconduct and breaching the provisions of the Legal Practitioners Act. Section 53 of the Legal Practitioners Act gives the Court the discretion *to "... either admonish ... suspend ... or cause [the name] to be struck off the Roll*

..." any practitioner who contravenes the provisions of Section 52. In order for a court to exercise this power it must first hear counsel on the charges preferred against him. We did not have occasion to hear counsel or address the issue at the hearing as we were overtaken by the events that unfolded in court.

[8.32] The option we have decided to take is to refer this judgment to the Legal Practitioners Committee of the Law Association of Zambia to determine what steps, if any, to take against counsel.

[8.33] As a consequence of the foregoing, we are of the firm view that grounds 1, 3 and 4 have merit and we allow them.

[8.34] Ground 2 questions the learned High Court Judges' failure to put the admission by the 1st appellant in its proper context. While it is true to say that the appellants admitted being indebted to the respondents, the

admission must be looked at in its proper context as argued by Mr. Mwanabo. The evidence on record reveals that the said admission was made after execution was levied at a point when the appellants were represented by one of the respondents. As such, the said admission cannot be said to be unequivocal or given freely and fairly.

[8.35] To this extent this case is distinguishable from the *Cusa*[6] case referred to by Mr. Mwansa SC. The admission must also be looked at in the light of the evidence showing that the legal services were to be provided on a *pro bono* basis by persons with whom the appellants were familiar with and who were their sympathizers. Moreover, given Mrs. Zaloumis' circumstances and the role she played in this matter, we posit that the appellants did not benefit from genuinely independent legal advice. The possibility of being misled into admitting

was, therefore, high. Further, if indeed the default judgment is irregular, the admissions made cannot cure the irregularity. Ground 2 of the appeal must also succeed and we allow it.

[9] Conclusion

[9.1] The appeal succeeds and we accordingly set aside the judgment of the court below. In doing so we grant the appellants leave to defend. As for costs, these will be the appellants' in this court, to be taxed in default of agreement.

M. MUSONDA
DEPUTY CHIEF JUSTICE

M. MALILA
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE

N. K. MUTUNA
SUPREME COURT JUDGE