IN THE SUPREME COURT OF ZAMABIA **APPEAL NO. 09/2016**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

CHIFUTI MAXWELL	**APPELLANT**
AND	
CHAFINGWA RODNEY MWANSA	**1ST RESPONDENT**
RODGERS CHIPILI MWANSA	**2ND RESPONDENT**

Coram : Wood, Mutuna and Chinyama, JJS

On 4th September 2018 and 6th September 2018

For the Appellant : Mr. J. Chibalabala of Messrs John Chibalabala Legal Practitioners

For the Respondent : Mr. M. Lungu of Messrs Lungu Simwanza and Company

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J U D G M E N T

Mutuna, JS. delivered the judgment of the Court.

Cases referred to:

1) **Khalid Muhammed v The Attorney General (1982) ZR 49**
2) **Stanely Mwambazi v Morester Farms Limited (1977) ZR 108**

3) **Nora Mwaanga Kayoba and Alizani Banda v Eunice Kumwenda Ngulube, SCZ judgment number 19 of 2003**
4) **Mwenya and Randee v Kapinga (1998) ZR page 99**

Statutes referred to:

1) **Supreme Court Practice, 1999, Volume 1 White Book**
2) **Lands and Deeds Registry Act, Cap 185**

Other works referred to:

1) **Black's Law Dictionary, by Bryan A. Garner, 7th edition, Thomson West, USA**
2) **Zuckerman On Civil Procedure: Principles of Practice, by Adrian Zuckerman, third edition, Sweet and Maxwell Thomson Reuters, London**

Introduction

1) The issue in this appeal is one which arises very often in all our Courts. It relates to instances when a judge is required to exercise his discretion to set aside a judgment entered in the absence of a defendant.

2) The issue is a fundamental question of law because our law, and indeed principles of natural justice, require that every person should have his

day in court and the Court must afford litigants an equal opportunity to present their cases.

3) This appeal thus considers whether or not the Court below misdirected itself when it declined to exercise its discretion in favour of setting aside a judgment entered in the absence of the Appellant. It arises from a decision of the Learned High Court Judge to that effect pronounced in a ruling dated 14th May 2015, dismissing the Appellants' application to set aside judgment of the Court dated 25th November, 2014. The application was titled as an application to set aside default judgment the significance of which is apparent in the latter part of this judgment.

Background

4) The background to this appeal is fairly straight forward. The Respondents took out an action

against the Appellants on 2nd September 2014 by way of originating summons under Order 113 of the ***Supreme Court Practice, 1999, volume 1, White Book.***

5) The relief sought by the Respondents was for possession of property known as subdivision B of Farm 1961, Lusaka (the property).

6) After the Respondents issued the process they had difficulties locating the Appellant, so they applied for and were granted leave to serve process by substituted service by way of advertising in the press. In accordance with this order the Respondents advertised the process and the appointed date of hearing in the press, thereby, serving the process and notifying the Appellant of the hearing date.

7) On the appointed day of hearing, the Appellant was not in attendance, and having been satisfied that process was served, the Court proceeded to hear the matter. In doing so, it entered judgment in favour of the Respondents against the Appellant directing that the Appellant and all other persons unknown do give vacant possession of the property to the Respondents within thirty days.

8) Later, the Appellant found out about the proceedings and the judgment and applied to the Learned High Court Judge for an order setting aside the judgment. Simultaneously, he also requested the Learned High Court Judge to stay execution of the judgment pending the application to set aside the judgment.

9) In support of the application the Appellant led evidence through an affidavit in support in which he explained that he was not able to attend Court on the date appointed for the hearing because he did not see the notice of the hearing in the press as he does not buy the newspaper in which it was advertised. He explained further that he has workers at the property in dispute and as such service of process should have been effected on them as was the case with the judgment. The evidence concluded by revealing how the Appellant came to be in occupation of the properly having bought it from Tubuke Milling Limited in 2001.

10) The Respondents opposed the application and led affidavit evidence through the First Respondent explaining how the two came into ownership of

the property through their late father. Further that they have been settled on the property since 1995 as joint owners.

Consideration by the High Court and the decision

11) In her consideration the Learned High Court Judge began by dispelling the notion by the Appellant that her judgment was a default judgment as opposed to a judgment on the merits as revealed by the summons to set aside. She, defined the term default judgment as per ***Black's Law Dictionary***, and concluded that the matter before her was heard on the merits and judgment entered after the Respondents proved their case in line with our decision in the case of ***Khalid Muhammed v The Attorney General***[1]. As such, the judgment was not a default judgment.

12) The Learned High Court Judge then considered the application to set aside the judgment in the light of Order 35 rule 5 of the ***High Court Act*** pursuant to which it was made. She concluded that the section permits a party to apply to set aside a judgment obtained against him in his absence on sufficient cause being shown. Having concluded this, she identified the issue for determination as being whether the Appellant had advanced sufficient grounds to warrant the setting aside of the judgment.

13) In determining the issue, the Learned High Court Judge went on a crusade of reviewing the evidence and claims by the parties in respect of ownership of the property. She concluded that the Respondents' claim to the property was superior to that of the Appellant because they were the

registered proprietors of the property and holders of certificate of title number 254350. The judge sought solace in section 33 of the ***Lands and Deeds Registry Act*** which states in part as follows:

> "**A certificate of title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts III to IV might be held to be paramount or to have priority; the Registered Proprietor of the land comprised in such Certificate shall, except in case of fraud, hold the same subject only to such encumbrances, liens, estates or interests as may be shown by such Certificate of Title and any encumbrances, liens, estates or interests created after the issue of such Certificate as may be notified on the folium of the Register relating to such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever ...**"

14) According to the Judge, the effect of section 33 of the ***Lands and Deeds Registry Act*** is that a certificate of title to land is conclusive evidence of

ownership of the land in issue. Further, once land had become the subject of a certificate of title, ownership thereof cannot be challenged unless there is evidence of fraud in the procurement of the certificate of title.

15) Last of all, the Learned High Court Judge found that the challenge mounted by the Appellant could not displace the interest of the Respondents in the property as registered proprietors. In addition, she found that since the certificate of title issued to the Respondents is conclusive evidence of ownership, and the Respondents not having consented to the Appellant, occupying their land, she was obliged to grant them an order of possession of the land and accordingly, dismissed the application to set aside judgment. In doing so, the Learned High Court Judge also

16.3 The Learned trial Judge misdirected herself in law in holding that title of the Respondents to the said property has not in any way been challenged by the Appellant when in fact the same had shown proof that he had purchased, developed and built permanent structures on part of the said property known as subdivision B of Farm 1961 Lusaka before the Respondents acquired interest in the entire piece of land;

16.4 The Learned trial Judge misdirected herself in law and fact in holding that the certificate of title issued to the Respondents being conclusive evidence of their ownership the Court is obliged to give the registered holder an order of possession of their land without taking account and considering the Appellant's interest in part of the said land he purchased from the third party, thus failing in her duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined with finality;

16.5 The Learned trial Judge misdirected herself in law in failing to appreciate that although there was trial before she delivered her judgment, the same was obtained in the absence of the other party, and since the Appellant had produced a copy of a contract of sale relating to a part of the said piece of land (which was a sufficient cause to set aside the judgment) it implied that there were triable issues that called for determination at full trial;

16.6 The Learned trial Judge misdirected herself in law by ignoring and refusing to properly apply the provisions of Order 35(5) of the High Court Rules which provided that "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"; and

16.7 The Learned trial Judge erred in law in following the decision in the case of Khalid Muhammed v The Attorney General (1982) ZR 49 where the Supreme Court stated the following on failure of a defence "A plaintiff must prove his case and if he fails to do so the mere failure of the opponents' defence does not entitle him to judgment".

17) The Appellant filed heads of argument in support of the appeal on 15th January 2016 which he relied upon at the hearing. The Respondents sought leave at the hearing to file their heads of argument which leave was granted. Likewise they relied on these heads of argument at the hearing. The parties also made *viva voce* arguments at the hearing.

18) Arguing grounds 1, 2, 3 and 5 together, the Appellant set out the findings made by the Learned High Court Judge and the evidence he tendered in support of the application to set aside the judgment. The Appellant then contended that the Learned High Court Judge misdirected herself in the said findings and argued that having demonstrated that he had a bona fide defence to the claim by the Respondents in the evidence, the Judge ought to have granted him leave to defend the action by setting aside the judgment and holding a full trial of the matter. This he argued is in line with our decision in the case of ***Stanely Mwambazi v Morrester Farms Limited***[2] in which we held that where triable issues are raised in interlocutory applications, justice requires that a trial be held and that where a party is in default

it is not in the interest of justice to deny him a right to be heard. That the penalty lay in condemning such defaulting party to costs.

19) The Appellant then turned to address the issue of notice of the encumbrance on the property and concluded that the structures he has built on the property are in themselves constructive notice of his equitable interest in the property. The Respondents ought, therefore, to have conducted a due diligence check on the property prior to purchasing it. He referred to our decisions in the cases of ***Nora Mwaanga Kayoba and Alizani Banda v Eunice Kumwenda Ngulube***[3] and ***Andrew Ngulube and Mwenya and Banda v Kapinga***[4]. We have not restated the principles in these two cases or discussed them in our

determination of the appeal as they have no bearing on the conclusion we have reached.

20) In ground 4, the Appellant once again challenged the findings of fact by the Learned High Court Judge and contended that she failed to discharge her duty of adjudicating upon all the matters in dispute. The Appellant also challenged the mode of commencement of the action by the Respondents in the Court below, contending that Order 113 of the ***White Book*** was only suitable in a situation involving a trespasser and not a person such as he who had demonstrated a right to occupation of the property.

21) The thrust of the Appellant's argument under ground 6 was that the provisions of Order 35 rule 5 of the ***High Court Act*** and Order 113 rule 8 of the ***White Book*** empower a Court to set aside a

judgment obtained in the absence of another party. He argued that having demonstrated sufficient cause, the Learned High Court Judge ought to have set aside the judgment.

22) In ground 7 of the appeal, the Appellant attacked the finding by the Learned High Court Judge that the Respondents had proved their case and thus entitled to judgment in line with our decision in the case of ***Khalid Muhammed v The Attorney General***[1]. He argued that in that case the issue of setting aside a judgment obtained in the absence of another party did not arise and that in this case the Court below was only called upon to determine whether or not he had sufficiently explained his absence on the material day.

23) In response both in the heads of argument and *viva voce* arguments counsel for the Respondent,

Mr. M. Lungu argued that the Learned High Court Judge was on firm ground in refusing to set aside the judgment because the evidence before her was such that the Respondents had a superior right to the property than the Appellant. He argued that the fact, in and of itself, that the Appellant had led evidence to show that he had executed a contract of sale in relation to the property could not override the certificate of title to the property which the Respondent had.

24) In relation to the matters that the Learned High Court Judge should have considered in deciding whether or not to set aside the judgment, Mr. M. Lungu argued that there was need for the Appellant to show a defence on the merits and triable issue in accordance with Order 13 of the ***White Book***. Further, Order 35 rule 2 of the ***High***

Court Act requires a defaulting party to show sufficient cause, which is a defence on the merits, before a Court can invoke its inherent jurisdiction to set aside a judgment. Counsel concluded that the Appellant had failed to demonstrate a defence on the merits or triable issues to warrant the re opening of the matter.

25) In reply counsel for the Appellant, Mr. J. Chibalabala reiterated that the Appellant had demonstrated that there were triable issues warranting the matter being re opened. He drew our attention to a document on the record of appeal which he contended proves that the Appellant paid for the property.

Consideration of the appeal and decision of this Court

26) In our introductory remarks to this judgment we have set out the issue in dispute as relating to

when a judge of the High Court should exercise his discretion to set aside a judgment obtained in the absence of a defendant. This is the main issue that was before the Learned High Court Judge and the only one she should have determined. We say main issue because there was the peripheral issue of whether or not she should have granted a stay of execution pending the application to set aside the judgment.

27) We have been compelled to make this clarification because out of the seven grounds of appeal presented by the Appellant, it is only ground 6 which is of relevance to the issue before us. We however, have not found it fit to condemn the Appellant for raising so many irrelevant issues arising from the other six misguided grounds of appeal because the approach he has taken arises

from the misdirection made by the Learned High Court Judge which we have pointed out in the latter part of this judgment.

28) Having determined that the only ground of appeal which merits our consideration is ground 6 we wish to restate the issue before us as being whether or not the Learned High Court Judge misdirected herself in refusing to exercise her discretion to set aside the judgment obtained in the absence of the Appellant. Arising from this issue is the sub issue of, what are the considerations which a judge is obliged to make in determining whether or not to set aside a judgment pursuant to Order 35 rule 5 of the ***High Court Act***.

29) The starting point in our consideration is to revisit the relevant provisions of Order 35 of the ***High Court Act*** which states in part as follows:

> "1) ...
> 2) ...
> **3) If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence or neglects to answer when duly called, the Court may, upon proof of service of notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant .**
> 4) ...
> **5) 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.**
> 6) ..."

The interpretation we have given to the foregoing Order is that it gives a Court discretion to proceed to hold trial where the plaintiff is in attendance but a defendant is not in attendance and not explained or sufficiently explained his absence.

The Court will exercise such discretion only where it is satisfied that process was served upon the defendant. The Order also gives a Court the option to adjourn the matter and direct service of the notice of hearing.

30) In a situation where the Court proceeds with the hearing and renders judgment, as was the case in this matter, upon application by a defendant and his showing *"sufficient cause"*, the Court has the discretion to set aside the judgment. Order 35 rule 5, however does not explain what constitutes *"sufficient cause"* or what facts the defendant needs to present before the Court if it is to set aside the judgment. Mr. M. Lungu has argued that the phrase means that the defendant needs to show a defence on the merits.

31) The ***White Book*** under Order 35 provides guidance as to what constitutes sufficient cause. At rule 1 sub-rule 1, the Order sets out the relevant consideration in such applications thus: *"where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important; unless the absence was not deliberate but was due to accident or mistake, the court will be likely to allow a re-hearing".*

32) The primary consideration for the judge at the hearing of an application to set aside a judgment are, therefore, the reasons for the absence of the party applying and not defence on the merits as argued by Mr. M. Lungu. ***Zuckerman On Civil Procedure: Principles of Practice*** in agreeing with the position we have taken has the following to say at page 1047:

> **"Although the generality of this proposition has been doubted, it remains the case that a party who has failed to attend is entitled to an opportunity to explain his absence so that he may show good reason for his absence".**

Further, where it is clear that the absence was not deliberate, but arose out of accident or mistake the Court will most likely order a retrial, that is, set aside the judgment.

33) In the earlier part of this judgment we explained that the Appellant gave his reasons for being absent as arising from the fact that he does not buy the newspaper in which the process and notice of hearing in relation to the matters in the Court below were advertised. He thus met the threshold required in an application to set aside a judgment obtained in the absence of a party by giving reasons for his absence at the hearing.

34) We also explained that the Learned High Court Judge embarked on a crusade of reviewing the evidence before her and concluding that the Respondents had superior title to the property than the Appellant. She did not at all consider the reasons for the Appellant's absence. This was a misdirection on her part from two fronts. Firstly, having refused to set aside the judgment, the Learned High Court Judge could and should not have revisited the evidence and make a finding as to who had superior title to the property. This amounted to holding a retrial without first setting aside the judgment. Secondly, it amounted to the judge considering whether or not the Appellant had a defence on the merits. This was a wrong consideration to make in the light of our explanation that at this stage of the proceedings

all she was called upon to do was consider the reasons for the Appellant's absence.

Conclusion

35) The conclusions we have reached in the two preceding paragraphs effectively determines the appeal. Our decision, is that the Learned High Court Judge misdirected herself in failing to consider the reasons for the Appellant's absence and thus refusing to exercise her discretion to set aside the judgment. Ground 6 of the appeal is, therefore, allowed.

36) We accordingly set aside the judgment of the Learned High Court Judge of 25th November, 2014 and order that the matter be retried in the High Court by another Judge. In doing so we also order that, in view of the various issues raised in the pleadings, the Judge must consider the matter as

if it were commenced by writ of summons and hold a trial and not proceed by way of a hearing under Order 113 of the ***White Book***. As to the costs, we order that the same shall abide the outcome of the retrial.

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A.M. WOOD
SUPREME COURT JUDGE

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N.K. MUTUNA
SUPREME COURT

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J. CHINYAMA
SUPREME COURT JUDGE

ownership of the land in issue. Further, once land had become the subject of a certificate of title, ownership thereof cannot be challenged unless there is evidence of fraud in the procurement of the certificate of title.

15) Last of all, the Learned High Court Judge found that the challenge mounted by the Appellant could not displace the interest of the Respondents in the property as registered proprietors. In addition, she found that since the certificate of title issued to the Respondents is conclusive evidence of ownership, and the Respondents not having consented to the Appellant, occupying their land, she was obliged to grant them an order of possession of the land and accordingly, dismissed the application to set aside judgment. In doing so, the Learned High Court Judge also

declined to grant the stay of execution because the application to set aside the Judgment upon which it was predicated failed.

Grounds of appeal to this Court and arguments by the parties

16) The Appellant is aggrieved by the decision of the Learned High Court Judge prompting this appeal launched on seven grounds as follows:

16.1 The Learned trial Judge misdirected herself in law in failing to give sufficient consideration and weight to the fact that the Appellant had entered into the contract of sale of part of the property known as subdivision B of Farm 1961 Lusaka with a third party before the Respondents acquired interest in the said land;

16.2 The Learned trial Judge fell into error in law when she failed to consider that by virtue of the said contract of sale between the Appellant and a third party the Appellant had acquired interest in part of the property known as subdivision B of farm 1961 Lusaka, albeit it was not subdivided then (sic);