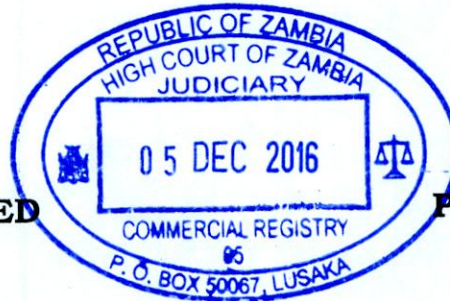


IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2012/HPC/0500

BETWEEN:



ECOBANK ZAMBIA LIMITED

PLAINTIFF

AND

PORTLAND DISTRIBUTORS LIMITED
DICKENS LUHANA
MARTIN SIMUMBA

1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT

Before the Honourable Mr. Justice W.S. Mweemba in Chambers at Lusaka.

For the Plaintiff : Mr R. Msoni - Messrs Malambo
& Company.

For the 3rd Defendant : Mr M. A. Mukupa - Messrs Isaac
& Partners

R U L I N G

LEGISLATION & OTHER WORKS REFERRED TO:

1. THE HIGH COURT RULES, CAP 27 OF THE LAWS OF ZAMBIA.
2. THE RULES OF THE SUPREME COURT OF ENGLAND 1999 EDITION.

CASES REFERRED TO:

1. WATERWELLS LIMITED V WILSON SAMUEL JACKSON (1984) Z.R. 98.
2. STANELY MWAMBAZI V MORRESTER FARMS LTD (1977) Z.R. 108. (SC)
3. MULENGA & ORS V INVESTRUST MERCHANT BANK LIMITED (1999) Z.R. 101.
4. JOHN W.K. CLAYTON V HYBRID POULTRY FARM LTD (2006) ZR 70.

5. ***AFRICAN BANKING CORPORATION (Z) LIMITED (T/A BANK ABC) V PLINTH TECHNICAL WORKS LIMITED AND ORS (SELECTED JUDGMENT NO. 28 OF 2015).***
6. ***COVINDBHAI BAGHIBHAI AND BALLABHAI PATEL V MONILE HOLDING COMPANY LTD (1993-1994) Z.R 20.***

This is an application by the 3rd Defendant for an order of stay of execution and to set aside Judgment in default of appearance and defence. It is supported by an Affidavit sworn by Martin Simumba the 3rd Defendant and Skeleton Arguments filed into Court on 20th September, 2016.

It is deposed by Mr Simumba that his Advocates were served with Amended Originating Process in this matter on 13th July, 2016 and that they gave it to him but he was unable to adequately instruct them at that time and that he eventually left jurisdiction.

It is also deposed that since the Ruling of this Court that he be joined to the proceedings, he had always intended to defend this suit but had been precluded by logistics and that his failure to file a defence was not as a result of disrespect for the Court but due to circumstances beyond his control that delayed him to provide instructions.

Mr Simumba also deposed that the Plaintiff was likely to execute its Default Judgment if this Court did not stay execution and that this application was not intended to deprive the Plaintiff of the fruits of its judgment.

Further, that he has a defence on the merits and believes that this matter should be determined on the said merits at trial and that no prejudice would be occasioned to the Plaintiff if it were granted as the interests of justice would be served.

There is also an Affidavit in Opposition filed into Court on 27th September, 2016 sworn by Themba Lusengo the Head of Early Warning Remedial Recovery in the Plaintiff Bank.

He stated that he wished to respond to the application by the 3rd Defendant that Judgment in default of appearance be set aside and execution stayed.

It is further deposed that the Defendant had acknowledged that he was duly served with the Amended Originating Process even prior to his departure from the Jurisdiction and had not advanced any reasons why he did not instruct his Advocates before leaving jurisdiction.

He also averred that the 3rd Defendant had no defence on the merits outlined in his defence that was exhibited as "MS1." Moreover that the 3rd Defendant previously served at a high level in the Bank of Zambia as APEX Manager for the Enterprise Development Project under the auspices of the World Bank in 2006 and was a holder of a Master's Degree in Business Administration with a bias in Corporate Finance and as such he was highly literate, well exposed and aware of the consequences of signing the Deed of Guarantee that is in issue.

He also stated that the 3rd Defendant did not dispute having been aware that the 1st Defendant was about to receive a loan facility and did not also dispute that he freely executed a Deed of Personal Guarantee to secure the 1st Defendant's facility from the Plaintiff. He also did not dispute that the 1st Defendant defaulted in repaying its short term loan facility to the Plaintiff Bank.

According to the Deponent, this application was merely an attempt to frustrate the Plaintiff's immediate enjoyment of the fruits of the Judgment.

Counsel for the 3rd Defendant filed in Skeleton Arguments in support of the application. Counsel submitted that this Court had the jurisdiction to make any order necessary to do justice under Order 3 Rule 2 of the High Court Rules Cap 27 of the Laws of Zambia.

Moreover that the provisions of Order 13 Rule 8 as read together with Order 47 Rule 1 conferred this Court with the jurisdiction to grant an order of stay of execution of a Judgment by default and where the claim or part thereof was for liquidated amounts, the execution of which is to be Writ of Fieri Facias. Order 13 Rule 8 states that:

“Where judgment for a debt or liquidated demand is entered under this Order against a defendant who has returned to the appropriate office an acknowledgment of service containing a statement to the effect that, although he does not intend to contest the proceedings, he intends to apply for a stay of execution of the judgment by writ of fieri facias, execution of the judgment by such a writ shall be stayed for a period of 14 days from the acknowledgment of service and, if within that time the defendant issues and serves on the plaintiff a summons for such a stay supported by an affidavit in accordance with Order 47, rule 1, the stay imposed by this rule shall continue until the summons is heard or otherwise disposed of, unless the Court after giving the parties an opportunity of being heard otherwise directs”

Further that Order 47 Rule 1 states that:

“(1) Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution -

- (a) that there are special circumstances which render it inexpedient to enforce the judgment or order, or***
- (b) that the applicant is unable from any cause to pay the money, then, notwithstanding anything in rule 2 or 3, the Court may by order stay the execution of the judgment or***

order by writ of fieri facias either absolutely or for such period and subject to such conditions as the Court thinks fit.”

It was also Counsel's submission that the foregoing legal provisions would make this Court proceed on terra firma if it granted the stay of execution sought by the 3rd Defendant pending the hearing and determination of the Defendant's application to set aside default judgment and that the refusal to grant this application would make the 3rd Defendant's application to set aside judgment in default of appearance nugatory and a mere academic exercise as the Plaintiff would have already proceeded to execute the judgment.

Counsel also argued on the aspect of setting aside the Judgment in Default of Appearance and Defence. He quoted Order XII Rule 2 of the High Court Rules, Cap 27 of the Laws of Zambia which states that where judgment is entered pursuant to the provisions of this Order, it shall be lawful for the Court or a Judge to set aside or vary such judgment upon such terms as may be just and argued that this provision was applicable in this case as it was fit and proper for the Judgment in Default to be set aside.

According to Counsel, the Applicant had exhibited a defence on the merits and shown that there are triable issues requiring the matter to proceed to full trial as was stated in **WATERWELLS LIMITED V WILSON SAMUEL JACKSON (1)** that if no prejudice would be occasioned on the Plaintiff by allowing the defendant to defend the claim, then the action should be allowed to proceed to trial.

Moreover that in the case of **STANELY MWAMBAZI V MORRESTER FARMS LTD (2)** the Supreme Court held that:

“It is the practice in dealing with bonafide interlocutory applications for the Court 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 interests of justice to deny him the right to have his case heard”.

According to Counsel for the 3rd Defendant, his client had given a reasonable explanation as to the cause of the delay in filing its Defence and exhibited a draft defence, and that the preceding cases illustrated the defendant's intention to have the matter heard on its merits.

The Plaintiff's Counsel also filed Skeleton Arguments in Opposition to the application before Court. He contended that a successful litigant should only be denied immediate enjoyment of the fruits of a Judgment where there were justifiable reasons as was enunciated in the case of **MULENGA & ORS V INVESTRUST MERCHANT BANK LIMITED (3)** by the Supreme Court.

Moreover that having perused through the 3rd Defendant's Draft Defence exhibited before Court it was his position that the same did not raise any triable issues that needed to be determined by this Court and therefore the 3rd Defendant had no Defence on the merits.

Further that there were no good and sufficient grounds upon which the Court could exercise its discretion to order a Stay of Execution and as such the Plaintiff could be prejudiced by being made to hold onto an unexecuted Judgment.

Counsel also argued that on the application to set aside the Judgment in Default, the 3rd Defendant purported that his delay in entering an appearance and filing a Defence was because he was not in a position to adequately instruct his Advocates and that he subsequently left the jurisdiction thus it was not in dispute that the 3rd Defendant was properly served with the Amended process.

Further that the 3rd Defendant did not apply for extension of time for filing his defence but instead opted to leave the jurisdiction knowing that there was court process pending against him. According to Counsel the 3rd Defendant trivialised the action that was hovering above him.

He also cited the case of **JOHN W.K. CLAYTON V HYBRID POULTRY FARM LTD (4)** where the Supreme Court stated that it is the duty of a Defendant to provide a swift response by way of a Memorandum of Appearance and an elaborate Defence within the stipulated time.

Further that in his exhibited draft Defence, the 3rd Defendant alleged that he innocuously executed the Deed of Guarantee and that he did not know the ramifications of executing the same before he executed it as the Plaintiff did not explain the relationship and ramification of the same to him.

Counsel then invited this Court to note that the 3rd Defendant was the agent of the 1st Defendant as its Director and as such since the 2nd Defendant was also an agent and Director in the 1st Defendant Company he was on an equal position in which he could not be deemed to exert influence on the 3rd Defendant.

Moreover that the 3rd Defendant was an adult of full legal capacity who was also well educated and a holder of a Master of Business Administration Degree in Corporate Finance with vast experience as a businessman. It was also submitted that he also served in the Bank of Zambia at a high level as APEX Manager for the Enterprise Development Project under the auspices of the World Bank in 2006. Thus clearly his qualifications did not necessarily require to be aided by the Plaintiff in order for him to understand the nature and implications of executing the deed of guarantee.

In the case of **AFRICAN BANKING CORPORATION (Z) LIMITED (T/A BANK ABC) V PLINTH TECHNICAL WORKS LIMITED AND ORS (5)** the

Supreme Court in resolving whether the Bank had discharged its duty to ensure that the 2nd Respondent had adequate understanding of the nature and effect of the third party mortgage reasoned as follows:

“The 2nd Respondent testified, in the court below, that he is a businessman and he holds a Bachelor of Science degree in economics; that he had before pledged title deeds as security to the appellant bank before the mortgage in question; that he had signed a mortgage deed before; and that it was prudent for him to read before signing... From this evidence, and even if there was no evidence that the appellant had advised the 2nd respondent to seek independent legal advice, it is discernible that the 2nd respondent is an adult of full capacity who is well educated, and who is highly literate and well exposed, having executed similar contracts or mortgages with the appellant bank previously...Indeed, it is axiomatic that the sanctity of contract must be preserved and agreements which are freely and voluntarily entered into by the parties must be enforced by the courts of law”.

Counsel then contended that even in this case it was discernible that the 3rd Defendant, being an individual with a high level of education in business finance and well exposed to business finance through his previous employment with institutions such as the Bank of Zambia and the World Bank cannot be heard to raise a defence that he had no knowledge of the consequences of being a guarantor even if he has never previously signed a Deed of Guarantee with the Plaintiff.

Counsel then cited the case of **WATER WELLS LIMITED V WILSON SAMUEL JACKSON (1)** where the Supreme Court held inter alia that:

“Although it is usual on an application to set aside a default judgment not only to show a defence on the merits, but also to

give an explanation of that default, it is the defence on the merits which is the more important point to consider.”

Based on this decision, Counsel argued that the Defendant had no Defence on the merits to warrant the setting aside of the Judgment in Default and stay of execution.

I have considered the Affidavit and Viva voce evidence, the Skeleton Arguments and Authorities cited by both learned Counsel for the Plaintiff and the 3rd Defendant.

The main issue for determination by this Court is whether the 3rd Defendant has exhibited sufficient grounds for this Court to grant him an Order for Stay of Execution and to thereafter set aside the Judgment in default of appearance and defence.

The 3rd Defendant made the application for Stay of Execution based on Order 13 Rule 8 as read together with Order 47 Rule 1 of the Rules of the Supreme Court of England (White Book) which confers this Court with the jurisdiction to grant an order of stay of execution of a judgment by default and where the claim or part of it is for liquidated amounts.

While I agree that these provisions clothe this Court with the jurisdiction to grant a Stay of Execution. I am also aware of the fact that in order for a Court to grant such an order it should be satisfied that there are special circumstances which render it inexpedient to enforce the order to be stayed.

In my view there are no triable issues that this Court would have to deal with later if it stayed the execution at this stage and the only reason advanced for the application is the 3rd Defendant's failure to instruct his Advocates which I do not find special or compelling for me to exercise my discretion to grant a stay of execution.

Counsel for the 3rd Defendant also applied that Judgment in Default of Appearance and Defence be set aside based on Order XII Rule 2 of the High Court Rules cited above.

He also brought to the fore the two supreme Court decisions of **STANELY MWAMBAZI V MORRESTER FARMS LTD (2)** and **COVINDBHAI BAGHIBHAI AND BALLABHAI PATEL V MONILE HOLDING COMPANY LTD (6)** which set out the legal principle that triable issues should be allowed to come to trial despite the default of the parties.

I entirely agree with the two Supreme Court decisions on this point, however I am also cognisant of the Supreme Courts decision in **WATERWELLS LIMITED V WILSON SAMUEL JACKSON (1)** where they stated that:

“Although it is usual on an application to set aside a default judgment not only to show a defence on the merits, but also to give an explanation of that default, it is the defence on the merits which is the more important point to consider”.

Having read through the Draft Defence of the 3rd Defendant exhibited as “MS1” I note that the 3rd Defendant is trying to convince this Court that he was not told of the full effects of executing a guarantee but having considered that he previously served at a high level in the Bank of Zambia as APEX Manager for the Enterprise Development Project under the auspices of the World Bank in 2006 and is a holder of a Master’s Degree in Business Administration with a bias in Corporate Finance, I agree with Counsel for the Plaintiff that he is highly literate, well exposed and aware of the consequences of signing the Deed of Guarantee.

In the premises, I find no proper defence outlined therein for me to allow this matter to go to trial and I also find that it would not be in the interest of


justice to delay the Plaintiff from immediately enjoying the fruits of its Judgment as was espoused by the Supreme Court in the case of **MULENGA & ORS V INVESTRUST MERCHANT BANK LIMITED (3)**.

For the foregoing reasons, I find no merit in the application of the 3rd Defendant for a Stay of Execution and the Setting Aside of Judgment in Default of Appearance and Defence.

I accordingly dismiss the application of the 3rd Defendant. Costs to be in the cause.

Leave to appeal is granted.

Delivered in Chambers at Lusaka this 5th day of December, 2016.


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WILLIAM S. MWEEMBA
HIGH COURT JUDGE.