

IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT KITWE
(CIVIL JURISDICTION)

2015/HK/28

BETWEEN:

ALLEN CHARN SHARMA

AND

AGNESS MWAMBA



PLAINTIFF

DEFENDANT

Before; Hon. Mrs. Justice C. B. Maka-Phiri in Chambers on the 11th day of May, 2017

For the Plaintiff: Mr. I. Mulenga of Messrs Iven Mulenga and Co.

For the Defendant: Mr. C. Tafeni of Messrs Suba Tafeni & Associates

J U D G M E N T

Cases referred to:

- 1. Stanley Mwambazi v Morester Farms Limited (1977) Z.R 144**
- 2. Water Wells Ltd v Wilson Samuel Jackson (1984) Z.R 121**

The plaintiff commenced this action by way of writ of summons on 22nd January, 2015 and made the following claims:



1. *An order that the defendant pays the plaintiff the sum of K32,400.00 which the defendant fraudulently got from the plaintiff by misrepresenting that she had been given a purchase order by Mopani Copper Mines Plc for the supply of a Booster Pump when in fact not.*
2. *An order for damages for fraud and misrepresentation.*
3. *Interest and legal costs.*
4. *Any other relief the court may deem fit.*

On 15th July, 2015, the Deputy Registrar entered Judgment in default of appearance and defence in favour of the plaintiff. The defendant applied to set aside default Judgment and upon hearing both parties the Deputy Registrar dismissed the application. This was on account that the substantive claim was not disputed and as such there were no issues for determination at trial.

Being dissatisfied the defendant appealed against the decision of the Deputy Registrar and advanced one ground of appeal as follows:

1. *That the learned Registrar erred in law and fact when she held that there were no issues to take to trial in this matter and thereby declined to set aside the default Judgment.*

The defendant filed heads of argument in support of the appeal. The gist of the submission was that the defendant's exhibited defence did clearly show that there were triable issues raised. Further that the allegation of fraud and misrepresentation was sufficient to have

the matter tried for justice to prevail. The defendant relied on the cases of **Stanley Mwambazi v Morester Farms Limited**⁽¹⁾ and **Water Wells Ltd vs. Wilson Samuel Jackson**⁽²⁾.

The plaintiff's heads of argument were filed into court on 28th July, 2016. The gist of the plaintiff's submission was that the defendant has no defence on the merit to warrant the matter to proceed to trial. The plaintiff contended that the substantive claim was for payment of money advanced to the defendant and that in her exhibited defence, the defendant has not disputed having borrowed the money. Further that the defendant has acknowledged that she has not paid back the money an indication that she has no defence on the merit. The plaintiff further submitted that claims for damages and interest are an accumulation on the sums advanced to the defendant. That the plaintiff was not therefore claiming for anything other than what was loaned to the defendant. The plaintiff argued that the defendant's defence that the parties were to share the profits realised from the transaction was erroneous as the plaintiff never made any claim for profits. Lastly, the plaintiff submitted that should the court be inclined to set aside the Judgment in default, the defendant should be condemned in costs as she failed to enter her defence within the prescribed period.

At the hearing of the appeal, counsel representing both parties informed the court that they were relying on the respective heads of argument filed into court.

I have considered this appeal and the submissions by both parties. I have also considered the affidavit evidence and the exhibited defence. It is trite that in an application to set aside a Judgment in default of appearance and defence, the paramount consideration for the court is whether or not the defendant has shown a defence on the merit. It is the defence on the merit that will raise triable issues to be determined at trial. In this case, the plaintiff's claim is not only for payment of K32,400, but also for damages for fraud and misrepresentation. In the exhibited defence, the defendant has denied allegations of fraud and misrepresentation of which the plaintiff will be put to strict proof. The defendant has however admitted that she borrowed the K32,400 from the plaintiff and has not paid the money back because Mopani Copper Mines Ltd cancelled the order. It is clear from the exhibited defence that the defendant has no defence on the merit with regard to the claim of K32,400. The only issue in dispute is whether the defendant fraudulently obtained this money and made misrepresentation to entitle the plaintiff to damages. The issue of fraud and misrepresentation is therefore a triable issue to be resolved at trial.

In view of the above, it is my considered view that the Deputy Registrar was on firm ground when she declined to set aside default Judgment relating to the payment of K32,400. This is because the defendant has no defence on the merit to this particular claim. The Deputy Registrar should have however set aside the Judgment in

default for the claim relating to damages for fraud and misrepresentation as the same have been disputed. With the foregoing this appeal is partly successful. The Judgment in default of appearance as it relates to the claim for damages for fraud and misrepresentation is set aside and will proceed to trial. The Judgment in default of appearance in respect of the claim that the defendant pays the plaintiff the sum of K32,400 is hereby upheld. This amount will attract interest at the Bank of Zambia lending rate from date of writ to date of Judgment and thereafter at short term deposit rate until full payment. I order that each party will bear own costs.

Leave to appeal granted.

Delivered in Chambers at Kitwe; this 11th day of May, 2017.



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C. B. Maka-Phiri (Mrs.)
Judge