

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)



2016/HP/1703

B E T W E E N :

PATRICK MANSON MULWANDA

PLAINTIFF

AND

AUTRY MUUNGA
PAUL GEORGE SWANA
SYDNEY MUMBI LUSENGO
OTIS MUDIYO

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT**

Before Honorable Mrs. Justice M. Mapani-Kawimbe on the 7th day of June, 2017

For the Plaintiff : *Mr. N. K. R. Sambo, Messrs Sambo Kayukwa & Co.*
For the Defendant : *Mr. H. Kabwe, Messrs Hobday Kabwe & Co.*

R U L I N G

Legislation Referred To:

1. *High Court Act, Chapter 27*

This is the Plaintiff's application to set aside the Defendant's Memorandum of Appearance and Defence and is made pursuant to

Order 2 Rule 2 of the High Court Act. It is supported by an Affidavit.

The deponent, **Patrick Manson Mulwanda** states that his Advocates served the Defendants on 13th December, 2016, through their Advocates, Messrs Hobday Kabwe and Company, a Writ of Summons and Statement of Claim in the matter as ordered by the Court. This is shown in the exhibit marked "**A.**"

That the Defendants did not, for more than three months after service, enter any appearance and defence as required by the Rules of the Court. Further, that when the parties, through their Counsel, appeared before this Court on 7th March, 2017, the Court gave leave to the Plaintiff to enter judgment in accordance with the Rules of the Court and awarded him costs to the Plaintiff.

The deponent states that in defiance of the order of the Court, the Defendants' Advocates entered an appearance, and the Court Registry irregularly accepted the appearance and Defence with the full knowledge that the same should not have been accepted.

Firstly, the documents were filed out of time and their acceptance is prohibited by the Rules of the Court and, secondly, as it was not even intiluted in the matter as was on the Writ of Summons and Statement of Claim as shown in the exhibit marked **“B.”**

The deponent states that when his Advocates went to file the Judgment in Default of Appearance and Defence as authorized by the Court, the Court Registry declined to accept the same, despite there being a Court order on the file to allow its filing as shown in the exhibit marked **“C.”** That the act by both the Advocates for the Defendants and the Court Registry is irregular, presumptuous and in defiance of the authority of this Court and the Rules that govern the process of the Court.

The matter came up for hearing on 24th May, 2017. Counsel for the Defendants undertook to file an Affidavit in Opposition by 31st May, 2017. At the time of writing this Ruling, he had not done so.

I have seriously considered the application before me and the Affidavit filed in Support. The application raises the question whether the Defendants' Memorandum of Appearance and Defence are rightfully before Court.

Order 2 Rule 2 of the High Court Rules provides that:

"2. Parties may, by consent, enlarge or abridge any of the times fixed for taking any step, or filing any document, or giving any notice, in any suit. Where such consent cannot be obtained, either party may apply to the Court or a Judge for an order to effect the object sought to have been obtained with the consent of the other party, and such order may be made although the application for the order is not made until after the expiration of the time allowed or appointed."

In my view, Order 2 Rule 2 of the High Court only allows the enlargement or abridgment of time where parties to a cause have given their consent. In the case where parties are unable to agree, a party can apply for an order of enlargement or abridgment of time to Court.

The salient facts of this application as reprised in the Affidavit in Support are that the Defendants were served with Court process on 13th December, 2016. After three months of service, they did not

enter any appearance and defence as required by the Rules of Court. The Defendants caused a Memorandum of Appearance and Defence to be filed into Court on 7th March, 2017. According to the Writ of Summons dated 13th December, 2016, the Defendants were supposed to enter an appearance within fourteen days but did so after three months.

There is no indication on record that the parties had agreed to enlarge the time for the Defendants to enter an appearance and defence. Further, there is no proof that the Court granted the Defendants leave to enter an appearance and defence out of time. I am therefore, inclined to agree with Learned Counsel for the Plaintiff that the Defendants' memorandum of appearance and defence dated 7th March, 2017, offend the Rules of Court.

Accordingly, I expunge them from the Record as they were irregularly filed into Court. I award the Plaintiff costs to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 7th day of June, 2017.


M. Mapani-Kawimbe
HIGH COURT JUDGE