IN THE HIGH COURT FOR ZAMBIA **2016/HPC/0600**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

RONI KAYEYE	**1ST PLAINTIFF**
CYNTHIA KAYEYE	**2ND PLAINTIFF**
AMOS KATUBIYA	**3RD PLAINTIFF**
ELIZABETH KATUBIYA	**4TH PLAINTIFF**

AND

IMBWILI INVESTMENTS LIMITED	**DEFENDANT**

CORAM: Hon. Madam Justice Dr. W.S. Mwenda in Chambers at Lusaka on the 13th day of September, 2017

For the Plaintiffs:	Mr. N. M. Mulikita of Messrs N. M Mulikita & Partners
For the Defendant:	Ms. M. C. Kaoma of KMG Chisanga Advocates

RULING

Cases referred to:

1. *Stanley Mwambazi v. Morrester Farms (1977) ZR 108*
2. *Water Wells Limited v. Wilson Samuel Jackson (1984) ZR 98*

3. *Ladup Limited v. Siu (The Times 24 November 1983)*
4. *John WK Clayton v. Hybrid Poultry Farm Limited SCJ No. 15 of 2006*
5. *Robert Simeza & 3 Others v. Elizabeth Mzyeche SCJ No. 23 of 2011*
6. *BEM Consultants Limited v. Lackson Ambulaya & 2 Others (2014) HCJ*
7. *Revici v. Prentice Hall Incorporated and Others (1969) 1 All ER 772*
8. *Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc., The Saudi Eagle [1986] 2 Lloyd's Rep. 221 at 223, CA*
9. *Christian Diedricks v. Konkola Copper Mines Plc 2010/HN/28*
10. *Beachley Properties v Edgar (1996) The Times 18*
11. *Leeds Zambia Limited v Mazzonites Limited (Z). S.C.J. No 9 of 2001 (unreported)*

Legislation referred to:

1. *Order 12 (2) of the High Court Rules, Chapter 27 of the Laws of Zambia*
2. *Order 13/9/2 and Order 13/9/18 of the Rules of the Supreme Court, 1999 Edition ("The White Book")*
3. *Order 35/1/1 of the Rules of the Supreme Court, 1999 Edition ("The White Book")*
4. *Order 18/9/18 of the Rules of the Supreme Court, 1999 Edition ("The White Book")*

This is an application by the Defendant to Set Aside the Judgment in Default of Appearance and Defence herein.

The background leading to this application is that the Plaintiffs commenced these proceedings by Writ of Summons (the "**Writ**") and Statement of Claim on 22nd December, 2016, claiming the following relief:

(a) An order for specific performance of the Contract of Sale dated 15th March, 2015, executed between the Plaintiffs and the Defendant;

(b) An injunction restraining the Defendant from repossessing and disposing of the proposed Subdivision F of Subdivision 1 of Subdivision A of Farm 297a, Lusaka;

(c) Costs; and

(d) Any other relief the Court may deem fit.

As per the endorsement on the said Writ, the Defendant was required to cause an appearance to be entered within fourteen (14) days from the date of the same being served on the said Defendant, in default of which the Plaintiffs could proceed therein and obtain Judgment in in the absence of the Defendant.

The Defendant not having entered appearance or delivered any defence, the Plaintiffs, on 18th January, 2017, filed into court a Judgment in Default of Appearance and Defence (the "**Judgment in Default**"), which was signed by the court on 16th February, 2017.

On 16th February, 2017 a Notice of Appointment as Advocates, was filed into court by Counsel for the Defendant; and on 21st February, 2017, Counsel for the Defendant made an application, by way of Summons, to Set Aside the Judgment in Default of Appearance and Defence (the "**Application**"). The Application is supported by an

Affidavit (the "**Affidavit in Support**"), filed on the same date and sworn by one Elias Andrew Kashita.

It is the deponent's testimony that the Defendant was served with the Writ and Statement of Claim on 23rd December, 2016 and that at the time, the Defendant failed to engage Counsel, as that was during the period when law firms were on vacation.

It is the deponent's further testimony that the services of Counsel for the Defendant were retained on 19th January, 2017, but they were unable to enter any appearance as by that time, the Plaintiff had already filed the Judgment in Default, which was pending the Court's signature.

It is also the deponent's testimony that they were informed and believed that Counsel for the Defendant followed up the matter on a number of occasions in an endeavour to enter appearance and file a defence, although all was in futility as the record was still before the court.

According to paragraph 10 of the Affidavit in Support, it was only on 16th February, 2017 that Counsel for the Defendant were notified by the court registry staff that the file was back in the registry and that the Defence and Appearance could then be filed.

The deponent has also stated in paragraph 11 of the Affidavit in Support that the Defendant has a valid Defence to the Plaintiffs' action and to this effect has exhibited what has been erroneously termed the 'Deed of Moiety and Certificate of Title Number 14845'

and marked "EAK1", being proof of ownership of the property. However, what has been exhibited is the Defendant's Defence and Counterclaim. I therefore note that there seems to have been some degree of laxity in the preparation of the said Affidavit and the description of the exhibit. While this mistake may not be fatal, Counsel is reminded that it is good drafting practice to be meticulous and ensure that the correct exhibits are attached to the documents filed in court.

The deponent has also testified that the Defendant's failure to enter appearance and file its defence was neither deliberate nor meant to bring this court into disrepute; and that, in the premises, neither party shall be prejudiced by an order of court setting aside the Judgment in Default.

The Application is augmented by Skeleton Arguments, in which it is contended that the Defendant has shown the reasons for its failure to appear to and defend the Writ and Statement of Claim; and also, that the Defendant has demonstrated that it has a defence on the merits to warrant the setting aside of the Judgment in Default.

To fortify the said submissions, Counsel for the Defendant has referred the court to the case ***Stanley Mwambazi v. Morrester Farms (1)*** in which an observation was made by the Supreme Court that, the practice in dealing with *bona fide* interlocutory applications is for courts to allow triable issues to come to trial despite the default of the parties and that for this favourable treatment to be afforded,

there must be no unreasonable delay, no *mala fides* and no improper conduct of the action on the part of the applicant.

Counsel for the Defendant also referred the court to the case of ***Water Wells Limited v. Wilson Samuel Jackson (2)*** in which Ngulube DCJ (as he then was), observed, citing the case of ***Ladup Limited v. Siu (3)***, 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 the default, it is the defence on the merits that is more important to consider, and that if the plaintiff will not be prejudiced by allowing the defendant to defend the claim then the action should be allowed to go to trial.

In response, Counsel for the Plaintiffs filed into court on 24th March, 2017, an Affidavit in Opposition and Skeleton Arguments.

The Affidavit in Opposition was sworn by Roni Kayeye, the 1st Plaintiff herein, and it is the testimony of the said deponent that the Defendant had ample time to enter its Appearance and Defence either through its agents or representatives, given the urgent nature of the matter and the time limit stipulated on the Writ within which the Defendant was to enter appearance.

It is also the testimony of the deponent that it is untrue that the Defendant was unable to engage the services of its legal representatives owing to the Defendant's uncooperative conduct exhibited to the said deponent at the time of effecting service of the Writ and Statement of Claim. The Defendant's director, Mr. Kashita (who is also the deponent to the Affidavit in Support) is said to have

stated that he did not expect the Plaintiffs to seek legal redress as he is the owner of the property in question and therefore, at liberty to deal with it as he pleased.

The deponent averred that the said Mr. Kashita demonstrated the Defendant's unwillingness to defend the Writ through his actions and utterances when, on two occasions, he refused to accept service of court process and deliberately misdirected the deponent to effect service of the Writ on Messrs Mainza and Company being his alleged legal representatives, when in fact not. Further, that Mr. Kashita's actions were done with intent to deceive the deponent and were a clear indication of the Defendant's lack of a meritorious defence.

Paragraphs 11 to 20 of the Affidavit in Opposition are direct responses to the issues raised in the Defendant's proposed Defence as exhibited in its Affidavit in Support.

The Affidavit in Opposition is buttressed by Skeleton Arguments, the core of which is that the Defendant was unwilling to enter appearance and that its defence lacks merit. To this effect, Counsel for the Plaintiffs cited the cases of ***John WK Clayton v. Hybrid Poultry Farm Limited (4), Robert Simeza & 3 Others v. Elizabeth Mzyeche (5) and BEM Consultants Limited v. Lackson Ambulaya & 2 Others (6)***. In a similar manner, Counsel for the Plaintiffs referred the court to the explanatory notes in Order 13/9/18 of the Rules of the Court, 1999 Edition (the "**White Book**").

Counsel for the Plaintiffs also referred the court to Order 12 Rule 2 of the High Court Rules and Order 13 Rule 9 of the White Book, to

highlight the discretion of the court in setting aside a judgment in default of defence and appearance.

Counsel for the Plaintiffs also referred to the explanatory notes in Order 35/1/1 of the White Book to demonstrate that a party with notice of the proceedings who disregards the opportunity of appearing at and participating in the trial will normally be bound by the decision.

Submitting on the need for parties to a matter to be conscious of rules on observing time, Counsel for the Plaintiff referred the court to the case of ***Revici v. Prentice Hall Incorporated and Others (7).***

I have carefully considered this Application and the Affidavit in Support thereof; the Affidavit in Opposition as well as the Skeleton Arguments filed both in support of and in opposition to the Application. I have also carefully considered the plethora of judicial authorities that Counsel have brought to this court's attention.

It goes without saying, that in considering an application to set aside a judgment rendered in default of defence and appearance, the starting point is Order 12 (2) of the High Court Rules, Chapter 27 of the Laws of Zambia, which deals with default of appearance. It provides as follows:

> *"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."*

Similarly, Order 13 Rule 9 of the White provides as follows:

"Without prejudice to rule 7 (3) and (4) the Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order."

It is clear from the phrasing of the two orders above that the setting aside of a judgment in default is an issue that is determined at the discretion of the court.

In describing the said discretion of the court, the explanatory notes in Order 18/9/18 of the White Book state as follows:

"The discretionary power to set aside a default judgment which has been entered regularly is unconditional, and the court should not lay down rigid rules which deprive it of jurisdiction. The purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has merits to which the court should pay heed, not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence, and because, if the defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication."

The said explanatory notes also make reference to a judgment of the Court of Appeal in the case of ***Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc., The Saudi Eagle (8),*** from which propositions regarding the way in which the court exercises discretion are derived; and of relevance is the following:

"It is not sufficient to show a merely "arguable" defence that would justify leave to defend under O.14; it must both have "a real prospect

of success" and "carry some degree of conviction". Thus, the court must form a provisional view of the probable outcome of the action."

Counsel for the Plaintiffs correctly submitted that there needs to be demonstrated, a defence on the merits, for a judgment in default to be set aside. To emphasize this requirement, Counsel cited the case of ***Water Wells Limited v. Wilson Samuel Jackson (2)***, to drive at the point that although it is usual on an application to set aside a judgment in default not only to show a defence on the merits, but also to give an explanation of the default; it is the defence on the merits which is the more important point to consider.

I have noted the said submission by Counsel for the Plaintiffs and I am guided, in this respect, by the explanatory notes in Order 13/9/18 of the White Book, which further provide that:

"Also as a matter of common sense the court will take into account the explanation of the defendant as to how the default occurred."

In an application for an order to set aside a judgment in default of appearance and defence, there ought to be an appreciation of the rationale behind the possibility of making such an order. In light of this, I am guided by the explanatory notes in Order 13/9/2 of the White Book, which state as follows:

"The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

Having considered Order 12 of the High Court Rules and Order 13 of the White Book; and having considered the Defendant's Defence and Counterclaim exhibited in the Affidavit in Support, I am persuaded and thus have formed a provisional view of the probable outcome of the action.

Further, in the case of ***Water Wells Limited v. Wilson Samuel Jackson (2)***, which has been cited both in the arguments for and in opposition to this Application, the Supreme Court held that if no prejudice will be caused to a plaintiff by allowing the defendant to defend the claim, the action should be allowed to go to trial.

An idea of conduct likely to amount to prejudice was established in this court's case of ***Christian Diedricks v. Konkola Copper Mines Plc (9)***, (citing the English case of ***Beachley Properties v Edgar (10)*** and our very own unreported Supreme Court case of ***Leeds Zambia Limited v Mazzonites Limited (Z) (11)***), where Kabuka, J (as she then was) had the following to say:

> *"On the facts of this case, I find that, persistent issuance of applications which counsel repeatedly failed to attend on scheduled dates of hearing without any justifiable explanation whatsoever, even in the absence of any prejudice to the other party involved, constitutes conduct falling within the ambit of abuse of the process of court. I am here persuaded by the decision in the case of* ***Beachley Properties v Edgar****, wherein the Court of Appeal in England, gave this different dimension in approach to defaults of such a nature when it observed that:*

...the proper and regular administration of business in general before the courts should not be disrupted as a result of breaches of the rules of the court which occurred without any justification whatsoever and notwithstanding the absence of any prejudice to the other party involved...(emphasis supplied)

In the same vein, our own Supreme Court in the case of ***Leeds Zambia Limited v Mazzonites Limited (Z)****, refused to set aside a judgment obtained without hearing the defence case on account of persistent defaults and lack of a meaningful defence, holding that the record showed a history of default and lapses...coupled with the absence of any meaningful defence to his claim for professional fees, there can be no justification for a re-trial or for setting aside the judgment.*

What the ***Beachley Properties*** *case (supra) has addressed in my view, is the category of procedural default disclosing contumelious disregard for rules of the court, laxity, casual or a cavalier approach, thereto. I find plaintiff's counsel's persistent failure to attend court for the reasons advanced, unjustifiable and in the circumstances of this case, that they constituted an abuse of the process of court."*

In the premises, I do not find the Defendant or its Counsel's conduct to be the kind that would warrant a refusal to set aside the Judgment in Default. Further, I am satisfied that the Defendant has demonstrated a defence on the merits. I also find that there are triable issues that have been raised in the Affidavits filed in Support of and in Opposition to this Application, particularly as demonstrated in paragraphs 11 to 20 of the Affidavit in Opposition, which are direct averments to the Defendant's defence and counterclaim.

In view of the foregoing, this Application is granted and the Judgment in Default is hereby set aside to allow the parties in this matter to proceed to trial.

Costs for this Application are awarded to the Plaintiff, which costs shall be agreed and in default thereof, taxed.

Dated at Lusaka the 13th day of September, 2017.

W.S. MWENDA (Dr)
HIGH COURT JUDGE