

IN THE COURT OF APPEAL FOR ZAMBIA:

APPEAL 220/2023

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

MERCY MANG'WATO

APPELLANT

AND

GREAT NORTH CREDIT ZAMBIA LTD:

1ST RESPONDENT

SAMUEL MULAULI:

2ND RESPONDENT

ZAMLAB MEDICALS & DIAGNOSTICS LTD: 3RD RESPONDENT

CORAM: SIAVWAPA JP, CHISHIMBA AND PATEL SC, JJA

On 18th June and 22nd August 2024

FOR THE APPELLANT:

MR. L. MUNG'AMBATA OF MESSRS LIKEZO
& CO.

FOR THE RESPONDENTS:

NOT IN ATTENDANCE

J U D G M E N T

SIAVWAPA, JP, delivered the Judgment of the Court

Cases Cited:

1. *Shocked and Another v. Goldschmidt* [1998] ALL E.R 383.

Legislation referred to:

1. *Order rule 5 of the High Court Rule.*

1.0 INTRODUCTION

- 1.1. This appeal is against the Ruling dated 11th October, 2021, delivered by the Honourable Mr. Justice Bonaventure C. Mbewe in the High Court.
- 1.2. By the said Ruling, the learned Judge dismissed the Appellant's application for an order to set aside the Judgment delivered in her absence and subsequently an order to stay the sale of mortgaged goods.

2.0 BACKGROUND

- 2.1 The Appellant was joined to the proceedings as the 3rd Respondent to a mortgage action upon application on 20th January, 2021.
- 2.2 The hearing of the application did not take place and it was adjourned to 5th February, 2021. The Court granted the application and joined the Applicant to the proceedings and ordered her to file an affidavit in opposition within 14 days.
- 2.3 The Court further set 4th March 2021, for the hearing of the mortgage action.
- 2.4 The Appellant neither filed an affidavit in opposition, nor attended Court on the date set for hearing matter. The Court proceeded with the hearing in her absence and granted the remedies sought by the Applicants among them foreclosure on the mortgaged property and sale thereof.

- 2.5 On 7th October, 2021, the Appellant filed a summons and an affidavit in support of an order to set aside the Judgment obtained in her absence.
- 2.6 She exhibited medical documents showing that she had appeared before the Court on 5th February, 2021 and obtained an order for joinder, that she was diagnosed with COVID 19 and placed in quarantine at a health facility for 14 days and that she was re-tested placed on a further quarantine of 14 days.
- 2.7 The learned Judge considered the explanation and accepted the reasons advanced for her failure to file the affidavit in opposition and to attend the hearing.
- 2.8 The learned Judge was however, dissatisfied with the delay of about five months from the end of March to 7th October 2021, when she made the application.
- 2.9 The learned Judge considered the delay inordinate and without a satisfactory explanation and dismissed the two applications.

3.0 THE APPEAL

3.1 The Memorandum of Appeal accompanying the Notice of Appeal filed on 3rd November, 2021 contains the following grounds of appeal;

1. The Court below erred in law and fact when it dismissed the Appellant's application for an order setting aside the Judgment entered in her absence in the face of evidence

showing sufficient cause for not attending the hearing of 4th March, 2021.

2. The Court below erred in law and fact when it dismissed the Appellants application for an order setting aside the Judgment entered in her absence on the basis that there was inordinate delay in making the application.

4.0 ARGUMENTS IN SUPPORT

- 4.1 In the heads of argument filed on or about 27th September, 2022, the Appellant takes issue with the learned Judge for dismissing the application in the face of a satisfactory explanation for her failure to attend court.
- 4.2 The Appellant dismissed the Court's questioning of her truthfulness about why her lawyers did not attend court on 4th March, 2021. She reasoned that she had never appeared by counsel and that the issue was not a consideration for setting aside a Judgment granted in the absence of a party.
- 4.3 On the second ground, the Appellant submitted that delay in filing the application to set aside Judgment was not a requirement either. She maintained that the only requirement was for the applicant to give a satisfactory reason for non-attendance at the hearing, which she did.
- 4.4 Finally, she submitted that in the event that the Court accepted that there was a delay, five months was not inordinate.

5.0 **ARGUMENTS IN OPPOSITION**

5.1 There was no copy of the Respondents' heads of argument on the Record. We therefore, assume that the Respondents did not file heads of argument in opposition.

6.0 **OUR ANALYSIS AND DECISION**

6.1 The only issue for our determination is whether the learned Judge should have granted the order setting aside the Judgment granted in the absence of the Appellant.

6.2 Order 35 rule 5 of the High Court Rules provides as follows;

“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.”

6.3 Both the Appellant and the Court below referred to a statement extracted from the Judgment of the Court of Appeal of England and Wales in the case of Shocked and Another v. Goldschmidt¹, which states as follows;

“On an application to set aside a judgment given after a trial, in the absence of the applicant, different considerations applied than an application to set aside a default judgment. In particular, the predominate consideration for the Court is not whether there was any defence on the merits but the reason why the applicant had absented himself and if the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a re-hearing.”

6.4 At page 20 of the Record of Appeal, in the first paragraph, the learned Judge expresses his dissatisfaction with the Appellant for the absence of her lawyers at the hearing. The learned Judge also criticizes the Appellant for not calling her lawyers to give them instructions to apply for an abridgment of time or file an affidavit in opposition on her behalf.

- 6.5 The point is that the learned Judge veered off the relevant consideration for the application by venturing upon the internal communication between counsel and client. What was relevant to the application was whether or not the Appellant had given or shown sufficient cause to set aside the Judgment.
- 6.6 Nonetheless, in paragraph 5.4 of the Ruling at page 20 of the Record of Appeal, the learned Judge appears to have been satisfied with the explanation for the Appellant's absence at the hearing.
- 6.7 It was at that point that the learned Judge expressed his dissatisfaction with the Appellant's failure to explain the delay in making the application.
- 6.8 Clearly, the learned Judge refused to grant the application not on insufficiency of cause for failure to attend the hearing but for lack of an explanation for the delayed application to set aside the Judgment.
- 6.9 What is clear is that order 35 rule 5 of the High Court Rules, the provision under which an application in this regard can be made, does not give a time frame within which such application shall be made.
- 6.10 On that basis, it may be argued that once sufficient cause is given for the absence of a party at the hearing, it does not matter how long it takes the party against whom such Judgment was given to apply, the Judgment in issue should be set aside.

- 6.11 In our view, such a position is not justifiable because it is a requirement of any judicial process that applications should be made expeditiously. In the absence of a time limit set by law, an application should be made within a reasonable time.
- 6.12 We have, in certain instances, held a period of two weeks (14 days) to be reasonable time within which to file an application. In this case, the evidence given by the Appellant is that she was quarantined for COVID symptoms for fourteen days from the 6th February 2021, which expired on 20th February 2021. She was in quarantine for a further fourteen days from 21st February, 2021, until 6th March, 2021.
- 6.13 It was therefore, legitimate for the learned Judge to ask why the Appellant had not made the application at an earlier date, preferably within the month of March upon expiry of the second quarantine period.
- 6.14 The Appellant did not render any explanation for sleeping on her right to invoke Order 35 rule 5 of the High Court Rules. This is in light of the fact that there was no evidence of a further quarantine beyond the twenty-eight successive days she gave through her application.
- 6.15 In our view, five months is inordinate in view of the nature of the application and the consequences the Appellant would suffer, and which she in fact suffered, being the possession and eventual sale of the property.

7.0 CONCLUSION

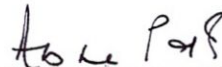
- 7.1 The net effect our consideration and analysis of the appeal is that the learned Judge was on firm ground when he dismissed the application for being inordinately late.
- 7.2 The end result is that we find no merit in the appeal and dismiss it accordingly. We order parties to bear their own costs because the appeal has failed only on the point of inordinate delay.



M.J. SIAVWAPA
JUDGE PRESIDENT



F.M. CHISHIMBA
COURT OF APPEAL JUDGE



A.N. PATEL SC
COURT OF APPEAL JUDGE