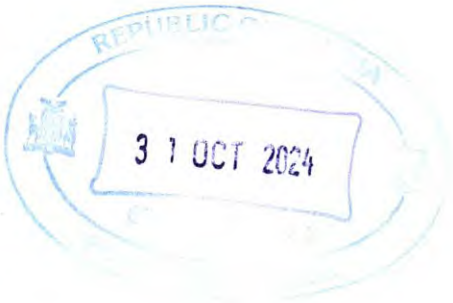
IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 96 of 2024**

HOLDEN AT KABWE

(Civil Jurisdiction)



BETWEEN:

BWALYA LUMBWE **APPELLANT**

AND

RONALD SIMWINGA (DR) **RESPONDENT**

CORAM: SIAVWAPA JP, CHISHIMBA & PATEL, JJA

On 14th & 31st October 2024

For the Appellant: Mr. K. Banda of Messrs AMW Legal Practitioners
Co-Advocates with Messrs. Mulilansolo Chambers

For the Respondent: No Appearance

JUDGMENT

Patel, JA, delivered the Judgment of the Court.

Cases Referred to:

1. Milan Gordvic v Mbizule -SCZ Appeal No.18 of 2017
2. Nahar Investments limited v Grindlays Bank (International (Zambia) Limited- SCZ Judgment No. 1 of 1984
3. Mazembe Tractor Company Limited vs Meridien BIAO Bank Limited (In Liquidation)- SCZ 8/209/97
4. Chifuti Maxwell v Mwansa and Anor- SCZ Appeal No 9 of 2016
5. Access Bank (Zambia) Limited and Group Five/ZCon Business Park Joint Venture (Suing as a Firm)- SCZ/08/52/2014
6. G4S Secure Solutions Zambia Limited v Lupupa Kabezya Lewis- SCZ Appeal No. 170/2015
7. Development Bank of Zambia and Mary Ncube (Receiver) v Christopher Mwanza and 63 Others- SCZ/8/103/08
8. Robert Simeza (suing in his capacity as Executor of the Estate of Andrew Hadjipetrou) and 3 others v Elizabeth Myzeche (Sued as the mother and guardian ad litem of minor beneficiaries) -SCZ Appeal No. 87 of 2011
9. Pramesh Bhai Megan Patel v Rephidim Institute Limited -SCZ Judgment No. 3 of 2011
10. Muvi TV v Makandani Banda -CAZ Appeal No.154 of 2023
11. Nkhuwa vs Lusaka Tyre Services Limited (1977) Z.R 43

Legislation & Rules referred to:

1. The Rules of the High Court, Chapter 27, Volume 3 of the Laws of Zambia.
2. The Rules of The Supreme Court 1965 (The White Book) 1999 Edition

1.0 INTRODUCTION

1.1 This is an appeal by the Appellant, (the Plaintiff in the Court below) against the Ruling of **Chibbabbuka, J,** of the High Court, delivered on 29th January 2024, on two applications made by the Appellant in the lower Court, seeking firstly an Order of stay of execution and secondly, an Order to set aside a Judgment obtained in his absence.

1.2 This Appeal arises out of a post-judgment composite Ruling and interrogates the law and procedure on applications both for an Order to set aside a Judgment made in the absence of a Party pursuant to **Order 35 rule 4 and 5** of the Rules of the High Court[1], and for an Order of stay of execution of the Judgment pursuant to **Order 45 rule 11** of the Rules of the High Court[1] and **Order 47 rule 1** of the Rules of the Supreme Court[2].

1.3 Ultimately, the Appeal interrogates the principles of case management as exercised by the trial Court and the circumstances in which an appellate court may set aside decisions made in the exercise of case management, a preserve of the trial court.

1.4 For the purposes of this Judgment, we shall refer to the Parties as they appear in this Court. For clarity, it is noted that the Appellant and Respondent were Plaintiff and Defendant, respectively in the lower Court.

2.0 BACKGROUND

2.1 The dispute between the Parties emanated between neighbours who shared a common boundary wall, and the problems that ensued over the shared boundary wall.

2.2 It is not disputed that the Respondent's house No. 23 Middle Way, in Kabulonga, shared a boundary wall with the Appellant's house No. 20 Serval Road, in Kabulonga in the Lusaka District.

2.3 It is also not in contention that the Parties agreed to construct a new concrete boundary wall between their two properties to replace the old wall that was in existence.

2.4 The Parties thereafter fell into disagreement and the Appellant commenced proceedings against the Respondent, by Writ of Summons and Statement of Claim on 26th March 2019, under cause number 2019/HP/0483 seeking amongst other reliefs, an injunction against the Respondent, special damages, damages, other relief and costs.

2.5 The lower Court proceeded to hear the matter on 22nd August 2022, in the absence of the Appellant, wherein it dismissed the Plaintiff's case for want of prosecution and entered Judgment on the Respondent's counter-claim having allowed the Respondent to proceed with its case.

3.0 DECISION OF THE COURT BELOW

3.1 The lower Court delivered Judgment in the matter on 24th August 2023 and which is seen at **pages 64 to 78** of the Record of Appeal. However, we are not examining the Judgment of the lower Court, as the appeal before us assails, not the Judgment of the lower Court, but the Court's subsequent refusal by its Ruling to set aside the Judgment obtained in the absence of a Party.

3.2 On 2nd October 2023, the Appellant applied by Summons for an Order to set aside Judgment made in the absence of a party pursuant to **Order 35 rules 4** and **5** of the High Court Rules. This application was filed together with its supporting affidavit and attendant list of authorities and skeleton arguments of even date. (hereinafter referred to as the 1st application). The 1st Application is seen at **pages 79 to 88** of the Record of Appeal.

3.3 On the said date, the Appellant also made another application by *ex parte* Summons for an Order to stay execution of the Judgment of the High Court dated 24th August 2023 pursuant to **Order 45 rule 11** and **Order 47 rule** 1 of the Rules of the Supreme Court[2] and the inherent jurisdiction of the Court. This application was filed with its supporting affidavit and attendant list of authorities. (hereinafter referred to as the 2nd application). The 2nd application is seen at **pages 89 to 95** of the Record of Appeal.

3.4 The Respondent opposed the two applications by its affidavit and skeleton arguments in opposition to the 1st application on 14th November 2023 as seen at **pages 102 to 110** of the Record of Appeal.

3.5 The Respondent also opposed the 2nd application by its affidavit and skeleton arguments in opposition filed on 27th November 2023 as seen at **pages 111 to 123** of the Record of Appeal.

3.6 The Appellant caused to be filed his affidavit in reply and his composite list of authorities and skeleton arguments on 4th November 2023, although the affidavit is dated 4th December 2023. This is seen at **pages 96 to 101** of the Record of Appeal.

3.7 The lower Court at a hearing held on 5th December 2023, having considered the matter before it, dismissed both applications in its now assailed Ruling of 29th January 2024, and granted leave to the Appellant to appeal both the Ruling and the Judgment of the Court.

3.8 The lower Court noted that it is trite law, as acknowledge by both parties in their respective arguments, that the trial Court has the power, as per **Order 35** of the Rules of the High Court to proceed with trial in the absence of a party when it deems fit. Similarly, **Order 35 Rule 1 (2)** of the Rules of the Supreme Court of England provide that:

> *"if, when the trial of an action is called on, one party does not appear, the Judge may proceed with the trial of the action or any counterclaim in the absence of that party".*

It is on the above authorities that the lower Court derived its mandate to proceed to hear and determine the counterclaim. As regards the authority to dismiss the plaintiff's action, the same was done following an application by the defendant's advocates, at the trial, for dismissal for want of prosecution.

3.9 Upon due consideration of the applications before it, the lower Court dismissed both applications, in its Ruling, now assailed.

4.0 THE APPEAL

4.1 Aggrieved with the Ruling of the lower Court, the Appellant filed a Notice of Appeal and Memorandum of Appeal on 27th February 2024, advancing four (4) grounds of appeal:

i. *The Learned Puisne Judge in the Court below erred in fact and law when she refused to set aside the judgment that was rendered after hearing the counterclaim in the absence of the Appellant without due regard to the fact that matters must be determined on the merits.*

ii. *The Court below erred in law and fact when it refused to set aside the judgment entered in the absence of the Appellant on the ground that the appellant was aware of the hearing date when there was no due proof of service of the notice of hearing.*

iii. *The Court below erred in law and in fact when it refused to set aside judgment obtained in the absence of the appellant despite the Appellant meeting the threshold required in an application to set aside a judgment obtained in the absence of a party by giving reasons for his absence at the hearing.*

iv. *The Learned trial Judge misdirected herself in law by ignoring and refusing to properly apply the provisions of Order 35(5) of the High Court Rules which provides that "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".*

5.0 APPELLANTS' ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 We have duly considered and appreciated the Appellants' Heads of Argument filed on 25th April 2024 and which will be referred to in the reasoning part of the Judgment.

6.0 RESPONDENT'S HEADS OF ARGUMENT

6.1 The Respondent did not file heads of argument nor attended the hearing of the appeal.

7.0 THE HEARING

7.1 At the hearing, Counsel relied on the Record of Appeal and its heads of argument which it augmented by emphasizing the fundamental principles of fairness in legal proceedings in that a Court must ensure that every party has an opportunity to present its case in full. It was Counsel's argument that there was no evidence on the Court record of the Notice of hearing of the Respondent's counterclaim.

8.0 DECISION OF THE COURT

8.1 We have carefully considered the grounds of appeal reproduced in *paragraph 4* above, the impugned Ruling, and the arguments.

8.2 No matter how the grounds of appeal are presented, essentially, they seek to challenge the power of the lower Court to have proceeded in the absence of a Party and its refusal to set aside the Judgment by its now assailed Ruling of 29th January 2024. The grounds of appeal being interrelated, we will deal with them with a holistic approach and ask ourselves the following question:

> *"In what circumstances can a Party rely on the provisions of* ***Order 35 rule 5*** *of the High Court Rules to set aside a Judgment of the Court entered in the absence of a Party? Conversely,*

"Whether the lower Court properly exercised its discretion when it proceeded to hear the case in the absence of a Party?"

8.3 In advancing its arguments, the Appellant has placed reliance on the provisions of **Order 35 rule 4** of the Rules of the High Court[1] to canvass the argument on **page 2** of its Arguments *"that the Court was obligated to ensure that there was due proof of service of the Notice of Hearing on the Appellant."*

8.4 **Order 35 rule 4** provides as follows:

"Where the defendant to a cause which has been struck out under rule 2 has a counterclaim, the court may, on due proof of service of the notice thereof, proceed to hear the counterclaim and give judgment on the evidence adduced by the defendant, or may postpone the hearing of the counterclaim and direct notice of such postponement to be given to the plaintiff."

8.5 The Appellant has also placed reliance on **Order 35 rule 5** to canvass the argument that the Judgment entered by the Court in his absence ought to have been set aside because the matter was heard in his absence and without proof of service of the notice of hearing.

Order 35 rule 5 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."

8.6 The Appellant has also relied on the case of **Milan Gordvic v Mbizule**[1] to advance the argument that the Court has the discretion to set aside a judgment obtained in the absence of a Party. The Appellant has argued that whilst **Order 35 rule 4** of the Rules of the High Court gives the Court discretion to proceed in the absence of a party, the discretion is only exercised where the Court is satisfied that notice was served on the party. He has also argued that with respect to the counterclaim, the onus of service was on the Respondent.

8.7 As we unpack the appeal, we can do no better than re-state from the Ruling of the lower Court, the events in the lower Court which prompted the learned Judge to proceed to dismiss the Appellant's case and hear the Respondent's counterclaim, as she did on 22nd August 2022.

8.8 The lower Court at **page 13** of the Record of Appeal noted as follows:

> *"I must mention at this juncture that contrary to the assertions by the plaintiff and his advocates, I did, at page J5 of the judgment, explicitly state reasons for the dismissal of the plaintiff's action and trial of the counterclaim. I stated that:*
>
> *"The matter was scheduled for trial on the 12th July 2021 and did not proceed as counsel for the defendant had a bereavement. The matter was adjourned to the 12th February 2022 at the instance of the plaintiff. The case was subsequently adjourned to the 21st April 2022 and again to the 2nd May 2022 but it did not take off on those dates. The matter was finally scheduled for the 22nd August 2022 and only the defendant and his advocates were in attendance. Based on the number of adjournments, counsel for the defendant applied that*

the matter proceeds to trial and in addition that the plaintiff's claim be dismissed for want of prosecution as the plaintiff seemed to no longer be interested in pursuing his claim. This Court allowed the said applications."

8.9 The above is clearly shown by the record of proceedings which appear at **pages 124 to 156** of the Record of Appeal. What appears at first glance is that there are no copies in the Record of Appeal, of any of the notices of hearing, (*of which there must have been several*), for the Appellant to canvass the argument based on lack thereof for the specific hearing of 22nd August 2022. The Record in fact speaks to many adjournments as accurately noted by the learned Judge and at which the next date of hearing was stated. This fact has not been disputed by the Appellant.

8.10 We have also looked at **page 141** of the Record of Appeal and have noted another request for an adjournment on the part of the Appellant, which was resisted by the Respondent. The lower Court issued what may be termed an unless order and in the words of the lower Court, the learned Judge stated as follows:

"Having heard counsel, the application for an adjournment is hereby granted as prayed. ***However, this will be the last adjournment and should the Plaintiff not be present at the next hearing the court will proceed to hear the defendant's counterclaim at trial.*** *The plaintiff is condemned in costs for that adjournment to be taxed in default of agreement."* (emphasis added).

8.11 It has also not escaped our attention that Counsel for the Appellant (the Plaintiff), whilst pleading for the adjournment, undertook to ensure that the Plaintiff would be ready to proceed at the next hearing and that he would inform counsel (with conduct) and communicate the concerns raised by the Respondent (the Defendant). This is seen at **page 141** of the Record of Appeal.

8.12 It is trite that for any application to set aside a judgment entered in the absence of a party, the key consideration must be anchored *''on sufficient cause''*. The Appellant in the proceedings referred to above, undertook to convey the sentiments of the Court to Counsel seized with conduct and ought to have noted the serious reprimand of the lower Court coupled with the Court's order to proceed at the next hearing, with or without the Appellant.

8.13 In examining whether the Appellant had established *''sufficient cause''* the lower Court relied on the provisions of **Order 35 rule 1 (1)** of the Rules of The Supreme Court which provides as follows:

> *"Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important; unless the absence was not deliberate but was due to accident or mistake, the Court will unlikely to allow a re-hearing"*

8.14 The learned Judge noted that in *casu*, the Appellant's explanation was that neither him nor his advocates were aware of the trial date as they were not served with the notice of hearing. Upon carefully reviewing the record, the learned Judge noted that the matter had been set down for commencement of trial on many dates. The record showed that the matter

was first allocated the 5th, 6th and 7th November 2019 as dates for commencement of trial, but this Court was informed by the marshal that the Appellant's counsel was out of jurisdiction and hence both parties were seeking an adjournment. An adjournment was accordingly granted to 3rd and 4th February 2020 but the Appellant by a notice of intention to adjourn filed on 30th January 2020 sought an adjournment on reason that the Appellant was out of jurisdiction. The matter was adjourned for the third time to the 12th and 13th May 2020 for commencement of trial, but the trial could not commence as the Appellant again applied for an adjournment, which was granted to 12th July 2021. The trial of the matter again failed to take off as counsel for the Respondent had a bereavement, and again adjourned to 21st February 2022 on which day counsel for the Appellant applied for an adjournment on basis that counsel with conduct of the matter was unwell. The record for this has been noted at **paragraph 8.10** and **8.11** above.

8.15 The lower Court considered the fact that there had been several further adjournments and noted that there was only one affidavit of service filed in these proceedings, which confirmed her reasoning that Parties were duly served through their respective pigeon-holes at the Court. The learned Judge also noted that the Appellant had not filed any affidavit of service or challenged any previous hearings of the several attendances that have been reflected above.

8.16 To us this is a classic case of the Appellant having failed to conduct himself in a diligent manner, and thereafter seeking to heap the burden on the Court by its reliance on the words:

"....*on due proof of service of the notice thereof"* as provided in **Order 35 rule 4** of the Rules of the High Court.

8.17 It is also worth mentioning that the Appellant sat back and waited and did nothing after the trial, till Judgment was delivered, one year later. We note the editorial notes to **Order 35 Rule 1** of the Rules of the Supreme Court that provide the general considerations that the Court should consider when faced with an application to set aside judgment obtained in the absence of a party at trial. One such consideration is that where a party had notice of the proceedings but disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision. The editorial notes further state that:

> *"In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered; where he had failed to comply with order of the Court, the Court will be less ready to exercise its discretion in his favour..... There is a public interest in there being an end to litigation and in not having the time of the Court occupied by two trials.*

8.18 We are also alive to the principle settled by the Supreme Court in the old case of **Nahar Investments limited v Grindlays Bank (International (Zambia) Limited**[2] which establishes the principle that an erring party cannot sit on its rights and wait for an adverse application or decision (*as the case may be*) before applying to correct its own error. The Appellant was the Plaintiff in the lower Court. The Appellant knew or ought to have known of the strong sentiments of the Court when it stated that it would proceed with or without the Appellant at the next hearing of the matter.

8.19 The question that begs asking is *'on the basis of the facts and circumstances of this case, can the lower Court be faulted for proceeding to hear the case in the absence of a Party?''* The resounding answer to that question is in the negative.

8.20 In the unreported case of **Mazembe Tractor Company Limited vs Meridien BIAO Bank Limited (In Liquidation)**[3], the Supreme Court made the following observations at page 7 as follows:

> *''....the rules are often augmented by Orders for Directions, including orders made by a judge in the exercise of the Court's inherent jurisdiction to control the proceedings before itself. The judge's order clearly stands on a higher footing than the rules, and it is an extremely naïve litigant who can think of disobeying and challenging the authority of the judge in his own Court room without consequences''*

8.21 The Supreme Court in the case of **Chifuti Maxwell v Mwansa and Anor**[4] was categorical when it stated that setting aside of a judgment is not as a matter of right, but at the discretion of the Court on a party providing sufficient cause to be granted such an order.

8.22 The dilatory conduct of the Appellant leaves much to be desired and will not be rewarded with its insistence that Judgment rendered in the absence of a party under **Order 35 rule 5** be set aside.

8.23 In dismissing this appeal, as we now do, we can do no better that uphold the case management directives followed by the lower Court which encompasses the need to administer justice in a case in a timely and cost-effective manner. We also quote from another decision of the Supreme

Court rendered in the case of **Access Bank (Zambia) Limited and Group Five/ZCon Business Park Joint Venture (Suing as a Firm)**[5] wherein the Court stated as follows:

> *"....Matters should, as much as possible, be determined on their merits rather than be disposed of on technical or procedural points. This, in our opinion, is what the ends of justice demand. Yet,* ***justice also requires that this court, indeed all courts, must never provide succor to litigants and their counsel who exhibit scant respect for rules of procedure****. Rules of procedure and timeliness serve to make the process of adjudication fair, just, certain and even-handed.* ***Under the guise of doing justice through hearing matters on their merit, courts cannot aid in the bending or circumventing of these rules and shifting goal posts****, for while laxity in application of the rules may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules..."* (Emphasis ours).

8.24 The Supreme Court in the case of **G4S Secure Solutions Zambia Limited v Lupupa Kabezya Lewis**[6], (albeit, in the context of application for an adjournment), offered guidance to trial courts. We are of the considered view that the same guidance applies to the facts in *casu,* when it stated as follows:

> *''We must emphasize that proceedings before our courts are court-driven and the court is expected to be in control of the proceedings and ensure that matters are not delayed by unnecessary adjournments. It is trite that adjournments are one of the major causes of delay in the dispensation of justice. Proper case*

management, therefore requires that the Court should only grant an adjournment in the most deserving of cases, bearing in mind all relevant circumstances of the case."

8.25 On the principle of finality, in its Ruling delivered by the Supreme Court, in the case of **Development Bank of Zambia and Mary Ncube (Receiver) v Christopher Mwanza and 63 Others**[7] the Court held:

"There must be finality and a party that is clearly in default should reap the consequences of its inertia and cannot be allowed to roam the courts like a headless chicken keeping the other party in suspense more so that the party was represented by Counsel."

8.26 In *casu*, the Appellant has lamentably fallen short of the requirement to show *sufficient reason* to set aside the Judgment of the lower Court. The Supreme Court in the case of **Robert Simeza (suing in his capacity as Executor of the Estate of Andrew Hadjipetrou) and 3 others v Elizabeth Myzeche (Sued as the mother and guardian ad litem of minor beneficiaries)**[8] affirmed the decision held in the case of **Pramesh Bhai Megan Patel v Rephidim Institute Limited**[9] where the Court stated:

"the most important consideration for the hearing of an application to set aside Judgment obtained in the absence of a party, is the reason for the absence of the party at the proceedings.....the fact that after being aware of the proceedings, the Respondent waited until after the Judgment had been entered against him before engaging Counsel lends credence to the Applicant's contention that he voluntarily elected not to take any definitive steps to response...."

8.27 Respectfully, and in the words of the Apex Court uttered in the cited case of **Robert Simeza v Myzeche**

> *''you cannot force a litigant who does not want to litigate to litigate.''*

8.28 In a recent decision of the Court delivered in the cited case of **Muvi TV v Makandani Banda**[10]**,** we guided litigants to stop blaming everyone but itself for its lack-lustre approach to its own actions. As we did in the **Muvi TV** case we refer to the Latin maxim *''vigilantibus non dormientibus jura subveniunt''* which means *''law aids the vigilant, not those who sleep over their rights''*.

8.29 We must echo once again the warning sounded to litigants in the old case of **Nkhuwa vs Lusaka Tyre Services**[11] where the Supreme Court noted as follows:

> *''It is regrettable that in recent years Legal Practitioners in this Country have approached the need to comply with the rules as to time with complete non-chalance. This Court has had occasion in the past to comment adversely on the attitude of legal practitioners to compliance with other rules of procedure but it is time that all legal practitioners were made to understand that where the rules prescribe time within which steps must be taken these rules must be adhered to strictly and those practitioners who ignore them will do so at their own peril.''*

9.0 CONCLUSION

9.1 The appeal being bereft of merit, it is dismissed in its entirety.

9.2 We make no award of costs as the Respondent did not participate in the appeal.

M. J. SIAVWAPA
JUDGE PRESIDENT

F.M. CHISHIMBA
COURT OF APPEAL JUDGE

A.N. PATEL S.C.
COURT OF APPEAL JUDGE