IN THE HIGH COURT FOR ZAMBIA **2019/HP/0320**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

FINCA ZAMBIA LIMITED **APPLICANT**

AND

PHERONOWA GENERAL DEALERS LIMITED **1ST RESPONDENT**
WALIWANA KAIRA **2ND RESPONDENT**

Before the Hon. Mrs. Justice R. Chibbabbuka on the 13th day of June, 2024.

For the Applicant:	N/A
For the 1st Respondent:	N/A
For the 2nd Respondent:	Mr. L. Mumba, Messrs Kafue, Chambers.

RULING

Cases referred to:

1. *Shell and B.P Zambia Limited vs Conidaris and Others (1975) ZR 174*
2. *American Cyanamid Company vs Ethicon Limited (1975) A.C 396*
3. *Zimco Properties Limited vs Lapco Limited (1988-1989) ZR 92*
4. *Bernard Kutalika vs Dainess Kalunga Appeal No. 73 of 2013*
5. *Stanley Mwambezi vs Morester Farms (1977) Z.R 108*
6. *Tata (Zambia) Limited vs Shilling Zinka (1986) ZR 51*
7. *Premesh Bhai Megan Patel vs Rephidim Institute (2011) ZR Vol 1, 134*
8. *Barrington vs Lee (1971) 3 ALL ER 123*
9. *Waterwells Company vs William Jackson (1984) ZR 98*
10. *S Brian Musonda (receiver of the 1st Merchant Bank Zambia Limited) vs Hyper Foods Products and 2 Others (1999) ZR 124*
11. *Finance Bank Limited vs Africa Eagle Limited and 2 Others (1998) ZR 237*
12. *James Daka vs Patel and ZSIC (1995-1997) ZR 108*
13. *Twampane Mining Corporative Society Ltd vs E & M Storti Mining Limited SCZ Judgment No. 20 of 2011*
14. *Kalunga Chansa vs Evelyn Hone Collage Appeal No. 134/2019*
15. *Chainama Hotels Limited and Others vs Investrust Merchant Bank (Z) Ltd Appeal No. 105/2009*

Legislation referred to:
The Rules of the Supreme Court of England (White book), 1999 Edition.
The High Court Act, Chapter 27 of the Laws of Zambia
Law of Property and Conveyancing Act, 1881

Other Works referred to:
Atkin's Court Forms, 2nd edition, Volume 22 (1), 1996 issue

1.0 Introduction

This is a combined ruling pertaining to the 2nd respondent's applications for an injunction, and to set aside judgment in default. The 2nd respondent's application to set aside judgment in default was filed on 3rd November, 2023, by summons made pursuant to *Order 12 Rule 2, Order 20 Rule 3,* and *Order 35 Rule 5* of the *High Court Rules.* While the application for an interim injunction, which was filed on 9h November, 2023, by summons, pursuant to *Order 27 Rule 4* of the *High Court Rules, Chapter 27* of the *Laws of Zambia* as read together with *Order 29 Rule 1* of the *Rules* of the *Supreme Court of England, 1999 edition.*

I will first determine the application for an interim injunction, and will refer to the parties as they appear above for convenience.

INJUNCTION APPLICATION

2.0 The 2nd Respondent's Affidavit in Support

The 2nd respondent deposed to an affidavit of even date as the summons. He deposed as follows:

When this action was commenced, he was served with the originating process, which shows his incorrectly spelt name. Following the service of the said originating process, he never received any other court documents in relation to this matter, that is notices of hearing, letters of service, summons and orders. He only learnt that his farm had been sold through an alert from a police officer. He conducted a search on the status of this matter, which search revealed that a Judgment in default of appearance and defence had been entered on 3rd December, 2020, and an order for sale granted. He has in the circumstances applied to set aside the judgment in default of appearance and the order for sale as he has a defence on merits.

A valuation report done at the instance of the applicant placed the market value of the property in issue at K5,165,000.00 and force market value at K3,615,000.00. A search conducted at the Ministry of Lands registry revealed that the property was sold at K585,000.00, which is way below its value. The money due to the applicant was K383,717.73, and so the surplus sum of K201,282.27 could not be said to be reasonable costs when the matter was prosecuted by In-house counsel.

He was ready to redeem his property had he been served with a return date and judgment which was entered ex-parte to his detriment. If the ex-parte order of interim injunction is not granted, he will suffer an injustice as he will be deprived of his farm. This is a good case in which this court can grant the order sought.

2.1 The 2nd Respondent's Supporting Evidence

In support of the application, the 2nd respondent filed skeleton arguments wherein he referred to *Order 27 Rule 1* of the *High Court Rules,* and *Order 29 Rule 1* of the *Rules* of the *Supreme Court of England, 1999 edition,* which give this court the power to grant an order of injunction. He argued there are triable issues herein as shown under paragraphs 4 and 5 of his affidavit in support of the application. The said paragraphs reveal that he did not enter appearance and file a defence because after being served with the originating process, he was not served with any other court documents. He relied on the cases of **Shell and B.P Zambia Limited vs Conidaris and Others**[1] to argue that injunctive reliefs are not granted as a matter of right but are equitable reliefs granted in the court's discretion. The 2nd respondent also referred to the laid down principles which were outlined in the **American Cyanamid Company vs Ethicon Limited.**[2]

He argued that the affidavit in support of the application has disclosed his defence on merits and that it has further disclosed that the applicant dealt with his property without regard to the valuation report generated at their instance. He argued that the balance tilts in favour of granting the injunction so that the status quo is maintained regarding the probable loss of property. For this argument, the 2nd respondent relied on the case of **Zimco Properties Limited vs Lapco Limited**[3]. He argued that should the injunction not be granted, the applicant will continue to deprive him of the property which damage cannot be atoned for by an award of damages.

3.0 The Hearing

This application was disposed of pursuant to *Order 30 Rule 6A* of the *High Court (Amendment) Rules, 2020* which empowers the court to dispense with the hearing of an application, and to dispose of applications on documentary evidence.

4.0 The Decision of the Court

I am indebted to the 2nd respondent for the arguments, which I have carefully considered. The 2nd respondent seeks a prohibitory injunction, which by definition is a judicial order whereby the court orders a party to refrain from doing specified acts pending the determination of the parties' rights. It is well established that an order of injunction is discretionary and not awarded as a matter of right. The court in the case of **Bernard Kutalika vs Dainess Kalunga**[4] stated that the court's discretionary remedy to grant an injunction must be exercised judiciously, having regard to all the facts and circumstances of each and every case.

There are relevant principles and tests to be applied when a court is faced with deciding whether or not to grant an interim injunction which were set out in the **American Cyanamid Company** case, and which have been referred to by the 2nd respondent herein. Notably, that the court should address the question of whether or not on the facts raised there is a serious question to be determined at trial; whether damages would be an adequate remedy and the defendant is in a position to pay; and lastly where the balance of convenience lies. It is also well established that an injunction is only granted to regulate the position until the rights of the parties have been determined in an action, and therefore a party seeking an injunction ought to seek the relief when there is imminent danger of the damage he seeks to be protected of. An injunctive relief will have no practical effect if the purported damage the party seeks protection from has already happened. The authors of **Atkin's Court Forms, 2nd edition, Volume 22 (1), 1996 issue, on page 66,** list the defences to an injunction application. One such defence is termed a useless injunction. The authors state that:

> *"Injunction useless: that the grant of an injunction would be useless. Thus for example, if the act complained of is the felling of trees, the grant of an injunction will be refused if all relevant trees have been felled before the court is seized of the matter."*

In *casu*, the 2nd respondent has averred that he learnt of the fact that the property in question was sold from a police officer, and that when he conducted a search at the Ministry of Lands, he discovered that indeed the property has been disposed of. It follows quite clearly that the grant of an injunction in this matter is otiose as the property the 2nd respondent seeks to protect from being sold has already been sold. An injunction order would have no practical effect herein and is accordingly denied.

I will now turn to the application to set aside judgment.

<u>APPLICATION TO SET ASIDE JUDGMENT IN DEFAULT.</u>

5.0 The 2nd Respondent's Affidavit in Support

On 3rd November, 2023, the 2nd Respondent filed an affidavit in support of his application to set aside the Judgment of 3rd December, 2020. He deposed that when this action was commenced, he was served with the originating process. His first name on the originating process was and is still incorrectly spelt. Following the service of the originating process, he never received any other court documents in relation to this matter, that is notices of hearing, letters of service, summons and orders. He only learnt that his farm had been sold through an alert from a police officer. He conducted a search on the status of this matter, which search revealed that a Judgment in default of appearance and defence had been entered on 3rd December, 2020, and an order for sale granted. He has in the circumstances applied to set aside the judgment in default of appearance and defence, and the order for sale as he has a defence on merits.

A valuation report done at the instance of the applicant placed the market value of the property in issue at K5,165,000.00 and force market value at K3,615,000.00. A search conducted at the Ministry of Lands registry revealed that the property was sold at K585,000.00, which is way below its value. The money due to the applicant was K383,717.73, and so the surplus sum of K201,282.27 could not be said to be reasonable costs when the matter was prosecuted by In-house counsel. He was ready to redeem his property had he been served with the return date and Judgment of the court, which Judgment was done ex-parte to his detriment. If the default Judgment is not set aside, he will suffer an injustice as he will be deprived of his farm, which he pledged in a third-party mortgage agreement. This is a good case for the court to grant the order sought. He has a solemn and constitutional right to be heard as regards his property which was sold for a song.

5.2 The 2nd Respondent's Skeleton Arguments

The 2nd respondent filed skeleton arguments in support of his application to set aside judgment in default wherein he referred to *Order 20 Rule 3* and *Order 35 Rule 5* of the *High Court Rules* as the provisions of the law pursuant to which his application has been made. He argued that the court has discretion to set aside a judgment in default where the defendant has a defence and in the interest of justice. He referred to the case of **Mwambezi vs Morester Farms**[5] to buttress his argument. The 2nd respondent argued further that the Supreme Court in the case of **Tata (Zambia) Limited vs Shilling Zinka**[7] held that the reason to set aside a judgment in default is to perfect the court process. That he has a defence on merits and has further explained, in paragraphs 4 and 5 of his affidavit in support, that his failure to enter appearance and file a defence was due to the fact that his name was and is still incorrectly spelt, and that following the service of the originating process on him, he did not receive any more court documents in relation to this matter.

He referred to the case of **Barrington vs Lee**[7] in arguing that when dealing with an application to set aside a judgment in default, the question of whether there is a defence on merits and whether the applicant has given a reasonable explanation for his failure to file a defence within a stipulated time arises. He referred to the case of **Premesh Bhai Megan Patel vs Rephidim Institute**[8] for the argument that it is a defence on merit that is more important to consider. That his affidavit and exhibited defence shows that he has high prospects of succeeding in the main action and hence his application should be granted.

5.3 The Applicant's Affidavit in Opposition

The applicant filed an affidavit in opposition on 2nd February, 2024 wherein Freddie Kandiwo, the Head of Credit in the applicant company, deposed that the averment under paragraph 3 of the affidavit in support of the application which speaks to the 2nd respondent being served with the originating process and his name being wrongly spelt is not disputed. That the court entered a Judgment in default against the 2nd respondent following his neglect to enter appearance and file a response to the originating process within the required time. That had the 2nd respondent, who is the Managing Director of the 1st respondent, being desirous of redeeming his property, he would have entered appearance within the 14 days stipulated in the originating process.

The 2nd respondent has failed to advance a reasonable explanation to justify his failure to enter appearance and file his response. That the fact that the 2nd respondent's name was misspelt does not negate the fact that he was fully aware of the premise upon which the proceedings were commenced. That the record will show that the 2nd respondent was served with the originating process on 16th April, 2019, and a Judgment only entered on 3rd December, 2020. The 2nd respondent's defence lacks merit and has no prospects of success. The requirements of the law were fully adhered to in entering the Judgment against the respondents.

5.4 The Applicant's Skeleton Arguments

The applicant filed skeleton arguments in support of the application on even date as the affidavit in opposition. Counsel argued in those skeleton arguments that the 2nd respondent was served with the originating process which was in compliance with *Order 10 Rule 1* of the *High Court Rules*, which order clearly stipulates the time within which the respondents were to enter appearance as governed by *Practice Direction No. 4 of 1977*. That *Order 12 Rule 1* of the *High Court Rules* is instructive that Judgment in default may be entered where an appearance has not been made. That while *Order 35 Rule 5* imbues the court with the power to set aside a Judgment obtained in the absence of a party, the law requires that sufficient cause be shown.

Counsel relied on the case of **Waterwells Company vs William Jackson**[9] for the argument that in an application to set aside judgment in default, not only should a defence on merit be shown but an explanation of the default should be given. That the 2nd respondent has failed to meet the standard set out by the law to warrant the setting aside of the Judgment in default. The 2nd respondent has not advanced any justifiable reason for his failure to enter appearance to this action and file his defence for over a period of 20 months from the receipt of court documents entering Judgment. Counsel relied on the **Stanley Mwambazi** case for the argument that there is no triable issue herein. Counsel prayed for the dismissal of the 2nd respondent's application.

6.0 The 2nd Respondent's Affidavit in Reply

The 2nd respondent deposed to an affidavit in reply to the applicant's affidavit in opposition. The affidavit in reply was filed on 8th February, 2024. That the service of the originating process on him was after an alert that his matter was in court which caused him to appear, and the applicant's counsel served him with the process the following day on 16th April, 2019. That mortgage actions proceed to trial for the court to render a decision and grant a period within which to pay. He is not a shareholder in the 1st respondent company. He accidentally attended to a court hearing on 15th April, 2019 at which hearing the applicant's counsel told the court that the applicant intended to explore ex-curia means of settling the case but that same was not done. Instead, the applicant filed an application to enter judgment in default, which application he was not served with. He was never served with notices of hearing which he has been advised was the duty of the applicant's counsel to do. The property was grossly undervalued and sold at a suspiciously low price.

6.1 The 2nd Respondent's Skeleton Arguments in Reply

The 2nd respondent filed skeleton arguments on 8th February, 2024 wherein counsel reiterated some arguments contained in the arguments in support of the application and argued further that the 2nd respondent has a defence on merit, and that his explanation for not filing the defence is that the applicant on 15th April, 2019 proposed an ex curia settlement but the same was not done. Counsel relied on *Order 12 Rule 2* of the *High Court Rules* to argue that the Judgments in default entered in the absence of the other party is liable to be set aside. Counsel argued that *Section 20 subsection 1* of the *Law of Property and Conveyancing Act, 1881* requires that a mortgagee in possession should be given notice for payment of monies due, must give the true value of interest owed by the mortgagor in action, and if not interest or monies due, then the breaches, if any, that have been committed by the mortgagor. Counsel argued that the foregoing was not done in *casu.*

That the mortgagee is under a legal duty to use reasonable care and obtain the best price which the circumstance of the case permit. That the value of the property, according to the valuation report done by the applicant, was K5,165,000.00, and the force market value was K3,615,000.00. That the applicant sold the property at an unjustifiably low price of K585,000.00 according to entry no. 13 on the land register exhibited herein. That the courts have in a plethora of cases held that the mortgagor has an inviolable right to redeem his property, which was violated in this case. Counsel relied on the cases of **S Brian Musonda (receiver of the 1st Merchant Bank Zambia Limited) vs Hyper Foods Products and 2 Others**[10] and **Finance Bank Limited vs Africa Eagle Limited and 2 Others**[11] to argue that the court may interfere with the mortgagee's rights to the extent of enlarging time even where there is foreclosure and possession, and that the court may order revaluation of the property. Counsel further relied on the case of **James Daka vs Patel and ZSIC**[12] for the argument that the court may interfere with a sale where the price is so low. Counsel prayed that the Judgment in default entered herein be set aside.

7.0 At the Hearing

At the hearing, counsel for the 2nd respondent relied on the affidavit in support and affidavit in reply filed by the 2nd respondent. Counsel further relied on the skeleton arguments in support and in reply, which arguments he reiterated. Counsel prayed that the application be granted and the judgment in default set aside.

8.0 Decision of the Court

I am indebted to the parties for the arguments. I have carefully considered the same.

The 2nd respondent seeks an order of this court setting aside the judgment in default entered by the learned Deputy Registrar in favour of the applicant on 3rd December, 2020. A judgment in default of appearance in an action such as this one may be made under *Order 12 Rule 9* of the *High Court Rules.* Any judgment in default obtained may be set aside under *Order 12 Rule 2* of the *High Court Rules,* which provides that:

> *"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."*

In a plethora of cases, such the **Mwambezi**, and **Waterwells** case, relied on by the parties herein, it has been held that the court has discretion to set aside a judgment in default of appearance where a defence on merits has been exhibited and where a satisfactory explanation for the default had been stated. In *casu,* the 2nd respondent has given a number of reasons for his failure to enter appearance, one of which is that on 15th April, 2019, he accidentally attended to a court hearing at which hearing the applicant's counsel informed the court that the applicant and respondents wanted to explore an ex-curia settlement but that the same was not done, instead, the applicant filed an application to enter judgment in default. The question then is what is the law regarding parties engaged in ex-curia negotiations and its effect on the time for entering appearance? The principle of law is that ex-curia negotiations do not stop time from running. The Supreme Court in the case of **Twampane Mining Corporative Society Ltd vs E & M Storti Mining Limited**[13] stated that:

> *"The position of the law is that ex-curia settlement discussions do not and cannot stop the time from running. This principle was ably espoused by the learned authors of Chitty on Contract paragraph 1949 at page 1267 where they stated inter-alia, once time has started running, it continues until proceedings are commenced or the claim is barred. Parties must bear in mind that ex-curia settlement discussions may fail or succeed hence the reason to be prudent enough to prepare for any eventuality. Watch the time and take the necessary steps as provided in the rules of court.* <u>*To use ex-curia*</u>

settlement discussions as an excuse for failure to comply with the rules is to do so at one's peril." Underling for court's emphasis.

The Court of Appeal adopted this position in the case of **Kalunga Chansa vs Evelyn Hone Collage**[14] when it was held that:

> *"The court has put litigants on notice that even if they are engaging in ex-curia settlement discussions, it is only prudent for them to prepare for any eventuality. This is bearing in mind the fact that the results of the negotiations are not guaranteed and may either fail or succeed. Thus the need to be shrewd and watch the time and take the necessary steps as provided by the rules of the court. The* ***Twampane*** *case therefore sets the bar high and sends a warning that by failing to abide by the rules of the court, one does so at their own peril."*

Based on the above, the 2nd respondent cannot rely on the ex-curia settlement discussions as a basis for his failure to enter appearance. The reason that one of his names was wrongly spelt equally cannot be a basis for his failure to enter appearance as he knew that he was the intended 2nd respondent in this matter.

Another reason for the 2nd respondent's failure to enter appearance is that save for the originating process, he was not served with any other subsequent court documents such as notices of hearings, court orders and the judgment in default. I have carefully perused the record and there is no evidence that the respondents were served with any court documents other than the originating process. This was a careless act on the part of the applicant as it had an obligation to ensure service of the notices of hearing and more importantly the judgment in default so as to ensure that the 2nd respondent is accorded an opportunity to redeem his property. The applicant's careless act notwithstanding, the 2nd respondent's own assertions show that prior to making this application to set aside the judgment in default, he did not attempt to redeem his property by engaging the applicant to possibly repay the loan.

The 2nd respondent merely sat back on the premise that the matter would be settled ex-curia, and has conveniently not disclosed when exactly he was alerted of the sale by the police officer. Had he made a prudent inquiry on the status of this action, he would have been brought to notice of the judgment herein, and would have accordingly made the application to set aside the judgment in good time, before the property was acquired by a third party. The authors of the *Rules* of the *Supreme Court, 1999 edition* guide under *Order 13/9/12* that:

> *"There is no rigid rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. The application should be made promptly and within a reasonable time, but the court will in a fit case disregard lapse of time. Thus, in an action against a married woman where default was due to a bona fide misapprehension on the part of the defendant, and delay subsequently occurred in applying to set aside the judgment, the court set it aside notwithstanding the delay, because the action was wrong in form. Apart from express rules there is an inherent power in the court to prevent an abuse of its proceedings and a judgment, although the application is out of time, will be set aside if circumstances require it. On the other hand, if delay is coupled with prejudice occasioned to the plaintiff or to a bona fide assignee of the judgment debt, the court may refuse to set aside the judgment."*
> underling for court's emphasis.

Order 2 Rule 2 of the *Rules* of the *Supreme Court, 1999 edition*, provides that:

> *"An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and*

before the party applying has taken any fresh step after becoming aware of the irregularity."

Premised on the above extracts of the law, an application to set aside a judgment must be made timely and without undue delay. Inordinate delay in making the application may result in refusal by the court to grant the application. In *casu,* there has been substantial lapse of time between the period when the judgment in default was entered and when the application to set aside the same was made. The 2nd respondent from the 15th April, 2019, on which date he claims to have accidentally appeared to a hearing in this matter, made no efforts, irrespective of not being served the default judgment, to inquire on the progress of the court action, or to indeed liquidate his loan. Had he done so, he would have been brought to notice of what was happening at the time. In addition, the property the 2nd respondent hopes to redeem, should this application be granted, has already been disposed of and is now possessed by a bona fide third party. Granting the order sought would prejudice the said bona fide purchaser of the said property. The 2nd respondent slept on his right to bring this application timely and thus cannot be aided.

As regards the argument that the property in question was sold at a price below its value, the Supreme Court in the case of **Chainama Hotels Limited and Others vs Investrust Merchant Bank (Z) Ltd**[15] wherein it was held that:

"With regard to the second part of the complaint that the property was undervalued, we wish to state that the authorities we have cited state that a mortgagee is entitled to sell at a price just sufficient to recover what is due to him provided that the amount is fixed with due regard to the value of the property......As we have seen from the authorities, there is no principle of law which compels a mortgagee to sell only at or above the value of the property. Certainly, much depends on what the potential buyers are prepared to offer."

Based on the above, there is no requirement for a mortgagee to sell the mortgaged property only at or above the value of the property. In the absence of an allegation and evidence of fraud on the part of the applicant herein, the assertion that the property was undervalued is not reason enough to set aside the judgment in default.

On the circumstances of this matter, I find that this is not an appropriate case to order the setting aside of the judgment in default. The foregoing notwithstanding, I have taken note of the 2nd respondent's assertion that following the sale of the property and deduction of the sum owed, there was a surplus of the sum of K201,282.27. The **Chainama Hotels Limited** case is instructive in that a mortgagee has an obligation to render a detailed account following a sale of the mortgaged property. In the premises, I hereby order the applicant to render an account before the Deputy Registrar of the High Court of what was due to the applicant under the mortgage, the costs of the action, costs incidental to the sale of the property and an account of how the proceed of the sale of the property were applied. The account should further reflect the surplus, if any, which surplus would be what is due to the 2nd respondent.

Each party shall bear their own costs of this application.

Leave to appeal is granted.

Dated at Lusaka this 13th day of June 2024

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
13 JUN 2024
R. CHIBBABBUKA, J
P.O. BOX 50067, LUSAKA

R.H Chibbabbuka
HIGH COURT JUDGE