

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

2023/HPA/033

BETWEEN:

CHRISTINE SAWASAWA NALILI APPELLANT

AND

COLIN NORMAN ROBERTS

RESPONDENT



BEFORE THE HONORABLE MRS. JUSTICE M.C. KOMBE

For the Appellant: Mr. L. Mu'gambata - Messrs. Likezo & Co

For the Respondent: In person

J U D G M E N T

Cases Referred to:

- 1) Water Wells Limited v. Wilson Samuel Jackson (1984) Z.R 98.
- 2) Corvinhai Barhabhai Patel and Vallabhai Barhabai Patel v. Monile Holdings Company Limited (1993) S.J. 19.
- 3) Stanley Mwambazi v. Morrester Farms Limited (1977) Z.R. 108.
- 4) Kelvin Kalasa and others v. Edina Mwilwa Tembo (CAZ/8/113/2022).
- 5) John W.K. Clayton v. Hybrid Poultry Farm Limited (2006) Z.R. 70.
- 6) Premesh Bhai Megan Patel v. Rephidim Institute Limited (SCZ Judgment No.3 of 2011).

7) Fanny Muliango and Samson Muliango v. Namdou Magas and Murus Transport and Farms Limited (1988/89) Z.R 209.

8) Charles Banda and Others v. Faith Mwewa (Appeal No.72 of 2000).

Legislation Referred to:

1) The Subordinate Court Rules, Chapter 28 of the Laws of Zambia.

1. INTRODUCTION

1.1 This is an appeal against the ruling of the learned trial Magistrate S.K Mweene delivered on 25th January, 2023 against the Appellant.

1.2 The background facts are that the Respondent (Plaintiff in the court below) filed a default writ of summons on 15th August, 2022 against the Appellant (Defendant in the court below) claiming the sum of K 34,343.00 being in respect of monies arising from failure to complete fitting of windows at the Plaintiffs property in Chalala.

1.3 In the supporting affidavit, it was asserted that the Plaintiff had paid to the Defendant through her company called Horizon Burglar Bars the sum of K 81,718.63 being full payment for fourteen (14) aluminum windows and insect net screens. The final payment was made on 29th

September, 2021. However, the windows and frames did not arrive within the two weeks after final payment.

1.4 When the frames finally arrived and fitted, some did not fit and so a complaint was made to the Competition and Consumer Protection Commission (CCPC) which visited the premises on 17th November, 2021.

1.5 Eventually six of the window panels with clear glass were delivered and fitted but there were many problems as some were the wrong size. The remaining panel frames were also delivered but without the glass. A complaint was made to the police as there were assurances from the Defendant that the works would be completed.

1.6 It was alleged that the Defendant failed to carry out the works and hence the Plaintiff filed a default writ of summons so that the court could help him recover the cost of completing the window installation.

1.7 The Defendant did not enter appearance and the Plaintiff obtained judgment in fault on 16th September, 2022 in the sum of K34,343.00, with interest at the current bank rate and costs.

1.8 The Defendant on 20th December, 2022 applied before the trial Magistrate for an order to set aside the default

judgment on the ground that she did not attend to the matter as she was still recovering after giving birth and that she had a defence on the merits on the Respondent's claims.

1.9 On 25th January, 2023, the trial Magistrate declined the Plaintiff's application on the basis that since the Defendant was found at the office and also appeared at the police station showed that she was fit enough to enter appearance before court.

2. **GROUND OF APPEAL**

2.1 Dissatisfied with the Ruling of the trial Magistrate, the Appellant on 26th January, 2023 filed a Notice of Appeal on the following grounds:

- (i) *The Honourable lower Court misdirected itself in law when it overlooked the principles for dealing with applications to set aside default judgments when it refused to set aside its judgment in default of 16th September, 2022 the court failed to apply the principle that a Defence on the merits is more paramount.*

(ii) *That the Honourable lower Court erred in law when it refused to set aside the default judgment in the face of evidence that there was no inordinate delay by the Defendant in applying to set aside the same thereby depriving the Defendant of her day in Court.*

3. **APPELLANT'S HEADS OF ARGUMENTS**

3.1 On the first ground, reference was made to Order 31 rule 6 of the Subordinate Court Rules Chapter 28 of the Laws of Zambia 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.”

3.2 Based on the foregoing, it was submitted that the lower court did not adopt the correct principles when considering the application before it. The position of the law when setting aside judgments in default had long been settled by our courts in a number of authorities.

3.3 In order to succeed in an application, the applicant had to satisfy the court on three scores. The first one was that

they needed to show that they had a defence which raised triable issues on merit. Secondly, there must not be inordinate delay in making the application and lastly, there must not be improper conduct or malafide on the part of the applicant.

3.4 It was submitted that while all three considerations were important, what was more important was a Defence on the merits as there was no point in allowing a matter to go to trial when there was no merit.

3.5 That in that regard, it had become customary to exhibit a draft of the proposed defence to the claim so as to enable the court assess on the face of it if the Appellant had a defence that raised triable issues.

3.6 The cases of **Water Wells Limited v. Wilson Samuel Jackson**⁽¹⁾ and **Covindhai Barhabhai Patel and Vallabhai Barhabhai Patel v. Monile Holdings Company Limited**⁽²⁾ were cited in this regard wherein it was stated that a judgment in default may be set aside if a triable issue is disclosed.

3.7 It was submitted based on the above cases that the Appellant in her application exhibited a proposed defence to the Respondent's claims in the affidavit to the application to set aside the judgment in default of appearance. It was argued that if the Appellant was able to prove what was contained in the depositions, it would entail that the Respondent's claims to be paid in excess of K33,000.00 was unjustified as what should have been paid to him was a mere K8,000.00.

3.8 That the lower court did not consider this defence and dismissed her application based on reasons that were outside her proposed defence. This failure to attach more importance to the proposed defence was a serious misdirection and the lower court's ruling ought to be set aside by this Court.

3.9 It was also added that a credible explanation had been rendered by the Appellant as to why she did not file a defence within the time.

3.10 On ground two, it was submitted that it was well settled that courts ought to allow triable matters to proceed to

trial. Therefore, where a party made an application to set aside a default judgment and a defence that raised triable issues was exhibited, the courts usually allowed the matter to proceed to trial unless there had been inordinate delay, malafide or improper conduct.

3.11 The case of **Stanley Mwambazi v. Morrester Farms Limited**⁽³⁾ was relied on. It was therefore submitted that the default judgment was entered on 16th September, 2022 and on 20th December, 2022, the Appellant applied to set aside the judgment in default. This entailed that only a period of three months lapsed between entry of the judgment and the application.

3.12 That this period could not by any imagination be stated to be unreasonable delay. It was also submitted that the Appellant had not engaged in malafide or improper conduct that could justify the lower court not to accord her the favourable treatment of setting aside the judgment in default and having the matter heard on its merits.

3.13 In conclusion, it was submitted that this was a proper case in which this Court should consider exercising its

appellate powers by upholding the appeal and ordering that the judgment in default be set aside and the matter be heard on merits by the Subordinate Court.

4. RESPONDENT'S HEADS OF ARGUMENTS

4.1 In relation to ground one, the Respondent submitted that he had perused the record of appeal and there was nowhere where the Appellant's defence on merit had been exhibited. That it was trite law that for a court to set aside a default judgment, the Applicant had to demonstrate her defence on the merit which she had failed to do.

4.2 Regarding ground two, it was submitted that the originating process was issued on the 15th August, 2022 and served on the Defendant on 16th August, 2022. Default judgment was entered on 16th September, 2022, a Writ of Fieri Facias was only registered on 30th September, 2022. The Appellant only filed to set aside the default judgment on 20th December, 2022 which was four months four days after the court process was served on her.

- 4.3 Reliance was placed on the case of **Kelvin Kalasa and others v. Edina Mwilwa Tembo** ⁽⁴⁾ where the Court of Appeal in denying the applicants leave to appeal out of time opined that 28 days was inordinate and that this principle was approved by the Supreme Court.
- 4.4 In the present case, therefore the delay was therefore inordinate within the meaning of the said case.
- 4.5 The Court was urged to dismiss both grounds of appeal for lack of merit.

5. **HEARING**

- 5.1 At the hearing of the appeal, both parties relied on the heads of arguments which were augmented with verbal submissions.
- 5.2 Learned counsel for the Appellant reiterated what was contained in the written submissions and added that it was not correct that the Appellant had not disclosed a defence on merit. That there was on the record of appeal an exhibited affidavit in opposition which was the defence which the trial Magistrate should have considered.

5.3 The Respondent who appeared in person also submitted that it was not true that the Appellant had not been served on time. That the Appellant had fifteen days within which to respond but she did not do so.

6. **DECISION OF THIS COURT**

6.1 I have carefully considered the clashing arguments by the parties on all the grounds of appeal. The Appellants grievance at the risk of repetition and which runs through two ground of appeal is that the trial Magistrate misdirected herself when she declined to set aside the judgment in default without considering that she had a defence on merit. In addition, that there was no inordinate delay on her part to apply to set aside the judgment in default as such she was deprived of her day in court.

6.2 I shall consider the two grounds of appeal together as they are all interrelated.

6.3 The issue for determination based on the two grounds is whether the trial Magistrate misdirected herself when she declined to set aside the judgment in default entered in favour of the Respondent on 16th September, 2022.

6.4 As rightly pointed out by counsel for the Appellant in the heads of arguments, there is a plethora of cases on this issue. The Supreme Court in the case of **John W.K. (5) Clayton v. Hybrid Poultry Farm Limited** (5) in upholding the celebrated case of ***Water Wells Limited*** cited by counsel for the Appellant stated that:

“... It is the defence on the merits, which is the more important point to consider. We agree... that it is wrong to regard the explanation for the default, instead of the arguable defence as the primary consideration.”

6.5 What is clear is from the above case is that when considering applications relating to default judgments, what is paramount is for the Court to consider whether the defendant has an arguable defence or a defence on the merit, the explanation for the default is immaterial. The Court re-echoed this principle in the case of **Premesh Bhai Megan Patel v. Rephidim Institute Limited** (6) where it was adjudged that:

“In dealing with an application to set aside a default judgment, the question is whether a defence on the merits has been raised or not,

whether the applicant has given a reasonable explanation of his failure to file a defence within the stipulated time and that it is the disclosure of the defence on the merit which is more important point to consider.”

6.6 I have perused the Record of Appeal. The Defendant filed an application to set aside the judgment in default on 20th December, 2022 and in paragraph 7 she averred that she had a defence to the Plaintiffs claims as he had asked them to provide 14 Aluminum sliding windows and all the windows were delivered and properly fitted at his premises. The Plaintiff only raised issues with her in the five windows that were not tinted.

6.7 That it was then mutually agreed that the five windows be removed and replaced with tinted ones and the Plaintiff demanded that the same should have a thickness of 6mm. When the Plaintiff was informed that the 6mm tinted glass windows were not available on the market, he agreed to have the 5mm tinted glass windows fitted on the five frames but before they could have them fitted, he again changed his mind and demanded that he would obtain a

quotation for the 6mm glass and they were to pay for the difference. That she agreed to that.

6.8 She exhibited the defence in her affidavit in support which was marked as “**CNS 2**”. While the Respondent contended that no defence was filed, the exhibited affidavit in opposition to the default writ of summons was the defence. It is my view that the Appellant raised triable issues.

6.9 In keeping with the principle in the **Stanley Mwambazi** case that in dealing with *bona fide* interlocutory applications courts should allow triable issues to come to trial despite the default of the parties, I hold the view that because the Appellant had raised a defence on the merit as exhibited, the trial Magistrate should have considered the defence and allow the issues raised come to trial despite the Appellant’s default.

6.10 However, what is clear from ruling is that what was considered was the reason for not entering appearance. I am further guided by the case of **Fanny Muliango and Samson Muliango v. Namdou Magas and Murus Transport and Farms Limited**⁽⁷⁾ where the Court held that:

“Where there is a defence to an action it is preferable that a case should go for trial rather than be prevented from doing so by procedural irregularities.”

6.11 Similarly, in the case of Charles Banda and Others v. Faith Mwewa⁽⁸⁾, the Supreme stated that:

“It is a well-established principle of law by a plethora of authorities that as much as possible procedural irregularities must not prevent triable issues to be fully adjudicated upon in court unless by so doing that would occasion prejudice to the other party...The only consideration is that the defaulting parties must bear costs.”

6.12 There is no dispute that the Appellant did not file her defence within the period stipulated by the rules and waited for four months before finally responding to the Respondent’s claims. Given the authorities that I have referred to, should this Court decline to set aside the judgment in default because the Defendant’s tardiness in filing a Defence as contended by the Respondent?

6.13 In the view that I hold, the fact that the consideration of a defence on merit is of paramount importance does not

mean that courts are disregarding the conduct by litigants. On the strength of the authorities referred to above, it is clear that a party's default should not prevent triable issues from being adjudicated upon unless it would occasion prejudice to the other party.

6.14 From the evidence adduced in the court below, I do not see what prejudice would have been occasioned to the Respondent if the matter was allowed to proceed to trial.


6.15 Given the foregoing reasons which I have highlighted above, I hold the view that that this is an appropriate case in which this Court should allow the appeal on the two grounds and set aside the judgment in default entered on 16th September, 2022 notwithstanding the Appellant's default.

6.16 For these reasons, I find that there is merit in the appeal and the appeal is upheld. Accordingly, the judgment in default of appearance and defence granted in favour of the Respondent on 16th September, 2022 is **HEREBY** set aside.

6.17 I also refer the matter back to the Subordinate Court to be heard on its merit by a different court.

6.18 Considering the circumstance of this case I make no order
as to costs.

DELIVERED AT LUSAKA THIS 30TH DAY OF SEPTEMBER, 2024


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M.C. KOMBE
JUDGE

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
30 SEP 2024
M.C. KOMBE, J
P.O. BOX 50067, LUSAKA