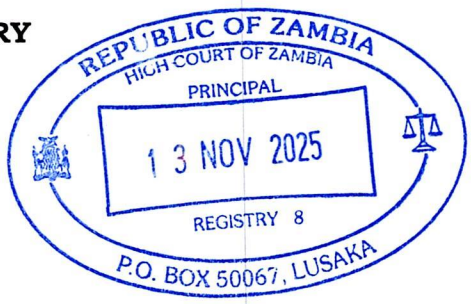
SCANNING

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

2024/HP/0359



BETWEEN:

ESTHER NALUMBWE **PLAINTIFF**

AND

DAVIS NYANGURU **DEFENDANT**

BEFORE HON. JUSTICE E. P. MWIKISA

FOR THE PLAINTIFF: MR. I. SIMBEYE OF MESSRS MALISA AND PARTNERS LEGAL PRACTITIONERS
FOR THE DEFENDANT: MS. M. HAMUKA OF MESSRS PAUL NORAH ADVOCATES

RULING

Cases Referred To:

1. *Waterwells Limited v Wilson Samuel Jackson (1984) Z.R. 98*
2. *Covindbhai Baghabhai Patel & Vallabhai Baghabhai Patel v Monile Holding Company Limited (1993) S.C.Z Judgment No.6 of 1993*
3. *Stanley Mwambazi v Morester Farms Limited (1977) ZR 108*

Legislation Referred To:

1. *The High Court Act, Chapter 27 of the Laws of Zambia*

This is the Defendant's application to set aside judgment in default of appearance and defence made pursuant to Order 12 Rule 2, Order 35 Rule 5 as well as Order 3 Rule 2 of the High Court Rules of the High Court Act, Chapter 27 of the Laws of Zambia. The application is dated 11th June, 2024, and is supported by a combined affidavit in support of ex-parte summons for an order to stay execution and to set aside judgment in default as well as skeleton arguments and list of authorities of even date. The affidavit in support was deposed to by Davis Nyangulu, the Defendant herein. The Defendant deposed therein that on or about 2nd May, 2024, the Plaintiff obtained a default judgment against him after commencing an action by way of writ of summons and statement of claim. It was deposed that the Defendant did not file a defence as he was not served with the said writ of summons and was therefore not made aware of the proceedings in the High Court. The Defendant deposed that prior to the Plaintiff obtaining the Judgment in Default, the Plaintiff had sued the Defendant in the Subordinate Court for Kabwe under Cause No. 2023/1B/378 but that the said matter was dismissed. That unbeknownst to the Defendant, the Plaintiff commenced this matter in the High Court, and that he was only later informed by his former

advocates in Cause No. 2023/1B/378, that the Plaintiff had obtained a Default Judgment against him in the High Court.

The Defendant deposed that he has a defence on the merit in this matter as shown by copy of the defence and counter-claim exhibited and marked "DN4" hence the application to set aside judgment in default of appearance and defence. It was deposed that the Defendant will be greatly prejudiced if the application for stay of execution is not granted and that the application to set aside Default Judgment will be rendered a mere academic exercise. That this is a proper case to set aside Judgment in Default.

On the other hand, the Plaintiff filed an affidavit in opposition dated 10th March, 2025, deposed to by Esther Nalumbwe, the Plaintiff herein, and Mwangilwa Silumbwe, an agent of the Plaintiff herein. The Plaintiff deposed therein that on 11th March, 2024, she contacted the Defendant informing him that she wanted to deliver a letter of demand for the return of the motor vehicle in issue, but that the Defendant instructed her to deliver the said letter to his legal representatives, Legal Aid Board, located in Kabwe. That the Defendant also directed her to serve the court process on Legal Aid

Board which she did, as can be seen from the acknowledgment of receipt of both the letter of demand and the originating process. Mwangilwa Silungwe, deposed that on 8th May, 2024, he went to the Defendant's residence to serve the Judgment in Default of Defence and Appearance and also served the same on Legal Aid Board on 9th May, 2024. It was deposed that the Defendant was not being truthful and that the Defendant has no valid defence on merit to warrant setting aside the Judgment in Default.

When the matter came up for hearing on 6th March, 2025, Counsel for the Defendant, Ms Hamuka, told the Court that this was the Defendant's application to set aside default judgment and stay execution dated 11th June, 2024. Counsel relied on the affidavit and skeleton arguments in support on record.

I have taken note of the list of authorities and skeleton arguments on the record.

I have carefully considered the affidavit evidence as well as the list of authorities and skeleton arguments on the record. The Defendant herein has made this application pursuant to Order XII Rule 2 of the

HCR, Order XXXV Rule 5 of the HCR as well as Order III Rule 2 of the HCR.

Order XII Rule 2 of the HCR 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."***

Order XXXV Rule 5 of the HCR 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."***

This Court has discretion to set aside a judgment entered by default.

I am fortified by Order XX Rule 3 of the HCR which provides that:

> ***"Any judgment by default, whether under this Order or under any of these Rules, may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as the Court or Judge may think fit."***

An applicant seeking to set aside the judgment entered by default ought to show good reason for the default as well as a good defence on merit. In **Waterwells Limited v Wilson Samuel Jackson (1984) Z.R. 98**[1], the Supreme Court held that:

> ***"Indeed, the Court of Appeal in England has held to similar effect in Ladup v Siu when they said 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 which is the more important point to consider. We agree with them that, it is wrong to regard the explanation for the default, instead of the arguable defence as the primary consideration. If the plaintiff would not be prejudiced by allowing the defendant to defend the claim then the action should be allowed to go to trial."

In light of the authorities above, it is prudent to consider whether or not the primary consideration, namely; a defence on the merits, exists in casu. The Plaintiff, in the affidavit in opposition to this application, deposed that the Defendant has not put forward a defence on the merit to warrant the setting aside of the judgment in default. Counsel for the plaintiff, in the skeleton arguments, submitted that in order for the Defendant's application to succeed, the Defendant ought not only to demonstrate that he has a meritorious defence but also that there is a proper explanation as to why they are out of time. Counsel submitted that the Defendant's application has failed on both grounds. That the application fails firstly because the reasons stated by the Defendant for being out of time are not tenable especially that the same lawyers who received process are in fact the ones on the file representing the Defendant. Secondly, that there is no defence on merit as they Defendant never

returned the subject motor vehicle to the Plaintiff. That the Defendant purportedly forfeited the Plaintiff's motor vehicle for no valid reasons. It was submitted that should this Court opt to use its discretion to set aside the judgment in default of appearance and defence, then it should condemn the Defendant to costs to be paid forthwith.

A perusal of the statement of claim shows that the Plaintiff claims to be owner of motor vehicle, Mitsubishi Canter Light Truck, registration Number ACM 2878ZM which developed a mechanical fault and was towed to the Defendant's garage for assessment and ultimate repairs. It was pleaded that after repairing the said motor vehicle, the Defendant has to date, not delivered the vehicle in issue to the Plaintiff despite several follow ups. The statement of claim also shows that the Plaintiff pleaded that it was discovered that the Defendant is using the vehicle in issue when the Plaintiff is not in any way indebted to the Defendant. That the Defendant is, therefore, unjustly holding on to and using the vehicle in issue in breach of the agreement between the parties. The Plaintiff thus claims inter alia; an order that the Defendant immediately hands over the motor

vehicle to the Plaintiff in a good state of repair; in the alternative, an order that the Defendant purchases the said motor vehicle at the sum of ZMW 250,000.00 together with the amount spent buying spare parts; damages for using the plaintiff's vehicle and for keeping the Plaintiff out of use of the Motor Vehicle since March, 2023, and an order for payment of costs.

A perusal of the intended defence shows that the Defendant is claiming a refund of the towing expenses as well as payment of his labour charges. The Defendant has also stated that contrary to the Plaintiff's allegations, the motor vehicle in question was kept as a lien and parked until it was seized by the Drug Enforcement Commission. I digress and note that the Defendant, in the affidavit in support of this application, deposed that the Plaintiff was being investigated by the Drug Enforcement Commission concerning some alleged money laundering offence resulting in the seizure of the vehicle in issue.

The Defendant has also counter-claimed that the Plaintiff pays the sum of ZMW 6,000.00 being the outstanding amount for the refund for the expenses used to tow the vehicle in issue as well as labour charges due for fixing the Plaintiff's Mitsubishi Canter Light Truck,

payment of storage charges for the said motor vehicle from 1st February, 2023, to 2nd April, 2024, and interest on the aforestated amounts.

I am of the considered view that the intended defence attached to the affidavit in support of this application has revealed that there is a defence on the merit in this case. I say so because the record shows that the Plaintiff claims that she is not in any way indebted to the Defendant while the Defendant intends to plead that the Plaintiff in fact owes the Defendant a refund for the expenses used to tow the vehicle in issue as well as payment of the labour charges. Further the record shows that the Plaintiff claims that the Defendant unjustly held on to the vehicle in issue and claims damages for using the said vehicle and for keeping the Plaintiff out of use of it since March, 2023, while the Defendant argues that the vehicle was kept in lien before the Drug Enforcement Commission seized it. The Defendant has also exhibited a Notice of Seizure dated 2nd April, 2024.

In light of the facts above, I cannot, at this stage, fully determine the issues arising from the facts and establish who is, in fact, indebted to who until the matter goes to trial. I hold the view that it will be in

the interest of justice to allow this matter proceed to trial in the circumstances despite the default of the Defendant to file a memorandum of appearance and defence.

In **Covindbhai Baghabhai Patel & Vallabhai Baghabhai Patel v Monile Holding Company Limited (1993) S.C.Z Judgment No.6 of 1993**[2], the Supreme Court held that:

> ***"A default judgment should be set aside if a triable issue is disclosed."***

In the case of **Stanley Mwambazi v Morester Farms Limited (1977) ZR 108**[3], the Supreme Court held, inter alia, as follows:

> ***"It is the practice in dealing with bona fide interlocutory applications for courts to allow triable issues to come to trial despite the default of the parties; where a party is in default he may be ordered to pay costs, but it is not in the interests of justice to deny him the right to have his case heard. I would emphasize that for this favourable treatment to be afforded to the applicant, there must be no unreasonable delay, no mala fide and no improper conduct of the action on the part of the applicant."***

I am of the further view that there has not been unreasonable delay, no mala fide and no improper conduct on the part of the Defendant herein. As the record shows, this action was commenced on 13th March, 2024, and the Defendant made this application on 11th June

2024, about three months after this action was commenced proving that there has not been unreasonable delay on the part of the Defendant.

In relation to the reason for the default, I note that the Defendant has argued that he was not made aware of these proceedings as the Plaintiff served the process on the Defendant's former advocates in the Subordinate Court. The Plaintiff, in the affidavit in opposition, rebutted this and stated that the Defendant directed the Plaintiff's representative to have the letter of demand and the originating process served on Legal Aid Board, Kabwe, which was done. That Legal Aid Board did acknowledge receipt of both the letter of demand and the originating process. In the skeleton arguments, Counsel for the Plaintiffs submitted that the Defendant has acknowledged that Legal Aid Board Kabwe office was acting for him and that on that basis alone there was a lawyer-client relationship between the Defendant and [Legal Aid Board] and that there was no reason for failing to enter a defence.

Indeed, a perusal of the record shows that a letter of demand was received by Legal Aid Board, Kabwe, on 31st January, 2024, and that

the writ of summons, statement of claim, list of documents and list of witnesses in relation to this action were also served on and received by Legal Aid Board on 15th March, 2024. The record also shows a notice of grant of Legal Aid under Cause 2023/IB/378, in the Subordinate Court of the First Class between the Plaintiff and the Defendant herein.

I am of the considered view that the Plaintiff has not shown that there was a lawyer-client relationship between the Defendant and Legal Aid Board in this particular action as alleged by Counsel for the Plaintiff. It is possible for the Defendant to prefer different legal representation in the High Court as is evidenced by the notice of appointment as advocates dated 24th May, 2024, showing Messrs Chilao Nyirongo Mwiinde Legal Practitioners as appointed advocates for the Defendants as at that point. A lawyer-client relationship cannot, therefore, be presumed or indeed assumed. I note that Counsel for the Plaintiffs submitted that the reasons given by the Defendant for being out of time are not tenable especially that the same lawyers who received process are in fact the ones on file representing the Defendant. This is clearly not true as the record shows that the

Defendant, in this action, was first represented by Messrs Chilao Nyirongo Mwiinde Legal Practitioners and now by Messrs Paul Norah Advocates and not Legal Aid Board who received the originating process.

In addition, the Plaintiff has also not shown any proof that the Defendant directed the Plaintiff to serve on Legal Aid Board as alleged. It is trite that he who alleges must prove and since the Plaintiff has failed to prove the said allegations, I find the Defendant's explanation more probable; namely, that the Defendant was not made aware of these proceedings as there is no proof to suggest otherwise. For this reason, I refuse to condemn the Defendant to costs as prayed by Counsel for the Plaintiff.

Despite my finding above, it is the defence on the merits which is a more important point to consider as stated in the **Waterwells Limited v Wilson Samuel Jackson** case supra. As stated earlier, I find that there is a defence on the merits as there are triable issues in this case.

In light of reasons stated and all the authorities cited, the Defendant's application succeeds and I accordingly set aside the

judgment in default of appearance and defence dated 2nd May, 2024. The application to stay the judgment in default of appearance and defence is rendered otiose as a consequence of my holding.

Leave to appeal is granted.

Dated at Lusaka the 13TH **day of** November**, 2025**

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ELITA PHIRI MWIKISA
JUDGE