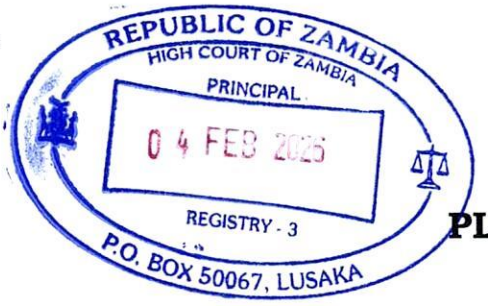
IN THE HIGH COURT FOR ZAMBIA **2023/HP/578**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN

WALUBITA KAFUTI **PLAINTIFF**

AND

FRANCIS MUTALE **DEFENDANT**

For the Plaintiff: *Mr. K. Mututwa, Messrs Victor Kachaka and Company*

For the Defendant: *No Appearance.*

RULING ON APPLICATION FOR STAY AND SETTING ASIDE JUDGMENT IN DEFAULT

A. CASES REFERRED TO:

1. *Southern Cross Motors Limited v Nonc Systems Technology (2012) ZR 524;*
2. *Stanley Mwambazi v Morrester Farms Limited (1977) ZR 108 (SC);*
3. *Water Wells Limited v Wilson Samuel Jackson (1984) ZR 121; and*
4. *Kariba North Bank Company Limited v Zambia State Insurance Corporation.*

B. LEGISLATION REFERRED TO:

1. *The High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia; and*
2. *The Supreme Court of England, 1999.*

1.0. INTRODUCTION AND BACKGROUND

1.1. This is a Ruling on an *Inter- Partes* Application for a Stay and to Set Aside Judgment in the matter commenced by way of Writ of Summons and Statement of Claim of 4th April, 2023.

1.2. On 24th April, the Plaintiff filed a Judgment in default of Appearance and Defence and following its endorsement by Court, the Defendant failed to file his Memorandum of Appearance and Defence. An *Ex-Parte* Order for Stay of Execution was filed and endorsed by the Court on 3rd May, 2023, and no date was given for *Inter-Parte* hearing.

1.3. Upon the matter being reallocated to me on 10th October, 2025, I set it down for Status conference on 21st November,2025. At the status Conference, Mr. Mututwa on behalf of the Plaintiff indicated that he was desirous of an *Inter-Parte* date for determination of the Order for Stay the pending Application to set it aside.

2.0. **AFFIDAVIT EVIDENCE**

2.1. The Affidavit in Support of Summons for Stay and Setting Aside Judgment was deposed to by **FRANCIS MUTALE**, the Defendant herein and filed on 3rd May, 2023.

2.2. Mr. Mutale deposed that on 24th April, 2023, the Plaintiff filed a Judgment in default of Appearance and Defence against the Defendant who in consequence failed to file the same.

2.3. It was deposed that the Deponent's failure to file a Memorandum Appearance and Defence was because he could not give instruction to his Advocates as he was working out of town, but that he did so upon his return. That he had since applied to set aside the Judgment in default of Appearance and Defence as shown in the Affidavit

in Support marked **"FM1"** attaching his Defence in the merits.

2.4. The Deponent averred that he had been advised by his Advocates and believes to be true that there was need for a Stay of Execution of the said Judgment to enable the Defendant's Application to set Aside the same be heard failing which the Plaintiff may execute to the prejudice of the Defendant.

2.5. The Affidavit in Opposition to the Application to Stay Execution and Setting Aside Judgment in default was sworn by **WALUBITA KAFUTI**, the Plaintiff and filed on 13th January, 2026.

2.6. Mr. Kafuti averred that he had read the Affidavit in Support of the Applications to Stay Execution and Set Aside Judgment in default and had been advised by his Advocates and believes to be true that a Court will only set aside a Judgment in default if there is a Defence on the merit.

2.7. It was deposed that although the Defendant had attempted to demonstrate a semblance of a Defence in his Affidavit in Support of the Application to Set Aside Judgment, he verily believed that the defence is merely an afterthought as the Defendant had in the past admitted to owing the full ZMW 490,000.00 as shown in the Payment Agreement marked **"WK1"** executed between the Plaintiff and the Defendant in the presence of one **DAVID KAMUSHELE**.

2.8. That he had been advised by his Advocates and believes to be true that where a party makes averments, the pleadings

must spell out sufficient details to enable the opposing party provide a response. Further that the Court will observe from the exhibited Defence that the Defendant merely states that any admission, if at all, was obtained by duress and does not give details of the alleged duress to enable this Court form its opinions on the supposed Defence.

3.0. SKELETON ARGUMENTS

3.1. In the Skeleton Arguments in Support of the Application, the Defendant placed reliance on **Order III Rule 2** of the **High Court Rules, High Court Act Chapter 27** of the **Laws of Zambia** and **Order 47 Rule 1** of the **Supreme Court of England, 1999**. It was submitted that the filing of the Application to Set Aside the Default Judgment gives rise to special circumstances that render it inexpedient for the Judgment to be enforced as doing so before the Application is heard would prejudice the Defendant.

3.2. My attention was drawn to the case of **Southern Cross Motors Limited v Nonc Systems Technology**[1] in which it was said the Court guided that the Applicant ought to have sufficient reason and that the filing of an Application to Set Aside the Default Judgment is sufficient reason to Stay Execution of the Judgement.

3.3. Submitting on the Setting Aside of the Judgment in Default and Appearance, **Order XX Rule 3** of the **High Court Rules**, **High Court Act Chapter 27** of the **Laws of Zambia** was relied upon. My attention was also drawn to the case of **Stanley Mwambazi v Morrester Farms Limited**[2] for the

position, among others, that it is a practice in dealing with bona fide Interlocutory Applications for Courts to allow triable issues to come to trial despite the default of the parties.

3.4. The concluding submission was that the Defendant has demonstrated that he is desirous of defending this action as he acted swiftly without reasonable delay and no improper conduct on his part.

3.5. In the Skeleton Arguments in Opposition filed on behalf of the Plaintiff, it was conceded that this Court is clothed with jurisdiction to set aside any Judgment in default. That however, it is trite that for a Judgment in Default to be Set Aside, there must be a Defence on the merit. Reliance was placed on the case of **Water Wells Limited v Wilson Samuel Jackson[3].**

3.6. It was vehemently disputed that the Defence exhibited in the Affidavit in Support and proposed to be relied on by the Defendant does afford him a Defence to the claims by the Plaintiff. That the Plaintiff has demonstrated that the Defendants admitted being indebted vide a document dubbed *'Payment Agreement'* and that the Defendant avers at Paragraph 5 of his supposed Defence as follows:

> *"Paragraph 5 is denied and the Defendant shall put the Plaintiff to strict proof thereof. The Defendant shall further aver that if there be any admission in writing, the same was under duress".*

3.7. The Plaintiff takes issue with the above. That pleadings serve the purpose of giving the opposing party notice of the case it will meet in Court and to effectively prepare for the case. Citing the case of **Kariba North Bank Company Limited v Zambia State Insurance Corporation**[4], it was stated that the Court summarized the purpose of pleadings and most importantly guided to the effect that it is essential that each party should give his opponent a fair outline of the case against him ahead of the hearing and for this purpose, he must set out in the body of his Pleadings, all the particulars which are necessary to enable his opponent to properly prepare his case.

3.8. Submitting further, the Plaintiff contended that the Defence sought to be relied upon by the Defendant is woefully lacking in material particulars pertaining the purported duress. That the Defence in question not only fails the Pleadings test, but actually deprives the Court of the material it requires to determine whether the Defence of duress is worth considering at a full trial with witnesses or is simply an afterthought.

3.9. Concluding his submissions, the Plaintiff stated that the Defendant has no Defence to very clear claims herein and he has actually admitted to owing the Plaintiff. That on the strength of the case of **Water Wells Limited v Wilson Samuel Jackson**[3], the Defendant is not entitled to the Court's exercise of its jurisdiction to set aside the Judgment

in Default in his favour as there is no Defence worth considering at a full trial.

4.0. THE HEARING

41. At the hearing scheduled for 21st January, 2026, only the Plaintiff's Advocate was present. No reason was placed on Record for the non attendance by the Defendant or his Advocates. Having satisfied myself that the Defendant was duly served with the Notice of hearing as exhibited in the Affidavit of Service filed by the Plaintiff's Advocates on 20th January, 2026, I proceeded to hear the Plaintiff's Advocate.

4.2. Mr. Mututwa informed Court that he would not be averse to the Court Proceeding to determine the matter based on the documents on Record as he had filed his client's Opposition to the Application to Set Aside the Judgment.

5.0. CONSIDERATION AND DECISION OF THE COURT.

5.1. I have carefully considered the Composite Application for Stay and Setting Aside Judgment in Default, the parties respective Affidavits and Skeleton Arguments. I am grateful to the Parties for the industry.

5.2. There is a meeting of minds by the Parties that this Court is clothed with jurisdiction to set aside any Judgment in default pursuant to **Order III Rule 2** of the **High Court Rules, High Court Act Chapter 27** of the **Laws** of **Zambia** and **Order 47 of Rule 1** of the **Supreme Court of England 1999**. That being the case, I will not belabour the point.

5.3. As I see it, the only issue for my determination is whether the Defendant has sufficient reason for making the Application to be afforded the favorable treatment he seeks as guided by the case of **Southern Cross Motors Limited and Nonc System Technology Limited**[1] and **Stanley Mwambazi v Morrester Farms Limited**[2].

5.4. The Defendant has contended that he has demonstrated sufficient reason for the delay in entering a Memorandum of Appearance and Defence as he was out of town and was not able to within requisite time but, that immediately upon his return, instructions were given. That he could not enter Appearance and file his Defence because the Plaintiff had already filed a Judgment in default. Further that the Defendant has a Defence on merit.

5.5. The Plaintiff's position, on the other hand is essentially that the Defence exhibited has no merit worth considering at trial. That the Defendant has, in Paragraph 5 of the supposed Defence, admitted owing the Plaintiff and so not entitled to the Court's exercise of its jurisdiction to set aside the Judgment default in his favour.

5.6. In resolving the diametrically opposed positions, I must necessarily analyse the supposed Defence by the Defendant exhibited as **"FM1"**. The relevant Paragraphs in my view are the following.

> *"4. Paragraph 4 of the Statement of Claim is denied and the Defendant shall aver that he does not owe the*

sum claimed as he did not borrow any money from the Plaintiff as alleged.

5. *Paragraph 5 is denied and the Defendant shall put the Plaintiff to strict proof thereof. The Defendant shall further aver that if there be any admission in writing, the same was under duress".*

5.7. The Plaintiff has taken issue with Paragraph 5 on the claim of duress lacking in material particulars and being an afterthought. According to the Plaintiff, the Defendant admitted being indebted vide a document dubbed *"Payment Agreement"* exhibited as **"WK1"** in the Affidavit in Opposition.

5.8. The view I take is that, while I agree that Paragraph 5 of the Defence is not couched in the best of ways, the first sentence denies any liability. In fact the denial of liability on the part of the Defendant begins from Paragraph 4. My view is further strengthened from my perusal of the *"Payment Agreement"* exhibited as **"WK1"** which, as I can discern, raises more questions than requisite answers for my determination of the Application to Set Aside the Judgment in default. It would be safer to conclude that the alleged admission by the Defendant is not unequivocal.

5.9. Given my inclination, an arguable Defence has been disclosed requiring me to exercise my discretion in favour of the Defendant on the principles enunciated in the case of **Stanley Mwambazi v Morrester Farms Limited**[2] that:

" ***(ii) It is a practice in dealing with bonafide Interlocutory Application 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 interest of justice to deny him the right to have his case heard.***

(iii) For this favorable treatment to be afforded, there must be no unreasonable delay, no malafidies or improper conduct on the action on the part of the Applicant.

5.10. I also see no prejudice to the Plaintiff by allowing the matter to proceed to trial where he will have his day in Court. I am fortified by the case of **Water Wells Limited v Wilson Samuel Jackson**[3] where the Supreme Court held, among others, that:

(7) If no prejudice will be caused to the Plaintiff by allowing the Defendant to defend the claim, then the action should be allowed to go to trial.

(8) Where a respondent has been put to great expense and inconvenience all traceable to the appellant's fault, even though the appeal succeeds, costs need not follow the event.

5.11. In this matter, the Application was made promptly and there was no inordinate delay as guided in the **Stanley Mwambazi v Morrester Farm**[2] case. However, the Plaintiff has been put through expense and inconvenience stemming from the

Defendant's default and the costs can not follow the event, as is generally the case.

6.0. CONCLUSION

Having found that there was no inordinate delay by the Defendant in making the Application and further that there are triable issues herein, the Defendant's Application to Set Aside Judgment in default is granted.

6.2. For avoidance of doubt, I Order that the Judgment in default filed by the Plaintiff and endorsed on 24th April, 2023, be and is hereby Set Aside.

6.3. Although the Defendant's Application has succeeded, the Plaintiff has been put through expense and inconvenience because of the Default of the Defendant. Accordingly, Costs are for the Plaintiff to be taxed in default of agreement.

DATED AT LUSAKA THIS 4TH DAY OF FEBRUARY, 2026.

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
ECONOMIC & FINANCIAL CRIMES DIVISION
04 FEB 2026
HON. I. M. MABBOLOBBOLO
P. O. BOX 50067, LUSAKA

I. M. MABBOLOBBOLO
HIGH COURT JUDGE