IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 77A OF 2007

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

 **MARK CHUUNYU CHONA** 1ST APPELLANT

 **LOVENESS BWALYA MUSONDA** 2ND APPELLANT

 AND

 **AUGUSTINE MUSUMALI** 1ST RESPONDENT

 **VERONICA MUSONDA** 2ND RESPONDENT

CORAM: **MWANAMWAMBWA, PHIRI AND WANKI, JJS**

 On the 16th February, 2012 and 22th May, 2012

For the Appellants: Mrs. L. Mushota of Messrs. Mushota and Associates

For the Respondents: N/A

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**J U D G M E N T**

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**WANKI, JS, delivered the Judgment of the Court.**

CASES REFERRED TO:-

1. **The Helenslea (1882) 7 P.D. 57.**
2. **Smith -Vs- Hammond (1896) 1 QBD 571.**
3. **Kaole Contracting and Engineering Company Limited -Vs- Mindeco (1980) ZR 91.**
4. **Water Wells Limited -Vs- Jackson, (1984) ZR 98.**
5. **John W.K. Clayton -Vs- Hybrid Poultry Farm Limited, (2006) ZR 70.**
6. **Buchman -Vs- Attorney General, (1993-1994) ZR 131.**
7. **Mususu Kalenga Building Limited and Winnie Kalenga -Vs- Richmans Money Lenders Enterprise, (1999) ZR 27, 28.**

OTHER MATERIALS REFERRED TO:-

1. **Supreme Court Practice (White Book) 1999 Edition Orders 10, 12, 20, 35 and 65.**
2. **High Court Rules Chapter 27 of the Laws of Zambia Orders 12, 20, 35, 39 and 53.**
3. **Chitty on Contracts, 28th Edition paragraph 32057.**

The appellants being dissatisfied with the Order of the High Court given on 6th February, 2007 at Lusaka refusing the application to set aside default judgment, appealed to the Supreme Court against the said Order.

The facts leading to the appeal are that, following the entry of judgment in default by the 1st respondent against them, the appellants applied to set aside the said default judgment.

The application was supported by an Affidavit in Support and an Affidavit in Reply. The 1st respondent filed an Affidavit in Opposition and a further Affidavit in Opposition.

The Court below after analyzing the affidavit evidence refused to set aside the judgment.

The appellants have in their Memorandum of Appeal advanced three grounds of appeal, namely:-

1. **The Court below erred in law and in fact when it refused to set aside the default judgment without considering the 1st appellant’s contention that he was not served with the originating process.**
2. **The Court below erred in law when it ignored or refused to rule on the suitability of this action as to whether or not it was suitable for inclusion on the Commercial List, and having failed or refused also ignored procedures laid down by Order L111 of the High Court Act (Amendment) Rules 1999.**
3. **The Court below erred in fact and in law to continue to entertain various applications after it had granted leave to appeal and the matter no longer in progress in that Court.**

Mrs. Mushota, Counsel for the appellants filed appellant’s heads of argument and list of authorities on which she relied.

In support of ground one of appeal, she pointed out that, **Order 10** **Rule 1 of the Rules of the Supreme Court**, (8) provides that, a Writ must be served personally on each defendant by the plaintiff or his agent.

Counsel submitted that, a Writ is not therefore duly served if not served on the defendant personally. She contended that, the only alternative to this is when service is by post to the correct postal address or by other substituted service done in accordance with the law.

She pointed out that, **Order 12 Rule 2** (8) states 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.”**

 Counsel contended that, the defendant’s lack of knowledge as to the commencement of legal proceedings against him can be considered to be such cause.

She pointed out that, **Order 20 Rule 3** (8) allows for:-

**“any judgment by default whether under this Order or under any of these rules, may be set aside by the Court or Judge, upon such terms as to costs or otherwise as the Court or Judge may think fit.”**

 Mrs. MUSHOTA further contended that, the Court below did not allow itself to even consider all the facts necessary for a just decision to be made.

 She submitted that **Order 35 rule 3** (8) states that:-

**“If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the Court may, upon proof of service of notice of trial proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant.”**

 Counsel contended that, the lack of evidence of service on the defendant should have sufficed.

 She further contended that, proof of service on the defendant or his advocates is a necessary component for the plaintiff to seek a default judgment. **Order 10 Rule 1 Sub-rule** **3** was cited, and states that:-

**“Any person serving a Writ of Summons or other originating process, default of appearance to which would under Order XII, entitle the plaintiff to enter final judgment, shall request the party served to acknowledge receipt by signing on the original or other copy of the process or on some other document tendered for the purpose, and the fact of any refusal to sign shall be so endorsed by the person serving.”**

 She submitted that, no proof was produced as to either service on the 1st appellant or his refusal to sign such Court process, nor was any endorsement on the copies in Court so made.

 Counsel further submitted that, in as much as the plaintiff would have wanted to rely on **Order 10 Rule 7** which states that:

**“Where no appearance has been entered for a party, or where a party or his solicitor, as the case may be, has omitted to give an address for service, all writs, notes, pleadings, orders, summons, warrants and other documents, proceedings and written communications in respect of which personal service is not requisite may be served by filing then with the Registrar.”**

She pointed out that, this would require knowledge on the part of the defendant that there was an action against him in the Court of record below. Counsel contended that, in as much as service of documents on a wrong address is not a compelling reason for one to seek the overturning of a default judgment. In support, she cited the cases of ***THE HELENSLEA*** (1) and ***SMITH -VS- HAMMOND*** (2) where it was discussed that service on a wrong address is not an irregularity to warrant the setting aside of the writ and service when the defendant is not misled or prejudiced. However, in this case, the 1st appellant was prejudiced as he was not notified as to the proceedings in Court in any manner by the then plaintiff.

 In the case of ***KAOLE CONSTRUCTING AND ENGINEERING*** ***COMPANY LIMITED -VS- MINDECO***, (3) ***MONDELEY J***. held that:- “the Writ of Summons have to be served.”

The Court was referred to **Order 10 Rule 22** (8) which provides that:-

**“The person serving a Writ of Summons shall, within three days at most after such service, endorse on the writ the day of the month and week of service thereof, otherwise the plaintiff shall not be at liberty (except where service shall have been effected by an officer of the Court appointed under Part VIII of the Act) in case of non-appearance to proceed by default; and every affidavit of service of such writ shall mention the day on which such endorsement was made. This rule shall apply to substituted as well as other service.”**

 It was submitted that in the matter at hand the Writ was neither endorsed, nor was it in exception delivered by an officer of the Court thereby making the seeking of a default judgment in this matter irregular.

 It was further submitted that in the case in casu, there was no personal service on the 1st appellant. This is supported by his affidavits at pages 6 and 12 of the Record of Appeal.

 Counsel contended that, the appellants had a defence on merit as at page 12 of the Record of Appeal. In support, the appellants relied on the case of ***WATER WELLS LIMITED -VS- JACKSON*** (4) which was upheld in the case of ***JOHN W. K. CLAYTON -VS- HYBRID POULTRY FARM LIMITED*** (5) where we held that:-

**“Although it is usual all on an application to set aside a judgment in default not only to show a defence on 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 … that it is wrong to regard the explanation for the default, instead of the arguable defence as the primary consideration.”**

It was further contended that, in the case in casu, the judgment disregarded both the explanation for the default and the merits of the defence. The appellant was denied the right to be heard and he was denied justice.

 In relation to ground two of appeal, Mrs. MUSHOTA pointed out that, **Order LIII Rule 5(2)** (9) gives the Judge discretion to consider whether procedure to be followed in an action make the action suitable for inclusion or exclusion in the Commercial List; and **Rule 6(2)** goes further to state that, at the scheduling conference which occurs fourteen days after the filing of Memorandum of Appearance and defence referred to in **Sub-rule (1)** and in consultation with the parties to the case prepare a chart or schedule of events of the case.

 She further pointed out that for a trial to commence, that is the fixing of a date for hearing subject to **Rule 8(2)** the Judge could only do this after the exchange of documents referred to in **Rule 8(1)**. She contended that the procedure laid down for matters on Commercial List could not have been followed and such should have been referred to the General List.

 Concerning ground three of appeal, Mrs. MUSHOTA contended that, it is an accepted and well known practice and norm that no actions are to continue in a Court of record if an appeal has been lodged, with regard to such a matter appealed against. In support of the position the appellants relied on **Order 39 Rule 1** (9) which states that:-

**“Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review; it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision: Provided that where the Judge who was seized of the matter has since died or ceased to have jurisdiction for any reason another Judge may review the matter.”**

It was further contended that, this position therefore should hold even with regard to other applications in regard to a matter already appealed against as was seen in the matter at hand.

 Counsel finally submitted that, for the foregoing reasons, the appeal should be allowed so that the matter may be heard and determined on the merits.

 In their heads of arguments, the respondents submitted that they were supporting the decisions of the Court below delivered on the 19th day of February, 2007 that is the subject of the appeal.

 It was pointed out that, in the first ground the appellant contends that, the Judge in the Court below erred in upholding the default judgment. It was further pointed out that under **Order 13 Rule 9** (8), the Court may on such terms and conditions as it may think just set aside or vary a judgment entered in default.

 It was contended that, **Order 13 Rule 9 Sub-rule 7** goes on to state that in case of a regular judgment the applicant must satisfy the Court that there is a defence on the merits.

 It was submitted that, in the Court below the appellant’s application was supported by an affidavit that exhibited a purported defence that in essence denied that the appellant ever dealt with the respondent. It was contended that, the documents exhibited in the Affidavit in Opposition that was filed by the respondent proved that, the appellant knew who he was dealing with. It was further contended that, the appellant applied for consent to assign, paid for the property transfer tax and went ahead to execute the assignment between himself and the 1st respondent and yet in the purported defence he denied that. It was pointed out that, at no time was any objection raised until the assignment was lodged.

 It was contended that this evidence was available to the Judge in the Court below.

 It was submitted that, based on the evidence alluded to the Judge in the Lower Court opined and rightly so, that there was no defence on the merits and therefore the application to set aside the default judgment was misconceived hence the dismissal as it did not meet the requirements of **Order** **13/9/7**. (8)

 Reliance was placed on the case of ***WATER WELLS LIMITED -VS-*** ***JACKSON*** (4) in which we held 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 merits which is the more important point to consider.”**

It was further submitted that, the Judge in the Lower Court had the opportunity to weigh the evidence before him and was on firm ground to conclude that there was no defence on merits. It was contended that on this account this Court should similarly dismiss this ground of appeal.

 As regards, the other grounds of appeal, it was pointed out that, it should be noted that the subject of the appeal was the decision of the Lower Court to refuse to set aside a default judgment. It was contended that the order appealed against did not address the issues raised in the Memorandum of Appeal.

 The respondent relied on the case of ***BUCHMAN -VS- ATTORNEY GENERAL*** (6) in which we held that:-

**“A matter which was not raised in the Lower Court cannot be raised in a higher Court as a ground of appeal.”**

 It was submitted that, the holding in the above case was restated in the case of ***MUSUSU KALENGA BUILDING LIMITED AND WINNIE*** ***KALENGA -VS- RICHMANS MONEY LENDERS ENTERPRISE*** (7) that:-

**“We said before and we wish to reiterate here that where an issue was not raised in the Court below, it is not competent for any party to raise it in this Court.”**

 It was contended that, the issues raised in the Memorandum of Appeal were clearly not the subject of the decision appealed against and were not raised and therefore, cannot be and should not be entertained by this Court.

 It was finally submitted that, from the foregoing, the appellants’ appeal is misconceived and should be dismissed in its entirety with costs.

 We have considered the grounds of the appeal; the heads of argument filed by both parties; the authorities; and the ruling of the Court below that, has been appealed against.

 In ground one of appeal, the appellant has attacked the Court below when it refused to set aside the default judgment without considering the 1st appellant’s contention that, he was not served with the originating process.

 From the Record of Appeal, there is no dispute that the Court below entered judgment against the appellants in default of appearance. The only issue that we have to consider is whether the **HIGH COURT RULES** were complied with; that is whether the Writ of Summons was properly saved on the appellant. The appellant in paragraph 12 of his Affidavit in Support of Summons for Stay and to set aside default judgment deposed that:-

**“Further that the affidavit of service filed on 7th November, 2005 shows that I was personally served by one Jack Kenneth Chali at the Task Force on Corruption address on Baluwe Road, Woodlands, Lusaka, it is not true that I was ever served process in this matter, as I was no longer at the said address by November, 2005 which I would have signed in acknowledgment.”**

 That was not disputed as the 1st respondent in his affidavit and further Affidavit in Opposition did not deny that fact.

 In its ruling at pages 129 and 130, the Court below said that:-

**“I will deal first with the application to set aside the judgment in default. I have read the affidavits and have considered the submissions of Counsel on either side. I consider that the deciding factor in this matter is that the defendant signed an assignment to the plaintiff. In my view, he cannot now be heard to say he has had no dealings with the plaintiff. It is clear to me that although there was no formal contract the assignment is enough evidence of contract between the parties in terms of Section 4 of the Statute of Frauds 1877. I therefore, refuse to set aside the judgment. The application therefore, fails with costs to the plaintiff -- …”**

 In our view, the Court below fell in error. It was supposed to rule on the crucial issue “whether the appellant was properly served” with the process for him to have filed an appearance and defence. If the Court below properly directed itself to the main issue, we believe it would have found sufficient cause on which to set aside the default judgment. The issue whether the appellant had made out a good defence was not relevant.

 In the circumstances, we find merit in the first ground of appeal. In the light of the Order, we propose to make we do not find it necessary to consider the other two grounds of appeal.

 We allow the appeal and set aside the default judgment. Further, we order that the matter be retried before another High Court Judge.

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M.S. Mwanamwambwa,

**SUPREME COURT JUDGE**

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 G. S. Phiri, M. E. Wanki,

 **SUPREME COURT JUDGE SUPREME COURT JUDGE**