IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

APPEAL NO. 133/2005
SCZ 8/160/2005

BETWEEN:

ROSEMARY BWALYA	**APPELLANT**
AND	
ZAMBIA NATIONAL COMMERCIAL BANK	**RESPONDENT**

CORAM: **Mwanamwambwa D.C.J, Wood and Malila, J.J.S**
On 14th April, 2015 and 8th January, 2016

For the Appellant: *In person.*
For the Respondent: *No appearance*

JUDGMENT

Mwanamwambwa, Deputy Chief Justice, delivered the Judgment of the Court.

CASES REFERRED TO:

(1) **WATER WELLS LIMITED V WILSON SAMUEL JACKSON** (1984) Z.R. 98
(2) **STANLEY MWAMBAZI V MORESTER FARMS LIMITED** (1977) Z.R. 108
(3) **GOVINDBHAI BAGHIBAI, VALLABHAI BAGABHAI PATEL V MONILE HOLDINGS COMPANY LIMITED** (1993-1994) Z.R. 20

LEGISLATION REFERRED TO:

(1) **ORDERS 20 (15), 35 (5) OF THE HIGH COURT RULES, CAP 27 OF THE LAWS OF ZAMBIA**
(2) **RULE 58 (2) AND (3) OF THE SUPREME COURT RULES, CAP 25 OF THE LAWS OF ZAMBIA**
(3) **SECTION 24 (1) (B) OF THE SUPREME COURT RULES, CAP 25 OF THE LAWS OF ZAMBIA**

For convenience we shall refer to the appellant as plaintiff and the respondent as defendant, which is what they were in the court below.

This is an appeal by the plaintiff, against the Ruling of the High Court dated 7th June, 2005 in which the Judge set aside a default judgment, which was initially obtained by the plaintiff. The Judge ordered that the matter proceeds to trial on its merits.

The history to this case is that on 23rd February, 2005, the plaintiff commenced an action against the defendant by writ of summons, claiming a total sum of K15, 344,000.00 in damages, together with interest and costs. According to the plaintiff's statement of claim, she had mortgaged her property to the defendant for a loan and the defendant took possession of her property on 1st September, 2004, without a court order authorizing the defendant to foreclose her property. She claimed that as a result, she had suffered loss and damage, as well as embarrassment. It was for this reason that she commenced the current proceedings claiming damages.

The record shows that the defendant was served with the plaintiff's Writ of Summons and a Statement of Claim on 24th February, 2005. However, it did not file a memorandum of appearance and defence to the plaintiff's claim within the prescribed time. On 11th March, 2005, the plaintiff entered judgment in default of appearance and defence for the sum of K15, 344,000.00. What followed was that the defendant filed an application before the Deputy Registrar seeking an order to set aside the default judgment which the plaintiff had obtained. The

application was supported by an affidavit in which the defendant deposed that it had a defence on the merits. A copy of the defence was exhibited to that affidavit. Upon hearing the application, the Deputy Registrar refused to set the default Judgment aside on the grounds that the defendant's defence contained general denials of the plaintiff's claim and as such it had not displayed a defence on the merits. The Deputy Registrar was also of the view that the grounds advanced by the defendant for its delay to file a defence, were not convincing.

The defendant was not satisfied with the decision of the Deputy Registrar. It appealed to a Judge of the High Court, who after considering the defence, set the default judgment aside and ordered that the matter proceeds to trial on the merits. The learned Judge allowed the defendant's appeal and noted that the defendant's defence referred to a related case, which at the time was before the Supreme Court, and he was of the opinion that, justice would not be done if the default judgment was left to stand. This time, it was the plaintiff who was not happy with the ruling of the High Court Judge. She has now appealed to this court advancing the following three grounds of appeal:

GROUND ONE

The learned trial Judge misdirected himself both in law and in fact when he failed or omitted to make a finding of negligence against the respondent when the elements that determine negligence where visible, namely:

a) **That the respondent was served with process but despite having acknowledged receipt of the same, sat back and waited until the appellant took the next appropriate action to enter default judgment.**

b) That even the excuse advanced for failing to file and serve the defence within the stipulated period lacks merit.

GROUND TWO
The learned trial judge erred in holding that the defence makes mention of a related case in the Supreme Court when the said case does not in any way touch on the issues before him.

GROUND THREE
The learned trial judge misdirected himself when he rightly observed the lower court's finding that the defence which was before him at the time did not display a defence to the plaintiff's claim on the merits but went ahead to set aside the default judgment.

In addition to the above grounds of appeal which were contained in the Memorandum of Appeal at pages 3 to 4 of the record, the plaintiff included what purports to be a fourth ground of appeal in her heads of argument, together with arguments supporting it. In this "purported ground of appeal", the plaintiff contends that:

> **"The learned trial Judge erred in law when he did not order costs for the appellant when setting aside judgment in default."**

In addressing the issues raised in this appeal, we shall begin by addressing what purports to be a fourth ground of appeal. From there, we shall deal with ground one. Thereafter, we will proceed to address grounds two and three at one go, because they are interrelated and the defendant argued them together.

It must be noted that we heard this matter in the absence of the defendant in Kabwe, because its Legal Counsel filed a notice

of non-appearance. However, both parties filed written heads of argument to support the grounds of appeal outlined above and we considered them. In addition, the plaintiff buttressed her written arguments with oral submissions.

Submitting on what purports to be the fourth ground of appeal, the plaintiff begun by citing **Order 20 Rule 15 of the High Court Rules, Cap 25** of the Laws of Zambia which stipulates that:

> **"Any judgment (or order) by default under this order or any other of these rules, may be set aside by the court upon such terms as to costs or otherwise as such the court may think fit."**

She further cited Order 35 rule 5 of the High Court Rules, Cap 25 of the Laws of Zambia which provides that:

> **"Any judgment (or order) obtained against any party in the absence of such party may, on the sufficient cause shown, be set aside by the court upon such terms as may seem fit."**

The plaintiff argued that the Judge erred when he, in total disregard of the above written rules, set aside the default judgment without giving an order for costs to the plaintiff and also giving an order for security for costs against the defendant. The gravamen of her argument was that the learned Judge was wrong in not giving conditions on costs when he set the default judgment aside. On the other hand, the defendant did not bother to make any submission against this purported ground of appeal.

We have mulled over the ground of appeal. We perused through the record to ascertain whether the plaintiff obtained leave of Court to amend her Memorandum of Appeal in order to add a fourth ground. We found that no such leave was obtained and we found her decision to 'sneak' a fourth ground of appeal in her heads of argument, to be rather strange. This is because **Rule 58 (2) and (3) of the Supreme Court Rules** are instructive. It stipulates as follows:

> "(2) **The Memorandum of Appeal ...shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the Judgment appealed against, and shall specify the points of law or fact which are alleged to have been wrongly decided...**
>
> (3) **The Appellant shall not, therefore without leave of the Court, put forward any grounds of objection other than those set out in the Memorandum of Appeal, but the Court in deciding the Appeal shall not be confined to the grounds put forward by the Appellant:**
>
> **Provided that the Court shall not allow an Appeal on any ground not stated in the Memorandum of Appeal unless the Respondent including any person who in relation to such ground should have been made a Respondent, has had sufficient opportunity of contesting the Appeal on that ground." *(Emphasis ours)***

It is clear from the rule cited above, that the plaintiff in this appeal was precluded from putting forward additional grounds of appeal other than those set out in her memorandum of appeal.

Quite obviously, she added the purported "fourth ground of appeal" in breach of **Rule 58 of the Supreme Court Rules**, because the purported ground is not contained in her memorandum of appeal on pages 3 to 4 of the record. As we have already pointed out, the record shows that she never obtained the leave of this Court to file an additional ground of appeal, even though she had the opportunity to do so well before the hearing of this appeal. In our view, her applying for leave would have given an opportunity to the other side to respond. **Rule 58 of the Supreme Court Rules** clearly stipulates the procedure for lodging a record of appeal. We cannot entertain a ground of appeal that is sneaked in through 'the back door' because that would have the effect of not only ambushing the defendant in this appeal, but the Court as well. The purpose of filing grounds of appeal, in a prescribed manner through a memorandum of appeal, is to ensure that the other side is not taken by surprise and may be notified of any objections or issues an appellant would be raising at the hearing of an appeal. Having said this, we will not allow the plaintiff's purported fourth ground of appeal to stand, because she did not obtain leave of court to add it. And since it breaches the rules, we will inevitably dismiss it together with the arguments supporting it. We will now turn to ground one.

On the first ground of appeal, the plaintiff submitted that the defendant acknowledged service of court process and there

was an affidavit of service to that effect. She stated that paragraphs 5 to 7 of the defendant's affidavit in support of the application to set aside default judgment, shows that there was professional negligence on the part of the defendant's lawyers. She argued that professional negligence by a lawyer could lead a client to sue for negligence, should it appear that the lawyer did not take reasonable steps to defend his client. She contended that a judgment in default of appearance and defence could not be set aside where there was clear negligence.

According to her, the defendant should have sued its lawyers for indemnity for the sum that was adjudged in the default judgment, instead of setting the default judgment aside, because the lawyers failed to take reasonable steps upon service of the court process to defend their client. She further submitted that the miscommunication between the defendant's legal counsel and its external lawyers was not supposed to take precedence over the court process. In her view, the delay in filing a memorandum of appearance and defence was the defendant's personal problem and it had nothing to do with the court's duty to dispense justice.

In support of paragraph (b) of her first ground of appeal, the plaintiff submitted that the reasons advanced by the defendant in its application to set aside the default judgment lacked merit,

because it was its own conduct which caused the delay in filing the defence.

On the other hand, the defendant opposed the first ground of appeal and denied any negligence on its part for not filing a defence within the stipulated 14 days from the date of service. Instead, the defendant gave an account of the preceding events and stressed the fact that it had only delayed to file its defence by two days, before the plaintiff was granted a judgment in default. It was submitted that the reasons for the delay in filing the defendant's defence were set out in paragraphs 4 and 5 of its affidavit on page 15 of the record. According to the defendant, the reasons were that it was still consulting with its lawyers who represented it in an earlier action under cause 2002/HPC/0400, a matter which related to the same parties and the same subject matter as the present case. It was argued that under cause 2002/HPC/0400, the defendant had commenced an action against the plaintiff for the foreclosure of a mortgaged property, and the payment of money which was lent to the plaintiff. That judgment to foreclose was obtained on 10th December, 2003, and the writ of possession was levied on 31st August, 2004. Further that on 3rd September, 2004, the plaintiff obtained a stay of execution and it was on the basis of that stay, that the plaintiff commenced the current proceedings against the defendant claiming damages for loss of business.

The defendant further submitted that, it was represented by Messrs. Fraser and Associates in the earlier action, and as such it was still trying to communicate with them at the time the plaintiff entered judgment in default, barely two days after the expiration of the 14 days statutory period. It was therefore argued that there was no negligence on its part and the High Court Judge was on firm ground when he set the default judgment aside. Relying on the case of **Water Wells Limited v Wilson Samuel Jackson**[1], the defendant submitted that where a delay and/or possible prejudice was of small magnitude which could be compensated by an order for costs, it was a basis upon which a court could set a default judgment aside. That in the present case, there was only a delay of two days and as such there was no prejudice to be occasioned to the plaintiff and if at all there was any, it could be compensated by costs. The defendant also quoted from the case of **Stanley Mwambazi v Morester Farms Limited**[2], in which this court held that:

> **"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... For this favorable treatment to be afforded to the applicant there must be no unreasonable delay, no mala fides and no improper conduct on the part of the applicant."**

On the basis of this authority, the defendant supported the decision of the High Court to set the default judgment aside, because there was no mala fides or undue delay on its part. The defendant further stressed that it would rely on the case of

Govindbhai Baghibai, Vallabhai Bagabhai Patel v Monile Holdings Company Limited[3], should this court be of the view that there are some inordinate delay on its part. The principle which was relied on from that case, was that even if a defendant did not act bona fide, the court would still set a default judgment aside, if a triable issue is disclosed. At this point the defendant indicated that it would address the question of whether its defence had revealed any triable issue in its arguments in response to grounds two and three.

We have carefully considered the arguments advanced in respect of the first ground of appeal. From the outset, we would like to make plain that the question of whether or not there was negligence on the part of the defendant and/or its lawyers is irrelevant to this appeal. This is because the current proceedings are not founded in an action for negligence and it never arose in the High Court. In this regard, the issue of negligence did not fall within the purview of the matters which the High Court was called to determine. What was before the Judge, was an appeal from a decision of the Deputy Registrar who had declined to set the default judgment aside. At that stage, just like in this appeal before us, the central issue for determination was whether or not, this was an appropriate case in which a default judgment could be set aside, considering the surrounding circumstances and the law. On our part, we intend to deal this issue as we address grounds two and three.

Having said this, we do not agree with the plaintiff's argument that the Judge in the court below should have made a finding of negligence on the part of the defendant in this matter. In fact, making such a finding would have been a serious digression from the main issues to be decided. We are also disinclined to agree with the plaintiff's argument that instead of setting aside the default judgment, the defendant should have sued its lawyers for indemnity for the sum that was adjudged in the default judgment. This is because, even if such the defendant had such an option, it should not at any rate, be a concern to the current proceedings because that is a private issue between the defendant and its lawyers. There is absolutely no merit in ground one and it accordingly fails. We will now proceed to deal with grounds two and three.

Submitting on ground two, the plaintiff argued that the Judge in the court below erred in holding that the purported defence makes mention of a related case before the Supreme Court, when that case does not in any way touch on the issues which were before him. She submitted that it was improper for the Judge to refer to the other matter before the Supreme Court, as a basis for setting aside the default judgment, because it was improperly before court. According to the plaintiff, the defendant ought to have raised a preliminary issue at the hearing of the matter and it should have also entered a conditional appearance, instead of

belatedly filing a purported defence which did not have merits but only consisted of general denials. It was her further submission that it was premature for the Judge in the court below to consider the other case before the Supreme Court, in the absence of a notice to raise a preliminary issue.

In support of the third ground of appeal, the plaintiff contended that the Judge misdirected himself when he rightly observed the lower court's finding that the defence which was before him at the time did not display a defence on the merits, but went ahead to set the default judgment aside. Relying on the case of **Water Wells Limited v Wilson Samuel Jackson**[1], the plaintiff submitted that although it was 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 that default, it was the defence on the merits which was the more important point to consider.

She submitted that the learned Deputy Registrar had refused to set the default judgment aside because the purported defence consisted of general denials. It was her submission that the Judge erred in law, when he proceeded to set the default judgment aside on another ground which was not pleaded by the defendant, despite considering that the defence displayed by the defendant had no merit. She pointed out that the Judge should not have set the default judgment aside on the basis of a defence

which had no merit at all. She relied on the case of **Stanley Mwambazi v Morester Farms Limited**[2], and submitted it was 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, and where a party was in default he could be ordered to pay costs, but it was not in the interest of justice to deny him the right to have his case heard. Further that for this favourable treatment to be afforded, there must be no unreasonable delay, no mala fides and no improper conduct on the part of the applicant. The plaintiff argued that in this case, the delay was unreasonable because the defendant had acknowledged receipt of the court process and there was an affidavit of service to that effect. It was her further argument that there was improper conduct by the defendant because it sat on its rights and did not even raise a preliminary issue or file a conditional appearance.

In response to grounds two and three, the defendant maintained that the Judge in the court below was right to have set the default judgment aside because it had exhibited a defence which revealed triable issues. It was submitted that the triable issues arose from the defendant's defence which made reference to an earlier case between the same parties, which at the material time was before the Supreme Court. Therefore, the defendant supported the decision of the Judge in the court below.

Our attention was further drawn to paragraphs 3 to 6 of the defendant's defence on page 20 of the record. It shows that, contrary to the plaintiff's assertions that there was no court order to allow the defendant possession of the mortgaged property, there was in fact an order of court dated 10th December, 2003. They pointed out that execution of the writ of possession took place on 31st August, 2004, and that by the time the plaintiff obtained a stay of execution on 3rd September, 2004, it had been overtaken by events as acknowledged by the ruling on page 42 of the record. For this reason, the defendant insisted that its defence did show triable issues and it commended the Judge for ordering the parties to be heard at trial.

The defendant also agreed with the opinion of the Judge that, setting the default judgment aside was in the interest of justice. In this regard, we were referred to the plaintiff's default judgment on page 6 of the record with emphasis that it had quantified sums of money which were awarded to the plaintiff without having the damages assessed. It was submitted that where a party seeks general damages, they must be assessed. It was the defendant's argument that since there was no assessment of damages prior to the order of the Deputy Registrar, the defendant would have suffered serious harm had the default judgment not been set aside. We were urged to dismiss this appeal with costs, for lack of merit.

We critically examined the issues raised in both grounds two and three. We note that a number of arguments were advanced by the plaintiff, some of which are based on a misapprehension of the law and procedure. One of the arguments advanced is that the defendant should have entered a conditional appearance and it should also have raised a preliminary issue, instead of applying to set the default judgment aside. We found this procedure suggested by the plaintiff, to be rather strange. We say this because according to the standard practice and procedure in our jurisdiction, the generally accepted way of challenging a default judgment by a defendant is by filing an application to set it aside, as was done in this case. And usually the defendant is also expected to exhibit the proposed defence to a plaintiff's claim so that the court can assess whether there is indeed an arguable defence on merits. Raising a preliminary issue as a way of challenging a default judgment is, undoubtedly, alien to this jurisdiction. The plaintiff's argument in that regard is therefore dismissed.

Further, it appears to us that the plaintiff misapprehended the ruling of the High Court, considering her argument that the learned Judge should not have set aside the default judgment having observed that the Deputy Registrar had refused to set it aside on the ground that the proposed defence did not display an arguable defence on the merits. A perusal of the ruling shows

that the Judge was merely considering the basis upon which the Deputy Registrar made his decision. He observed that the real reason why the Deputy Registrar declined to set the default judgment aside was because the defence which was before him did not display a defence on the merits. However, this did not by any means imply that the Judge agreed with the Deputy Registrar or that the Judge was bound by the decision of the Deputy Registrar.

In fact, the record shows that the Judge, after considering the matter, took a different view. He considered the fact that the defendant's defence made mention of a related case, which at the time, was on appeal before the Supreme Court. As such, the Judge was satisfied that justice would not be done if the default Judgment was left to stand. It was on this basis, that he decided to set the default Judgment aside and ordered the matter to proceed to trial on its merits. We are satisfied that the Judge was perfectly entitled to reconsider the issues in the manner he did, because the matter was before him on appeal. There is absolutely no substance in the plaintiff's argument that the Judge in the court below misdirected himself when he set aside the default judgment, because the Deputy Registrar had refused to do so on the basis that the proposed defence did not display a defence on the merits.

Now that this matter is before us on appeal, we have to determine whether, considering the circumstances surrounding this case and the law, the Judge was right to have set the default judgment aside. Authorities will show that the primary consideration in deciding an application to set aside a default judgment, is whether there is an arguable defence on the merits, although it is also necessary for the defendant to give an explanation for the default. In the case of **Water Wells Limited v Wilson Samuel Jackson** [1], it was held that:

> **"Indeed the Court of Appeal in England has held to similar effect in Ladup v Siu (2), 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 on trial.**
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> **On the authorities to which we have referred, it is obvious that as at the time when the defendant first made the application (which is the proper time to take into account) the delay and/or possible prejudice was of small enough a magnitude which could have been compensated by an order for costs. It only remains to consider whether the primary consideration, namely, the arguable defence, exists in this case."**

This case clearly underscores the importance of a defendant having an arguable defence on the merits, where there is an

application to set aside a default judgment. In the present case, the proposed defence disputes most of the allegations made by the plaintiff in her statement of claim. For instance, the defendant disputes the plaintiff's allegation that it had taken possession and foreclosed her property without any court order. Paragraphs 3 to 5 of the defence aver that on 10th, December, 2003, there was a judgment against the plaintiff for foreclosure of her property and execution of a Writ of Possession was levied on 31st August, 2004. The defence further avers that the plaintiff had stayed the High court orders which the defendant obtained and appealed against them in the Supreme Court. Further that the Supreme Court had reserved ruling and the parties were still waiting for the ruling. Therefore, the defendant was disputing that the plaintiff was entitled to the reliefs she was seeking because the execution on the plaintiff's property was levied in accordance with a court order. It is evident from all this, that the defendant's defence was in fact anchored on the related case, which at the time was before the Supreme Court. We do not therefore agree with plaintiff that the Judge should not have considered that the defendant's defence mentioned that related case, which at the time was before the Supreme Court. In our view, the case was closely knitted with the present case and the Judge was entitled to consider it.

We also think that the defendant has sufficiently showed an arguable defence on the merits. Triable issues were clearly

disclosed, and they can only be resolved if the matter goes to trial. Further, we do not think the plaintiff will suffer any prejudice if this matter is allowed to go to trial, so that all the issues are determined and the defendant is given an opportunity to defend its case. The explanation given by the defendant for its default was purely to do with its internal challenges in communicating with its external lawyers, and we are of the view that any resulting prejudice to the plaintiff can be compensated by costs.

Time and again we have stressed the need for cases to come to trial wherever possible, despite the default of the parties, so that all issues are conclusively resolved. In the case of **Stanley Mwambazi v Morester Farms Limited**[2], we held as follows:

> **"At this stage 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. The situation is different from that which obtains when there has been a trial and there is default in connection with a proposed appeal because then it cannot be said that the parties have been denied the right to a trial. 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 male fides and no improper conduct of the action on the part of the applicant."**

In this case, the defendant delayed to file its defence by two days only. We do not think this amounted to unreasonable delay.

There is equally no evidence of mala fides or improper conduct on the part of the defendant, other than its default in filing a defence. For these reasons, both grounds two and three must fail.

We must add that even assuming all the three grounds of appeal had merit, this appeal was doomed to fail on procedural grounds. This is because the appeal does not comply with the provisions of **Section 24 (1) (b) of the Supreme Court Rules, Cap 25 of the Laws of Zambia** which provides that:

> **"24. (1) No appeal shall lie-**
>
> **(a) ...**
>
> **(b) from an order of a Judge giving unconditional leave to defend an action;..."**

In this case, the Judge in the court below ordered for this matter to proceed to trial without attaching any condition. In effect, the Judge was granting an order which was giving unconditional leave to the defendant to defend the action. This means that the plaintiff should not have appealed against the ruling of the High Court. Therefore this appeal was incompetent and it should equally fail on procedural grounds.

It follows from what we have stated above, that this whole appeal is dismissed. We hereby refer this matter back to the High Court, so that it goes to trial on the merits. We will in the

circumstances order the defendant to enter appearance and defence to the plaintiff's statement of claim within 14 days of this judgment. We order that costs of this appeal shall abide by the outcome of the High Court trial.

M. S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

A.M. WOOD
SUPREME COURT JUDGE

M. MALILA
SUPREME COURT JUDGE