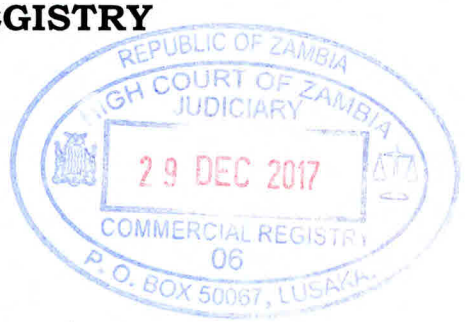
IN THE HIGH COURT FOR ZAMBIA **2014/HPC/0083**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA



(Civil Jurisdiction)

BETWEEN:

MADISON FINANCE COMPANY LIMITED **APPLICANT**

AND

YOTAMU CHISI T/A JAMITANDO ENTERPRISES **1ST RESPONDENT**

NGULUBE JEFTIN SINYINZA **2ND RESPONDENT**

Before the Hon Lady Justice Irene Zeko Mbewe in Chambers

For the Applicant: *N/A*

For the 1st Respondent: *In Person*

For the 2nd Respondent: *N/A*

RULING

Cases Referred to:

1. *Vijaygiri Goswami V Dr. Mohamed Anwar Essa and Commissioner of Lands, SCZ Judgment No. 3 of 2001*
2. *Mtonga and Another v Money Matters Limited (2010) ZR Volume 1 382*
3. *Nkongolo Farm Limited v Zambia National Commercial Bank Limited, Kent Choice (in receivership) and Charles Haruperi (2005) ZR 78*
4. *Stanley Mwambazi v Morester Farms Limited [1977] ZR 108*

5. *Pretoria City Council v Ismail [1938] TPD 246*
6. *Sonny Paul Mulenga & Vismer Mulenga (Both personally and Practicing as SP Mulenga International), Chainama Hotels Limited and Elephants Head Hotel Limited v Investrust Merchant Bank Limited (1999) Z.R. 101*

Legislation Referred to:

1. *High Court Rules, Chapter 27 of the Laws of Zambia*
2. *Money Lenders Act, Chapter 398 of the Laws of Zambia*

This is a Ruling on the 1st Respondent's application for an order to set aside the Judgment order pending an application for an order to review the said Judgment Order. The application is made pursuant to *Order 20 Rule 3 and Order 39 High Court Rules, Cap 27 of the Laws of Zambia.*

The supporting affidavit filed on 27th July, 2017 deposed to by the 1st Respondent reveals that the Applicant commenced an action against the Respondents herein on 19th February 2014 and that the Court entered Judgment in default of appearance and defence, and subsequently a Judgment Order on 3rd July, 2014. It is deposed that the Applicant never served the Respondents with Court process hence they were unaware of the proceedings against them. The 1st Respondent contends that the Applicant's failure to serve him with

court process was deliberate as the Respondents' addresses were known to the Applicant and that the Applicant had been in contact with the 1st Respondent. The 1st Respondent further contends that he paid K15,470.00 to the Applicant which was the total amount due, and as such there is no reason for the Applicant to take possession of his house (Exhibit "YC1-3"). It is deposed that the Applicant has inconvenienced his tenants by evicting them from the 1st Respondent's house during the rainy season. According to the 1st Respondent, he will suffer irreparable damage if the Judgment Order is not stayed as the Applicant will proceed to sell the said house even though he does not owe the Applicant any money. The 1st Respondent urges the Court to set aside the Judgment Order dated 3rd July, 2014 and grant leave to review the same.

The 1st Respondent filed skeleton arguments on 27th July, 2017 in which he submits that the law provides that a complainant is required to serve court process on the other party against whom an action is commenced. The 1st Respondent argues that the Applicant herein deliberately chose to breach this requirement of the law and caused a fraud on the mortgage. The 1st Respondent submits that

the Applicant intends to impair the administration of law and justice by concealing material facts to the Court as regards service of process and payment of the loan or mortgage with the objective of depriving the Respondents of their property. The case of **May Vijaygiri Goswami V Dr Mohamed Anwar Essa and Commissioner of Lands[1], SCZ Judgment No. 3 of 2001** was cited where the Supreme Court stated that:

> **"Our constitution does not countenance the deprivation of property belonging to anyone....."**

The 1st Respondent also referred to Article 16 (1) and (2) of the Constitution of Zambia which provides that:

> **"A person shall not be deprived of the property."**

In view of the foregoing, the 1st Respondent argues that upon full payment of the loan with interest to the Applicant, the Respondents herein had no obligation towards the Applicant, but that the Applicant had an obligation to discharge the mortgage over the property. The 1st Respondent contends that compound interest is not allowed and that the parties never agreed to make any payments other than the money due to the Applicant. In

furtherance of this argument, the 1st Respondent drew my attention to *section 15 (1) of the Money Lenders Act Cap 398 of the Laws of Zambia* which states as follows:

> **"Where, in any proceedings in respect of any money lent by a money-lender after the commencement of this Act or in respect of any agreement or security made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act, it is found that the interest charged exceeds the rate of forty-eight per centum per annum, or the corresponding rate in respect of any other period, the Court shall, unless the contrary is proved, presume for the purposes of section fourteen, that the interest charged is excessive and that the transaction is harsh and unconscionable..."**

The 1st Respondent argues that the relationship between the parties is not one of creditor and borrower, and as such the Applicant cannot be allowed to overcharge the Respondents by taking possession of the house which is of greater value than the money that was due to it and paid off. To support this proposition the case

of **Mtonga and Another v Money Matters Limited[2] (2010) ZR Volume 1,** at page **382** was referred to.

As regards the contention that the Applicant acted without regard to the Respondents' rights, I was referred to the case of **Nkongolo Farm Limited v Zambia National Commercial Bank Limited, Kent Choice (in receivership) and Charles Haruperi[3] (2005) ZR 78** in which the Supreme Court held that:

> **"Where a party relies on any misrepresentation, fraud, breach of fraud. In the instant case, fraud was not alleged." "Where a party relies on any misrepresentation, fraud, breach of trust, willful default or undue influence by another party, he must supply the necessary particulars of the allegation in the pleadings. Fraud must be precisely alleged and strictly proved. There is no presumption."**

The 1st Respondent went on to cite the provisions of the section 314 of the **Penal Code Cap 87 of the Laws of Zambia** in arguing that the Applicant deliberately caused fraud on the mortgage of the property against the provisions of the law. The 1st Respondent prays that the application herein should be granted with costs.

At the hearing of this application, the 1st Respondent placed reliance on the affidavit filed herein and averred that he obtained money from the Applicant which money he paid back as agreed and that he does not owe the Applicant any money. The 1st Respondent's oral submissions mirrored the contents of his supporting affidavit, and I shall not repeat them.

I have considered the affidavit evidence, list of authorities and the arguments advanced by the 1st Respondent in making this application.

In order for me to determine whether an Order to set aside the Judgment Order dated 3rd July, 2014 should be granted, it is imperative that a background of the facts leading to this application is given. The Applicant by a facility letter dated 24th December, 2012 availed to the 1st Respondent a loan in the sum of K20,000.00 which was secured by a mortgage over House No.34/Block 124, George Improvement Area, Lusaka. That the 2nd Respondent guaranteed the said loan facility. When the Respondents defaulted in their remittance of repayments, on 19th February, 2014 the Applicant commenced this action against the Respondents claiming

inter alia for the payment of K12,486.74 being the outstanding balance of the money due to the Applicant. The record indicates that the Applicant made attempts to effect personal service on the Respondents but could not locate their physical addresses hence made an application to serve court process by way of substituted service. The Court granted the application for substituted service by way of an Order dated 31st March, 2014 and on 24th and 25th April, 2014 the Respondents were accordingly served by way of advertisement in the Post Newspaper as exhibited in an affidavit of service dated 28th April, 2014.

When the matter came up for hearing on 22nd May, 2014 before my learned sister Honourable Judge F. M. Chishimba, the Respondents had not filed any opposing affidavit and the Court proceeded to determine the matter as there was proof of service of court process on the Respondents. Accordingly, the Court entered Judgment in favour of the Applicant on 3rd July, 2014 in which it was ordered as follows:

1. *That Judgment in default of appearance be entered against the Respondent in the sum of K12, 486.74 being the outstanding balance on the loan facility as at 14th January, 2014.*
2. *That interest on the said sum of K12,486.74 be paid at the contractually agreed rate until complete payment, and that the said sum be paid within thirty (30) days from the hereof.*
3. *That in the event of default by the Respondents, the Applicant be at liberty to foreclose on the declared legal mortgage and have possession and exercise the statutory power of sale.*
4. *Costs to the Applicant to be taxed in default of agreement.*

Acting on the Judgment Order, on 2nd July, 2015 the Applicant issued a writ of possession in respect to the mortgaged property. It is against this background that the 1st Respondent brings this application to set aside the said Judgment Order pending application for an order to review the said Order.

When the matter came up for hearing on 4th October 2017, I proceeded to hear it in the absence of the Applicant as there was an affidavit of service and there was no explanation as to their non attendance.

The 1st Respondent's application is made pursuant to *Order 20 Rule 3 High Court Rules, Cap 27 of the Laws of Zambia* which provides as follows:

> **"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."**

Order 39 Rules of the High Court, Cap 27 of the Laws of Zambia states as follows:

> **"39. (1) Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where wither 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."**

The above rules bestow this Court wide discretion to set aside or vary a Judgment on such terms as it determines. I am further

guided by *Order 12 Rule 3 of the High Court Rules Cap 27 of the Laws of Zambia* which 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."**

In determining the application to set aside the Judgment Order, the 1st Respondent must demonstrate that he was prevented from filing a defence or affidavit in opposition and that there is also merit in the defence (**Stanley Mwambazi v Morester Farms Limited[4] [1977] ZR 108)** . The 1st Respondent should also have acted within a reasonable time or explain the reasons for the delay.

The 1st Respondent's main contention is that the Respondents herein were not served court process by the Applicant. That the Applicant concealed material facts that it had been paid more than what was agreed, and that compound interest was charged on the loan which according to the 1st Respondent is not allowed. Conversely, the Applicant argues that court process was served by way of substituted service.

The starting point is whether the Respondents herein were served with court process. It is settled law that where service cannot be served personally, substituted service may be resorted to and it shall be as good as personal service. In this regard, I am persuaded by a South African case of **Pretoria City Council v Ismail[5] [1938] TPD 246** where Schrenier J stated the following:

> **"Substituted service is a way of achieving in law the same result as if the proceedings, notice or order, or whatever the matter may be had been brought to the notice of the persons affected. It is not a way of establishing that such notice or other matter was actually brought to the notice or knowledge of the person affected; it takes the place of bringing such notice or other matter to his knowledge. So in ordinary litigation, the summons may with the Court's leave be served by posting or by publication or in some other manner; and when that is done, there is no doubt that the service is just as operative and has the same legal results as if the party who had to be served was presented with a copy of the document to be served."**

According to the affidavit in support of ex parte summons for leave to serve Originating Summons and date of hearing by substituted service filed on 26th March 2014, the process server indicates in paragraph 5 as follows:

> "**That having filed the originating process, I, on the Applicant's behalf sort to effect personal service on the Respondents but failed to locate their physical addresses. That when I contacted the Respondents through their mobile cellular phones so that they could direct me to their physical addresses, the Respondents opted to be elusive and did not pick up their mobile cellular phones on the appointed day when attempts to connect with them where made.**"

Following the Applicant's application for substituted service, on 26th March 2014, the Court Ordered that court process shall be effected by substituted service as there was evidence that the Respondents could not be found. A subsequent affidavit of service was filed on 28th April 2014 showing that the court process had been advertised in the local newspaper. The record shows that the Respondents

herein were served court process via substituted service by advertisement in the Post Newspaper but elected not to file any opposing affidavit a fact which was noted by the learned trial Judge at the hearing of the Originating Summons.

In an affidavit of service dated 2nd July 2015, in a letter enclosing the Judgment Order dated 3rd July 2014, it shows that the letter was personally received by the 1st Respondent who signed for it on 7th August 2014 (Exhibit "DB1"). The record further reveals that on 1st July 2016 almost two (2) years later after receipt of the Judgment Order, the Respondents applied to stay execution, which was not granted.

From the chronology of events, I have no reason to doubt the process server's account of effecting service on the Respondents herein. The record reveals that he first made attempts to personally contact the Respondents but that proved futile resulting in an Order to effect service by way of substituted service. The 1st Respondent disputes this by stating that the Applicant knew their physical address and that the Applicant deliberately neglected or failed to serve court process on them when the addresses were well

known, and that the Applicant had contact with the 1st Respondent. This assertion is in contrast to what the process server deposed that the Respondents could not be physically located and phone calls to the Respondents remained unanswered.

On the totality of the evidence on record, the Court is satisfied that the Respondents were duly served with court process by way of substituted service but for some reason, the Respondents chose not to respond. I find that the Respondents acted in bad faith as the record shows that there was proper service of the court process including the Judgment Order, and it took the Respondents two years to awake from their slumber. Much as the 1st Respondent now seeks the protection of the law, I find that he had excluded himself from the jurisdiction of the Court by failing to attend Court. I further find that there was no misconduct on the part of the Applicant. Following the finding that there was proper service of court process, the issue of whether there is a defence on the merits and the reason for delay become redundant. The 1st Respondent cited a number of cases which I have considered, and I opine that under the facts of this case, the cited cases do little to aid his cause

more so that the Court will not give comfort to those with a lackadaisical attitude in defending a matter.

In conclusion, I am of the considered view that the 1st Respondent has not shown sufficient cause to warrant the setting aside of the Judgment Order. In respect to the issues raised on the payments made to the Applicant, and the charging of compound interest, this Court having pronounced its Judgment cannot address the same.

I therefore see no reason for denying the Applicant the enjoyment of the fruits of its Judgment and I am bolstered by the case of **Sonny Paul Mulenga & Others v Investrust Merchant Bank Limited[6] (1999) Z.R. 101**, where the Supreme Court held that:

> **"The successful litigant should not be denied immediate enjoyment of a Judgment unless there are good and sufficient grounds."**

Based on the aforesaid, I find that this application lacks merit and I accordingly dismiss it.

Costs to the Applicant to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 29th day of December, 2017.

HON IRENE ZEKO MBEWE
HIGH COURT JUDGE