SELECTED JUDGMENT NO.32 OF 2018

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IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.188/2015**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

NATURAL VALLEY LIMITED **APPELLANT**

AND

BRICK AND TILE MANUFACTURING LIMITED **1ST RESPONDENT**

THE ATTORNEY GENERAL **2ND RESPONDENT**

Coram : Wood, Musonda and Mutuna JJS

On 10th July 2018 and 20th July 2018

For the Appellant : Mrs. M. Zaloumis and Ms M. Mwanawasa of Dove Chambers

For the First Respondent : Mr. N.M. Mulikita of Messrs N.M. Mulikita and Partners

For the Second Respondent : Mr. I. Imasiku, Principal State Advocate of Attorney General's Chambers

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J U D G M E N T

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The judgment of the Court was delivered by Mutuna, JS.

Cases referred to:

1) **Re Gospel of God Church, Isaac Matongo v Shadreck Masedza and the Attorney General (1977) ZR 292**
2) **Katongo v Attorney General (1975) ZR 148**

Statutes referred to:

1) **High Court Act, Cap 27**
2) **Rules of the Supreme Court, 1965, volume 1 (1999 edition).**

Introduction

1) This appeal calls into question the effect of failure by a party to answer to a statement of claim served upon it by way of filing a defence to such statement of claim. It challenges the decision by the Learned High Court Judge entering judgment in default of defence.

2) The Appeal also discusses the effect of an admission by one defendant on a co-defendant.

3) Last of all, we will endeavor to explain the remedies which are available to a party aggrieved by the entry of a default judgment. We will, in this regard, consider whether or not an aggrieved party can appeal against such a judgment.

Background

4) The facts of this case are that the First Respondent purchased properties known as subdivision 4 of subdivision A of Farm 379a and subdivisions 5 of subdivision A of Farm 379a Lusaka ("the properties") in 1973 from Lusaka Building and Transport Company Limited. Pursuant to the said purchase, the First Respondent was issued with certificates of title numbers 35056 and 35057 by the Second

Respondent acting through the Registrar of Lands and Deeds.

5) On 4th March 2004, the Commissioner of Lands issued notices of intention to re-enter in respect of the properties. Subsequently, certificates of re-entry were issued and the properties were allocated to the Appellant and certificates of title to the properties were issued to it.

6) Sometime in 2009, the First Respondent attempted to pay ground rent at the Lands Department for the properties but discovered that they had been allocated to the Appellant by the Commissioner of Lands following the issuance of the notices of intention to re-enter and certificates of re-entry.

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7) Later in 2010, the First Respondent discovered through a search on the properties that the Commissioner of Lands had cancelled the re-entries. This was by way of preliminary entries which appeared on the print out which had been issued by the Lands Department in respect of the properties. It, therefore, engaged the Commissioner of Lands to confirm this position but its efforts did not yield any results.

8) Meanwhile, the Appellant started developing the two properties which prompted the First Respondent as Plaintiff in the Court below, to take out an action against the Second Respondent and the Appellant claiming the following reliefs:

8.1 a declaration that it is the rightful title holder of the properties;

8.2 a declaration that the purported re-entries on the properties effected by the Commissioner of Lands are null and void;

8.3 an injunction against the Appellant restraining it from interfering with the First Respondent's quiet enjoyment of the properties;

8.4 an order that the First Respondent should be granted access way to the properties by the Appellant;

8.5 any other relief that the Court deems fit; and

8.6 Costs.

9) After the First Respondent took out the action it caused the process to be served upon the Second Respondent and the Appellant, as First and Second Defendants respectively. In response, the Second Respondent caused an application to be filed for an order to strike it out from the proceedings as a party for misjoinder.

10) In support of the Second Respondent's application mentioned in the preceding paragraph, was an affidavit in which the Second Respondent

acknowledged the error in the issuance of the notices and certificates of re-entry. It also explained the steps it had taken in rectifying the error.

11) The Learned Deputy Registrar heard the Second Respondent's application and dismissed it on the ground that the action could only be determined properly if the Second Respondent remained as a party. This prompted the Second Respondent to file a defence to the action. The Appellant, however, neglected to file a defence and merely filed a conditional memorandum of appearance predicated on an application to strike out the writ of summons for irregularity.

12) Later, the First Respondent filed an application before the Learned High Court Judge for entry of

judgment on admission and in default of pleadings and to strike out pleadings against the Second Respondent and the Appellant, respectively. This was pursuant to Order 30 rule 8 and Order 21 rule 6 of the ***High Court Act*** as read with Orders 27 rule 3, 18 rule 19 and 19 rules 5 and 7 of the ***Rules of the Supreme Court, 1965, (1999 edition) volume 1 (White Book)***. In support of the application the First Respondent filed an affidavit. The other two parties opposed the application by way of affidavits. It is the ruling from this application that this appeal arises.

Contentions by the parties and arguments by the First Respondent

13) The First Respondent contended that the affidavit filed by the Second Respondent in support of the application for misjoinder amounted to an admission of the claim against it. As such, the Second Respondent and Appellant ceased to have legitimate defences.

14) In relation to the Appellant, the First Respondent contended that it had not responded to its claim by way of filing a defence. Consequently, the action against it, was undefended.

15) The Second Respondent's response to the application was that the contents of the affidavit in support of the application for misjoinder did not amount to an admission. Further, the First Respondent had no cause of action against the Second Respondent because the Commissioner of

Lands did not re-enter the properties, hence the cancellation of the certificates of re-entry.

16) The Appellant, contended that it was still the legal holder of the certificates of title issued in relation to the properties. As such, it is the owner of the said properties. Further, the admissions made by the Second Respondent in the affidavit in support of the application for misjoinder do not affect its rights in the properties.

Consideration of the application by the Learned High Court Judge and decision

17) The Learned High Court Judge considered the contentions of the parties and arguments by the First Respondent's counsel and found that in terms of Order 21 rule 6 of the ***High Court Rules***, a plaintiff is at liberty to apply for judgment on

admission where a defendant by the pleadings or otherwise admits the claim. She then considered whether the evidence placed before her revealed an admission of the claim by the Second Respondent and concluded that the cancellation of the re-entries and confirmation by the Commissioner of Lands that the First Respondent is the registered owner of the properties amounted to an admission. Further, the judge reasoned that the First Respondent had not ceased to be the registered proprietor of the properties, therefore, the case was a proper case for entry of judgment on admission.

18) In regard to the Appellant, the Learned High Court Judge found that it was affected by the judgment entered against the Second Respondent

because its affidavit in opposition was not a sufficient rebuttal to the First Respondent's claim in the absence of a defence to the writ of summons and statement of claim. That only when a defence and other pleadings are filed does a Court proceed to hold a trial in a matter. Consequently, since there was no defence filed by the Appellant she could not hold a trial in the matter.

19) The Learned High Court Judge concluded by pronouncing judgment against both the Appellant and Second Respondent.

Grounds of appeal and arguments by the parties before this Court

20) The Appellant is aggrieved by the decision of the Learned High Court Judge and has launched this

appeal advancing three grounds of appeal as follows:

20.1 The trial Judge erred in fact and law when she entered judgment on admission against the Appellant and the Second Respondent based on the Second Respondent's admission without hearing the Appellant.

20.2 The trial Judge erred in law when she entered judgment against the Appellant based on the premise that the Appellant did not file a defence when reliefs sought against the Appellant were declaratory in nature.

20.3 The trial Judge erred in fact and in law when it declared that the Second Respondent is the legal owner of the properties.

21) The Appellant and Second Respondent filed heads of argument prior to the hearing of the appeal. The First Respondent did not file heads of argument but relied upon the Second Respondent's arguments. Counsel for the Appellant and First Respondent also made *viva voce* arguments at the hearing of the appeal.

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22) In respect to ground 1 of the appeal, the Appellant's argument was that the admission made by the Second Respondent was not binding on it in accordance with Order 27 rule 2 sub-rule 2 of the ***White Book***. Therefore, the Learned High Court Judge ought to have referred the matter to trial because it had intimated its intention to defend by filing a conditional appearance. Further, she ought to have considered the evidence adduced by the Appellant in the affidavit in opposition to summons for misjoinder.

23) Under ground 2 of the appeal, the Appellant questioned the entry of default judgment in view of the declaratory relief sought in the claim. The position taken by the Appellant was that a Court cannot enter summary judgment or default

judgment in a matter where the relief sought is for a declaration. Reliance was placed on the decision by Sakala J (as he then was) in the case of ***Re Gospel of God Church, Isaac Matongo v Shadreck Masedza and the Attorney General***[1] where it was held as follows at page 292:

> **"The power to grant a declaration should be exercised with proper sense of responsibility and with full realization that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. The discretion should be exercised with care and caution and judicially. In particular the Court will not make a declaratory judgment where an adequate alternative remedy is available."**

24) The Appellant contended that prior to making his decision, Sakala J, warned himself against the danger of making declaratory judgments and proceeded to review the evidence adduced by the parties. As a result of this, the Appellant took the

view that since there were contentious issues presented before the Learned High Court Judge she should have adopted the procedure by Sakala J by putting the Appellant on its defence through a trial.

25) In conclusion, the Appellant referred to the decision by Care, J in the case of ***Katongo v Attorney General***[2] whose principle is similar to that stated by Sakala J on the undesirability of granting declaratory judgments where an alternative remedy exists.

26) As regards ground 3 of the appeal, the position taken by the Appellant was that the decision by the Learned High Court Judge to declare the First Respondent the legal owner of the property amounted to granting summary judgment. This,

according to the Appellant, was a misdirection because Order 14 rule 4 sub-rule 9 of the ***White Book*** does not permit the entry of summary judgment in circumstances such as those that had confronted the Learned High Court Judge.

27) In the *viva voce* arguments, counsel for the Appellant, Ms M. Mwanawasa argued that Order 12 rules 1 to 7 of the ***High Court Act*** set out the claims in relation to which default judgments can be entered. She contended further that where process is endorsed for a declaratory judgment the Court cannot enter default judgment if a defendant omits to file a defence but orders that the matter proceed to trial as if no default had been made in accordance with Order 12 rule 8 of the ***High Court Act***.

28) In response, the Second Appellant's arguments by and large addressed the merits of the claim by the First Respondent in the Court below. Our summary of the heads of argument does not reproduce these parts of the arguments and focuses only on the relevant arguments in relation to the three grounds of appeal. The authorities we were referred to were also not relevant to the determination of this appeal. As such, we have not referred to them

29) Arguing ground 1, the Second Respondent contended that the Learned High Court Judge was on firm ground in entering judgment on admission in view of the admissions revealed in the affidavit in support of the application for misjoinder.

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30) Turning to ground 2 of the appeal, the Second Respondent argued that the pleadings that had been deployed before the Court had included a defence and that the Learned High Court Judge was on firm ground when she refused to hold a trial in the matter because the Appellant had neglected to file a defence.

31) In regard to ground 3, the Second Appellant argued that the Appellant having failed to file a defence the Learned High Court Judge was on firm ground when it declared the First Respondent the rightful owner of the properties.

32) In the *viva voce* arguments, counsel for the First Respondent Mr. N.M. Mulikita argued that the appeal is misconceived because the judgment entered by the Learned High Court Judge was a

judgment on admission and not a default judgment. According to counsel, this is evident from the summons filed by the First Respondent in the Court below pursuant to which the Learned High Court Judge delivered the ruling which is the subject of this appeal. He argued further that the Learned High Court Judge was on firm ground when she entered the judgment because the Appellant neglected to file the defence.

Consideration of the grounds of appeal and decision of this Court

33) Grounds 1 and 2 raise the issue whether or not a Court can enter default judgment where a claim seeks a declaratory judgment. In determining these two grounds of the appeal we would like to begin by revisiting the application which was

before the Learned High Court Judge. A reading of the summons reveals that the application sought two things, that is, entry of judgment on admission and in default of defence. The former application related to the Second Respondent whilst the latter, related to the Appellant.

34) In regard to the default judgment entered against the Appellant, although the Learned High Court Judge did not expressly pronounce that she was entering default judgment against the Appellant, we are of the firm view that this, infact, is what she did. This is revealed by the portion of her ruling which states that *"... no defence was filed for the 2nd Defendant and as such there is no need to proceed to trial ..."*. Thus the basis of the judgment was the want of a defence to signify the

Appellant's intention to defend. We therefore, do not agree with Mr. N.M. Mulikita's argument that the judgment entered in respect of the Appellant was a judgment on admission.

35) The distinction we have made is important because it is not in all cases where a party is entitled to entry of default judgment where the opposite party omits or neglects to file a defence as was argued by Ms M. Mwanawasa. Order 12 rule 1 of the ***High Court Act*** allows entry of judgment in default where a writ of summons is endorsed with a liquidated demand. Rule 2 of the same Order provides for entry of interlocutory judgment and issuance of a notice of assessment where a writ is endorsed with a claim for pecuniary damages and the defendant fails to

enter a defence. Similarly, Rule 4 provides that in a matter where a writ is endorsed with a claim for damages in respect of detention of goods, a plaintiff may enter interlocutory judgment.

36) In a matter where the writ is endorsed with a claim for recovery of land or mesne profits, a plaintiff may enter judgment pursuant to rules 6 and 7 where a defendant defaults to file a defence.

37) The examples we have given in the two preceding paragraphs are the only ones specifically provided for under the rules for entry of default and interlocutory judgments. The question, therefore, is what then happens in respect of claims not specifically provided for such as the one which had confronted the Learned High Court Judge, for

a declaratory judgment? Order 12 rule 8 provides as follows:

> **"In all actions not otherwise specifically provided for by the other sub-rules, in case the party served with the writ of summons does not appear within the time limited for appearance upon the filing by the plaintiff of a proper affidavit or certificate of service, the action may proceed as if such party has appeared."**

38) The effect of the rule we have set out in the preceding paragraph in relation to this appeal is that the learned High Court Judge should not have granted the order for default judgment against the Appellant because the remedy sought in the writ of summons was for a declaratory judgment. She, instead, should have issued an order for directions to chart the course for a trial in the matter as if the Appellant had filed a defence.

39) It was thus, a misdirection on part of the Learned High Court Judge to enter judgment in default and hold that there was no need for a trial in the matter in relation to the First Respondent's claim as against the Appellant.

40) In arriving at the decisions we have made in the preceding paragraphs we have relied entirely on our interpretation of Order 12 of the ***High Court Act***. We have not found it necessary to consider the holding in the cases referred to us by counsel for the Appellant namely, ***In Re Gospel of God Church***[1] and ***Katongo v Attorney General***[2] because the circumstances in this case are distinguishable from those in the two cases. This case involves a default judgment, as such, evidence on the main issue was not heard, while

in the other two cases evidence on the issue in dispute was heard.

41) Taking the issue further, even assuming that the judgment entered was judgment on admission, it would still have been a misdirection on the part of the Learned High Court Judge because, as the Appellant has argued, the admission by the Second Respondent (if it can be said to be such) did not extend to the Appellant and it could, therefore, not be bound by it. The reason for this is that the wording of Order 27 rule 2 sub-rule 2 of the ***White Book*** is that an admission is only binding on the person who makes it.

42) Having found that the Learned High Court Judge misdirected herself by entering default judgment against the Appellant, the question we would like

to pose is what is the remedy available to the Appellant? Order 12 rule 10 sub-rule 2 of the ***High Court Act*** provides the remedy of setting aside and it is worded as follows:

> **"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."**

(The underlining is the Court's for emphasis only.)

43) In the light of the provisions of Order 12 rule 10 sub-rule 2 it would appear, on its face, that the Appellant ought to have gone back to the Learned High Court Judge and sought to set aside the default judgment alleging that it had a defence on the merits. The appeal would in such a case appear to be the wrong remedy to resort to.

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44) We have considered the options in the preceding paragraph and hold that the nature of this case is such that the correct remedy is an appeal and not setting aside before the Learned High Court Judge. This arises from the fact that our holding is that the Learned High Court Judge ought not, in the first place, to have entered default judgment because the Order does not provide for default judgment in the light of the relief sought in the Court below. Consequently, the default judgment was not *"entered pursuant to the provisions of ... Order [12]"* and cannot, therefore, be remedied in accordance with Order 12 rule 10 sub-rule 2 of the ***High Court Act***. Arising from this, there is merit in grounds 1 and 2 of the appeal.

45) Coming to ground 3 of the appeal, in view of our holding in respect of grounds 1 and 2, this ground of appeal must equally succeed. A declaration can not be pronounced without a full hearing of the matter because no interlocutory or default judgment can be made in respect of such relief. We hold, therefore, that there is merit in ground 3 and uphold it.

Conclusion

46) All three grounds of appeal having succeeded, we allow the appeal with costs to abide by the outcome of the Court below. We accordingly set aside the default judgment entered against the Appellant and remit the record back to the High Court be dealt with by the same judge by invoking

the provisions of Order 12 rule 8 of the ***High Court Act***. That is to say, she must issue directions for trial as if the Appellant had filed a defence and proceed to hold a trial at the close of pleadings in the usual way.

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A.M. WOOD
SUPREME COURT JUDGE

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M. MUSONDA, SC.
SUPREME COURT JUDGE

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N.K. MUTUNA
SUPREME COURT JUDGE