

IN THE HIGH COURT FOR ZAMBIA

2018/HPC/0247

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

**JU LI CORPORATION LIMITED
NJAMBA MANEKU**

**1ST PLAINTIFF
2ND PLAINTIFF**

AND

**CHINA NATIONAL ELECTRIC ENGINEERING
CORPORATION LIMITED**

DEFENDANT

**CORAM: Hon. Lady Justice Dr. W S. Mwenda in Chambers at
Lusaka this 7th day of February, 2020**

*For the Plaintiffs: Mr. M. Lisimba of Mambwe, Siwila and Lisimba
Advocates*

For the Defendant: Ms. N. Chibuye of Nchito and Nchito Advocates

RULING

Legislation cited:

- 1) Order 14A, rule 1 of the Rules of the Supreme Court of England and Wales, 1999 (the White Book).
- 2) Order 35, rule 5 of the High Court Rules, Chapter 27 of the Laws of Zambia.

This is the Defendant's preliminary issue raised pursuant to Order 14A of the Rules of the Supreme Court of England and Wales, 1999 (the White Book). The preliminary issue was raised orally at the

hearing of the Plaintiff's Summons to Set Aside Default Judgment. Ms. Chibuye, learned Counsel for the Defendant, submitted that the Defendant's position with regard to the application to set aside default judgment was that at the time the said application was filed by the Plaintiffs, this Court was *functus officio*. That, according to this Court's Ruling dated 18th June, 2019, at page R8, the Court determined that the Plaintiffs had had the opportunity to address the Court on the issues but did not appear and therefore, dismissed the Plaintiffs' application for review. She contended that as could be seen from the record, the Plaintiffs had had numerous opportunities to present their case but did not do so. That, in light of this, it was the Defendant's prayer that the Plaintiffs' application to set aside default judgment be dismissed.

In response, Mr. Lisimba, learned Counsel for the Plaintiffs submitted that it was precisely because of the absence of the Plaintiffs at the hearing that the default judgment was obtained and it was the Plaintiffs' contention that this Court is empowered to set aside any order obtained in default. Further, that, it is not true that having decided on 18th June, 2019, that the Plaintiffs had had the opportunity to address the Court meant that the matter was heard on the merits. Counsel contended that this Court can reopen and set aside any order that has been granted in the absence of one party. He argued that no prejudice would be occasioned to the Defendant if the matter were to be heard on the merits. That, the preliminary issue raised lacked merit and should be dismissed to allow the application to set aside default judgment to be heard and determined.

In reply, Ms. Chibuye reiterated that the Ruling of 18th June, 2019, dismissed the Plaintiffs' application for review and if the Plaintiffs were aggrieved, they had the option of appealing against the said Ruling. That, it was the Defendant's position that as at 18th June, 2019, this Court was *functus officio*. That, consequently, the application was incompetently before this Court.

I have considered the submissions by Counsel on both sides in support of and against the preliminary issue raised. The preliminary issue was raised pursuant to Order 14A. The said Order stipulates in rules 1 as follows:

"1. - (1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that –

a) Such question is suitable for determination without a full trial of the action, and

b) Such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just."

A brief background leading to this preliminary issue is that on 19th February, 2019, this Court made Ruling on a preliminary issue brought by the Defendant that the action herein was statute barred and should be dismissed. This Court found that the action was caught up by section 2 (1) of the Limitation Act and was therefore

statute barred. The Court accordingly dismissed the action. The Plaintiffs then applied to the Court for review of its Ruling of 19th February, 2019. However, the Defendant brought another preliminary issue asking the Court to make a determination as to whether the Plaintiffs' application for review could be sustained on the basis of the facts adduced by the Plaintiffs. The Court, in a Ruling dated 18th June, 2019, sustained the preliminary issue and ruled that review was not available to the Plaintiffs in the circumstances of this case. The application for review was accordingly dismissed. Following the dismissal of the application for review, the Plaintiffs filed a Summons to Set Aside Judgment in Default, which application is the subject of the present preliminary issue.

It is the Defendant's contention that as at 18th June, 2019 when this Court delivered its Ruling regarding the application for review, the Court became *functus officio*. On the other hand, it has been contended on behalf of the Plaintiffs, that this Court has the power to set aside any order obtained in the absence of the other party, pursuant to the provisions of Order 35, rule 5 of the High Court Rules, which provides as follows:

"Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the Court, upon such terms as may seem fit."

I opine that what is in issue in this preliminary issue is not whether or not this Court has the power to set aside a judgment or order obtained against a party in the absence of the party. What is in

contention is whether or not this Court became *functus officio* after it rendered the Ruling of 18th June, 2019.

Black's Law Dictionary, 10th Edition, defines *functus officio* as:

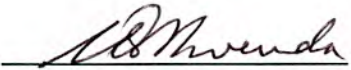
"(Of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."

Having regard to the definition of *functus officio* above, I am in agreement with the Defendant's contention that this Court became *functus officio* after delivering the Ruling of 18th June, 2019, as the Court had dismissed the application for review, albeit following the raising of the preliminary issue by the Defendant. When the action was dismissed for being statute barred, the Plaintiffs had the option to appeal to the Court of Appeal against this Court's Ruling but did not do so and instead applied for a review of the Court's Ruling dismissing the action. However, this Court found that the Plaintiffs had not satisfied the requirements for the Court to grant the order of review prayed for and dismissed the same. Henceforth, this Court became *functus officio*, as correctly submitted by Counsel for the Defendant.

In view of the foregoing, the Defendant's preliminary issue is sustained. The application to set aside default judgment is incompetently before this Court and is dismissed with costs to the Defendant, to be agreed or taxed in default thereof.

Leave to appeal is granted.

Delivered at Lusaka the 7th day of February, 2020.



DR. W. S. MWENDA
JUDGE