IN THE HIGH COURT FOR ZAMBIA **2018/HPC/0489**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

KASHIKOTO CONSERVANCY LIMITED **PLAINTIFF**

AND

DARRELL ALEXANDER WATT **DEFENDANT**

CORAM: Hon. Lady Justice Dr. W. S. Mwenda in Chambers at Lusaka this 26th day of December, 2019.

For the Plaintiff: *Mr. M. Ndalameta of Musa Dudhia and Company*
For the Defendant: *Mr. B. Phiri and Mr. B. Mulunda of Tutwa S. Ngulube and Company*

RULING

Cases referred to:

1) *Covindbhai Baghabhai Patel and Valabhai Patel v. Monile Holding Company Limited (1993) S.J. 19 (S.C.).*
2) *Investment Bank Plc. v. Chick Masters Limited and Another (2011) ZMHC 30.*
3) *Development Bank of Zambia and KPMG Peat Marwick v. Sunvest Limited and Sun Pharmaceuticals Limited (1995-1997) Z. R. 1187.*
4) *Kelvin Hang'andu and Company v. Webby Mulubisha (2008) 2 Z.R. 82.*
5) *Premesh Bhai Megan Patel v. Rephidim Institute Limited (2011) 1 Z.R. 134.*
6) *Edson Chenda v. Satkaam Limited (1979) Z.R. 119.*
7) *Finance Bank Zambia Limited v. Dimitrios Monokandilos Filandria Kouri (2012) 1 Z.R. 484.*
8) *Stanley Mwambazi v. Morester Farms (1977) Z.R. 144 (Reprint).*
9) *Harry Mwaanga Nkumbula v. The Attorney General (1979) Z.R. 267.*
10) *Khalid Mohammed v. The Attorney General (1982) Z.R. 49.*

11) *Sobek Lodges Limited v. Zambia Wildlife Authority (2011) 2 Z.R. 235.*

Legislation referred to:

1) *Order 20, rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia.*

Published work referred to:

1) *P. Matibini, Zambian Civil Procedure: Commentary and Cases Volume 1 (LexisNexis, 2017) at page 322.*

This is the Defendant's application to set aside Interlocutory Judgment in Default dated 24th December, 2018. The application was filed on 22nd February, 2019. It is supported by an affidavit (hereinafter referred to as "the Affidavit in Support"), of even date.

The Plaintiff opposed the application and on 11th March, 2019, filed into Court an affidavit (hereinafter referred to as "the Affidavit in Opposition"), augmented by Skeleton Arguments of even date.

The Affidavit in Support was sworn by Darrell Alexander Watt, the Defendant herein, who testified to the effect that he was never aware that the proceedings herein had been commenced against him by the Plaintiff and was never served with the Writ of Summons and/or Statement of Claim. That, he only came to know of these proceedings when he was served with an Order of Interlocutory Injunction dated 21st day of December, 2018 and an Interlocutory Judgment in Default dated 19th December, 2018.

The deponent deposed further, that he was only served with the documents in January, 2019 after his goods had already been removed from the property. He averred that he is aware that there is already another set of proceedings in which he is the Plaintiff, regarding the same facts and same properties shown in the Interlocutory Injunction served on him, and same parties, under cause number 2017/HP/0831. It was the deponent's further testimony that he is a former employee of Mushingashi Limited and not Kashikoto Conservancy Limited, the Plaintiff herein, and that Mushingashi Limited struggled to fulfill its financial obligations towards its employees, inclusive of the Defendant. Further, that he has no relationship whatsoever with the Plaintiff and the Plaintiff's decision to sue him is an abuse of the court process.

The deponent testified that sometime in 2018, the Plaintiff in this case acquired Mushingashi Limited and assumed and took on its obligations. That, the Plaintiff acknowledged the debts owed to him and attempts were made at a settlement between himself and the Plaintiff. As evidence of this assertion, a copy of an original settlement allegedly drafted by the Plaintiff was produced as exhibit "DW1"

The deponent stated that he believed that he would be severely prejudiced should the Interlocutory Judgment in Default not be set aside. That, the Plaintiff was aware of the matter under cause number 2017/HP/0831 before it commenced the action before this Court and that therefore, this matter is an abuse of the process of

the Court. That, he has a *bona fide* defence in this matter and this matter is meant to deprive him of the fruits of the Judgment in cause number 2017/HP/0831. Further, that this action is a deliberate ploy by the Plaintiff to try and waste not only the Court's time with duplicity of actions but also making him incur unnecessary costs.

In the Affidavit in Opposition sworn by one Lawrence Samva Sikutwa, a director in the Plaintiff Company, he asserted that the Plaintiff was incorporated on 20th December, 2016 and is engaged in the business of conservation, tourism and community development. That, the Plaintiff acquired Farm No. 8589 from a company called Mushingashi Limited in August, 2017. The said farm was unencumbered and not bought with any obligation. Further, that the Plaintiff did not acquire Mushingashi Limited or any of its obligations.

It was the deponent's further averment that the Plaintiff commenced this matter on 21st November, 2018 in relation to the Consultancy Agreement executed by the Defendant on 1st September, 2017. As evidence of this assertion, the deponent produced a copy of an undated and unsigned document entitled "Consultancy Agreement" as exhibit "LSS2" and an email from the Defendant dated 28th September, 2017, as exhibit "LSS3", which states that the Defendant had signed the said agreement.

It was the Plaintiff's testimony that in order to make it easy for the Defendant to fulfill his obligations under the Consultancy Agreement, the Defendant was permitted to occupy a cottage on the Plaintiff's

Farm No. 8590, Mumbwa. That, after the expiry of the Consultancy Agreement, the Defendant got into a habit of trespassing on the Plaintiff's Farm No. 8590 and neighbouring farm Nos. 8589, 8591, 8592, 8593 and 8594 and would always claim that it was for purposes of accessing the cottage.

The deponent asserted further, that in this action the Plaintiff sought *inter alia*, orders that:

a. *The Consultancy Agreement expired and the Defendant is not entitled to enter on the Plaintiff's Farm Nos. 8589, 8591, 8592, 8593 and 8594;*
b. *The Defendant is liable for damages for breach of the Consultancy Agreement; and*
c. *The Defendant is liable for damages for unauthorized use and occupation of the Plaintiffs' cottage.*

It was the deponent's testimony that the Defendant was served with the court process and injunction application in this action on or about 24th November, 2018, a copy of the letter of service allegedly signed by the Defendant in acknowledgment of receipt being produced as exhibit "LSS4". That, since the receipt of the Writ of Summons and Statement of Claim, no documents were ever filed by the Defendant as a defence to the action in general and consequently, on 24th December, 2018, this Court entered judgment against the Defendant and ordered that:

i) *the Defendant is liable for breach of the Consultancy Agreement made on or about 1st September, 2017 (the Consultancy Agreement).*

ii) *the Consultancy Agreement expired on 1st September, 2018 and the Defendant is not entitled to enter upon the Plaintiff's farm No. 8590 and the cottage located therein; and farm Nos. No. 8589, 8591, 8592, 8593 and 8594; and*

iii) *the Defendant is liable for unauthorized use and occupation of the Plaintiff's cottage on farm No. 8590.*

The deponent stated further, that damages for breach of the Consultancy Agreement and unauthorized use of the cottage were to be assessed. A copy of the Interlocutory Judgment was produced as exhibit "LSS5". The Plaintiff wondered why the Defendant is raising cause number 2017/HP/0831 in these proceedings as the same is between the Defendant herein and a company called Mushingashi Limited for money allegedly owed as a result of the Defendant's employment. That, the Plaintiff and the said Mushingashi Limited are two different entities.

It was the deponent's contention that, the Plaintiff herein was never a party to the Defendant's employment case. Further, that the Plaintiff has never acknowledged any debts allegedly owed to the Defendant and the alleged settlement referred to in the Affidavit in Support and exhibited as "DW1" was part of a discussion held on a "without prejudice" basis, which culminated into a draft Settlement Agreement that has already been pronounced upon by this Court in cause number 2018/HPC/0372.

Furthermore, that on 31st October, 2018, the Defendant herein was found liable for breach of confidence in relation to the said draft

Settlement Agreement. A copy of the Judgment was produced as exhibit "LL7". That, he has been informed by the Plaintiff's advocates that even though the Defendant has applied to have the said Interlocutory Judgment set aside, it remains in force, unless and until set aside, if ever at all. That, the Plaintiff has not abused this Court's process.

The matter came up for hearing on 15th April, 2019. Mr. Phiri, learned Counsel for the Defendant, submitted that his client would rely on all the documents filed in support of the application and augmented the same by submitting that it is trite law that where triable issues are raised in a matter, that matter must be allowed to proceed to trial so that they may be determined on the merits. It was Counsel's submission that both the Affidavit in Support and Affidavit in Opposition disclose triable issues and as such, it will be in the interest of justice to have the default judgment set aside.

In response, Mr. Ndalameta, learned Counsel for the Plaintiff, submitted that his client would also rely on the documents filed in opposition to the application herein. Mr. Ndalameta argued that the main issues to consider in this application are, firstly, whether a satisfactory explanation has been given by the Defendant for failure to file a defence; and secondly, whether there is a defence on the merits. He contended that the Defendant has failed on both scores, as there is no explanation given by the Defendant as to why no defence was filed and the factual averments of the Plaintiff in the Affidavit in Opposition have not been disputed by the Defendant, and

existence of the agreement shows that there are triable issues that need to be determined by this court.

I have considered the application before this Court and the supporting documents as well as the documents filed in opposition to the application. I have further, considered the *viva voce* submissions by Counsel in support of their respective cases. Having critically examined the documents before me, the issue for consideration in this application, in my view, is whether or not the Defendant has satisfied the requirements for this court to grant the order to set aside default judgment, namely providing a defence on the merits and giving a satisfactory explanation for the failure to file a defence.

The Defendant has argued in his Skeleton Arguments in Support that the Court should set aside the Interlocutory Judgment in Default entered by this Court against the Defendant because he has exhibited a defence on the merits. That, the Plaintiff obtained the judgment erroneously because there are already proceedings before the Court involving the same parties and same subject matter.

The Defendant submits further, that the delay in filing the Defence is regrettable but not deliberate as there was a failure on the part of the Defendant's advocates to file the Defence, the Defendant not having been personally served with the court proceedings by the Plaintiff. That, prejudice will be occasioned to the Defendant if the Interlocutory Judgment in Default is not set aside as this will have a

bearing on the other matter commenced earlier by the Defendant involving the same facts against the Plaintiff.

In support of his contention that a default judgment should be set aside if a triable issue is disclosed, the Defendant has cited the case of *Covindbhai Bangabhai Patel and Valabhai Patel V Monile Holding Company Limited*[1]. The Defendant has submitted that in the case before this Court, the Interlocutory Judgment was entered on 24th December, 2018 and thus there has not been any inordinate delay. That, the matter commenced by the Plaintiff is irregular and an abuse of court process.

It is the Defendant's further argument that the Plaintiff was sued by the Defendant in the Principal Registry over the same properties in question and the same parties and similar facts under cause number 2017/HP/0831, which matter is yet to be fully determined by the Court and hence, there is a risk that the two judgments might be conflicting. That according to Dr. Matibini's book, Zambian Civil Procedure: Commentary and Cases, volume 1 at page 322, a multiplicity of actions on the subject matter, by the same parties, simply amounts to abuse of the court process; and according to the Defendant, abuse of the court process was defined in *Investrust Bank Plc v. Chick Masters Limited and Another*[2] where Kaoma JS explained that:

> *"Abuse of court process can arise where the claim is vexatious, scurrilous or obviously ill founded such as where proceedings are*

> *started to pursue a claim which has already been dealt with by way of full and final settlement between the parties".*

That, the Supreme Court disapproved of the commencement of a multiplicity of actions over the same matter, as well as pursuit of other steps during the action in *Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceutical Limited*[3]

The Defendant also cited the case of *Kelvin Hang'andu and Company v Webby Mulubisha*[4] where the Supreme Court is quoted to have stated that:

> *"Once a matter is before a court in whatever place, if that process is properly before it, the court should be the sole court to adjudicate all issues involves, all interested parties have an obligation to bring all issues in that matter before that particular court; forum shopping is abuse of court process which is unacceptable".*

The Defendant argued that from the authorities cited, it is evident that the courts frown upon a party abusing the court process and that the Plaintiff's commencing of this action is not in good faith as can be observed from the Affidavit in Support. That, this in turn may compromise the integrity of the court's procedures.

It was the Defendant's further argument that the Plaintiff is abusing the court processes and procedures because it could have filed in a defence and counterclaim in the matter under cause number 2017/HP/0831 instead of commencing an action afresh, thereby misusing the court's resources and wasting the court's time.

Further, that in light of the Plaintiff's deliberate ploy to try and waste not only the court's time but also making the Defendant herein incur unnecessary costs, and/or cause a long enough delay so that the properties in question can be sold off, thereby preventing the Defendant from claiming what is owed to him in the case under cause number 2017/HP/0831, it is the Defendant's application that the Judgment in Default be set aside, allowing the matter to be dismissed for abuse of court process.

In the Skeleton Arguments in Opposition, the Plaintiff argued that it is a cardinal consideration in applications to set aside judgments in default that the party against whom the default judgment was entered shows that he has a defence on the merits. Thus, in the case of *Premesh Bhai Megan Patel v. Rephidim Institute Limited*[5], it was reiterated by the Supreme Court that:

> *"In dealing with an application to set aside a default judgment, the question is whether a defence on the merits has been raised or not, whether the applicant has given a reasonable explanation of his failure to file a defence within the stipulated time and that it is the disclosure of the defence on the merits which is the more important point to consider."*

That, the Defendant has neglected to show any defence on the merits to enable this Court exercise its discretion to set aside the Interlocutory Judgment of 24th December, 2018. As authority for this argument, the Plaintiff has cited the case of *Edson Chenda v. Satkaam Limited*[6], where it was stated that in obtaining leave to defend the defendant need no more than establish a triable issue,

namely, he should satisfy the court that he has a defence on the merits.

The Plaintiff argued that in the present case, the Defendant has opted to allude to irrelevant facts as opposed to showing this Court whether or not there is a defence on the merits which would warrant the setting aside of the Interlocutory Judgment. That, therefore, the Defendant has failed to satisfy the factors that must be considered before an interlocutory judgment can be set aside and as such, the Defendant's application should not be entertained. Further, that in the event that this Court is of the view thar a defence on the merits has been shown, the same lacks conviction. That, in the case of *Finance Bank Zambia Limited v. Dimitrios Monokandilos Filandria Kouri*[7], the Court stated that the defence relied upon must not only be arguable, but it must also carry some degree of conviction.

The Plaintiff submitted further, that by the Defendant's conduct and unreasonable delay, he is not entitled to any favourable consideration. For this argument, the Plaintiff relied on the case of *Stanley Mwambazi v. Morester Farms*[8]. The Plaintiff further argued that in the circumstances such as the one before court where no defence on the merits is disclosed, there would be no point in setting aside the default judgment as there would be nothing to be tried between the parties and the Defendant has no story he wants to present for this Court's consideration. Additionally, that there is a fundamental principle that courts do not make orders that will be of no effect as per the holding in the case of *Harry Mwaanga Nkumbula*

v. The Attorney General[9]. That, an order setting aside the default judgment would be pointless in the absence of any evidence that there is some sort of defence to the case brought forward by the Plaintiff.

The Plaintiff submitted in further opposition to the application, that since this is the Defendant's application, the evidential burden is on him to satisfy this Court that reasons exist for setting aside the Interlocutory Judgment. For this argument and the argument that the Defendant must meet the burden of proof regardless of what may be said of the Plaintiff's opposition, the Plaintiff referred this Court to the case of *Khalid Mohammed v. The Attorney General*[10]. Lastly, the Plaintiff cited the case of *Sobek Lodges Limited v. Zambia Wildlife Authority*[11], to the effect that the decision should be against a party who bears the burden of proof and has not discharged it. That, according to the court in that case, this is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. That, having failed to discharge the evidential burden, the Defendant's application therefore, ought to be dismissed with costs.

The Defendant has submitted in his Skeleton Arguments that the delay by the Defendant in settling a defence is regrettable but that it was caused by the fact that the Defendant was not personally served with court proceedings and therefore, the delay was not deliberate on the part of the Defendant. In the Affidavit in Support the Defendant asserted that he was not aware that the proceedings herein had been

commenced against him and only came to know of the proceedings when he was served with an order of Interlocutory Injunction dated 21st December, 2018 and Interlocutory Judgment in Default dated 19th December, 2018. However, contrary to these assertions by the Defendant, exhibit "LSS4"" in the Affidavit in Opposition, which is a copy of the letter of service, signed by the Defendant himself in acknowledgement of receipt, shows that he was served the said documents personally on 23rd November, 2018 and therefore, was aware of the proceedings. For the above reason, the reason advanced by the Defendant for the delay in settling a defence does not hold water.

Coming to the requirements for setting aside of default judgments, Counsel for the Plaintiff has correctly submitted that the cardinal consideration in such applications is for the party against whom the default judgment was entered to show that he has a defence on the merits. It is the Defendant's contention that he has a defence on the merits while the Plaintiff disputes that claim.

It is my considered opinion that in view of exhibit "LSS4" in the Affidavit in Opposition which proves that the Defendant was served with court process in good time and duly acknowledged service of the same, the Defendant has failed to give a satisfactory explanation as to why no defence was filed. Further, and most importantly, the Defendant has failed to show any defence on the merits or indeed triable issues. I concur with the submission by the Plaintiff that triable issues cannot mean simply raising any issues that the parties

have between them, but issues that are relevant to the claim as set out in the pleadings. Indeed, the issues being raised by the Defendant have nothing to do with the case represented in the Statement of Claim and therefore, do not constitute a defence on the merits which would warrant the setting aside of the Interlocutory Judgment.

For the above reasons, I find that the Defendant has failed to discharge his evidential burden to the satisfaction of this Court. Therefore, the application to set aside Interlocutory Judgment in Default is dismissed with costs. The costs shall be agreed by the parties or taxed in default of agreement.

Leave to appeal is denied.

Delivered at Lusaka the 26th day of December, 2019.

DR. W. S. MWENDA
HIGH COURT JUDGE