

IN THE HIGH COURT OF ZAMBIA

2007/HP/0738

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA



BETWEEN:

WILLIS MUHANGA

PLAINTIFF

AND

ZAMBIA OPEN UNIVERSITY

1<sup>ST</sup> DEFENDANT

DR. FREDERICK NGANDU

2<sup>ND</sup> DEFENDANT

*Before the Hon. Mrs. Justice F. M. Chisanga, this.....day of..... 2014.*

*For the Plaintiffs: S. Lukangaba, Messrs Mweemba Chashi & Partners*

*For the Defendants: E.C. Chiyenge, Messrs C. C. Mwansa & Associates*

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## RULING

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### Cases Referred to:

1. **Sonny Paul Mulenga & Others v. Investrust Merchant Bank Limited (1999) Z.R. 101 (SC).**
2. **Nyampala Safaries & 4 others v. Zambia Wildlife Authority & 6 others (2004) Z.R. 49.**
3. **M. Chizyuka, Betty B.M. Chizyuka v. Credit Africa Bank Limited (1999) Selected judgment.**
4. **Carmine Safaries Zambia Limited and Another v. Zambia National Tender Board & 6 Others SCZ Appeal No. 145/2003**
5. **Megarry V. C. in Mothercare Ltd vs Robson Books Ltd (1979) F.S.R. 466 at 474**

This is an application by the plaintiff for an order to stay execution of judgment dated 4<sup>th</sup> November, 2013 pending determination of the appeal.

The application is supported by an affidavit sworn by the plaintiff. He has deposed that he filed into court a Notice of Appeal and Heads of Argument containing seven grounds of appeal one of which is the award of costs. Despite his intention to appeal, the defendants, in executing the judgment, have applied for taxation of costs. The deponent contends that he is likely to be prejudiced in the event that costs are taxed and execution levied against him therefore rendering the appeal useless and a mere academic exercise.

In opposition to the application is an affidavit sworn by the 2<sup>nd</sup> Defendant and Prof. Moses Musonda, the acting Vice Chancellor of the 1<sup>st</sup> defendant. It is deposed therein that the plaintiff's appeal lacks merit; the mere fact that the plaintiff has appealed on seven grounds is not in itself sufficient. It has been deposed that taxation of costs is not stayed pending appeal. In any case, even in the unlikely event that the appeal succeeded, it would not be rendered academic exercise as the defendants are capable of refunding the costs which are at the centre of the plaintiff's application.

At the hearing, learned counsel for the applicant, Mr. Lukangaba, submitted that the record of appeal had already been filed into court and further that the heads of argument demonstrate that there is a case on the merit to be determined by the Supreme Court and chances of success are high. The application is necessitated by the fact that the Defendants have proceeded to

have costs taxed. He submitted that the application is intended to stay execution that may arise as a result of the taxed costs. And further that if the defendants are allowed to execute, the whole exercise may render the appeal academic because the issue of costs is one of the matters the plaintiff has appealed against.

Learned counsel for the defendants submitted in response that the appeal lacks merit and was an exercise in futility, with no prospects of succeeding. Concerning the issue of costs, Ms. Chiyenge referred to Order 36 rule 10 of the High Court Rules to highlight the fact that the High Court can exercise discretion to stay a judgment but this discretion can only be exercised when there is sufficient ground. That the fact that the plaintiff had appealed on seven grounds was completely irrelevant; it is the substance that mattered.

She submitted further that the question of costs, which is really the bone of contention, is a subject of general principle that a successful litigant will be awarded the costs unless there are circumstances warranting a decision otherwise. She argued that there was no basis on which the court would not have awarded the defendants costs as they were the successful litigants. That in any event, if the plaintiff succeeded on appeal, he would recover his costs. Learned counsel urged the court to dismiss the application with costs as the plaintiff had not demonstrated special reasons why execution of costs should be stayed.

In reply, Mr. Lukangaba was in total agreement with the submission that there must be sufficient ground to warrant a stay of execution. He submitted that paragraph 7 of the detailed heads of arguments exhibited showed sufficient ground to warrant a stay in this matter. He argued that the respondents had not demonstrated the reason they felt the grounds were insufficient apart from making a general statement to the effect that costs were recoverable. He pointed out that the defendants would equally be able to recover costs in the event that the appeal does not succeed.

Learned counsel further submitted that the fact that the defendants were successful did not mean a stay could not be granted. The Supreme Court had on a number of occasions awarded costs both in the lower court and the Supreme Court. He urged the court to grant the stay pending appeal because the defendants had started the process of taxation of costs which could lead to execution.

I have considered the application as well as the arguments advanced by the parties. As rightly submitted by Ms Chiyenge, and conceded by Mr. Lukangaba, a party seeking a stay of execution of a judgment must disclose sufficient ground warranting stay of execution.

In **Sonny Paul Mulenga & Others v. Investrust Merchant Bank Limited (1999) Z.R. 101 (SC)**, Ngulube DCJ, as he then was, reading the judgment of that court, said;

“in exercising its discretion whether to grant a stay or not, the court is entitled to preview the prospects of the appeal”

And in **Nyampala Safaries & 4 others v. Zambia Wildlife Authority & 6 others (2004) Z.R. 49**, it was stated that a stay of execution is only granted on good and convincing reasons. The rationale for this position is clear, which is that a successful litigant should not be deprived of the fruit of litigation as a matter of course. The application for stay of execution must therefore clearly demonstrate the basis on which such a stay should be granted.

These authorities have been relied upon by Ms. Chiyenge as well as **Richard M. Chizyuka, Betty B.M. Chizyuka v. Credit Africa Bank Limited (1999) Selected judgment** and **Carmine Safaries Zambia Limited and Another v. Zambia National Tender Board & 6 Others SCZ Appeal No. 145/2003**, per Chibesakunda, JS.

The plaintiff has filed in 7 grounds of appeal and exhibited the Heads of argument on which he proposes to rely in the Supreme Court.

I have reviewed the prospects of success. In doing so, I perceive I am not to attempt to deal with the appeal itself but rather, to indicate whether, on the material on record, the proposed appeal has real prospects of success. In that connection, I consider the words of **Megarry V. C. in Mothercare Ltd vs Robson Books Ltd (1979) F.S.R. 466 at 474** to be of assistance. He said the following:

*“.....All that has to be seen is whether the plaintiff has prospects of success which, in substance and reality exist. Odds against success no longer defeat the plaintiff, unless they are so long that the plaintiff can have no expectation of success but only a hope. If his prospects of success are so small that they lack substance and reality, then the plaintiff fails, for he can point to no question to be tried which can be called ‘serious’ and no prospect of success which can be called ‘real’”*

Upon considering the material before me, I have reached the view that the odds against success of the proposed appeal are so long, with the effect that they are unreal. A glimmer of a hope of success cannot be the basis on which execution of a judgment can be stayed. It is clear that it is the recovery of costs that is intended to be curtailed by the stay of execution sought. In my view, such a course will only have the effect of postponing the inevitable seeing as the prospects of success are unreal, as substantively argued by Ms. Chiyenge. An order to stay execution of a judgment is never made for the sake of according respite to an applicant where none appears warranted on the facts.

On the foregoing, the application to stay execution is refused.

Dated the .....*24<sup>th</sup>*.....day of .....*July*..... 2014.

  
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**F. M. CHISANGA**  
**HIGH COURT JUDGE**