

Lucy

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2015/HP/0328

BETWEEN:

SAMSON MUKASANO



PLAINTIFF

AND

**EVANS MUKOSHA
BRIAN NKANDU
DAIMIANO CHIKUNGU
EUNICE NGOSA
LANGISON CHISENGA
MODESTUS CHOLA**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT
5TH DEFENDANT
6TH DEFENDANT**

**BEFORE HON. MRS. JUSTICE P. C. M. NGULUBE ON THE 28TH OF JULY
2015**

**FOR THE PLAINTIFF : MR G.M. KAULUNGOMBE
MESSRS MARSHAL CHAMBERS**

FOR THE DEFENDANTS : IN PERSON

R U L I N G

Cases referred to:

1. *Turnkey Properties v Lusaka West Development Company Ltd, B.S.K. Chiti (Sued as Receiver) and Zambia State Insurance Corporation Ltd (1984) Z.R. 85 (S.C.)*
2. *Mulenga and Others v Investrust Merchant Bank Limited (1999) Z.R. 101*

Legislation referred to:

1. *The High Court Act, Chapter 27 of the Laws of Zambia*

This is a Ruling on the Defendant's application for an Order to stay execution of the Ruling dated 2nd April, 2015 pending setting aside. The Application was made pursuant to Order 36 rule 10 of the High Court Rules.

The Affidavit in support of the Application was deposed to by the 1st Defendant in which he stated that on 2nd April, 2015, a ruling was delivered against him resulting in the Plaintiff's advocates going round the District and the village trying to install the Plaintiff as Senior Chief Muchinda and even getting signatures from the District Administration purporting that the Court had declared the Plaintiff as the duly elected senior Chief Muchinda.

That the said Advocate has brought confusion in the Chieftom and risks the wrath of the villagers if he so continues.

The 1st Defendant further averred that he was the duly and rightful heir to the throne of Chief Muchinda as per minutes marked "EM3" and "EM4". That the Plaintiff is nowhere near the said throne and therefore his claims should be dismissed. That according to Exhibit "EM3" he was selected and was awaiting recognition to be senior Chief Muchinda by the Government.

That the Plaintiff has not produced any official document as all the exhibits he referred to are invitation letters to the Plaintiff to attend the said succession meetings.

The 1st Defendant stated that the Honourable Court was misled by the Plaintiff's Advocates when he stated in the Affidavit of Service that the 1st Defendant had been served with summons when in fact not. That the matter was a very serious matter and needed serious consideration before granting any relief to the Plaintiff as he had not come to court with clean hands but is playing a cat and mouse game.

That the subject ruling should be stayed pending the setting aside as it was not in the interest of the people of Chief Muchinda's Chiefdom.

In the Affidavit in Opposition deposed to by the Plaintiff it was stated that it was not true that the Plaintiff and/or his Advocates went round to inform people in the chiefdom that the Court had declared him Senior Chief Muchinda because courts in Zambia do not appoint chiefs but in the event of conflict the Court's role is to merely make a ruling as to who is most probable to be Chief based on the evidence before it. That he had been elected Senior Chief Muchinda on the advice of the Traditional Council of all Lala speaking people called InsakaYelala but due to claims from a number of people, he decided to bring the matter before Court and

As per exhibit marked "SM1" a copy of a Letter informing the government not to recognize any person as Senior Chief Muchinda.

That the 1st Defendant has not been elected or appointed by any competent authority as Senior Chief Muchinda and his claims to the throne are mischievous and fraudulent as the minutes of the consultative meeting produced and marked "SM2" to "SM6" show.

Further that the 1st Defendant was served with inter parte summons and its supporting Affidavit on 11th May, 2015 together with the other Defendants by the Clerk of Court in Serenje and that through the Plaintiff's Advocates an Affidavit of Service was duly filed.

That Orders for direction had been made and it would only be prudent for the 1st Defendant to abide by the said Orders so that he proves his claim before the Court. That until the matter has been disposed off by the Court, neither the Plaintiff nor any other person will be recognized as Senior Chief Muchinda.

The 1st Defendant filed an Affidavit in Reply in which he deposed that the Plaintiff was never duly elected Senior Chief Muchinda and in fact the Plaintiff was masquerading and wanted people including the Court to believe that he was the elected Chief but he had not shown the Court any tangible proof to that effect.

That the InsakaYelala does not choose a Chief as it is just an association, the selection body of the Senior Chief Muchinda is BenaNyendwa Clan. Produced and marked "EM1" was a copy of the said constitution. That according to the constitution, the InsakaYelala is a body of advisors and not people who select a chief.

That the consultative meeting asserted by the Plaintiff was not a legal Assembly as it had been chaired by the Plaintiff's Advocate who does not belong to the said association and no chief was present.

The 1st Defendant further averred that there was no way a copy of the summons was served on him as it was left at his home and that he did not put his names on the copy of the summons.

When the application came up for hearing on 25th June, 2015, the 1st Defendant reiterated the contents of the Affidavit in Support of the application as well as the Affidavit in Reply. He further prayed that the Injunction which was granted be discharged as it was wrongly granted and that he be awarded costs in the matter.

In response, Learned Counsel for the Plaintiff largely reiterated the Affidavit evidence and further submitted that the ruling that the 1st Defendant sought to stay was not a ruling that confirmed the Plaintiff as Chief. That the ruling was based on a balance of

probability in favor of the Plaintiff and that the Plaintiff and not the Defendant may have an arguable claim.

That on page 3 of the InsakaYelala constitution, the InsakaYelala is the advisory body to all traditional rulers in Serenje and that it rendered its advisory opinion on who was most likely or suitable to ascend to the throne. That the 1st Defendant should have obtained a contrary position to that of the InsakaYalele, which he did not. That consequently, the chances of the 1st Defendant succeeding in the Supreme Court in the absence of any substantive evidence before this Court are very slim.

Further that the 1st Defendant's submissions were wrongly before the court as the main matter had not been determined.

Learned Counsel submitted that the 1st Defendant's application be dismissed and that he be advised to abandon the appeal so that the substantive issues be determined.

In reply, the 1st Defendant submitted that even if the Plaintiff maintains that he is chief, he should bring proof of the process of selection and must show the family which chose him. It was further prayed that the matter proceeds to trial so that witnesses are called.

Having considered the Affidavit evidence and submissions made by both parties, I note that both parties have included extraneous

matters in their Affidavits as well as submitted on issues pertaining to the merits of the case which will only to be determined by way of trial.

That course of action is unacceptable as it may lead me into commenting on the triable issues. In **Turnkey Properties v Lusaka West Development Company Ltd, B.S.K. Chiti (Sued as Receiver) and Zambia State Insurance Corporation Ltd**, the Supreme Court pronounced itself by stating as follows;

“It is improper for a Court hearing an interlocutory application to make comments which may have the effect of pre-empting the decision of the issues which are to be decided on the merits to the trial.”

Therefore, in determining this application, I shall not consider the said Affidavit evidence nor submissions on issues relating to the merits of the case.

The 1st Defendant made this application pursuant to Order 36, rule 10 of the High Court Rules which provides that;

“Except as provided for under rule 9, the Court or Judge may, on sufficient grounds, order stay of execution of judgment.”

Gleaning from the Affidavit evidence and the submissions made, the 1st Defendant is inviting me to stay, or suspend the operation of the interim injunction granted on 2nd April, 2015.

The law on grant of stay of execution was laid down as thus in **Mulenga and Others v Investrust Merchant Bank Limited (1999) Z.R. 101** where the Supreme Court held that:

“In terms of our rules of Court, an appeal does not automatically operate as a stay of execution, and it is utterly pointless to ask for a stay solely because an appeal has been entered. More is required to be advanced to persuade the Court below or this Court that it is desirable, necessary, and just to stay a judgment pending appeal.”

For a stay to be granted, there must be sufficient grounds advanced by the 1st Defendant to warrant the grant.

The 1st Defendant has alleged that he was not duly served with the Inter parte Summons for the interim injunction as it was left at home and that he did not append his names thereon. This assertion is contrary to the record which reveals an Affidavit of service which was deposed to by the Plaintiff.

There being no contrary evidence, I find no reason to doubt the sufficiency of service effected on the 1st Defendant and it thus follows that the 1st Defendant has not advanced enough grounds to warrant the stay of the interim injunction granted on 2nd April, 2015.

Further, I must unequivocally state that, by the said ruling dated 2nd April, 2015, this Court did not in any way pronounce the Plaintiff as the duly elected Senior Chief Muchinda but merely restrained the Defendants from holding themselves out as Chief Muchinda and carrying out any functions of the said Chief Muchinda until final determination of the dispute. The issue of who rightfully ascends to the Chieftaincy is yet to be determined by way of trial.

I accordingly dismiss the 1st Defendant's application for lacking merit.

Costs to the Plaintiff.

Dated this 28th July, 2015


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P. C. M. NGULUBE
HIGH COURT JUDGE