

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

2007/HP/0091

IN THE MATTER OF: CREDIT FINANCE LIMITED

AND

IN THE MATTER OF: EQUITABLE MORTGAGE ORDER 88 RULE 1(1) OF THE
RULES OF THE SUPREME COURT (1999 EDITION)

BETWEEN:

CREDIT FINANCE LIMITED

AND

CO-OPERATIVE CREDIT SCHEME

DOHEPERSTER CHILEKWA



BEFORE HON. MRS. JUSTICE P.C.M NGULUBE ON 17th DAY OF JUNE 2015

FOR THE APPLICANT : No Appearance

FOR THE RESPONDENTS : Mr Douglas Chomba (Chief Executive Officer)

R U L I N G

Legislation referred to:

1. *The High Court Act, Chapter 27 of the Laws of Zambia*
2. *Rules of the Supreme Court of England (1999 Edition)*

Case referred to:

1. *Bain & Co vs Church Commissioners for England (1989) 1W.L.R. 24*
2. *Bank of Zambia v Aaron Chungu, Access Financial Services Limited, Access Leasing Limited (2008)1 Z.R. 81*

This is a ruling on the Respondent's ex- parte application for Restitution of property and setting aside the re-issued writ of possession dated 28th July, 2011 for irregularity. The said application was made pursuant to Order 36 Rule 10 of the High Court Rules and Order 2, rule 2 of the Rules of the Supreme Court (1999 Edition).

In the Affidavit in Support of the application, Douglas Chomba in his capacity as Chief Executive Officer in the 1st Respondent Co-operative deposed that on 30th April, 2009 the Supreme Court granted the Respondent a stay of execution of the High Court Judgment dated 18th December, 2008 pending the determination of the appeal after the Applicant had executed a writ of possession. Service of the said Order was effected on the Applicant's Advocate. Exhibited was a copy of the letter of service duly acknowledged.

That in consequence of the Order of Stay of Execution, the Applicant handed back the keys to the property as evidenced by the copy of the Letter exhibited. That the Respondents recently learnt that the date of the hearing of the Appeal had been set, however, due to lack of knowledge of the same none of the parties turned up for the matter as a result the appeal was struck out with the liberty to restore the matter. That the Respondent has since moved a motion in the Supreme Court to restore the matter.

The deponent further explained that the Supreme Court merely struck out the appeal from the active cause list with the liberty to restore and did not discharge the Order for Stay of Execution which was earlier granted. That in defiance to the Supreme Court Order for stay of execution, the Applicant on 28th July, 2011 re-issued a writ of possession to take possession of the pledged property which in fact has not yet been determined by the Supreme Court.

That the said writ of possession had very untrue statements suggesting that the Respondents admitted their liability when in fact not. The writ of possession only made reference to the High Court Judgment which is subject of the Appeal.

As a consequence of the said writ of possession, the Sheriff of Zambia has since repossessed the property and even handed it over to the Applicant. That in the absence of a specific order by the Supreme Court discharging the stay of execution, the re-issuance of the writ of possession is surprising.

The deponent further stated that he had been advised that as the matter is still on appeal, the re-issued writ of possession was highly irregular and that the Applicant was supposed to have applied to restore the matter in the Supreme Court and apply to dismiss the Appeal.

That it will be in the interest of justice that the re-issued writ of possession be set aside for irregularity and the property be given back to the Respondents pending the full determination of the appeal otherwise the appeal will be rendered an academic exercise.

In the Skeleton Arguments filed in support of the Application, it was submitted that the Order striking out the appeal from the active cause list did not discharge the stay of execution nor did it grant the Applicant possession and that at no point did the Applicant apply to dismiss the appeal, thus there was no basis for the writ of possession.

Relying on **Bain & Co vs Church Commissioners for England**¹, it was submitted in the alternative that the Applicant should have given a notice to vacate to the Respondents.

When the application came up for hearing, the Respondents' representative relied on the contents of the Affidavit as well as the Skeleton Arguments filed in support of the application. He further added that the re-issued writ of possession by the Applicant is irregular and fraudulent because it referred to the High Court Judgment which is subject of the Supreme Court Appeal.

I have carefully considered the Affidavit evidence and the submissions made in support of the Application, however, I note that this Court has no Jurisdiction to deal with the application at

hand as the main matter is already before the Supreme Court by virtue of the Order for Stay of Execution granted by a Single Judge of the Supreme Court.


I am guided by the case of **Bank of Zambia v Aaron Chungu, Access Financial Services Limited, Access Leasing Limited²**, where the Supreme Court held as follows;

“the order of stay by the single judge of the Supreme Court had the effect of removing the proceedings from the High Court into the Supreme Court; thereby ousting the trial Judge’s jurisdiction in the matter. In short, the trial Judge had no Jurisdiction to entertain an application for committal for contempt in a matter that was already before the Supreme Court.”

In the said case, a party sought to bring committal proceedings before the High Court despite there having been an appeal pending before the Supreme Court coupled with an Order for Stay of Execution of the High Court Judgment granted by the Single Judge of the Supreme Court.

I accordingly dismiss this application as this is not the right fora.

Dated this 17th June, 2015


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P. C. M. NGULUBE
HIGH COURT JUDGE