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



**BETWEEN:**

**MR. SHAIKI**

**1<sup>ST</sup> APPELLANT**

**MR. ANNIS**

**2<sup>ND</sup> APPELLANT**

(BOTH TRADING AS SHANN CARRIERS AND GENERAL DEALERS)

AND

**ARCLEO KACHI KANDUNDA**

**RESPONDENT**

**BEFORE HON. MRS. JUSTICE P.C.M. NGULUBE ON 3<sup>RD</sup> DAY OF JUNE 2015**

**FOR THE APPELLANTS**

: Mrs P.S. Mumbi (Messrs Charles  
Siamutwa Legal Practitioners

**FOR THE RESPONDENT**

: In Person

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## **R U L I N G**

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**Cases referred to:**

1. *Watson Nkandu Bowa v Fred Mubiana & Zesco Selected Judgment no.21 of 2012*
2. *Nyampala Safaris v ZAWA (2004) ZR 49*
3. *Wilson v Church (no.2) [1879] 12 Ch D. 454 CA*
4. *Sonny Paul Mulenga & Vismer Mulenga, Chainama Hotels Limited and Elephant Hotel Limited vs Investrust Merchant Bank (S.C.Z. Judgment no.15 of 1999)*
5. *Michael Chilufya Sata v Chanda Chimba III, Zambia National Broadcasting Corporation, Muvi Tv Limited & Mobi Tv International Limited - 2010/HP/1282 (unreported)*

**Legislation referred to:**

1. *The High Court Act*



This is a ruling on the Appellants' application for an Order of Stay of Execution. The Appellants made the application ex parte pursuant to Order 36 rule 10 of the High Court Act and the ex parte order of stay was granted by this court on 21<sup>st</sup> January, 2015.

The Affidavit in Support of the Application was sworn by the 1<sup>st</sup> Appellant, who deposed that the Respondent had sued him as the sole trader of Shann Carriers in the lower court and obtained Judgment on 2<sup>nd</sup> December 2014, produced and marked "DS1".

That before obtaining judgment, the Respondent applied to the lower court and obtained an order of attachment of property attaching his motor vehicle freight liner M/Horse, registration number ALJ 7618, ACA 1906ZM with chasis number 1FUYYDDZBXYL46944. Produced and marked was "D2" an Ex- parte Order of Interim Attachment of Property.

He stated that he has since appealed the said Judgment of the lower court as per Notice of Appeal and Certificate of compliance exhibited as "D3" and "D4" respectively. Further that following the Order of court a sum of K30, 000.00 has been furnished and paid into court as security of costs.

That he had applied to the lower court to stay execution of the Judgment pending appeal but the same was dismissed, produced was a copy of the said ruling.



The 1<sup>st</sup> Appellant deposed that the nature of business he is engaged in is transportation of goods on behalf of customers and therefore the trucks such as the one seized are tools of trade. That the attachment of the truck has meant loss of business and income as payments of bills and other obligations come from the income from the truck.

That he believes he has a high chance of success on appeal and unless the honourable Court orders a stay of execution and a release of the attached vehicle pending appeal, he shall suffer irreparable loss.

The Affidavit in opposition deposed to by the Respondent stated that he opposed the application as it appeared to be misconceived and an abuse of the court process. That the said Judgment has already been executed by way of Writ of Fieri Facias and what remains is merely the sale of the appellant's vehicle which was earlier attached.

That the Applicant did not comply with the procedure of lodging an appeal in that he paid the security for costs after the requisite period allowed for lodging appeals had long elapsed and that the lower court was justified to dismiss the application as procedure was not followed.



Further that the subject appeal was in fact before the Mansa High Court Civil Registry where the original official Court record is being kept. That all appeals emanating from northern region are handled by the Judge in charge of the Ndola High Court, hence it is duplicity and likely to bring the judiciary into embarrassment on account that two judges from two regions will be handling the same matter and may have two different decisions.

That the applicant ought to be advised to lodge his applications at Mansa High Court Civil Registry or the Judge in Charge at Ndola who supervises the Northern Circuits of the judiciary and not at the principal registry. In any event, the Judgment had already been executed, hence there is nothing to stay as the Applicant ought to have stayed the sale of the truck as opposed to stay of execution of Judgment because the Writ of Fieri Facias had already been executed in the matter.

The Respondent deposed that it will be irregular to release the truck which was attached to these proceedings because this application is merely for stay of execution of judgment and not application to discharge the order of interim attachment of property.

That the applicants have no chances of success and should instead lodge their applications in the normal registry as opposed to forum shopping which is frowned upon by the judiciary on several occasions.



When the matter came up for hearing, Learned Counsel for the Appellant relied on the Affidavit in Support filed and further submitted relying on **Bowa vs Mubiana and Zesco**<sup>1</sup>; **Nyampala Safaris v Zawa**<sup>2</sup> and the English case of **Wilson v Church**<sup>3</sup> that the Appellants' prospects of success on the appeal were high and that the damage that would be caused should not the stay be granted will be irreparable damage in the event of the appeal succeeding.

It was also submitted that the vehicle that was seized from the appellants is a tool of trade and valued higher than what was awarded to the Respondent. That order 42 of the High Court rules proscribes against executing on tools of a person's trade.

That the allegations of there being another appeal before the Ndola High Court lack proof as the Respondent has not even furnished cause numbers of the said appeal.

Further that the Judgment of the lower court stated that the vehicle attached should be seized in the event of the Appellants' failure to pay the Judgment sum. That therefore seizure was as a result of the Judgment that the Appellants have appealed against.

Learned Counsel submitted that execution of the Judgment had not been completed as the goods had not been advertised nor sold and that should the stay not be granted the appeal would be rendered



academic. Therefore counsel urged this court to exercise its discretion in favour of the Appellants.

The Respondent in response stated that he strongly relied on the Affidavit in Opposition.

Having considered the Affidavit Evidence of both parties and the submissions made by Learned Counsel for the Appellants, I am of the view that the issue that falls for determination in this application is whether to grant the stay of execution or not. The law is clear as to what I should consider when dealing with an application for stay of execution of Judgment.

Firstly, this Court is empowered under Order 47, rule 5 of the High Court Rules to grant Orders staying execution of Judgments appealed against as an appeal on its own does not operate as a stay of execution. The said Order provides as follows;

***“An appeal shall not operate as a stay of execution or of proceedings under the judgment or decision appealed from, except so far as the court below or the Court may order, and no intermediate act or proceeding shall be invalidated, except so far as the court below may direct.”***



In Sonny Paul Mulenga & Vismer Mulenga, Chainama Hotels Limited and Elephant Hotel Limited vs Investrust Merchant Bank<sup>4</sup> the Supreme Court stated,

*“an appeal does not automatically operate as a stay of execution and it is 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. The successful party should be denied immediate enjoyment of a judgment only on good and sufficient grounds.”*

The Supreme Court affirmed this decision in the case of Watson Nkandu Bowa v Fred Mubiana & Zesco<sup>1</sup>, where it reiterated that,

*“it follows, necessarily, that for the court below to grant an order to stay its own judgment, ruling or order, it needs to satisfy itself that there is likelihood that the appeal will succeed.”*

The rationale for a stay of execution pending appeal lies in what was stated in the acclaimed case of Wilson v Church<sup>3</sup>, that,

*“where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the Court in cases to make such orders for staying*



*proceedings under a judgment appealed from as will prevent the appeal, if successful, from being nugatory.”*

In the case of Michael Chilufya Sata v Chanda Chimba III, Zambia National Broadcasting Corporation, Muvi Tv Limited & Mobi Tv International Limited<sup>4</sup>, my Learned brother succinctly put it as follows;

*“ in terms of the rules of Court, the entry of an appeal does not automatically operate as a stay of execution. More is required to be advanced or shown in order to persuade a trial Court, or an appellate Court for that matter, that it is desirable, necessary, or just to stay a judgment, or a ruling pending an appeal. Be that as it may, when a party is appealing, exercising his undoubted right of appeal, a Court ought to see to it that if there is a real likelihood that the appeal might succeed, it should not be rendered nugatory.*

*It must also be further shown either that special circumstances exist to warrant the grant of stay, or that without a stay a defendant stands to be ruined, or suffer irreparable injury. Whatever the case, some special ground, or reason should be shown to exist.*



*It is impossible to enumerate in advance all the matters that might be considered to constitute special circumstances. But it may nonetheless be said that the allegations that there has been a misdirection; that the judgment was against the weight of the evidence; or that there was no evidence to support it; are not special circumstances on which the Court will grant a stay of execution.*

*It must also be noticed that in exercising the discretion whether or not to grant a stay, a Court is entitled to preview the prospects of the proposed appeal. The rationale for these stringent conditions, or criteria in exercising the discretion to grant a stay, is that a successful party should not be denied immediate enjoyment of the fruits of the judgment, or ruling, unless good, and sufficient grounds are advanced, or shown.”*

I am in full agreement of this view and will determine this application as per stated position.

Having perused the grounds of appeal as advanced in the Notice of Appeal filed on 16<sup>th</sup> December, 2014, I find that there is a real likelihood of the Appeal succeeding and denying the Appellants a stay of execution of the said Judgment would render the Appeal



nugatory. Further taking into account the fact that the subject of the execution is alleged to be part of the Appellants' tools of trade, I deem this to be a special circumstance to warrant an Order of Stay of Execution pending appeal.

Therefore I hereby grant the stay of execution of the Judgment passed on 2<sup>nd</sup> December, 2014.

Costs to be in the cause.

**Dated this 3<sup>rd</sup> day of June, 2015**



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**P. C. M. NGULUBE**  
**HIGH COURT JUDGE**