

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2011/HP/1342



B E T W E E N :

ANDREW THOLE

APPLICANT

AND

FREDRICK MULENGA

1st RESPONDENT

CONSTANCE CHIPINDI

2nd RESPONDENT

Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on 9th February, 2017

For the Applicant : *Mr. A.D.M Mumba, Messrs AD Mwansa & Associates*

For the Respondent : *Mr. C. Chibwe, Messrs Ysakar Legal Practitioners*

R U L I N G

Legislation Referred To:

1. *Rules of the Supreme Court (RSC) 1999 Edition*

This is the Respondents' application to stay Writ of Possession for irregularity. It is filed pursuant to Order 47 and Order 2 Rule 2 of the Rules of the Supreme Court and is supported by an Affidavit.

The deponent **Fredrick Kaputo Mulenga** states that he was unlawfully evicted from his home on the basis of an irregularly obtained Writ of Possession as shown in the exhibit marked "**FKM7**". The deponent avers that the Court never passed judgment in this matter and that the Consent Order that was settled by the parties on 27th November, 2015, was set aside by the Court for irregularity on 14th October, 2016.

The deponent further states that this matter was stuck out on 31st January, 2017 and regardless of this circumstance, a Writ of Possession was issued. The deponent concluded with a prayer to the Court to stay Writ of Possession and to grant him costs for his eviction and return to the premises.

The Applicant did not file an Affidavit in Opposition

At the hearing Learned Counsel for the Respondents relied on the Affidavit in Support and Skeleton Arguments. He stated that the facts of this case, which are on record, did not require elaboration

or complex arguments, granted that the Court had previously set aside the Consent Order dated 27th November, 2015 for irregularity.

Learned Counsel wondered how the Writ of Possession had been obtained by the Applicant when the Court had no record of it. He prayed to the Court to stay Writ of Possession on the basis that it was irregularly obtained and to return the property known as Stand No. 30085 to the 1st Respondent. He also prayed for costs for the 1st Respondent's eviction and return to the premises.

In response, Learned Counsel for the Applicant did not tender any objection to the application. He conceded that the Consent Order upon which the Writ of Possession was issued had been set aside for irregularity. He equally pointed out that there was neither a consent order nor judgment rendered by the Court to warrant Writ of Possession.

Learned Counsel further reiterated the fact that this matter was struck out on 31st January, 2017. He stated as an officer of the

Court this, his co-advocates, Messer Mosha & Company, who obtained the Writ of Possession, had not acted diligently. Further, that they did not communicate their action to him, adding that if they had done so, then he would have advised them of their client's renewed position in the matter.

I have seriously considered the affidavit evidence and the submissions tendered by Counsel for the respective parties. The sole issue to be determined is whether this is a proper case where I can use my discretionary power to stay the Writ of Possession.

Order 47 Sub rule (1) of the Rules of the Supreme Court sets out thus:

"Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution -

- (a) that there are special circumstances which render it inexpedient to enforce the judgment or order, or***
- (b) that the applicant is unable from any cause to pay the money, then, notwithstanding anything in rule 2 or 3, the Court may by order stay the execution of the judgment or order by writ of fieri facias either absolutely or for such period and subject to such conditions as the Court thinks fit.***

It is unassailable that at the time the Writ of Possession was issued at the instance of Messrs Mosha & Company, there was no subsisting Consent Order between the parties. Further, the Court has never rendered a judgment in this case. However, in unexplained but undesirable circumstances, Messrs Mosha & Company obtained a Writ of Possession upon, which the 1st Respondent was evicted from Stand No. 30085. The situation was further compounded by the fact that the Court had struck out this matter on 31st January, 2017.

In the circumstances, I have no hesitation in holding that Writ of Possession obtained by Messrs Mosha & Company is irregular as there is no basis upon which it is founded. As rightfully submitted by Learned Counsel for the Applicant, had his co-advocates communicated with him then the Writ of Possession would not have been issued given that their client's instructions had changed. I have no difficulty in finding that Messer Mosha & Company had no instructions from their client.

Accordingly, I grant the 1st Respondent's application to stay Writ of Possession. I award cost to the 1st Respondent for his eviction and return to Stand No. 30085 to be borne by Messer Mosha & Company. They must casually bear the costs of this application

Leave to appeal is granted.

Dated this 9th day of February, 2017.


M. Mapani-Kawimbe
HIGH COURT JUDGE