

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



2015/HP/1393

B E T W E E N :

PHILLIP CHITAMBO NYIRENDA

PLAINTIFF

AND

VINCENT BANDA

DEFENDANT

Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the 8th day of June, 2017

For the Plaintiff : Ms. N. Mbuyi, Messrs Ituna Partners

For the Defendant : Mr. S. S. Zulu SC, Messrs Zulu & Company

R U L I N G

Case Authorities Referred To:

1. *Nkhata & Four Others v The Attorney General* (1966) ZR 124 CA
2. *Wilson Masauso Zulu v Avondale Housing Project Limited* (1982) Z.R. 172 (S.C)
3. *Sonny Paul Mulenga, Vismar Mulenga, Chainama Hotels Limited and Elephants Head Hotel v Investment Merchant Bank Limited* (1999) Z.R 101 (S.C)
4. *Victor Namakando Zaza v Zambia Electricity Supply Corporation Limited* (2001) ZR 107
5. *Nyampala Safris and 4 Others v Wildlife Authority and 6 Others* (2004) Z.R. 49 (S.C)
6. *Trespford Chali v Bwalya Emmanuel Kanyanta Ngandu* SCZ/8/009/2014

Legislation Referred To:

1. *High Court Act, Chapter 27*
2. *Rules of the Supreme Court 1999 Edition*

This is Plaintiff's application to stay execution of judgment pending an appeal before the Court of Appeal. It is filed pursuant to Order 3 Rule 2 as read with Order 47 Rule 5 of the High Court Rules, and Order 59 Rule 13 of the Rules of the Supreme Court. It is supported by an Affidavit.

The history of this matter is that on 21st August, 2015, the Plaintiff issued Writ of summons seeking an order that he is the legally selected Chief Kazembe and an order for possession of the Chieftainship. The Plaintiff was unsuccessful in all his claims and judgment was delivered in favour of the Defendant on 17th March, 2017.

At the hearing of this application, Learned State Counsel for the Plaintiff relied on the Affidavit in Support. The gist of which is that the Plaintiff being dissatisfied with the judgment of this Court has lodged an appeal to the Court of Appeal. The Plaintiff believes that his appeal has merit and is convinced of its high prospects of

success, hence this application. The Plaintiff contends that he is suffering great injustice in that the Defendant who is not entitled to the throne of Chief Kazembe IX is performing duties much to his detriment.

The Defendant did not file an Affidavit in Opposition.

Learned Counsel for the Plaintiff filed Skeleton Arguments where she submitted that the Plaintiff's appeal had high chances of succeeding. She cited the case of **Nkhata and four Others v The Attorney General of Zambia**¹ asserting that since this Court erred on the findings of facts, its decision could be reversed on appeal. The findings of facts which are assailed are listed in the memorandum of appeal in the exhibit marked "**PCN2.**"

Counsel buttressed her submission by citing the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**² where the Supreme Court held that an appellate Court could reverse findings of fact made by a trial Court if it was satisfied that they are perverse, or made in the absence of any relevant evidence, or upon misapprehension of facts. Counsel contended that since

the present case hinged on a determination of facts and not law, the findings of facts could be appealed against.

The Defendant did not file an Affidavit in Opposition but tendered Skeleton Arguments. Learned State Counsel submitted that the Plaintiff had not shown by Affidavit any special circumstances to warrant a stay of execution of judgment pending appeal. He added that the Plaintiff had not demonstrated any prospect of the appeal succeeding. Further, that the Plaintiff had not shown how he would be ruined if a stay was not granted. State Counsel asserted that the appellate Court could not lightly interfere with the findings of fact that the Plaintiff being the son of a former Chief was disqualified from succeeding to the Kazembe throne as succession is matrilineal and not patrilineal.

State Counsel called in aid the cases of **Sony Paul Mulenga, Vismar Mulenga, Chainama Hotels Limited and Elephants Head Hotel v Investrust Merchant Bank Limited** on the principle of stay of execution of judgment.

He also cited the case of **Victor Namakando Zaza v Zambia Electricity Supply Corporation Limited**⁴ where the Supreme Court similarly held that:

“(iii) The findings made by the trial Court should not lightly be interfered with, in keeping with what this Court has said on numerous occasions in the past.”

It is a well settled principle of the law that the Court will not grant a stay of execution of judgment unless they are good and reasonable grounds for going so. What amounts to “*good and reasonable grounds*” is posited in Order 59/13 of the Rules of the Supreme Court, which puts it thus:

“Neither the Court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. The Court does not make a practice of depriving a successful litigant of the fruits of his litigation... But the Court is likely to grant a stay where the appeal would otherwise be rendered nugatory, or the Appellant would suffer loss which could not be compensated in damages. The question whether or not to grant a stay is entirely in the discretion of the Court and the Court will grant it where the special circumstances of the case so require.... But the Court made it clear that a stay should only be granted where there are good reasons for departing from the starting principle that the successful party should not be deprived of the fruits of the judgment in his favour.”

In the case of **Nyampala Safaris and 4 others v Wildlife Authority and 6 others, Mambilima, JS**⁵, as she then was, re-

stated this position of law, when she declared that a stay should only be granted where good and convincing reasons have been advanced by a party. She went on to state that the rationale for the position was that a successful litigant should not be deprived of the fruit of litigation as a matter of course.

In the case of **Sonny Paul Mulenga, Vismar Mulenga, Chainama Hotels Limited and Elephants Head Hotel v Investrust Merchant Bank Limited**³, the Supreme Court held that:

- “(i) In terms of our rules of Court, an appeal does not automatically operate as a stay of execution and it is pointless to request for a stay solely because an appeal has been entered.*
- (ii) In exercising its discretion whether to grant a stay or not, the Court is entitled to preview the prospects of the proposed appeal succeeding.*
- (iii) The successful party should not be denied immediate enjoyment unless there are good and sufficient grounds.”*

Considering the guidelines outlined in the above cited cases, the question is, has the Plaintiff met the criteria set as outlined above in order for me to exercise my discretionary power to grant a stay of execution of the judgment in question?

I have come to the conclusion that the Plaintiff has not advanced good reasons for being granted a stay. It is trite that in considering an application for a stay of execution of judgment, I have a duty to examine the grounds of appeal, to determine whether an Applicant has prospects of succeeding. This however by no means implies that I should delve into the merits of each ground of appeal.

My perfunctory examination of the memorandum of appeal reveals that it only assails findings of fact. In my view, this departs from trite law which requires an appeal to be based on law and fact. This being the case, I hold the view that this appeal is unlikely to succeed in light of the **Victor Namakando Zaza** case.

In the case of **Tresphord Chali v Bwalya Emmanuel Kanyanta Ngandu**⁴, the Supreme Court held that:

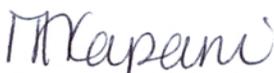
“The Court below held that the Appellant had failed to prove his case. The Court accordingly dismissed the action. The Appellant wants to stay execution of that judgment. We are at a loss to what the purpose of staying execution of that judgment is. The appellant sought some declarations. He failed to obtain any. For example the Appellant’s claim for a declaration that Farm L/19962/M belongs to him failed. Does he, by the stay of execution that he seeks, want that claim to be deemed to have succeeded until the appeal is determined? If that is what he wants then this application is untenable because this is not the purpose for which

an order for stay of execution of a judgment is granted. The same can be said about the other declaration that he sought. Therefore, we see no purpose for granting any stay of execution in this appeal. We dismiss the application, with costs to the Respondent.”

In the present case, the Plaintiff did not succeed in any of his claims, and I find that there is nothing to stay. I, therefore, refuse to grant a stay of execution of judgment and dismiss this application forthwith. I award costs to the Defendant to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 8th day of June, 2017.


M. Mapani-Kawimbe
HIGH COURT JUDGE