

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



2016/HP/0370

BETWEEN:

BIG WILLAS TRANSPORT AND GENERAL SUPPLIERS LIMITED **1st PLAINTIFF**

PETER MBAYA BUKASA **2nd PLAINTIFF**

AND

FIRST NATIONAL BANK **DEFENDANT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 9th DAY OF AUGUST, 2017

For the Plaintiffs : Mr M. Bwalya, Ellis and Company

For the Defendant : Mr M. Moonga, Legal Manager

R U L I N G

CASES REFERRED TO:

- 1. Attorney General V Marcus Achiume 1983 ZR 1**
- 2. Sonny Paul Mulenga & Vismer Mulenga (Both personally & Practising as SP Mulenga International) and Chainama Hotels Limited and Elephants Head Hotel Limited V Investrust Merchant Bank Limited SCZ No 15 of 1999**
- 3. Nyampala Safaris (Z) Limited, Baobab Safaris (Z) Limited, Nyumbu Safaris (Z) Limited, Exclusive Safaris (Z) Limited, Busanga Trails (Z) Limited V Zambia Wildlife Authority, Zambia National Tender Board, Attorney General, Luangwa Crocodile and Safari Limited, Sofram and Safaris Limited, Leopard Ridge Safaris Limited, Swanepoel & Scandrol Safaris Limited 2004 ZR 49 SC**
- 4. Communications Authority V Vodacom Zambia Limited SCZ No 21 of 2009**
- 5. Ndongo V Moses Mulyanga and Rotisco Banda SCZ No 4 of 2011**
- 6. Michael Chilufya Sata V Chanda Chiimba 2011 Vol 2 ZR 445**
- 7. Watson Nkandu Bowa (swing as administrator of the estate of the late Ruth Bowa) V Fred Mubiana and ZESCO Limited 2012 Vol 3 ZR 165**

LEGISLATION REFERRED TO:

- 1. Statutory Instrument No 65 of 2016(Court of Appeal Rules 2016), Court of Appeal Act No 7 of 2016**
- 2. The High Court Rules, Chapter 27 of the Laws of Zambia**

This is a ruling on an application made by the Defendant for an order to stay execution of the judgment, pending the determination of the appeal. The application was made pursuant to Order XXXVI Rule 10 of the High Court Rules, and Order X Rule 5 and Order XIII Rule 12 of Statutory Instrument No 65 of 2016 (Court of Appeal Rules 2016) under the Court of Appeal Act No 7 of 2016 of the Laws of Zambia.

Counsel relied on the affidavit sworn by Euphrice Kombe, and submitted that the Defendant had appealed against the judgment delivered by this court on 28th June, 2017. It was stated that they had applied that the said judgment be stayed, so that the appeal would not be rendered academic.

Counsel further in the submissions stated that it was their belief that the grounds of appeal that they had advanced have merit, and therefore the appeal has real prospects of success. Further that no prejudice would be occasioned to the Plaintiffs if the stay of execution were to be granted, as should the Court of Appeal uphold this court's judgment, there will be an order as to costs, which would be adequate compensation to the Plaintiffs.

It was also stated that they were alive to the fact that stays of execution are granted at the court's discretion, and that this done only where sufficient grounds are shown. That as the appeal has reasonable prospects of success, this was sufficient ground warranting stay of execution of the judgment. Counsel accordingly prayed that the application be granted.

Counsel for the Plaintiffs in response opposed the application, and relied on the affidavit filed in opposition to the application, on 20th July, 2017, and deposed to by the 2nd Plaintiff. His submission was that a stay of execution is granted only on good and sufficient reasons, as stated in a number of authorities among them **NYAMPALA SAFARIS LIMITED AND FOUR OTHERS V ZAMBIA WILDLIFE AUTHORITY AND SIX OTHERS SCZ/8/179/2003**.

Counsel asked the court to note that the affidavit in support of the application does not contain any good and convincing reasons that would warrant the order sought being granted, as it merely states that the Defendant is not satisfied with the court's judgment, and has filed a notice and memorandum of appeal. It was Counsel's submission that it is trite law that the mere fact that a party has filed a notice and memorandum of appeal does not entitle them to a stay of execution. That a party must demonstrate good and sufficient grounds for staying execution of the judgment.

Further that the prospects of success of the appeal are considered before granting a stay of execution, as was stated in the case of **MICHAEL CHILUFYA SATA V CHANDA CHIIMBA 2011 VOL 2 ZR 445**. Counsel's view was that the appeal in this matter is against findings of fact, and it is trite that it is rare that an appellate court will tamper with the findings of the trial court, unless under exceptional circumstances. To this end the cases of **NDONGO V MOSES MULYANGA AND ROTISCO BANDA SCZ No 4 of 2011** and **COMMUNICATIONS AUTHORITY V VODACOM ZAMBIA LIMITED SCZ No 21 of 2009** were referred to.

That in the **NDONGO** case it was held that the appellate court will only reverse findings of a trial court if they were perverse. Counsel stated that on that basis the prospects of success of the appeal in this case were

slim, as the judgment appealed against made findings of fact, and the appeal against such would be an academic exercise.

Still in submission, Counsel stated that the Defendant had not shown that it would suffer irreparable damage if the stay was not granted, and reliance was placed on the case of **WATSON NKANDU BOWA (suing as administrator of the estate of the late Ruth Bowa) V FRED MUBIANA AND ZESCO LIMITED 2012 VOL 3 ZR 165**, in support of this position.

That even the argument advanced by Counsel for the Defendant that if the Court of Appeal would uphold the judgment of this court, the Plaintiffs would be compensated in costs for the grant of the stay of execution, could not stand, as those costs are awarded in the court's discretion.

Counsel also submitted that the Plaintiffs would be prejudiced if the application were to be granted, as they would be denied the fruits of their judgment. He maintained that good and sufficient grounds had not be demonstrated by the Defendant, or that it would suffer irreparable damage if the stay of execution was not granted. Counsel prayed that the application be dismissed with costs.

In reply Counsel for the Defendant stated that both the notice of appeal and memorandum of appeal show that the appeal is premised on both law and fact, and he therefore reiterated that the appeal had prospects of success. He added that the fact that an appeal is based only findings of fact does not mean that it is bound to fail.

To fortify this argument, reliance was placed on the case of **ATTORNEY GENERAL V MARCUS ACHIUME 1983 ZR 1** where the Supreme Court stated that "**findings of fact will only be set aside for being perverse, not supported by the facts or that they cannot be reasonably made**".

That therefore an appeal on findings of fact made by a trial court could succeed. He stated that only ground four in the memorandum of appeal is merely on findings of fact, and that the **ATTORNEY GENERAL V MARCUS ACHIUME 1983 ZR 1** would be argued in advancing this ground. On the reliance on the case of **WATSON NKANDU BOWA (suing as administrator of the estate of the late Ruth Bowa) V FRED MUBIANA AND ZESCO LIMITED 2012 VOL 3 ZR 165** by Counsel for the Plaintiffs, it was stated that irreparable damage stated in that case is just but one of the examples of sufficient cause, as the said case made reference to the prospects of success as being sufficient ground to stay execution.

His submission was that they had therefore shown sufficient and convincing reasons for the grant of the stay of execution pending the determination of the appeal, and that no prejudice would be occasioned to the Plaintiffs if the stay were to be granted. He reiterated that if the stay of execution was not granted, the appeal would be rendered an academic exercise, as the Plaintiffs would proceed to execute.

I have considered the application. Order XXXVI Rule 10 of the High Court Rules, Chapter 27 of the Laws of Zambia provides that;

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

Order X Rule of Statutory Instrument No 65 of 2016(Court of Appeal Rules 2016) states that;

“5. An appeal shall not operate as a stay of execution or of proceedings under the judgment appealed against unless the High Court, quasi judicial body or the Court so orders, and no intermediate act or proceeding shall be invalidated, except so far as the Court may direct”.

Order XIII Rule 12 of Statutory Instrument No 65 of 2016(Court of Appeal Rules 2016) on the other hand provides that;

“12. Where an application may be made to the Court or the High Court, it shall be made in the first instance to the High Court”.

The question that arises for determination in this application is whether there are sufficient grounds that have been advanced by the Defendant warranting the grant of a stay of execution of judgment dated 28th June, 2017? In the case of **SONNY PAUL MULENGA & VISMER MULENGA (Both personally & Practising as SP Mulenga International) AND CHAINAMA HOTELS LIMITED AND ELEPHANTS HEAD HOTEL LIMITED V INVESTRUST MERCHANT BANK LIMITED SCZ No 15 of 1999** the Supreme Court stated 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. The successful party should be denied immediate enjoyment of a judgment only on good and sufficient grounds.

Counsel for the applicants here came very close to asking for a stay as of right based on the bare fact that a notice of appeal had been lodged”.

The Court in that matter went on to further observe that ***“in exercising its discretion whether to grant a stay or not, the court is entitled to preview the prospects of the proposed appeal”.*** The principles enunciated in that case have been re-stated in various authorities, as

seen from the submissions made in this case. The issue is what amounts to sufficient grounds?

Counsel for the Plaintiffs referred to the case of **NYAMPALA SAFARIS (Z) LIMITED, BAOBAB SAFARIS (Z) LIMITED, NYUMBU SAFARIS (Z) LIMITED, EXCLUSIVE SAFARIS (Z) LIMITED, BUSANGA TRAILS (Z) LIMITED V ZAMBIA WILDLIFE AUTHORITY, ZAMBIA NATIONAL TENDER BOARD, ATTORNEY GENERAL, LUANGWA CROCODILE AND SAFARI LIMITED, SOFRAM AND SAFARIS LIMITED, LEOPARD RIDGE SAFARIS LIMITED, SWANEPOEL & SCANDROL SAFARIS LIMITED 2004 ZR 49 SC** as well as the cases of **MICHAEL CHILUFYA SATA V CHANDA CHIIMBA 2011 VOL 2 ZR 445** and **WATSON NKANDU BOWA (suing as administrator of the estate of the late Ruth Bowa) V FRED MUBIANA AND ZESCO LIMITED 2012 VOL 3 ZR 165**, as expounding what is meant by sufficient grounds.

As can be seen from the above authorities sufficient ground may consist of real prospects of success of the appeal, and irreparable damage if a stay is not granted, and the appellant's appeal succeeds. The Defendant in this case argued that the prospects of success of the appeal in this case are very high, and therefore, the stay of execution should be granted. The Plaintiffs on the hand argued that a perusal of the grounds of appeal reveals that the appeal is against findings of facts, as is therefore unlikely to succeed, as appellate courts rarely interfere with findings of facts.

I am alive to the fact that at this stage my role is not to delve into the merits of the appeal, but merely to preview the prospects of success. I have also taken into account the fact that findings of fact are only reversed on appeal if they are perverse, not supported by the facts or that they cannot be reasonably made. Based on all these factors, I grant the stay of execution pending the determination of the appeal, but on the

condition that the Defendant pays the judgment sum of K632, 000.00 into court within fourteen days.

Failure to do so will entail that the stay of execution shall be discharged, and the Plaintiffs shall be at liberty to execute to recover the said amount. Costs shall be in the cause. Leave to appeal is granted.

DATED THE 9th DAY OF AUGUST 2017

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE