

IN THE HIGH COURT FOR ZAMBIA

2017/HPA/0028

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

FRANK DUN NDHLOVU

APPELLANT

AND

LAURA NELIA MWEENE

RESPONDENT

**BEFORE HONOURABLE MADAM JUSTICE P. K. YANGAILO ON
28TH JUNE 2017**

For the Appellant: Mr. M. Bwalya - Ellis & Co

For the Respondent: Mr. L. Mayembe - Messrs. K.B.F. & Partners

R U L I N G

CASE AUTHORITIES REFERRED TO:

1. *Sonny Mulenga and Others vs. Investrust Merchant Bank Limited (2004) ZR 96;*
2. *Nyampala Safari Zambia Limited and 4 others vs. Zambia Wildlife Authority (2004) ZR 49;*
3. *Michael Chilufya Sata vs. Chanda Chimba III & Others (2011) ZR 519;*
4. *Zambia Revenue Authority vs. Javesh Shah SCJ No. 10 of 2001;*
5. *John Kunda (Suing as Country Director of and on behalf of the Adventist Development and Relief Agency (ADRA) vs. Keren Motors (Z) Limited SCZ Judgment No. 14 of 2012;*
6. *Southern Cross Motors limited vs. Nonc Systems Technology Limited (2012) Vol. 1 ZR 524;*
7. *R. B. Policies At Lloyd's vs. Butler [1949] 2 All ER 226 at 229, 230; and*
8. *Board of Trade v Cayzer, Irvine and Co. Limited [1927] AC 610 at 628*

LEGISLATION AND OTHER WORKS:

1. *The Subordinate Court Act, Chapter 28 of the Laws of Zambia;*
2. *The High Court Act, Chapter 27 of the Laws of Zambia;*
3. *The Rules of the Supreme Court of England 1999 Edition (White Book);*
4. *The Limitation Act of 1939;*
5. *Black's Law Dictionary, Bryan A. Garner, 10th Edition;*
6. *British Acts Extension Act Chapter 10 of the Laws of Zambia; and*
7. *Halsbury's Laws of England, Vol. 28 4th edition, Para 605 at page 266.*

This is an application for an Order for Stay of Execution of Judgment of the Subordinate Court pending Appeal. The application was made *Ex Parte* pursuant to **Order XLIV Rule 4 of the Subordinate Court Rules**¹ and **Order III Rule 2 of the High Court Rules**². The application was supported by an Affidavit sworn by one Frank Dun Ndhlovu, the Appellant and filed herein on 12th June, 2017.

The background to this matter is that on 14th July, 2016 the Court below delivered a Judgment in an Appeal from the Local Court wherein the Respondent herein was awarded a share in the matrimonial home at 30% of the value, a farm in Chisamba; one truck; a maize and onion planter; dairy equipment; Caldina vehicle; one lounge suite; a fridge; one double bed; kitchen units; and all kitchen utensils. The said Judgment also ordered that the Appellant herein retain the fish farm and plot in Sinazeze; business premises on a plot in Chinika area; two trucks; two graders; three drilling reeds; wheat planter; roller compacter; submersible pumps; drip irrigation; Dyna truck; two Mercedes Benz; one lounge suite; one fridge; deep freezer and two double beds. The Appellant was also informed of his right to appeal within thirty (30) days of the Judgment of the Court below. Being dissatisfied with the said Judgment, the Appellant lodged into Court a Notice of Appeal on 30th May, 2017, some nine (9) months after the period within which to appeal had lapsed. Subsequently, the Appellant then applied to stay the Court's Judgment and for Special Leave to Appeal out of time. The application to Stay Execution of Judgment was

dismissed on 2nd June, 2017, whilst the application for Special Leave to Appeal out of time, was granted on 5th June, 2017. Having been granted Special Leave to Appeal, the Appellant then proceeded to lodge an *Ex Parte* Summons to Stay Execution of Judgment before this Court on 12th June, 2017, which I directed that it be heard *Inter Parte* on 20th June, 2017.

The application to Stay Execution of the Judgment of the Court below was supported by an Affidavit sworn by one Frank Dun Ndhlovu, the Appellant. The gist of the Affidavit is that the Appellant is not satisfied with the Judgment of the Court below. He averred that on 29th May, 2017, the Sheriff of Zambia seized goods at his farm by virtue of a Writ of Delivery and he applied for a Stay of Execution on 30th May, 2017, which application was dismissed. He also averred that his grounds of Appeal have high prospects of success and that if execution of Judgment is not stayed, he will suffer injustice and the Appeal will be rendered a mere academic exercise.

The Respondent lodged herein an Affidavit in Opposition to an Order to Stay Execution of Judgment on 20th June, 2017. The Affidavit was sworn by Laura Nellie Mweene, the Respondent, who averred that the Application to Stay Execution of Judgment at this point in time was a misconception, as execution of Judgment by way of Writ of Delivery and Writ of Possession has already been carried out and reports rendered by the Sheriff and his Bailiffs to that effect. It was also averred that the report rendered by the Sheriff following a successful execution, symbolises the end of the

execution and that the Appellant ought to have made an application to Stay Execution of Judgment within the prescribed time by the law. She further averred that the Respondent's grounds of Appeal listed in the Notice of Appeal, filed on 30th May, 2017, do not have a high prospect of success as the Judgment of the Court below shows that the Appellant never tendered any evidence and as such there will be nothing to be heard regarding his appeal since the Appeal operates as a re-hearing on the record. She urged this Court not to grant the Appellant an Order to Stay Execution of Judgment.

At the scheduled hearing on 20th June, 2017, Counsel for the Appellant, Mr. M. Bwalya relied on the Affidavit in Support of 12th June, 2017. He submitted that the matter was brought pursuant to **Order XLIV Rule 4** of **The Subordinate Court Rules**¹, which provides that: -

"Appeal not to operate as stay of execution

The entering of 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 appellate court may order, and no intermediate act or proceeding shall be invalidated, except so far as the court below may direct."

He also referred this Court to **Order III Rule 2** of **The High Court Rules**², which provides that: -

"What orders to be made

Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he

considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not."

Mr. Bwalya submitted that the Court will normally grant a Stay of Execution where good and convincing reasons have been advanced and where there are high prospects of success on Appeal, as well as where the Applicant is at risk of suffering irreparable injuries, if the application to Stay Execution of Judgment is not granted. In support of his argument, Mr. Bwalya referred this Court to the cases of ***Sonny Paul Mulenga & Others vs. Investrust Merchant Bank Limited***¹ and ***Nyampala Safari Zambia Limited and 4 others vs. Zambia Wildlife Authority***², where he submitted that the Court highlighted the consideration in determining an application for a stay of execution. Mr. Bwalya also referred the Court to the case of ***Michael Chilufya Sata vs. Chanda Chimba III & Others***³, which he submitted, supports the Appellant's application. It was also argued by Mr. Bwalya that the Judgment obtained in the Court below emanated from proceedings that were held in the absence of the Appellant and as such the Appellant was never heard. He contends that a matter must be heard on its substance and merit and this was not the case in the Court below. He invited the Court to the case of ***Zambia Revenue Authority vs. Javesh Shah***⁴, which he submitted, supports his contention. He further argued that the Appellant's grounds of Appeal are meritorious, as it challenges jurisdiction of the Court below, in that the matter in the Court below was an Appeal from the Local Court,

where the Local Court granted divorce in 1982 and the Subordinate Court only heard this matter in 2015, which is a period of over 30 years. He referred the Court to **Section 2 (4)** of the **Limitation Act of 1939**⁴. Mr. Bwalya contended that this Court is empowered to grant any Order in the interests of justice in line with **Order 3 Rule 2** of **The High Court Rules**² and prayed that the Order to Stay Execution of Judgment be granted so that the matter can be heard on its merits.

Mr. Mayembe, Counsel for the Respondent opposed the application to Stay Execution of Judgment of the Court below and relied on the Affidavit in Opposition of 20th June, 2017. He argued that execution of the Judgment below has been carried out and if that were not the case, the Sheriff and his Bailiffs would not have rendered Sheriff's Seizure Forms exhibited as "**FDN 3**" and "**FDN 4**" in the Affidavit in Support of the application to Stay Execution. He also argued that an Appeal operates as a hearing on record and thus the Appellant's prospects of success are minimal because the Appellant did not adduce any evidence in the Court below, on which a rehearing could be based. It was his argument that where Judgment has been obtained in the absence of the other party, the other party can set aside the Judgment but not appeal it. Mr. Mayembe further argued that, the Appellant was only granted Special Leave to Appeal on 5th June, 2017 and as such, the Appellant's Notice of Appeal lodged on 30th May, 2017, was not properly before the Court, as it was filed before leave was granted and no application has been made to regularise its status. He

contends that there is no Notice of Appeal before this Court on which this Court can be guided to determine if there are prospects of success of the Appeal. Mr. Mayembe reiterated that there was nothing to stay as execution has been enforced and prayed that the application for Stay of Execution of Judgment be denied.

In reply, Mr. Bwalya submitted that the contention by Counsel for the Respondent that Judgment has been executed is a misdirection as per contents of documents exhibited as "**FDN3**" and "**FDN4**" being the Sheriff's Seizure Forms, indicates the items on which execution was enforced. On the Respondent's argument that there is no Notice of Appeal on which the Court can determine the prospects of success, Mr. Bwalya referred this Court to **Order 44 of The Subordinate Court**¹, which he argued requires a party intending to appeal to file a Notice of Appeal stating the grounds of Appeal and that therefore, the Respondent's contention that there is no Notice of Appeal is a misdirection. On the ground raised by the Respondent that an Appeal operates as a re-hearing of the record from the Court below, Mr. Bwalya submitted that this Court has the inherent jurisdiction to take fresh evidence, where such evidence came to light after the matter had been heard and to call witnesses where the Court is of the view that there is a matter that needs to be clarified. That the Respondent's submission that since the Appellant did not adduce any evidence in the Court below, there is nothing to be heard, is therefore a misdirection. He submitted that this case has high prospects of success and prayed that the Order



of Stay of Execution of the Judgment of the Court below be granted so that the matter can be heard on its merits.

I have seriously considered the application by the Appellant to Stay Execution of the Judgment pending Appeal. I have further considered the Affidavits, authorities and submissions, for which I am very grateful to both Learned Counsel.

It is a well settled principle of law that a successful litigant is entitled to the immediate enjoyment of the fruits of its Judgment. I refer to the holding of the Supreme Court in the case of **John Kunda (Suing as Country Director of and on behalf of the Adventist Development and Relief Agency (ADRA) vs. Keren Motors (Z) Limited**⁵. It is further trite that the Court has the discretion to Order a Stay of Execution provided there are sufficient grounds warranting such an Order.

Order 36 Rule 10 of the High Court Rules² stipulates that: -

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

A Stay of Execution may be granted where the Appeal is likely to be rendered academic. Further, a Stay of Execution can also be granted by the Court where the Applicant shows that there are chances of success in the Appeal and that there are good reasons for the stay of execution. I refer to the case of **Nyampala Safaris Zambia Limited and Others**³, where it was stated that the Applicant must clearly demonstrate the basis upon which a stay should be granted.

Further, in the case of ***Southern Cross Motors Limited vs. Nonc Systems Technology Limited***⁶, it was observed that: -

“...the applicant ought to demonstrate some ‘sufficient reason’ in applying for a stay. Under Order 47 Rule 1 of the Rules of the Supreme Courts, there must be shown to be ‘special circumstances’ or ‘cause’ which render it desirable to order a stay. This requires evidence to be adduced...”

It was contended by Mr. Bwalya that as can be seen from the Notice of Appeal, the Appellant has high prospects of succeeding with his Appeal, as he was never heard in the Court below and should be heard on merit. That if the stay is not granted, the Appellant stands to suffer irreparable damage. The Respondent on the other hand contended that if the Appellant wanted to be heard on merit as he alleges, then the proper procedure would have been for him to apply to set aside the Judgment obtained in his absence in the Court below instead of Appealing to this Court.

I have perused the Appellant's Notice of Appeal exhibited as "**FND2**" in the Affidavit in Support of this application. As submitted by the Respondent, the Notice of Appeal was lodged outside the time allowed by the Judgment of the Court below and hence it is not properly before the Court. It is trite that where a party wishes to proceed with an Appeal outside the time allowed, one is required to obtain Special Leave to do so. **Order 44 Rule 3 of The Subordinate Court Act**¹ provides that: -

"Where special leave to appeal shall be granted, the date of the judgment or decision against which the appellant intends to appeal shall, for the purposes of this Order, be deemed to be the

date upon which special leave to appeal against the same shall have been granted, and thereafter the provisions of this Order shall apply in all respects as in a case where special leave to appeal is not required." (emphasis mine)

From the above provision, it is quite clear that the starting point for the Appellant ought to have been first to obtain Special Leave to Appeal. The rule as set out above is quite explicit and the procedure to be followed is that before a Notice of Intention to Appeal can be issued, Special Leave of the Court must be obtained, where time within which to lodge an Appeal has lapsed. Only after the Court's Special Leave to Appeal has been obtained shall the Notice of Appeal be issued. The Notice of Appeal that the Appellant relies on, being exhibit "**FND2**" in the Affidavit in Support of the application for Stay of Execution, was filed on 30th May, 2017, before Special Leave to Appeal was granted on 5th June, 2017, as shown in exhibit "**FND6**" of the Affidavit in Support of this application. This was done contrary to the provisions of the law. It has been held in a plethora of cases that as a general rule, breach of a regulatory rule is curable and not fatal depending upon the nature of the breach and the stage reached in the proceedings. In the case in *casu*, at the stage reached in the proceedings, there is no evidence on record to the effect that the Appellant applied before the Court to cure the regulatory rule that he had breached before making this application to this Court. In fact, at the hearing of this application, Mr. Bwalya, Counsel for the Appellant, conceded that the only Notice of Appeal on the record is the one that was filed on 30th May, 2017. It is trite that an application for Stay of Execution

is granted on good and convincing reasons and where there are high prospects of success. The cases of **Sonny Mulenga and Others vs. Investrust Merchant Bank Limited**¹; and **Michael Chilufya Sata vs. Chanda Chimba III and others**³ were cited by the Appellant as authorities on the principles employed by the Court when determining an application for a Stay of Execution. In the case of **Sonny Mulenga and Others vs. Investrust Merchant Bank Limited**¹, the Supreme Court held that: -

"In terms of our rules of Court, an appeal does not automatically operate as a stay of execution, and it's 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."

The Supreme Court went on to observe in the said case as follows: -

"In exercising its discretion whether to grant a stay or not, the Court is entitled to preview the prospects of the proposed appeal."
(emphasis mine)

In the case of **Michael Chilufya Sata vs. Chanda Chimba III ZNBC, MUVI TV Limited MOBI TV International Limited**³ Matibini J (as he then was) stated that: -

"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." (emphasis mine)

In my opinion, the cases cited by the Appellant are succinctly clear that 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 an appellate Court, that it is desirable, necessary, or just to stay a Judgment pending an Appeal. Thus, in granting a Stay of Execution or not, this Court ought to weigh whether there is a real likelihood that the Appeal might succeed. In exercising the discretion whether or not to grant a stay, a Court is entitled to preview the prospects of success of the proposed Appeal.

In the case *in casu*, the Notice of Appeal of 30th May, 2017, that the Appellant relies on, is patently improperly before the Court. Accordingly, on this issue, I agree with the submissions by Mr. Mayembe that there is no proper Notice of Appeal on which this Court can be guided on whether the Appeal has any prospects of success. However, this irregularity is not fatal as it is curable.

The other argument advanced by the Appellant is that he has sufficient reasons to warrant a Stay of Execution as Judgment has not been executed. He based his contention on the exhibits "**FND3**" and "**FND4**" which are Sheriff's Seizure Forms. The Respondent contends that these are seizure forms, which are issued upon execution of Judgment and therefore, Judgment has been executed. I have perused exhibits "**FND3**" and "**FND4**" which are Sheriff's seizure forms. "**FND3**" is an inventory for the Writ of Delivery

listing goods that had been delivered and to be delivered, while "FND4" is an inventory for the Writ of possession listing goods that the Sheriff took possession of. According to **Black's Law Dictionary**⁵: -

"a Writ of Delivery is a writ of execution employed to enforce a judgment for the delivery of chattels. It commands the sheriff to cause the chattels mentioned in the writ to be returned to the person who has obtained the judgment; and if the chattels cannot be found, to distrain the person against whom the judgment was given until he returns them. A Writ of Possession is the writ of execution employed to enforce a judgment to recover the possession of land. It commands the sheriff to enter the land and give possession of it to the person entitled under the judgment."

A perusal of the exhibits mentioned above clearly shows that the Sheriff partially delivered the goods awarded in the Judgment of the Court below. As such, in my view, it cannot be argued, as the Respondent has attempted, that the Judgment of the Court below has been executed in full.

The other argument also advanced by Mr. Bwalya in support of the Appellant's application to stay execution is that the Judgment in the Court below was obtained in the absence of the Appellant and that the Appellant should be given an opportunity to be heard on merit. Mr. Mayembe argued that the law is very clear where judgment has been obtained in the absence of the other party and that what the Appellant ought to have done is to apply to set aside the Judgment in the Court below as opposed to launching an

Appeal to the High Court. It is his contention that the course of action taken by the Appellant in launching an Appeal as opposed to setting aside the Judgment is improper.

Order XXXI of The Subordinate Court Act¹, provides that: -

"Setting aside of judgment made in absence of party

Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the court, upon such terms as may seem fit."

The above provision is in tandem with the argument advanced by Mr. Mayembe. If the Appellant's cry is that he was never heard in the Court below, then he ought to have applied to set aside the Judgment of the Court below in order for him to be heard on merit. It is trite that in order for an Order for Stay of Execution to be granted, the Appellant's Appeal ought to be meritorious. In the case in *casu* the Appellant's argument that the Judgment ought to be stayed as he was not heard in the Court below cannot be sustained in the circumstances of this case.

The Appellant's further argued in support of Staying the Execution of the Judgment that the Court below had no jurisdiction to hear an Appeal from a divorce that was granted by the Local Court in 1982, which is after thirty (30) years since the Local Court delivered its Judgment. He referred this Court to **Section 2 (4) of The Limitation Act⁴**.

The **Limitation Act of 1939⁴** applies in Zambia by virtue of the provisions of **Section 2 of The British Acts Extension Act⁶**, which

states that the Acts of the Parliament of the United Kingdom (which include the **Limitation Act of 1939**⁴) set forth in the Schedule to the Act shall be deemed to be of full force and effect within Zambia.

Section 2 (4) of The Limitation Act⁴, provides as follows: -

“...An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due;...”

It is clear from the foregoing provision of the Act that any action that is based upon a Judgment must be brought within a period of twelve (12) years from the date on which the Judgment became enforceable. Any action which is brought after the expiration of the specified limitation period cannot be sustained. The purpose and effect of statutes of limitation is to protect Defendants. According to **Halsbury's Laws of England**⁷, three different reasons have been advanced by the courts to explain the purpose of limitation statutes, which are as follows: -

- 1. That long dormant claims have more cruelty than justice in them;***
- 2. That a Defendant might have lost evidence to disprove a stale claim; and***
- 3. That a Plaintiff with a good causes of action should pursue them with reasonable diligence.***

I refer to the case of **R. B. Policies At Lloyd's vs. Butler**⁷ where Streatfeild J. stated that: -

“one of the principles of the Limitation Act 1939 is that those who go to sleep on their claims should not be assisted by the courts in recovering their property. But another equally important principle is that there shall be an end to these matters and that there shall be protection against stale demands.”

I also refer to the case of ***Board of Trade v Cayzer, Irvine and Co. Limited***⁸, where Lord Atkinson made the following observation: -

“The whole purpose of this Limitation Act is to apply to persons who have good causes of action which they could if so disposed, enforce, and to deprive them of the power of enforcing them after they have lain by for the number of years respectively and omitted to enforce them. They are thus deprived of the remedy which they have omitted to use.”

Mr. Bwalya also referred this Court to ***Order III Rule 2*** of ***The High Court Act***², which I have already cited above. He argued that it is inherent in the jurisdiction of an appellant Court to actually take in fresh evidence where such evidence came to light after the matter has been heard and to call in witnesses where the Court is of the view that there is a matter that needs to be clarified.

The Appellant knew that there was an Appeal from the Local Court before the Court below but failed to attend the proceedings without proper cause, where he could have raised the issue of jurisdiction that he now raises before this Court. That cannot be termed fresh evidence as envisaged under the law on which the Appellant based this argument in an attempt to justify that his Appeal has high prospects of succeeding.

However, the Judgment of the Court below, in my observation, does not offer much in the form of an explanation, as to how the Court found it proper and justiciable to entertain an application for property settlement by the Respondent, founded on a divorce pronounced some three decades previously. Further, the Judgment below does not address the legal consequences of the parties herein co-habiting as husband and wife after the divorce in 1982 by the Monze Local Court. Was this subsequent co-habitation a re-marriage by repetition or under customary law, as suggested in paragraph three (3) on page J3 of the Judgment of the Court below, that ought to have been formally dissolved by a Court of competent jurisdiction before an application for property settlement, such as one made by the Respondent in the Court below, could be entertained? These are very serious omissions by the Court below that may impact the validity of its entire Judgment upon which the execution being challenged by the Appellant in this Court is premised. Therefore, would it be fair and just for this Court to ignore these apparent omissions? The answer to this question must be in the negative, in the view of this Court. I say so, because if it is established that the proceedings before the Court below were improperly before that Court, as a result of the lapse of time between the divorce of 1982, subsequent co-habitation by the parties and an Appeal to the Court below for property settlement in 2016, execution resulting from this process may inflict an irreparable injustice on the Appellant. This Court has a duty to ensure that an opportunity is given to the parties in this cause to

delve into these gaps in the proceedings of this matter in order for proper justice to be done to the parties under the laws.

Consequently, on the basis of the wide powers bestowed on this Court by **Order III Rule 2** of **The High Court Act**² and in the quest to dispense justice to both parties to this matter, it is the view of this Court that the justice of this matter demands that a prudent inquiry and assessment ought to be made whether the proceedings before the Court below, where these proceedings are now founded in this Court, were indeed properly before that Court below. To ignore these screaming unexplained gaps in the history of this case, in the view of this Court, would be a deliration of duty of this Court and a potential injustice to both parties that **Order III Rule 2** of **The High Court Act**² intended this Court to cure in appropriate cases.

Accordingly, I Order that the justice of this particular case demands that the Judgment of the Court below be stayed and it is hereby stayed to the extent of goods and items that are reflected as not delivered and/or not collected in the Sheriff's Seizure Forms exhibited as "**FDN 3**" and "**FDN 4**" in the Appellant's Affidavit in Support hereof, pending the parties hereto to take appropriate remedial steps to cure the irregularities in the Notice of Appeal. The status quo of the parties as before the Application for Stay of Execution shall be maintained. Further, this Order of Stay of Execution is made on the express condition that neither party to this cause of action shall sell, transfer, pledge and/or dilute in any

other way of whatsoever nature as may affect ownership of the properties in issue in this matter until further Order of Court.

I make no order as to costs and leave to appeal is granted.

Dated the 28th Day of June, 2017

A handwritten signature in black ink, appearing to read 'P. K. Yangailo', is written over a horizontal dotted line.

**P. K. YANGAILO
HIGH COURT JUDGE**