

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

2017/HP/0712



B E T W E E N :

MAUREEN CHIRWA
DUNCAN CHIRWA

**1ST PLAINTIFF
2ND PLAINTIFF**

AND

ELIAS TEMBO
THE ATTORNEY GENERAL
LUSAKA CITY COUNCIL
PEGGY KANDESHA

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
3RD PARTY**

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the
29th day of November, 2017**

For the Plaintiffs : *Mr. K. Kaunda, Ellis & Company*
For the 1st Defendant : *Mr. R. Mainza, Mainza & Company*

R U L I N G

Case Authorities Referred To:

1. *Nyampala Safris and 4 Others v Wildlife Authority and 6 Others (2004)*
Z.R. 49 (S.C)
2. *Sonny Paul Mulenga, Vismar Mulenga, Chainama Hotels Limited and
Elephants Head Hotel v Investment Merchant Bank Limited (1999) Z.R 101*
(S.C)
3. *Shelter for All, Evans Mukula Chomba v Kingfred Ramsey and Precious
Ramsey SCZ/8/192/2009*

Legislation Referred To:

1. *High Court Act, Chapter 27*

This is the 1st Defendant's application to stay execution of judgment pending determination of an appeal by the Court of Appeal. It is made pursuant to Order 3 Rule 2 of the High Court Rules and is supported by an Affidavit.

The background facts are that sometime in August, 2005, the Plaintiffs sued the 1st Defendant for encroachment, trespass and damages on Stand No. 24594, Lusaka. Judgment was delivered by this Court on 16th November, 2017, wherein the Plaintiffs succeeded against the 1st Defendant.

At the hearing, Learned Counsel for the 1st Defendant relied on the Affidavit filed in Support. The gist of which is that the 1st Defendant being dissatisfied with this Court's Judgment has lodged an appeal to the Court of Appeal. The 1st Defendant believes that his appeal is meritorious and has a high prospects of succeeding.

Learned Counsel for the Plaintiffs filed an Affidavit in Opposition, which he wholly relied on. The gamut of his Affidavit is that the appeal has no prospects of succeeding. He contends that

the 1st Defendant failed to prove his claims. Further, that his grounds of appeal merely attack findings of fact and have no prospects of success.

In rejoinder, **Elias Tembo** insists that the Plaintiffs fraudulently acquired their property. He contends that if a stay is not granted, the Court will be endorsing the abhorrent sale of property in dispute. He also insists that his appeal has high prospects of success.

I wish to point out that paragraphs 11, 13, 14, 17, 19, 20, 23, 24 26 and 28 of the Affidavit in Reply contain evidence and not material facts. Further, paragraphs 7, 15, 18, 23, 24, 26 and 27 in the Affidavit in Reply contain legal arguments and conclusions. The cited paragraphs do not turn on the requirements of a stay and will not be considered.

I have carefully examined the Affidavits filed herein and the submissions tendered by Learned Counsels. The application raises the question whether in the circumstances of this case, I can

exercise my discretionary power to grant a stay of execution of judgment pending an appeal to the Court of Appeal.

It is a well settled principle of the law that the Court will not grant a stay of execution of judgment unless there are good and reasonable grounds for doing 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, JS¹**, 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 is 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 Limited²**, 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 1st Defendant met the criteria set as outlined above to provoke my discretionary power to grant a stay of execution of the judgment? In other words, has the 1st Defendant demonstrated that there are good and convincing reason(s) for granting a stay of execution of judgment? Has he shown in his application that his appeal has prospects of succeeding and if a stay is not granted, then his appeal would be rendered nugatory and an academic exercise?

In applying the above principles to the application before me, I am of the firm view that the 1st Defendant has not advanced good reasons for a stay of execution of judgment. The 1st Defendant's intended appeal mainly attacks findings of facts and does not in my view raise difficult points of law. It is unlikely to succeed on appeal.

The dispute in this case concerns land ownership and land is not a moveable asset. In the case of **Shelter For All, Evans Mukula Chomba v Kingfred Rumsey and Precious Ramsey**³, the Supreme Court stated that land is an immovable asset and any developments on it have monetary value, which can easily be ascertained by assessment.

Taking into account the above stated principle of law, I hold that the 1st Defendant will not suffer irreparable damage if a stay is not granted. I find no reason to deny the Plaintiffs their fruits of judgment.

I accordingly, dismiss this application and award the Plaintiffs costs to be taxed in default of agreement.

R7

Dated this 29th day of November, 2017.

M. Mapani
M. Mapani-Kawimbe
HIGH COURT JUDGE