

**IN THE HIGH COURT FOR ZAMBIA**

**2014/HP/1506**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**BETWEEN:**

**ELIAS TEMBO**

**PLAINTIFF**

**AND**

**MWITWA JILANDA RHONA**

**1<sup>ST</sup> DEFENDANT**

**LUSAKA CITY COUNCIL**

**2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL**

**3<sup>RD</sup> DEFENDANT**

**CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC**

*For the Plaintiff* : *Mr. R. Mainza of Messrs Mainza and Co.*  
*Mr. L. Chikuta of Messrs Mumba Malila*  
*and Partners*

*For the 1<sup>st</sup> Defendant:* *Mr. Okware of Messrs Okware and*  
*Associates*

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**RULING**

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**Cases Referred to:**

1. *Kapoko V The People* 2016/CC/0023
2. *Ladd v Mashall* (1954) 3 ALL ER 745
3. *Zambia Revenue Authority V The Post Newspaper* SCZ

*Judgment No. 18 of 2016*

This was the Plaintiff's application for stay of execution of this Court's ruling dated 19<sup>th</sup> December, 2017 granting leave to the 1<sup>st</sup> Defendant to amend her Defence and Counterclaim. The Plaintiff filed in an affidavit in support deposed to by himself. He averred that the Plaintiff was aggrieved with this ruling and appealed to the Court of appeal on 5<sup>th</sup> January, 2018 and a Notice of Appeal and Memorandum of Appeal.

He further deposed that perusal of the grounds of appeal showed that it weighed in favour of the appeal succeeding. He stated that the Supreme Court had not departed from its decisions on amendments cited by the Plaintiff in opposition. He asserted that the Supreme Court had not departed from its decision on an amendment cited by the Plaintiff in opposition. According to him, the Plaintiff's appeal possessed high prospects of success.

He averred that if the 1<sup>st</sup> Defendant executes the aforementioned ruling and then the appeal succeeds, there would be confusion in this case management.

He stated that none of the Defendants would be prejudiced as a result of this application for stay in that the next hearing date of this matter is in August, 2018 and by the Court of Appeal would have disposed of the interlocutory appeal. That it would be in the interest of justice and proper case management that the Court is implored to invoke its inherent Jurisdiction to stay the Ruling of 19<sup>th</sup> December, 2018.

The Plaintiff filed in skeleton arguments and cited the case of ***Post Newspaper Limited (in Liquidation) v Abel Mbozi and Others*** 2018/HP/0064 where it was held that:

*“The Constitutional Court is a superior Court than this Court and this Court is bound by any decision made by that Court. Therefore, if that Court is being asked to set aside the consent order dated 10<sup>th</sup> January, 2018 in cause number 2016/HPC/0518, this Court cannot go ahead to hear the Plaintiffs claim in this matter with regard to setting aside the said consent order, as doing so has the potential of the two Courts arriving at conflicting decisions which may bring the administration of justice into disrepute.”*

He argued that the appeal was anchored on the appellant’s objection to the application for the 1<sup>st</sup> Defendant to amend its defence and present a counterclaim, then in the absence of a stay of these proceedings, the appeal would be rendered nugatory and an unnecessary academic exercise as it would serve no purpose to

amended pleadings in a case that had already been tried and determined.

He contended that considering the volume of work in the Court of Appeal, it would be some time before the appeal was determined by the Court of Appeal and if a stay is not granted, the proceedings in the High Court could conclude before the appeal is determined and this would render the appeal completely otiose.

He cited the explanatory notes under Order 59/13/2 of the White Book and stated that this provision underscores the importance of holding the ring by way of an Order of Stay of Proceedings pending determination of the Appeal.

He submitted that the appeal herein had prospects of success and it was in the interest of justice that a stay pending appeal was granted so that the Appellant was not deprived of the means of prosecuting his appeal. The Plaintiff cited a number of authorities to support his submission that for the sake of proper case management it was proper and equitable to stay these proceedings pending determination at the interlocutory appeal by the Court of Appeal as any decision in the Appeal No. 19 of 2018 would surely have binding on cause No. 2014/HP/1602.

I have considered the affidavit evidence on record and the Plaintiff's skeleton arguments.

The law gives this Court the discretion to grant an Order for Stay of Proceedings. It is also emphasized that this discretion must be

exercised judiciously and on well established principles. This was well elaborated in the case of **Zambia Revenue Authority V The Post Newspaper SCZ Judgment No. 18 of 2016.**

The Supreme Court in that case gave clear guidance on the law relating to granting stay applications. They held that:

*“Firstly, the successful party should not be denied the immediate enjoyment of a Judgment, unless there are good and sufficient grounds. Stay of Execution should not be granted for mere convenience of the Post. Neither should it be granted on sympathetic or moral considerations. Secondly, in exercising its discretion whether to grant the stay or not, the Court is entitled to preview the prospects of success of the proposed appeal.....*

*We wish to emphasize that the prospect of success of a pending appeal is a key consideration in deciding whether or not to grant stay of execution of a judgment appealed against....In short the Court should a stay pending possible victory. It should not stay pending loss.”*

In my view this case is very instructive. In the present case I hold the view that the Plaintiff's appeal against my ruling of 19<sup>th</sup> December, 2017 has no prospects of success. This is because the Ruling allowed the 1<sup>st</sup> Defendant to submit additional documents on the ground that the said documents could not have been obtained with reasonable diligence for use at that time and that the said documents had an important influence on the result of the

case. This Court referred to the case of **Ladd v Mashall (1954) 3 ALL ER 745** to support this proposition.

Further, I am of the firm view that having dismissed the 1<sup>st</sup> Defendant's application would have amounted to dismissing it on a technicality which was well elaborated in the case of **Henry Kapoko V The People 2016/CC/0023**.

In view of this I maintain that the appeal has no prospects of success as the ruling was on firm ground. I therefore refuse to grant the Plaintiff's application for an Order of Stay of the Ruling dated 19<sup>th</sup> December, 2017.

Leave to appeal is granted.

Delivered under my hand and seal this <sup>27<sup>th</sup></sup>..... day of March, 2018



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**Mwila Chitabo, S.C.**

**JUDGE**