

**IN THE HIGH COURT FOR ZAMBIA**

**2016/HPC/0568**

**AT THE COMMERCIAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**BETWEEN:**

**CAVMONT BANK LIMITED**

**APPLICANT**

**AND**

**NYENYEZI CHRISTIAN ACADEMY LIMITED**

**1<sup>ST</sup> RESPONDENT**

**MARTHA MUSHIPE**

**2<sup>ND</sup> RESPONDENT**

**Before the Honourable Mr. Justice W. S. Mweemba in Chambers  
at Lusaka**

*For the Applicant:*

*Mr. S. Mwananshiku – Messrs M & M  
Advocates*

*For the Respondents:*

*Mrs. M. Mushipe – Mesdames Mushipe &  
Associates*

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**R U L I N G**

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**LEGISLATION REFERRED TO:**

- 1. Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.**
- 2. Order 36 Rule 9 of the High Court Rules, Chapter 27 of the Laws of Zambia**

**CASES REFERRED TO:**

1. **Ruth Kumbi V Caleb Robson Zulu SCZ Judgment No. 19 of 2009.**
2. **Southern Cross Company Limited V NONC Systems Technology Ltd (2012) ZR 524.**
3. **R V Sussex Justice *Ex-Parte* McCarthy (1924) 1 KB 256.**
4. **Tata Zambia Limited V Shilling Zinka (1986) ZR 51.**
5. **Sonny Paul Mulenga and Vismer Mulenga (both personally and Practicing as S P Mulenga International), Chainama Hotels Limited and Elephants Head Hotel Limited V Investrust Bank Limited (1999) ZR 101.**
6. **Development Bank of Zambia and Livingstone Saw Mills Limited V Jet Cheer Development (Z) Limited SCZ Judgment No. 33 of 2008.**
7. **Brian Musonda (Receiver of First Merchant Bank Zambia Limited (In Receivership) V Hyper Foods Products Limited and two others (1999) ZR 124.**

This is an application by the 2<sup>nd</sup> Respondent for an Order of Entry, Control and Stay of Sale of the property situated at Plot No. 273 Kabulonga Road, Kabulonga/Ibex Hill Lusaka pending the hearing and determination of an application to settle Judgment sum by way of instalments.

The application is supported by an Affidavit sworn by Martha Mushipe the 2<sup>nd</sup> Respondent herein as well as Skeleton Arguments both filed into Court on 5<sup>th</sup> February, 2018.

It is deposed by Mrs. Mushipe that the Court on 17<sup>th</sup> August, 2017 passed a Judgment in default wherein the Court found for the Applicant in the sum of K771,163.55 despite the Applicant's Bank Statement showing otherwise. That the Judgment was entered by the Court despite there being pending applications by the 2<sup>nd</sup>

Respondent to set aside the default Judgment and an application to set aside an Order of the Court allowing the 2<sup>nd</sup> Respondent to only appeal against the Court's failure to award costs to the 2<sup>nd</sup> Respondent instead of the whole Ruling.

It is stated that the Applicant is executing the Judgment and obtained an Order of Possession which order was executed and the Applicant took possession of the 2<sup>nd</sup> Respondent's property namely Plot No. 273 Kabulonga Road, Ibex Hill Lusaka. That before the Applicant could further execute the Judgment by way of sale the Respondent filed into Court an application to settle the said Judgment sum by way of instalments and obtained an order for stay of execution pending the hearing and determination of the application to settle the Judgment sums by instalments.

It is deposed that despite being served with the Order for Stay of Execution, the Applicant has still continued to have possession and control of the property thereby preventing the 2<sup>nd</sup> Respondent right of entry and control of the property at Plot No. 273 Kabulonga Road, Ibex Hill at which the 2<sup>nd</sup> Respondent's law firm business is housed. That the 2<sup>nd</sup> Respondent cannot only operate the law firm as a result of the Applicant's current possession of the Mortgaged Property but the 2<sup>nd</sup> Respondent has also been deprived access to all the law firm's files.

That the 2<sup>nd</sup> Respondent is therefore being deprived access to tools of trade and it is in this respect that she seeks for an Order for Right of Entry to the Property and Control.

It is stated that the order being sought will enable the 2<sup>nd</sup> Respondent access her tools of trade and enable her law firm to be operational but further ensure that the *status quo* of the parties herein is maintained pending the hearing of the application to settle the Judgment Sum by instalments.

There is also an Affidavit in Opposition filed into Court on 8<sup>th</sup> February, 2018 sworn by Martha Lungu Sichone, Senior Recoveries Officer of the Applicant Bank.

She deposed that following the 2<sup>nd</sup> Respondent's service of the Order of Stay of Execution of the Judgment the Applicant has complied with the said Order and it has not taken any steps to offer the property for sale to members of the public and therefore the *status quo* is being maintained. That on the morning of 5<sup>th</sup> February, 2018, she personally met the 2<sup>nd</sup> Respondent at the premises and she and her staff were given free access to remove all their files from the premises.

It is stated that the contents of paragraph 13 and 14 of the 2<sup>nd</sup> Respondent's Affidavit are not true when she claims that she has been deprived access to all the law firm's files and that she has been deprived access to the tools of the trade.

The 2<sup>nd</sup> Respondent filed an Affidavit in Reply to Affidavit in Opposition to the Affidavit in Support of the Summons herein on 9<sup>th</sup> February 2013. It is deposed that the 2<sup>nd</sup> Respondent has been denied the Right of Entry and Control of the Property and as such the *status quo* has *prima facie* changed in that the 2<sup>nd</sup> Respondent can no longer operate her law firm business as before. That the Applicant only allowed the 2<sup>nd</sup> Respondent access to her files on 6<sup>th</sup> February, 2018 and not on 5<sup>th</sup> February, 2018.

It is stated that the 2<sup>nd</sup> Respondent's law firm is situated on the property in possession of the Applicant and as such the 2<sup>nd</sup> Respondent's law firm business has been hindered in that the 2<sup>nd</sup> Respondent cannot receive Court process through its registered address and cannot also get new business. That although the 2<sup>nd</sup> Respondent has access to her files, the files have been scattered in other people's houses making it difficult to meet clients and operate the law firm effectively and generate income. Further that she is being denied access to her tools of trade by the Applicant in refusing to allow her the Right of Entry and Control of the Property which houses her law firm business. It is prayed that the application be granted.

Detailed Skeleton Arguments have been filed by both parties. The 2<sup>nd</sup> Respondent anchored her application on **Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia** which states that:

**“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”.**

The case of **RUTH KUMBI V CALEB ROBSON ZULU (1)** was cited where the Supreme Court held that:

**“The stay of execution is granted in order to maintain the *status quo* of the parties pending the application before the Court”.**

The case of **SOUTHERN CROSS COMPANY LIMITED V NONC SYSTEMS TECHNOLOGY LIMITED (2)** was also cited wherein I. C. T. Chali J observed as follows:

**“In terms of Order 36 Rule 9 of the High Court Rules, the Applicant ought to demonstrate some *“sufficient reason”* in applying for a stay. Under the White Book, there must be shown to be *“special circumstances”* or *“cause”* which render it desirable to order a stay. This requires evidence to be adduced such as the applicant’s income, nature and value of his property, as well as details of indebtedness to other persons apart from the judgment creditor. For only then can a court make an informed decision as to the *“proper balance between the needs of the judgment debtor to be granted a stay of***

***execution and the needs of the judgment creditor to obtain due and prompt satisfaction of his judgment debt”.***

In opposing the 2<sup>nd</sup> Respondent’s application, the Applicant has argued that at the hearing of the application to pay in instalments, the Court will have to decide if the Respondents have provided good and sufficient grounds to suspend the Applicant’s right to immediate enjoyment of the Judgment. It is submitted that at the present moment the *status quo* should be maintained until the Court makes a determination on the application to pay in instalments. The case of **SONNY PAUL MULENGA & OTHERS V INVESTRUST MERCHANT BANK LIMITED (5)** was cited where the Supreme Court held that:

**“The successful litigant should not be denied immediate enjoyment of a judgment unless there are good and sufficient grounds”.**

The Applicant contends that it has maintained the *status quo* by obeying the *Ex-parte* Order of Stay of Execution that the Court granted to the 2<sup>nd</sup> Respondent on 3<sup>rd</sup> February, 2018 by not taking any further action until further Order of the Court.

It is contended that the 2<sup>nd</sup> Respondent has not come with clean hands in this matter in that she has not disclosed to the Court that the law firm’s files were given to her on 5<sup>th</sup> February, 2018. That in paragraph 17 of her Affidavit in Support she has claimed that she has an equitable right to redeem her property but should not

succeed as she has not come with clean hands. The case of **DEVELOPMENT BANK OF ZAMBIA AND LIVINGSTONE SAW MILLS LIMITED V JET CHEER DEVELOPMENT (Z) LIMITED (6)** was cited for this submission. In that case the Supreme Court outlined the well known maxim which states as follows:

**“He who comes to equity must come with clean hands”.**

It is submitted that the application be dismissed with costs.

In the Respondent’s Arguments in Reply filed on 9<sup>th</sup> February, 2018 it was contended that the Judgment of 17<sup>th</sup> August, 2017 was entered in default of the 2<sup>nd</sup> Respondent filing a Defence and that the Judgment was entered despite there being an application to set aside the Judgment in default on record which the Court never ruled upon. It was submitted that there is no law which prevents a party applying to set aside any judgment in default and as such there is sufficient reason for the Court to suspend the Applicant’s enjoyment of the purported Judgment. The case of **TATA ZAMBIA LIMITED V SHILLING ZINKA (4)** was cited for this submission.

It is further contended that the Applicant executed the Judgment dated 17<sup>th</sup> August, 2017 knowing that there was a pending application before Court to set aside the said Judgment which was entered in default. It was therefore argued that despite the Applicant relying on the maxim of he who comes to equity must come with clean hands, the Applicant’s hands are *prima facie* dirty.



The Respondent's Counsel submitted that in the circumstances, the Court should grant the Order being sought for because justice should not only be done but should manifestly and undoubtedly be seen to be done. That this principle was espoused in the case of **R V SUSSEX JUSTICE EX PARTE MCCARTHY (3)** which provides that:

**“It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice”.**

I must at this juncture state that I agree with the principles espoused in the cases of **TATA ZAMBIA LIMITED V SHILLING ZINKA (4)** and **R V SUSSEX JUSTICE EX PARTE MCCARTHY (3)** but these principles are not applicable to the application before me. I am not considering the nature of the Judgment handed down herein on 17<sup>th</sup> August, 2017 but considering the extent to which I can stay execution of that Judgment before the application for stay is heard *inter-partes*.

I have considered the application for an Order for Right of Entry, Control, Stay of Sale and that the Applicant vacate the 2<sup>nd</sup> Respondent's Property pending hearing and determination of an application to settle Judgment Sums by instalment payments.

On 3<sup>rd</sup> February, 2018, I granted an *ex-parte* Order for stay of execution of Judgment dated 17<sup>th</sup> August, 2017 pending the hearing and determination of the application for an Order to settle the Judgment sums by way of instalments. Before granting the said stay I asked myself as to what was there to stay given that the Applicant has already taken possession of the Mortgaged Property. After perusing the Record I found that whilst the Applicant Bank had foreclosed on the Mortgaged Property it had not yet sold it. There was therefore something to stay namely the sell of the Mortgaged Property. I exercised my discretion and stayed any further execution of the Court's Judgment of 17<sup>th</sup> August, 2017, pending the hearing and determination of the Respondent's application to settle Judgment sums by instalment payment by my brother S. B. Nkonde J who will also hear and determine *inter-partes* the application for Stay of Execution.

I had earlier on mentioned that the issue of non-disclosure that the 2<sup>nd</sup> Respondent was given the law firm's files on 5<sup>th</sup> February, 2018 was argued as a ground on which this Court should dismiss this application because she has claimed that she has an equitable right to redeem her property and yet she came to Court with unclean hands.

On this ground alone, I find and hold that the 2<sup>nd</sup> Respondent's application cannot succeed because it is tainted by non-disclosure.

The matter does not however end there. It is well settled that the Court may order a stay of possession where there are reasonable

prospects that the money owed will be paid within a reasonable time. I refer to the case of **BRIAN MUSONDA (RECEIVER OF FIRST MERCHANT BANK ZAMBIA LIMITED (IN RECEIVERSHIP) V HYPER FOODS PRODUCTS LIMITED AND TWO OTHERS (7)** where the Supreme Court held that:

**“the Court in exercise of its equitable jurisdiction can interfere with the contractual rights of the mortgagee to the extent of enlarging time where there is foreclosure or suspending Orders for possession or postponing the alternative reliefs where there is reasonable prospects that the money due can be paid within reasonable time”.**

It is my view that the determination as to whether or not the Judgment debt can be paid within a reasonable time will be made by S. B. Nkonde J when he hears and determines the Respondent's application to pay the Judgment Sums herein by instalments. I cannot deal with that application as it is before another Judge of the High Court.

For the foregoing reasons, I accordingly hereby dismiss the 2<sup>nd</sup> Respondent's application for an Order for Right of Entry and Control of the Mortgaged Property. For the avoidance of doubt the Stay of Sale of the Mortgaged Property which I granted *ex-parte* on 3<sup>rd</sup> February, 2018 remains in force until the *inter-parte* hearing relating thereto is determined by S. B. Nkonde J.

Costs to the Applicant Bank to be taxed in default of agreement.

Leave to Appeal is hereby granted.

**Dated the 15<sup>th</sup> day of February, 2018.**



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**WILLIAM S. MWEEMBA**  
**HIGH COURT JUDGE**