

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



2017/HP/0380

IN THE MATTER OF:

THE IMMIGRATION AND DEPORTATION ACT OF ZAMBIA NO. 18 OF 2010 OF THE LAWS OF ZAMBIA, SECTION 34, 35, 36, 37, 38 AND 39

IN THE MATTER OF:

ORDER 53 OF THE RULES OF THE SUPREME COURT (RSC). WHITE BOOK (1999 EDITION) VOLUME 1 AND VOLUME 2

IN THE MATTER OF:

AN APPLICATION FOR JUDICIAL REVIEW

IN THE MATTER OF:

OMAR DIRIE HIRSI

AND IN THE MATTER OF:

RESIDENCE PERMIT NO. H-0182/10 H-270/03

B E T W E E N :

OMAR DIRIE HIRSI

APPLICANT

AND

THE ATTORNEY GENERAL

RESPONDENT

Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the 29th day of January, 2018

For the Respondent : *Mr. E Tembo, Assistant State Advocate*

R U L I N G

Cases Referred To:

1. *Nyampala Safaris 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 Investrust Merchant Bank Limited (1999) Z.R. 101 (S.C.)*
3. *Tresphord Chali v Bwalya Emmanuel Kanyanta Ngandu SCZ/8/009/2014*

Legislation Referred To:

1. *Rules of the Supreme Court, 1999 Edition*

By an exparte application the Respondent seeks to stay proceedings and execution of judgment pending an appeal, before the Court of Appeal, pursuant to Order 45 Rule 11 of the Rules of the Supreme Court. The application is supported by an Affidavit.

The background facts are that the Applicant commenced proceedings for judicial review, on 9th March, 2017, wherein he challenged his deportation under the Immigration and Deportation Act No. 18 of 2010. The Applicant originally migrated to Zambia in 2003 and held Resident Permit No. H-0182/IOH-270/03 issued by the Department of Immigration on 22nd November, 2010. On 26th September, 2016, he was summoned to the Department of Immigration headquarters, where he was detained. His residence

permit was revoked and he was subsequently deported following a warrant that was signed by the Minister of Home Affairs. I delivered judgment in the Applicant's favour on 9th October, 2017.

At the hearing of this application, Learned Counsel for the Respondent relied on the Affidavit in Support. The gist of which the Respondent being dissatisfied with the judgment of this Court has lodged an appeal to the Court of Appeal. The Defendant is convinced of its high prospects of success, hence the application to stay the Court's judgment pending the appeal hearing.

I have earnestly considered this application together with the Affidavit filed in Support. The application raises the question whether in the circumstances of this case, a stay of proceedings and execution of judgment pending appeal should be granted.

It is a well settled principle of the law that the Court will not grant a stay of execution of judgment unless they 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 was 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 Respondent met the criteria set as outlined above in order for me to exercise my discretionary power to grant a stay of execution of the judgment in question?

I have come to the conclusion that the Respondent has not met the threshold for granting a stay. It is trite, in considering an application for a stay that I have a duty to examine the grounds of appeal, to determine whether an applicant has prospects of succeeding. This however by no means implies that I should delve into the merits of each ground of appeal. In my view, the grounds mostly attack findings of fact and the Respondent is unlikely to succeed on appeal.

In the case of **Tresphord Chali Vs Bwalya Emmanuel Kanyanta Ngandu** the Supreme Court held that:

'The court below held that the appellant had failed to prove his case. The court accordingly dismissed the action. The appellant wants to stay execution of that judgment. We are at a loss to what the purpose of staying execution of that judgment is. The appellant sought some declarations. He failed to obtain any. For example the appellant's claim for a declaration that Farm L/19962/M belongs to him failed. Does he, by the stay of execution that he seeks, want that claim to be deemed to have succeeded until the appeal is determined? If that is what he wants then this application is untenable because this is not the purpose for which an order for stay of execution of a judgment is granted. The same can be said about the other declarations that he sought. Therefore, we see no purpose for granting any stay of execution in this appeal. We dismiss the application, with costs to the respondent.'

The Respondent was unsuccessful before this Court and I find nothing to stay. If I did grant a stay, I would be changing the outcome of my decision and giving the Respondent undue advantage, which is not my intention.

Accordingly, I dismiss this application but make no order as to costs.

Dated this 29th day of January, 2018.


M. Mapani-Kawimbe
HIGH COURT JUDGE