

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

**2017/HP/0873**



**B E T W E E N :**

MIRRIAM MUMBA

**APPLICANT**

**AND**

DAVIE SILILO

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

OTHERS UNKNOWN

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

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

*For the Plaintiffs* : *Mr. Mr. A. Banda, Messrs LM Chambers*  
*For the Defendants* : *No Appearance*

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**R U L I N G**

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**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. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R 172*
4. *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 Applicant'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 on 31<sup>st</sup> May, 2017 the Applicant sued the Defendants for possession of Lot No. 13303/M, Chilanga, Lusaka. Judgment was delivered by this Court on 20<sup>th</sup> September, 2017, against the Plaintiff.

At the hearing, Learned Counsel for the Applicant relied on the Affidavit filed in Support. The gist of which is that the Applicant being dissatisfied with this Court's Judgment has lodged an appeal to the Court of Appeal. The Applicant believes that her appeal is meritorious and has high prospects of succeeding. The Applicant contends that the Court should have called evidence from either the Ministry of Lands or the Zambia Police to assist in proving her case. She argues that if the judgment is not stayed, the Respondents will proceed to alienate land, and their actions will render her appeal an academic exercise.

The Respondents filed an Affidavit in Opposition where they opposed the Applicant's proposition to shift the burden of proof onto the Court. They argued that it was for the Applicant and not the Court to prove her allegations against them, but she failed to do so. They also contended that the Applicant had a choice of joining the Ministry of Lands or Zambia Police to these proceedings, but opted not to. The Respondents state that Lot 13303/M was alienated in 2012 and the owners had title deeds. They prayed to Court to dismiss the application.

I have carefully examined the Affidavits filed herein. 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 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, JS<sup>1</sup>**, as she then was, restated 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 Limited<sup>2</sup>**, 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 Applicant 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 Applicant demonstrated that there are good and convincing reason(s) for granting a stay of execution of judgment? Has she shown in her application that her appeal has prospects of succeeding and if a stay is not granted, then her 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 Applicant has not advanced good reasons for a stay of execution of judgment. The Applicant'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. Moreover, in her Affidavit, the Applicant shifted the burden of proof

to the Court, which is quite extraordinary and offends the principles laid down in **Masauso Zulu v Avondale Housing Project Limited**<sup>3</sup>.

In that case the Supreme Court stated that:

**“where a Plaintiff makes any allegation, it is generally for him to prove those allegations. A Plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent’s case.”**

Thus, an adjudicator, has no role in aiding any party in proving their case. The burden of proof rests with the accuser.

The dispute between the parties 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**<sup>4</sup>, 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 that principle of law into account, I hold that the Applicant will not suffer irreparable damage if a stay is not granted. I find no reason to deny the Respondents their fruits of judgment.

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

Dated this 29<sup>th</sup> day of January 2018.

  
M. Mapani-Kawimbe  
**HIGH COURT JUDGE**