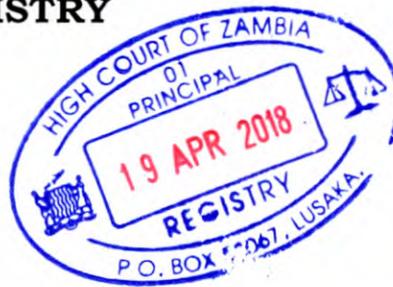


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

2017/HP/0378



BETWEEN:

MIRRIAM MWEMBELA

1ST APPLICANT

RUBY TICKLAY

2ND APPLICANT

ADAM AZIM TICKLAY

3RD APPLICANT

AND

AZIM TICKLAY

RESPONDENT

**Before the Honourable Mrs. Justice S. M Wanjelani this 19th day
of April, 2018 in Chambers.**

*For the Applicants: Mr. A. Kearns, Messrs Willa Mutofwe &
Associates*

*For the Respondent: Mrs. P.C. Hampunganya, with Ms. K. Tembo,
Messrs Milner and Paul Legal Practitioners*

RULING

Cases referred to:

- 1. Sonny Mulenga and Vismer Mulenga, Chainama Hotels and
Elephants Head Hotel Limited V Investrust Merchant Bank
(1999) ZR 101*
- 2. Zambia Revenue Authority V Post Newspaper, Appeal No. 36 of
2016*
- 3. Becker v Earl's Court Ltd(1911) 56 Sol Jo, 206, CA*

Legislation and other material referred to:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*
2. *Rules of the Supreme Court, 1999 Edition*
3. *Halsbury's Laws of England, Volume 17, 4th Edition*

The Applicants seek a Stay of Execution of the Ruling delivered on 6th February, 2018, dismissing their claims on preliminary points of law.

The application is supported by an Affidavit sworn by the 2nd Applicant, in which she avers that being dissatisfied with the Ruling, she has lodged an appeal in the Court of Appeal as per the exhibited "*Notice of Appeal*" and "*Memorandum of Appeal*" marked '**RT2**'. She contends that if the Judgment is not stayed the Respondent would proceed to levy judgment and seek costs to continue abusing the 1st Applicant, and further that the Appeal has merit and if the Stay of Execution is not granted, she would suffer irreparable injury.

The Respondent filed an Affidavit in Opposition in which he averred that his perusal of the Applicant's "*Notice of Appeal*" and the "*Memorandum of Appeal*" do not reveal that the Applicants have an arguable case on appeal. He further contends that there are no exceptional or compelling circumstances to warrant the Stay of Execution being granted.

The Deponent further deposed that the application arose from a claim over which the Court had no jurisdiction to entertain; that the

dismissal of the matter on a preliminary issue shows that it lacked merit and that the 2nd and 3rd Applicants are adults who do not need maintenance. The Respondent also filed skeleton arguments which I shall refer to where necessary.

The Applicant filed an Affidavit in Reply with supporting skeleton arguments alleging that some paragraphs of the Affidavit in Opposition contained extraneous matters, legal arguments and conclusion and thus the entire Affidavit in Opposition or the offending paragraphs should be expunged. It was contended that the Applicants had high prospects of success on appeal and that the Respondent will not be prejudiced if a Stay of Execution was granted.

I have carefully considered the Affidavits and the Skeleton arguments on record. I will start with the Applicant's assertion that the Respondent's Affidavit in Opposition should be expunged for being objectionable. A perusal of Paragraphs 8,9,11 and 13, of the Affidavit in Opposition, indeed reveals that they contain legal arguments, conclusions and prayers contrary to the provisions of **Order 5 Rule 15 of the High Court Rules**, which states:

“An Affidavit shall not contain extraneous matter by way of objection or prayer or legal argument or conclusion.”

I therefore find that there is merit in the Applicants' contention and I accordingly expung Paragraphs 8,9,11 and 13 from the record while the rest of the Affidavit in Opposition remains on the record.

In relation to the substantive application for a Stay of Execution, the Applicants contend that the prospects of succeeding on appeal are high and if the Stay is not granted, they will suffer irreparable injury. In the case of **Sonny Mulenga and Vismer Mulenga, Chainama Hotels and Elephants Head Hotel Limited V Investtrust Merchant Bank⁽¹⁾** , the Supreme Court stated, inter alia that:

“an appeal does not automatically operate as a stay of execution, and it is utterly pointless to ask for a stay solely because an appeal has been entered, more is required to be advanced to persuade the Court below that it is desirable and necessary and just to stay a judgment pending appeal --- In exercising its discretion whether to grant a stay or not, the Court is entitled to preview the prospects of success of the proposed appeal.”(underline for emphasis only).

Further **Order 59/13** of the **Rules of the Supreme Court** guides as follows:

“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..."

Taking into account the facts of case and the authorities cited herein, it's my considered view that the Grounds of Appeal exhibited by the Applicants do not disclose any real prospects of success. In addition, the Applicants have not illustrated what irreparable injury they will suffer that cannot be compensated for in damages, considering that the Ruling did not change the status quo of the Parties pending Appeal or grant any reliefs or remedies capable of being enforced by the Respondent. In the case of **Zambia Revenue Authority V Post Newspapers Limited⁽²⁾**, the Supreme Court espoused the following principles to be considered when determining whether or not to grant a Stay of Execution:

" where a judgment or a Ruling refuses judicial review or an injunction, there is nothing to stay because the judgment or Ruling does not award a remedy such as money or property which can be obtained by court execution, In short a failed judgment or Ruling cannot be stayed because it did not award anything- if there is nothing to execute about such a judgment or Ruling, then there is nothing to stay, only a judgment or Ruling that awards a remedy which can be enforced by Court can be stayed".

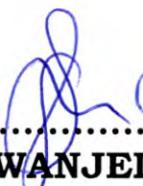
The only award from the contested Ruling was costs, which are subject to agreement and in default thereof, subject to taxation before execution can be levied. Further, according to *Halsbury's Laws* in Paragraph 455:

"As a rule, a stay of execution as to costs pending appeal is not granted when the Respondent's solicitor undertakes to repay the costs paid to him if the applicant's appeal is successful, and in the case of Becker v Earl's Court Ltd (1911) 56 Sol Jo, 206, CA, a refusal to give a personal undertaking was held to be no ground for granting a stay".

Furthermore costs are quantifiable and would not amount to irreparable injury incapable of be compensated for in monetary terms nor do they amount to special circumstances.

In the sum total, therefore, I find that the Applicants have not advanced good grounds or special circumstances to warrant this Court exercise its discretion to grant a Stay of Execution of the Ruling, pending Appeal. The application is consequently dismissed, with costs to the Respondent.

Delivered this 19th day of April, 2018.


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S.M. WANJELANI
HIGH COURT JUDGE