

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

2016/HP/1897

IN THE MATTER OF:



**THE PROPERTY COMPRISED IN A
DEED OF MORTGAGE RELATING
TO THE REMAINING EXTENT OF
SUBDIVISION NO.29 OF
SUBDIVISION D OF FARM NO.23a,
MAKENI, LUSAKA.**

AND

IN THE MATTER OF:

**ORDER 30 RULE 14 OF THE RULES
OF THE HIGH COURT CHAPTER 27
OF THE LAWS OF ZAMBIA**

AND

IN THE MATTER OF:

**AN APPLICATION FOR
ENLARGEMENT OF TIME WITHIN
WHICH TO EXERCISE THE
EQUITABLE RIGHT OF
REDEMPTION**

BETWEEN:

FAHEEMA FARMS LIMITED

1ST APPLICANT

FAHEEMA K. KHAN

2ND APPLICANT

AND

ZAMBIA NATIONAL COMMERCIAL BANK PLC

RESPONDENT

BEFORE THE HONOURABLE JUSTICE MRS. M. C. KOMBE

For the Applicants:

*Mr. C. Mhango - Messrs Ghanje
Mhango & Co*

For the Respondent:

*Mrs. K. Musana-In-House
Counsel*

R U L I N G

Cases referred to:

1. **Aristogerasimos Vangelatos and Another v. Metro Investments Limited - SCZ Ruling No.21 of 2013.**
2. **Zambia Seed Co Ltd v. Chartered International Pty Limited (1999) ZR 151.**
3. **Zambia Revenue Authority v. The Post Newspapers Limited- SCZ Judgment No. 18 of 2016.**
4. **Nyampala Safaris Zambia Limited, and Others v. Zambia Wildlife Authority, and Others SCZ/8/179/2003 (unreported).**

Legislation and other material referred to:

1. **The High Court Rules, Chapter 27 of the Laws of Zambia.**
2. **The Rules of the Supreme Court of England (RSC)-1999 Edition (White book).**

This is a ruling on the Respondent's Notice to raise Preliminary Issues on points of law. The application is made pursuant to Order 14A and Order 33 Rule 3 of the Rules of the Supreme Court of England, 1999 Edition.

The Respondent seeks the determination of the following questions:

1. *Whether the Applicant can make this application under Order 47 rule 1(1) of the Rules of the Supreme Court of England.*
2. *Whether the Court has jurisdiction to grant a Stay of Execution of a judgment which has already been executed.*

The affidavit in support of the application was deposed to by **ANGELA CHIKAMBA MWALULA**, the Litigation Head in the Legal Department of the Respondent.

She deposed that on 24th January, 2019 the Applicants served the Bank with Summons for Stay of Execution pending determination of an application to liquidate debt in monthly instalments.

That a perusal of the documents served revealed that the Applicants sought a stay of execution by way of writ of *feri facias* whereas the Respondent executed on the property in issue by way of writ of possession.

That as the Respondent had already executed the Judgment for which the Applicants sought the Order of Stay of Execution, the said execution could not be stayed. A copy of the Debit and Advice Note and seizure form from the Sheriff of Zambia was exhibited. That the application for stay of execution was irregularly before this Court.

At the hearing of the application, learned counsel for the Respondent Mrs. K. Musana relied on the Notice and the arguments in support.

The Respondent in its skeleton arguments referred the Court to Order 47 Rule 1(1) of the Rule of the Supreme Court of England upon which the application was premised.

It was submitted in this regard that this rule applied to execution by way of writ of *fifa* and not writ of possession. That in the case before Court, a writ of possession and not *fifa* was issued. That the Court did not have jurisdiction to stay the writ of possession under Order 47 rule 1(1).

It was also the Respondent's argument that there was nothing for the Court to stay as the writ of possession was already executed on 9th January, 2019 and the Respondent Bank was now in possession of the mortgaged property. That the application before Court was filed after the execution. She referred the Court to the case of **Aristogerasimos Vangelatos and Another v. Metro Investments Limited** ⁽¹⁾ where the Supreme Court held:

“We now move on to the Stay of Execution of the High Court Judgment. The decision by the learned single Judge on leave, led to discharge of the order of stay of execution and indeed his refusal to stay execution of the High Court Judgment, pending appeal. The question is whether we can stay execution of judgment now. The answer is in the negative. Execution of judgment was

done on 23rd April, 2012. That was about 5 months before this motion was filed. The Plaintiffs took possession of the stand in dispute on that date. As of now there is nothing to stay. So we refuse to grant the stay.”

In the verbal submissions, counsel for Respondent reiterated her arguments and referred the Court to Order 31 rule 12 of the High Court Rules that a mediation settlement order shall have the same force and effect for all purposes as a judgment, order or decision and be enforced in the like manner.

She also submitted that Order 31 rule 14 of the High Court Rules provided that no appeal shall apply against a registered settlement.

Counsel referred the Court to the case of **Zambia Seed Co Ltd v. Chartered International Pty Limited** ⁽²⁾ where it was held that by law, the only way to challenge a judgment by consent was to start another action. She submitted in this regard that the applications before Court not only sought to vary the Consent Order but in essence sought to challenge the same.

That if Courts were allowed to reopen the agreement, parties might as well continue to litigate their matters without considering *ex-curia* means of settlement.

In opposing the application, learned counsel for the Respondent Mr. G. Mhango relied on the skeleton arguments. In their response, the Applicants also referred the Court to Order 47 rule 1 (1) and submitted that they could make an application under that order at any time thereafter after the judgment or Order.

It was argued that there was a Consent Settlement Order dated 4th December, 2018 in which the Applicants were to pay K1, 600, 000.00 and consequent to that, there was a writ of possession. That as the Order states, an application under Order 47 could be made at the time of the Judgment or Order or at any time thereafter and the Order does not say "at any time thereafter but before execution." That the application could therefore be made at any time after judgment or order and execution of a judgment or order.

It was submitted that possession was defined as the act of having and controlling property. That this being land, the act of having and controlling property could be stopped or stayed pending determination of an issue.

Further that the Order made reference to special circumstances and that in casu, there were special circumstances.

That as per clause 2 of the Consent Settlement Order between the parties, it was agreed that the land in issue would be portioned and subdivided into two and the Applicants would sell one of the portions and the proceeds therefrom to pay the Respondent the amount of K1,600,000.00. That the Respondent however executed on the whole farm and not the portion as agreed. That this was another special circumstance entitling the Applicants under Order 47 (1) to be granted a stay as the Respondent should have executed only on a portion of the land and not the whole farm.

It was further argued that as per paragraphs 5, 6 and 7 of the affidavit of Faheema Khan, in pursuance of the agreement to portion the farm into two and the proceeds from the sale to be used to repay the loan, the Respondent went into a sale agreement with EL KING ELMASRY INVESTMENTS LTD behind the Applicants back and sold the whole farm. That it was proceeds from the sale that would have been paid to the Respondent to settle the loan. That the behaviour by the EL KING ELMASRY INVESTMENTS LTD and the Respondent especially that the Respondent knew of the sale agreement between the Applicants and EL KING ELMASRY INVESTMENTS LTD was a special circumstance warranting the grant of stay of execution to the Applicants.

That all in all, an application could be made to stay under order 47 rule (1) of the Rules of the Supreme Court of England and as much as execution was done, possession being a continuous act of having and controlling property and the property not having changed ownership and the property being land, a stay under Order 47 rule 1(1) was appropriate and would achieve the desired justice.

In his verbal submissions, Mr. Mhango submitted that the Applicants were not appealing but had applied for a stay of execution of judgment; that the Applicants were not challenging the consent so the issue of a fresh action did not arise.

He reiterated that the continuous process of possession could be stayed pending determination of the application to pay in instalments. That would result into justice.

In reply, counsel for the Respondent in relation to the argument that there was execution on the whole of the property as opposed to a portion and that that made it a special circumstance to stay the execution, submitted that perusal of consent settlement order showed that parties agreed to allow the Applicants to sell a portion of the property.

That in clause 3, the Applicants were to pay the proceeds of settlement by certain dates. That in clause 8 however, there was a default clause that should the Applicants default in any one payment, the Respondent would foreclose on the mortgaged property and not just a portion. That the Applicants had not shown that there was any sort of payment by those due dates.

It was further argued that there was no evidence of the alleged collusion between the buyer and the Respondent before the Court. That if the Applicants were firm on their allegation, they should have gone further to show how the said collusion was done, for instance, lack of advertisement.

She submitted that there were no special circumstances warranting the stay of execution. That what remained was that the parties agreed to terms and the Applicants failed to honour the terms. They could not therefore ask the Court to vary the terms of the consent order by applying for additional instalments and there was nothing to stay as the property had been sold.

She prayed that the application be granted.

Those were the submissions by the parties that I have considered.

On the first preliminary issue, the Respondent seeks the Court's determination on whether the Defendant can make this application under Order 47 rule 1(1) of the Rules of the Supreme Court of England.

Order 47 rule 1 of the White Book provides as follows:

“(1) Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution—

- (a) That there are special circumstances which render it inexpedient to enforce the judgment or order, or**
- (b) that the applicant is unable from any cause to pay the money, then, notwithstanding anything in rule 2 or 3, the Court may by order stay the execution of the judgment or order by writ of fieri facias either absolutely or for such period and subject to such conditions as the Court thinks fit.”**

It is clear from Order 47 rule 1 (1) that where judgment or an order is made for the payment of money and on an application by that person the Court is satisfied that there are special circumstances which render it inexpedient to enforce the judgment or order, or that the applicant is unable to pay the money, the court may by order stay the execution of the judgment or order by writ of *feri facias*.

The Respondent submits that on 24th January, 2019 the Applicants served the Bank with Summons for Stay of Execution pending determination of an application to liquidate debt in monthly instalments. That a perusal of the documents served revealed that the Applicant sought a stay of execution by way of writ of *fifa* whereas the Respondent executed on the property in issue by way of writ of possession.

The Respondent contends that this rule applies to execution by way of writ of *fifa* and not writ of possession. That in the case before Court, a writ of possession and not *fifa* was issued. That the Court did not have jurisdiction to stay the writ of possession under Order 47 rule 1(1).

The Applicants contention on the other hand is that an application can be made to stay under order 47 rule (1) of the Rules of the Supreme Court of England.

Order 47/1/1 on Stays of execution provides as follows:

“This rule confers express power on the Court to stay execution by writ of fi. fa. either absolutely or for such period and subject to such conditions as the Court thinks fit”.

It is clear from Order 47 that it confers power on the Court to stay execution by writ of *feri facias* and not writ of possession.

In the case before Court, the Respondent executed on the Applicants' property by way of writ of possession and not *feri facias*. In this regard, I find that the Applicants cannot apply to stay execution of writ of possession under this Order which expressly provides for stay of execution by writ of *feri facias*.

What this means is that the issues raised relating to special circumstances as provided for under Order 47 rule 1 are not applicable in this case. The Applicants proceeded under a wrong provision of the law. Therefore, there is merit in the first preliminary issue and so I find.

On the second preliminary issue, the Respondent seeks a determination whether the Court has jurisdiction to grant a stay of execution of a judgment which has already been executed.

The Respondent argues in this regard that they had already executed the Judgment for which the Applicants sought the Order of stay of execution on 9th January, 2019 and the Respondent Bank was now in possession of the mortgaged property. That the application for the stay of execution was irregularly before this Court.

The Applicants' contention is that they could make an application under Order 47 at any time thereafter after the judgment or Order.

Furthermore, that there were special circumstances which warranted an Order to stay execution.

A consideration of special circumstances is provided for under Order 47 rule 1 of the White Book. However, I have already stated that the Applicants have proceeded under the wrong Order as Order 47 is not applicable on the facts of this case.

Getting back to the second question, whether this Court has jurisdiction to stay execution of a judgment which has already been stayed, the starting point is determining the provision that gives this Court the power to stay execution.

From my own reading of the rules, there is no specific provision under our rules to stay execution of a writ of possession. Under Order 45/3/5 of the White Book, the court cannot grant a stay of writ of possession against a trespasser and a stay against a tenant or service occupier would normally be limited to between four and six weeks.

That said, the Court has inherent powers under Order 3 rule 2 to make any interlocutory order which it considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not.

In the present case, the Applicants have moved this Court to grant a stay of execution pending an application to pay judgment debt in instalments.

In terms of the sequence of events, the Consent Settlement Order was signed on 4th December, 2018. According to this settlement order, the Applicants were at liberty to sell a portion in extent of five (5) acres of the mortgaged property and apply the monies towards payment of the settlement sum. Under clause 3, the Applicants were to pay the sum of K800, 000.00 on or before 29th December, 2018 and the balance sum of K800, 000.00 on or before 31st January, 2019.

Clause 8 of the settlement order, provided that should the Applicants default on the payment of any one instalment or any part thereof; the debt would become due and the 2nd Applicant would stand debarred and foreclosed of and from all the right title interest and equity of redemption in the mortgaged property; and the Respondent would be at liberty to exercise its rights to repossess and sell the mortgaged property.

The Respondent executed on the whole farm and not the portion as agreed because the Applicants defaulted in the payments. The Respondent consequently filed into Court the writ of possession on 8th

January, 2019 and on 9th January, 2019, the Sheriffs proceeded and executed.

On 17th January, 2019, the Applicants filed into Court an application for stay of execution of the writ of possession pending determination of an application to liquidate the debt in monthly instalments and served the Respondent on 24th January, 2019. By that time execution had already been done.

Given the foregoing facts, can execution be stayed? In the case of *Aristogerasimos Vangelatos and Another v Metro Investments Limited* referred to by the Respondent the Supreme Court held:

“We now move on to the Stay of Execution of the High Court Judgment. The decision by the learned single Judge on leave, led to discharge of the order of stay of Execution and indeed his refusal to stay execution of the High Court Judgment, pending appeal. The question is whether we can stay execution of judgment now. The answer is in the negative. Execution of judgment was done on 23rd April 2012. That was about 5 months before this motion was filed. The Plaintiffs took possession of the stand in dispute on that date. As of now there is nothing to stay. So we refuse to grant the stay.”

It is abundantly clear from the above case authority that there is nothing to stay where possession has already been taken.

Although the facts in the case of **Zambia Revenue Authority v. The Post Newspapers Limited** ⁽³⁾ are different from the present case and also the above cited case, the Supreme Court arrived at the same conclusion in relation to stay of execution of judgments. It stated that:

“In short a failed judgment or ruling cannot be stayed because it did not award anything. If there is nothing to execute about a judgment, then there is nothing to stay about it.”

In my view, this observation by the Supreme Court re-emphasised the principle that if there is nothing to stay, the court cannot grant a stay of execution.

In the present case, there is evidence that by the time the Applicants made the application to stay execution of the settlement order, the Respondent had already issued a writ of possession. So while counsel for the Applicants submitted that possession being a continuous act of having and controlling property meant that execution could be stayed, at the hearing of the application Mrs. Musana informed the Court that following the execution, the property in question had since been sold.

Moreover, it is trite law that there must be good and convincing reasons in order for the Court to order a stay of execution as espoused in the case of **Nyampala Safaris Zambia Limited, and Others v. Zambia Wildlife Authority, and Others**⁽⁴⁾ where the following observations were made by the Supreme Court:

“A stay of execution is granted on good and convincing reasons. The rationale of this position is clear. Which is that a successful litigant should not be deprived of the fruits of litigation as a matter of course. The application must therefore clearly demonstrate the basis of which a stay should be granted.”

The parties agreed and consented to terms of the consent settlement order and upon default of the Applicants, the Respondent proceeded to execute as agreed in the consent settlement order. I am of the view that the Respondent should not be deprived of the fruits of litigation as a matter of course.

For the reasons I have highlighted above, I find merit in the second preliminary issue.

The net result of my findings is that the Applicants application for stay of execution of the Consent Settlement Order pending an application to liquidate debt in instalments is irregularly before this Court. It is

accordingly dismissed. Considering the circumstances of the case, I
make no orders as to costs.

DELIVERED AT LUSAKA this 29TH DAY OF SEPTEMBER, 2020



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M.C. KOMBE
JUDGE