IN THE HIGH COURT FOR ZAMBIA **2016/HPC/0118**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

INDO ZAMBIA BANK LIMITED **APPLICANT**

AND

MARTHA MUSHIPE
T/A MUSHIPE AND ASSOCIATES **RESPONDENT**
(Sued in her capacity as the Borrower, Mortgagor and Personal Guarantor)

CORAM: Hon. Lady Justice Dr. W.S. Mwenda in Chambers at Lusaka on the 7th day of February, 2020.

For the Applicant: *Mr. M. Ndhlovu of Messrs. MRN Legal Practitioners*

For the Respondent: *In Person*

RULING

Cases referred to:

1. *Michael Chilufya Sata v. Chanda Chiimba III, Zambia National Broadcasting Corporation, Muvi TV Limited and TV International Limited (2010/HP/1282).*
2. *Mothercare Limited v. Robson Books Limited (1979) F.S.R 466 at 474.*
3. *Ruth Kumbi v. Robinson Kaleb Zulu, S.C.Z Judgment No. 19 of 2009.*
4. *Nyampala Safaris (Z) Limited and 4 Others v. Zambia Wildlife Authority and 6 Others (2004) Z.R 49 (S.C).*
5. *Stanley Mwambazi v. Morrester Farms (1977) Z.R. 108.*
6. *Water Wells Limited v. Wilson Samuel Jackson (1984) Z.R. 98.*
7. *Covindbhai Patel and Vallabhai Patel v. Monile Holding Company Limited (1993) S.J. 19 (S.C.).*
8. *Gideon Mundanda v. Timothy Mulwani and Agricultural Finance Company Limited and S.S.S. Mwiinga (1987) Z.R. 29.*
9. *Zambia Revenue Authority v. The Post Newspaper, SCZ Judgment No. 18 of 2016.*

10. *Sonny Paul Mulenga and Vismer Mulenga (Both personally and practicing as SP Mulenga International) v. Chainama Hotels and Elephant's Head Hotel Limited and Investrust Merchant Bank Limited (1999) Z.R. 101.*
11. *Gaedonic Automotives Limited and Another v. Citizen Economic Empowerment Commission, S.C.Z Judgment No. 39 of 2014.*

Legislation referred to:

1. *Order 3, rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia (the High Court Rules).*
2. *Order 47, rule 5 of the High Court Rules.*
3. *Order 10, rule 5 of the Court of Appeal Rules, S. I. No. 65 of 2016 (the Court of Appeal Rules).*
4. *Order 59, rule 13 of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book).*
5. *Order 10, rule 4 (1) of the Court of Appeal Rules.*

Publication referred to:

Bryan A. Garner (Ed), Black's Law Dictionary, 8th Edition [Thomson Reuters, 2004].

This is the Respondent's application for stay of execution of Judgment in Default granted on 6th September, 2016 and Ruling dated 30th November, 2018, pending appeal (hereinafter referred to as "the Application"). The Application was made pursuant to Order 47, rule 5 of the High Court Rules, Chapter 27 of the Laws of Zambia (hereinafter referred to as "the High Court Rules"), and Order 10, rule 5 of the Court of Appeal Rules, Statutory Instrument No. 65 of 2016 (hereinafter called "the Court of Appeal Rules").

The Application was filed into court on 7th December, 2018 and is accompanied by an affidavit (hereinafter referred to as "the Affidavit in Support"); and a List of Authorities and Skeleton Arguments of even date.

The Affidavit in Support was sworn by Martha Mushipe, the Respondent herein and it was her testimony that on 16th March, 2016, the Applicant filed an Originating Summons accompanied by an Affidavit, against the Respondent, and that the Respondent filed a conditional memorandum of appearance, on 29th March, 2016; pending the hearing of an application for further and better particulars.

It was the deponent's further testimony that, on 10th November, 2016, the Court ordered the dismissal of the applications which were pending before court, namely; an application for stay of execution and to set aside default judgment; and application for extension of time within which to file an affidavit in opposition. That, the Court dismissed the said applications on the basis that the K500.00 hearing fee that the Respondent was ordered to be paid on 6th October, 2016 was not paid into court before the next hearing date (10th November, 2016); and further refused to entertain an application for an adjournment, on the basis that the sick leave note exhibited was not authentic as the date stamp was illegible.

The deponent averred that on 11th November, 2016, the Respondent filed an application to review the resultant ruling of this Court at the 10th November, 2016 hearing; which application has since been dismissed.

It was the deponent's testimony that she has since lodged and appeal with the Court of Appeal and as such, the said appeal will be rendered nugatory if this Application in not granted. The deponent, to this end,

produced exhibit "MM1/2", being copies of the Notice of Appeal and Memorandum of Appeal.

In the Skeleton Arguments and List of Authorities augmenting the Affidavit in Support, the Respondent submitted that an appeal does not operate as a stay and further, that if the judgment in default in executed, the appeal would not be heard on the merits if the stay being sought in this Application is not granted. To buttress this assertion, the Respondent cited Orders 3, rule 2 and 47, rule 5 of the High Court Rules and Order 10, rule 5 of the Court of Appeal Rules. In a similar vein, the Respondent also referred the Court to the case of *Michael Chilufya Sata v. Chanda Chiimba III, Zambia National Broadcasting Corporation, Muvi TV Limited and TV International Limited*[1].

Citing the case of *Mothercare Limited v. Robson Books Limited*[2], the Respondent submitted that all that had to be seen was whether the plaintiff had prospects of success which, in substance and reality existed. That, odds against success no longer defeated the plaintiff unless they were so long that the plaintiff had no expectation of success but only a hope.

The Respondent also referred the Court to the case of *Ruth Kumbi v. Robinson Kaleb Zulu*[3], to support her contention that a stay of execution is granted in order to maintain the *status quo* of the parties, pending the application before the court.

Referring to the case of *Sonny Paul Mulenga and Vismer Mulenga (Both personally and practicing as SP Mulenga International) v.*

Chainama Hotels and Elephant's Head Hotel Limited and Investrust Merchant Bank Limited[4], the Respondent submitted that a successful party should not be denied immediate enjoyment of a judgment unless there are good and sufficient grounds. That, the court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant such stay, and will only grant such stay if there are special circumstances. In this regard, the Respondent submitted that an example of such special circumstances is that an appeal would be rendered nugatory if the stay is not granted.

The Respondent, thus, submitted that this is a proper case in which this Court can exercise its inherent jurisdiction and as such, serve the interest of justice by staying execution of the Default Judgment and the subsequent Ruling.

The Application is opposed and to this end, the Applicant filed into court, an affidavit (hereinafter referred to as "the Affidavit in Opposition"), on 29th January, 2019, and the same was sworn by one, Kafwimbi Nachalwe Lungu, the Assistant Branch Manager in the Applicant's Lusaka Branch.

It was the deponent's testimony that the Respondent has not elicited any facts in her Affidavit in Support, to show that there are good and compelling reasons for this Court to extend the order staying execution pending determination of the Appeal that she has filed.

The deponent deposed that the Respondent had, prior to the ruling of this Court which she has appealed against, another order staying

execution of judgment from 25th November, 2016, much to the prejudice of the Applicant, which is currently the judgment creditor, as the said Respondent has not bothered to pay any portion of the judgment debt which she does not dispute.

Finally, the deponent deposed that they had been advised by Counsel for the Applicant that the Respondent's intended appeal against the ruling of 30th November, 2018 lacks merit and has no prospects of success.

The Affidavit in opposition, is augmented by Skeleton Arguments dated 29th January, 2019, the essence of which is that it is a settled principle of law that a court will not grant a stay of execution of judgment unless there are good and compelling reasons for doing so; and that the Respondent has failed to demonstrate that she is entitled to such order of stay, at the expense of denying the Applicant the fruits of its judgment. In this regard, Counsel for the Applicant referred the Court to the case of *Nyampala Safaris (Z) Limited and 4 Others v. Zambia Wildlife Authority and 6 Others*[4] and Order 59, rule 13 of the Rules of the Supreme Court of England and Wales, 1999 Edition (hereinafter referred to as "the White Book").

Counsel for the Applicant submitted that the Respondent has not, in her Affidavit in Support and Skeleton Arguments, demonstrated that her appeal has any prospects of success. That, the gist of the Respondent's arguments is that the stay is required for maintaining the *status quo* as an appeal does not automatically operate as a stay of execution and that the said arguments do no go so far as to justify the continuation of an order staying execution pending appeal.

Counsel for the Applicant contended that at the core of the ruling being appealed against is whether there were conditions precedent for review of the court order that the Respondent sought to have reviewed. That the said ruling elaborately outlined the inadequacies of the Respondent's application to review; and that the Respondent's Application herein has given no indication, through the Respondent's Skeleton Arguments, that the Respondent's appeal has any prospects for the appellate court to find that the criterion for review of judgments was misapplied by this Court.

The Respondent responded to the Affidavit in Opposition, and in this respect, filed into court, on 18th February, 2019, an affidavit (hereinafter referred to as "the Affidavit in Reply"), also sworn by the Respondent and it was her testimony that the judgment in default was entered against her on 6th September, 2016, which she has appealed against as she was not given an opportunity to file a defence and to be heard.

The deponent further averred that the facility obtained was an overdraft facility and not a loan and therefore, subject to reducing balances upon each deposit being made.

The Respondent deposed that it has come to her attention that the Applicant has since changed account numbers thrice and as such, there is no proper paper trail with regard to the deposits that were being made and are being made. That, the said different account numbers which seem to have been combined, namely, 0334693490019, 0010030700012 and 0012030001557, have

further compounded the banking irregularities, thereby confusing the Respondent who is not aware as to which account the deposits that she has been making are being credited to.

It was the Respondent's testimony that the value of the property was over K3,500,000.00 at the time of the overdraft and that the said property has been improved greatly and its value enhanced to well over K7,700,000.00 as opposed to the Applicant's claim of K255,993.89, which has reduced considerably by further deposits whose statements can only be produced by the Applicant. To support her assertion, the Respondent produced exhibit "MM5-30", being copies of some of the deposit slips. That, she is unable to exhibit the valuation report of the property, which is in the custody of the Applicant and a copy of which the Respondent seems to have misplaced, together with the deposit slips for account 0334693490019.

That, she has been depositing monies into the account 0012030001557 whilst waiting for reconciliation statements with the other accounts whose numbers the Applicant changed and as such, information can only be provided by the Applicant and therefore, it is a falsehood that the Respondent has not bothered to pay. That, the Respondent has redeemed her indebtedness and has paid more than what was outstanding and will demand for any excess payments to be paid back to her.

The Respondent also averred that she requested for the latest statements from the three accounts which have not been availed to

her and which can only be produced and made available by the Applicant.

It was the Respondent's testimony that she has not only appealed against the ruling of 30th November, 2018, but against the default judgment of 6th September, 2016 and as such, she has a defence on the merits, which she produced as exhibit "MM33", being an Affidavit in Opposition. She thus, averred that in the absence of a stay of execution of the ruling and the judgment in default, there is a substantial risk of her homestead being sold and the Respondent being rendered destitute pending the hearing and determination of appeal.

The Affidavit in Reply is augmented by Skeleton Arguments in which the Respondent has submitted, in response to the Applicant's argument that the Respondent has not elicited any facts in her Affidavit to show compelling reasons for this Court to extend the order staying execution; that the ruling of the Court was based on a default judgment and the Court did not take into account the fact that the Respondent had a defence, which she was not allowed to file and as such the case was not heard and determined on the merits. In this regard, the Respondent referred the Court to the case of *Stanley Mwambazi v. Morrester*[5], to support her argument that the courts should allow triable issues to go to trial despite the default of the parties.

The Respondent also referred the Court to the cases of *Water Wells Limited v. Wilson Samuel Jackson*[6] and *Covindbhai Patel and Vallabhai Patel v. Monile Holding Company Limited*[7], in fortifying her

contention that in an application to set aside a default judgment, a defence on the merits is important to consider, and that a default judgment should be set aside if triable issues are disclosed.

The Respondent also submitted that she has alleged banking malpractices and as such the Applicant should not be allowed to unjustly enrich itself.

Further, the Respondent contended that she has since appealed to the Court of Appeal and the said appeal is yet to be determined by the Court of Appeal and as such, not confirming the stay of execution will render the said appeal nugatory.

Citing the case of *Gideon Mundanda v. Timothy Mulwani and Agricultural Finance Company Limited and S.S.S. Mwiinga*[8], the Respondent submitted that the Applicant may sell the property of the Respondent and that since land is the subject matter in this action, damages would not sufficiently remedy the loss of an interest in land.

Referring to the case of *Nyampala Safaris (Z) Limited and 4 Others v. Zambia Wildlife Authority and 6 Others*[4], earlier cited by Counsel for the Applicant, the Respondent contended that the Applicant is misleading the Court as the said case espouses the principles in judicial review cases.

It was the further contention of the Respondent that the ruling of this Court, delivered on 30th November, 2018, was based on alleged procedural technicalities and not on the basis of the case being heard on the merits. That, this matter was disposed of on the basis of a

default judgment without allowing the Respondent to file her defence/Affidavit in Opposition. She contended, in this regard, that the value of the mortgaged property is far in excess of the amount being claimed.

With respect to the Applicant's arguments as regards review of court orders, the Respondent submitted that the same were misconceived as the parties cannot, at this stage, delve into the legal arguments pertaining to the law on review.

Finally, the Respondent contended that she has not only appealed against the ruling of 30th November, 2018, but also against the default judgment dated 6th September, 2016, from which the ruling emanates. In this regard, the Respondent submitted that the law is very clear as a default judgment can be set aside and that at this stage, it is not necessary to delve into the substantive appeal. With this, the Respondent maintained that she has demonstrated to this Court, the basis on which the stay should be granted and that it would defeat the whole purpose of appealing to the Court of Appeal if the Applicant was allowed to go ahead with the execution.

I have carefully considered the parties' Affidavits, Skeleton Arguments and the authorities cited.

It is not in dispute that this matter was commenced by way of Originating Summons, following which the Respondent entered conditional appearance with the view to filing an application for further and better particulars. The said application for further and

better particulars was dismissed for lacking merit, by a ruling of this Court, date 15th August, 2016.

As the record shows, on 5th September, 2016, Counsel for the Applicant conducted a search on the court record, to establish whether or not the Affidavit in Opposition to the Originating Summons, List of authorities and Skeleton Arguments had been file. By an affidavit dated 6th September, 2016, the Applicant deposed that a search had been conducted on the court record, which revealed that the Respondent had not filed the Affidavit in Opposition and the Skeleton Arguments as ordered by this Court.

On 7th September, 2016, Judgment in Default of Defence was entered, the Respondent's application for further and better particulars having been dismissed and the Respondent having failed to file her Affidavit in Opposition.

The Respondent then applied for an order to stay execution of the default judgment and also applied to set the same aside. When the matter came up for hearing on 6th October, 2016, it was established that the Respondent had not served documents pertaining to the said applications, on the Applicant, thereby causing the matter to be adjourned. The Respondent, at the said hearing, was condemned to pay a hearing fee of K500.00, before 10th November, 2016. When the matter came up for hearing on 10th November, 2016, the hearing fee of K500.00 had not been settled by the Respondent who was also not in attendance at the said hearing, but sent one Ms. M. Mulenje who stated that she had no instructions, but was only present at the hearing, strictly to request for an adjournment as the Respondent

was admitted to hospital. Consequently, the Court dismissed the Respondent's application for stay of execution of default judgment.

On 11th November, 2016, the Respondent filed two applications, namely:

(i) for an order of stay of execution of the default judgment pending the hearing of the application to review this Court's ruling of 10th November, 2016; and

(ii) an application to review the ruling dated 10th November, 2016.

An *ex parte* order to stay execution of the default judgment pending the hearing of the application to review the ruling, was thus, granted on 21st November, 2016.

The *inter parte* hearing of the application to stay execution of default judgment and the application for review of this Court's ruling of 10th November, 2016 was held on 14th December, 2017, following numerous adjournments at the instances of the parties. The said hearing culminated into the ruling of 30th November, 2018, which now, is the subject of contention and the ruling sought to be appealed against.

From the record, it is clear that the said ruling of 30th November, 2018, expressly granted leave to appeal.

The Respondent, in the Application currently before this Court, has contended that she has since lodged an appeal before the Court of Appeal and that the same will be rendered nugatory if the Application

herein is not granted. That, she has satisfied the special circumstances considered in granting a stay of execution by demonstrating that her appeal would be rendered nugatory if the stay is not granted.

In opposition, the Applicant has argued that the Respondent ought to have demonstrated that her appeal has prospects of success, and that she has failed to discharge this requirement.

From the foregoing, the issue for determination, in my view, is whether this a fit case in which to grant an order to stay execution of the default judgment pending appeal of this Court's ruling of 30th November, 2018.

Both parties have alluded to the fact that an appeal does not operate as a stay of execution, that a stay of execution pending appeal should only be granted upon the applicant demonstrating prospects of the appeal succeeding. Indeed, these principles have clearly been espoused by our Supreme Court in cases such as *Zambia Revenue Authority v. The Post Newspaper*[9] and *Sonny Paul Mulenga & Vismer Mulenga (Both personally & practising as SP Mulenga International) and Chainama Hotels Limited and Elephants Head Hotel Limited v. Investrust Merchant Bank Limited*[10]. It was thus held, in the latter case, that:

> *"An appeal does not automatically operate as a stay of execution and it is pointless to ask for a stay solely because an appeal has been entered. More is required to be advanced to persuade the court below or this court that it is desirable, necessary and just to stay a judgment pending appeal. The successful party should be denied*

immediate enjoyment of a judgment only on good and sufficient grounds."

Indeed, it is clear from these authorities that more has to be shown by an applicant, for the Court to be inclined to grant an order for stay of execution. However, the situation in *casu* is not typically fitted in the conditions set in the cases above and for reasons that will become apparent, immediately below, I have slightly departed from the same.

I have taken time to recount the events as they appear on the record, so as to give the backdrop leading to the present stage of this matter. As earlier stated, this Court in its ruling of 30th November, 2018, expressly granted leave to appeal against the said ruling as fortified by Order 10, rule 4 (1) of the Court of Appeal Rules, which states as follows:

"The High Court or a quasi-judicial body may grant or refuse leave to appeal to the Court without formal application at the time when judgment is given, and in that event the judgment shall record that leave has been granted or refused accordingly."

Further, Order 3, rule 2 of the High Court Rules provides as follows:

"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."

From the foregoing provisions, it is my considered view that this Court is clothed with the necessary jurisdiction and discretion to make the order as expressed in the ruling of 30th November, 2018, namely, that leave to appeal was granted.

In my opinion, this in itself is sufficient for this Court to grant the order for stay of execution of the ruling, pending appeal, as refusing to grant the same after expressly granting leave to appeal would simply defy all logic and indeed, render the Respondent's appeal before the Court of Appeal nugatory. Further, I am of the view that it is of utmost expediency to extend this order of stay to the default judgment as it is the same judgment in respect of which the order of review was sought, denied and appealed against.

If a court is to move on its own to grant leave to appeal as empowered by Order 10, rule 4 (1) of the Court of Appeal Rules and Order 3, rule 2 of the High Court Rules, it is only rational that the same court should be willing to grant a stay pending appeal otherwise, the very essence of the Court granting leave to appeal, at its discretion as per the law above, would be devoid of any sense if it chooses to refuse a stay pending the appeal whose leave it has granted.

The foregoing, notwithstanding, and without engaging in an exercise that might amount to revisiting the substance of the ruling of this Court, dated 10th November, 2016, wherein this Court dismissed the Respondent's applications for stay of execution and setting aside of the default judgment, owing to the Respondent's failure to pay the hearing fee of K500.00; I find it imperative to state the following and set the record straight for the parties.

After the Respondent's applications were dismissed due to the Respondent's failure to pay the hearing fee of K500.00, the Respondent went on to apply for review of the court order dismissing

the two applications. However, it is imperative for this Court to guide the parties as to the effect of a dismissal of a matter or application before it is heard on the merits.

To begin with, the learned authors of Black's Law Dictionary define dismissal as follows:

> *"Termination of an action or claim without further hearing, esp. before the trial of the issues involved."*

Particularly, regarding dismissals based on a party's failure to comply with an order of court, the same have been dubbed 'involuntary dismissals', and have been defined as follows, by the learned authors of Black's Law Dictionary:

> *"A dismissal of a lawsuit because the plaintiff failed to prosecute or failed to comply with a procedural rule or court order."*

The above are self-explanatory and need no further elaboration. In addition, the Supreme Court stated the following, in the case of *Gaedonic Automotives Limited and Another v. Citizen Economic Empowerment Commission*[11], regarding the effect of a dismissal of court process and subsequent actions:

> *"We have seriously considered this appeal together with the grounds of appeal advanced and the arguments in the respective Heads of Argument and the authorities cited... It is our considered view that this appeal raises one major question. This is whether the Plaintiff whose case was dismissed for being inactive for 60 days under Order 53, rule 12 of the High Court (Amendment) Rules, 1999, can commence a fresh action... The view that we take of this Appeal is that the Plaintiff can commence a fresh action after dismissal of the earlier action... The simple reason is that the matter was not adjudicated upon or determined on its merits, as the parties were not heard... Our understanding of dismissal under*

> *the 60 days Rule is that it means nothing else could be done under that cause. And hence, the reason why the Respondent had to commence a fresh action... We do not, therefore, agree that the second actin was an abuse of court process, as the first action was dismissed before it was heard or adjudicated upon."*

Although the authority above is not dealing with an application to set aside judgment in default or an application for stay of execution, the principle espoused therein can be extended to this matter.

It follows, therefore, that since the Respondent's applications leading to the ruling of 10th November, 2016 were dismissed, nothing more could be done under the applications, save for the Respondents to renew or make fresh applications; or to appeal against the ruling; and the endeavour by the Respondent to challenge the said dismissal or revive the applications by seeking a review was not the appropriate procedure. The reasons the same was not appropriate was elaborately discussed by this Court in the ruling of 30th November, 2018, and I will not delve into re-opening the merits of that application. It is settled.

Despite the manner in which the Respondent sought to challenge the dismissal of its applications by this Court's order of 10th November, 2016, this Court, in what it deemed as the interest of justice and still giving the Respondent the benefit of doubt, granted leave to appeal in the ruling of 30th November, 2018.

In view of the foregoing, the Application herein is granted and the *ex parte* order for stay of execution of default judgment and ruling of 30th November, 2018, is hereby confirmed, pending the hearing and

determination of the Respondent's appeal since lodged in the Court of Appeal.

Costs of this Application are awarded to the Respondent, to be agreed by the parties or taxed in default thereof.

Leave to appeal is denied.

Dated at Lusaka the 7th day of February, 2020.

W.S. MWENDA (Dr)
HIGH COURT JUDGE