

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

2017/HP/1139

BETWEEN:



JASIEL PHIRI

PLAINTIFF

AND

FREDRICK WILLIAM SINKAMBA

1st DEFENDANT

THE ATTORNEY GENERAL

2nd DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 21st
DAY OF AUGUST, 2020**

For the Plaintiff : In person

For the 1st Defendant : In person

For the 2nd Defendant : No appearance

R U L I N G

CASES REFERRED TO:

1. **Paul Mulenga & Vismer Mulenga** (both personally & practising as SP Mulenga International) **and Chainama Hotels Limited and Elephants Head Hotel Limited and Investrust Merchant Bank Limited SCZ No 15 of 1999**
2. **Watson Nkandu Bowa v Fred Mubiana and Zesco SCZ No 11 of 2012**

LEGISLATION REFERRED TO:

1. **The High Court Rules, Chapter 27 of the Laws of Zambia**

This is a ruling on an application filed by the plaintiff on 25th February, 2020, for an order to stay execution of the judgment pending determination of the appeal. The application was made pursuant to Order 37 Rule 10 of the High Court Rules, Chapter 27 of the Laws of Zambia.

The gist of the affidavit filed in support of the application, which is deposed to by the plaintiff, is that he has appealed against the judgment of the court that was delivered by this court on 29th November, 2019, as shown on exhibit 'JP1', the notice of appeal and memorandum of appeal. The plaintiff further avers that the intended appeal has prospects of success, and that if the judgment is not stayed, the appeal will be rendered nugatory.

He also states that the 1st defendant has commenced clearance of the property, subject of these proceedings, and appears set to start construction.

On 26th March, 2020, the 1st defendant filed an affidavit in opposition to the application. The said affidavit in opposition, which is deposed to by Frederick William Sinkamba, a representative of the 1st defendant states that the plaintiff, while having filed a notice of appeal and memorandum of appeal in the Court of Appeal on 31st December, 2019, had by 17th March, 2020, not filed the record of appeal and heads of arguments within the required sixty (60) days. This is evidenced by the search forms exhibited as 'FWS1' and 'FWS2' to the affidavit.

Further, that even on 26th March, 2020 when the 1st defendant conducted a search at the Court of Appeal, it was discovered that by that date, the appeal had not been lodged in the Court of Appeal, and neither had the plaintiff applied for extension of time to do so. The search forms reflecting this position are exhibited as 'FWS3' and 'FWS4' to the affidavit.

The deponent contends that the failure by the plaintiff to lodge the appeal within sixty (60) days as required, entails that he does not wish to prosecute the appeal. Therefore, the stay of execution should not be granted, as it will prejudice the 1st defendant. On 2nd June, 2020, the 1st defendant filed a further affidavit in opposition.

That affidavit also sworn by Frederick William Sinkamba states that the plaintiff was out of time in lodging the appeal before the Court of Appeal. Consequently, the Court of Appeal dismissed the appeal for want of prosecution. Exhibited as 'FWS1' to that affidavit, is the order dismissing the appeal for want of prosecution.

The plaintiff on 16th June, 2020 filed an affidavit in reply, which is sworn by himself. He deposes therein that the sixty (60) day period for filing of the record of appeal elapsed on 1st March, 2020. However, his advocates assured him that they would apply for an order extending time, as the record of proceedings of the High Court had not been obtained. However, to the plaintiff's dismay, he discovered that his advocates had not applied for extension of time to lodge the appeal, when he was served the order dismissing the appeal.

He states that he is taking steps to have the appeal restored, and he has engaged other Counsel to do so. The plaintiff also avers that the appeal has prospects of success, and that granting the stay of execution will not result in any prejudice to the 1st defendant, as the property in issue is real property, which will not be damaged.

I have considered the application. It was made pursuant to Order 37 Rule 10 of the High Court Rules, Chapter 27 of the Laws of Zambia. However, there is no such provision in the High Court Rules, but Order 36 Rule 10 of the said High Court Rules provides that;

“Except as provided for under rule 9, the Court or Judge may, on sufficient grounds, order stay of execution of judgment”.

With regard to stays of execution, the general principle is that a successful litigant should not be denied the enjoyment of the fruits of a judgment, except on good and sufficient grounds. In the case of ***Sonny Paul Mulenga & Vismer Mulenga (both personally & practising as SP Mulenga International) and Chainama Hotels Limited and Elephants Head Hotel Limited and Investrust Merchant Bank Limited SCZ No 15 of 1999*** it was held that;

“In terms of our rules of court, 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 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”.

Therefore, the question that arises is whether sufficient grounds have been demonstrated warranting the grant of the application in this matter? From a plethora of authorities, on the subject, sufficient grounds have been held to exist where the prospects of success of the appeal are high, and if a stay of execution is not granted, the appeal will be rendered nugatory. Further, a stay of execution will be granted where if execution is levied, the applicant will suffer economic ruin which cannot be atoned for in damages, if they succeed on appeal.

In this regard, in the case of ***Watson Nkandu Bowa v Fred Mubiana and Zesco*** ⁽²⁾ it was stated that the following two factors must exist in order for a stay of execution pending appeal to be granted, namely that;

- 1. That there are prospects of the appeal succeeding; and*
- 2. That irreparable damage will be occasioned if a stay is not granted, and the appellants’ appeal succeeds.*

In this matter, it has been seen that while the plaintiff who is dissatisfied with the judgment filed a notice of appeal and a memorandum of appeal, he did not file the record of appeal within the sixty (60) days of filing the notice of appeal, as provided in Order X Rule 6 of the Court of Appeal Rules, Statutory Instrument No 65 of 2016. As a consequence, the appeal was dismissed for want of prosecution on 26th May, 2020.

In the affidavit in reply, the plaintiff states that he is in the process of having the appeal restored. However, this has not been done, and therefore, the appeal having been dismissed for want of prosecution, there is nothing to stay. I accordingly find that insufficient grounds have been advanced warranting the grant of a stay of execution. I thus dismiss the application for want of merit, with costs to the 1st defendant, to be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THIS 21st DAY OF AUGUST, 2020

 S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE