

**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**2017/HPC/0324**

**BETWEEN:**

**KHALID ESMAIL**

**AND**

**JAFFER JAMES MWANZA**



**PLAINTIFF**

**DEFENDANT**

***CORAM: Hon. Lady Justice Dr. W.S. Mwenda in Chambers at Lusaka this  
25<sup>th</sup> day of August, 2020***

***For the Plaintiff: Mr. K. Musaila of Chonta Musaila and Pindani  
Advocates***

***For the Defendant: In Person***

---

**RULING**

---

**Cases referred to:**

- a) *John Mumba, Danny Museteka, Dr. W. Amis, Dennis S. Simuyuni v. Zambia Red Cross Society (2006) Z.R. 137.*
- b) *Zambia Export and Import Bank Limited v. Mkuyu Farms Limited and Elias Andrew Spyron and Mary Langley Spyron (1993-1994) Z.R. 36.*

**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 1 of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book).*

- 3) *Practice Note 59/13/2 of the White Book.*
- 4) *Order 36, rules 6 and 9 of the High Court Rules.*

**Published Work cited:**

- 1) *Odgers on Civil Court Action, 24<sup>th</sup> Edition at page 460, paragraph 24.47.*

There are two applications by the Defendant before this Court, namely; application for an order for stay of execution of judgment and application for an order to liquidate judgment sum in installments. Summonses for both applications were filed into court on 13<sup>th</sup> July, 2020 and were augmented by affidavits in support. The Affidavit in Support of Summons to Liquidate Judgment Sum in installments was filed on 13<sup>th</sup> July, 2020, while the Affidavit in Support of Summons for an Order to Stay Execution of Judgment was filed on 31<sup>st</sup> July, 2020.

The two applications came up for hearing on 18<sup>th</sup> August, 2020 and the Defendant submitted that he would rely on the documents he filed into court in support of his applications. Similarly, Mr. Musaila, learned Counsel for the Plaintiff submitted that his client would rely on the Skeleton Arguments filed in opposition to the applications for payment of judgment sum in installments and stay of execution of judgment filed into court on 17<sup>th</sup> August, 2020.

I will begin by considering the application for stay of execution of judgment. In the Affidavit in Support filed on 31<sup>st</sup> July, 2020, sworn by Jaffer James Mwanza, the Defendant herein, he deposed to the fact that he made an application before this Court seeking to liquidate the judgment sum in installments and it was for that



reason that he was seeking the indulgence of this Court to stay the execution of the consent judgment entered with the Plaintiff. He averred that the Plaintiff had seized some properties which are currently under the custody of the Sheriff of Zambia and that without the order of this Court staying execution of the consent judgment, the Plaintiff would proceed to sell the seized properties.

In the Combined List of Authorities and Skeleton Arguments in support, the Defendant gave a brief background to the case, namely, that he enjoyed a business relationship with the Plaintiff who sold him a non-runner bus on condition that if he managed to fix it at his cost, he could buy it from the Plaintiff on hire purchase basis. He fixed the bus but within a month, the bus broke down. The Plaintiff then took out summons claiming the payment of the total sum at once. At the advice of his then lawyers, he entered into a consent judgment. He does not dispute owing the Plaintiff the amount in issue. He is now applying to the Court to stay execution of the said judgment while applying to pay the judgment sum in installments as he does not have the capacity to pay the same in one installment.

The Defendant submitted that the application for an order of stay of execution of judgment is made pursuant to Order 3, rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia, which gives this Court authority to make any application that would be necessary for the purpose of ensuring that justice is done. He contended that it would be in the interest of justice and prudent that this Court exercises its discretion and grants the application

for stay of execution of judgment so that he can be given an opportunity to redeem himself in this matter. The Defendant cited the learned authors of Odgers on Civil Court Action, 24<sup>th</sup> Edition at page 460, paragraph 24.47 where it reportedly says:

*“Although the court will not without good reasons delay a successful plaintiff in obtaining the fruits of his judgment, it has power to stay execution if justice requires that the defendant should have this protection.”*

In addition, the Defendant placed reliance on the case of *John Mumba, Danny Museteka, Dr. W. Amis, Dennis S. Simuyuni v. Zambia Red Cross Society*<sup>1</sup>, where the Supreme Court stated as follows:

*“...However, after the injunction was discharged, the court below granted an ex parte order for stay of execution. The court below should have asked itself, before granting the said stay as to what was there to stay.”*

The Defendant contended that in the present case, there is something to stay as stated by the Supreme Court in the John Mumba case. The Defendant submitted, further, that he was alive to the fact that the grant of a stay of execution is discretionary and to that end, cited Practice Note 59/13/2 of the Rules of the Supreme Court of England (the White Book) which provides as follows:

*“...The Question whether or not to stay is entirely in the discretion of the court...and the court will grant it where the special circumstances of the case so require.”*



It was the Defendant's prayer that the Court's discretion be exercised in his favour and that the stay be granted in the interest of justice.

The application for stay was opposed, and in the Skeleton Arguments filed in opposition to the application, it was argued on behalf of the Plaintiff that it is trite that a party is not entitled to a stay of execution as of right. That, the power to grant a stay of execution is discretionary as is evident from Order 47, rule 1 of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book) which 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 application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or any 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 judgment or order by writ of fieri facias either absolutely or for such period and subject to such conditions as the Court thinks fit.*

*(2) An application under this rule, if not made at the time the judgment is given or order made, must be made by summons...*

*(3) An application made by summons must be supported by an affidavit made by or on behalf of the applicant stating the grounds of the application and the evidence necessary to substantiate them, and in particular, where such an application is made on the grounds*

*of the applicant's inability to pay, disclosing his income, the nature and value of any property of his and the amount of any liabilities of his."*

It was submitted that the discretion by the court must be exercised judiciously and on well-established principles. Firstly, the successful party should not be denied the immediate enjoyment of a judgment, unless there are good and sufficient grounds. Further, that stay of execution should not be granted for mere convenience and neither should it be granted on sympathetic or moral considerations. It was contended that the Defendant has failed to provide any evidence necessary to substantiate his application, and in particular, since the application for stay of execution is made on the ground of inability to pay, the Defendant has failed to disclose his income, the nature and value of any property of his and the amount of any liabilities of his. That, the application for stay of execution is therefore, incompetent and ought to be dismissed.

I have considered the application for stay of execution of judgment. From the outset, let me make it clear that the judgment which the Defendant is seeking to stay is not a consent judgment but a judgment delivered by this Court on 2<sup>nd</sup> December, 2019 after a trial held on 22<sup>nd</sup> November, 2019 which the Defendant did not attend despite the Notice of Hearing having been served on the Defendant's then advocates, as evidenced by the Affidavit of Service filed into court on 22<sup>nd</sup> November, 2019. Further, in the Defendant's



own Combined Skeleton Arguments, he clearly states that he does not dispute owing the Plaintiff the judgment sum herein.

As correctly submitted by the Defendant, this Court has the discretion to grant a stay of execution of judgment if justice requires that the Defendant should have this protection. Further, as per Practice Note 59/13/2 of the White Book, the Court can grant a stay of execution in its discretion where the special circumstances of the case so require. However, as correctly submitted by Counsel for the Plaintiff, a successful party should not be denied the immediate enjoyment of the fruits of his judgment, unless there are good and sufficient grounds.

I agree with the submission by learned Counsel for the Plaintiff that the Defendant has failed to provide any evidence to substantiate his application. The Defendant has based his application for stay on his inability to pay but has not disclosed his income, the nature and value of any property of his and the amount of any liabilities of his to assist this Court in determining whether to exercise its discretion in the Defendant's favour. I am therefore, of the view that there are no special circumstances in this case which render it inexpedient to enforce the judgment. The application for stay has therefore, failed and is dismissed accordingly.

Moving on to the application for an order to pay judgment sum in installments, the Defendant deposed in his Affidavit in Support that the Plaintiff took out a writ against him claiming payment of the sum of K132,000.00 and by consent judgment, he was to pay

the said sum of K132,000.00. He averred that due to the poor business environment that has been made worse by the Covid-19 pandemic, he is unable to pay the judgment debt at once and is proposing to liquidate the said sum in installments of K10,000.00 as the minimum amount to be paid at any given time. He deposed further, that the inability to settle the judgment sum at once is in no way an attempt to deprive the Plaintiff the fruits of its judgment as he is genuinely unable to settle the same at once. He averred that he is a self-employed vehicle repairer who is not engaged in formal employment and as such, it has been extremely difficult to find clients due to the Covid-19 pandemic.

In support of the application, the Defendant submitted in his Skeleton Arguments that the application to liquidate the judgment sum in installments is anchored on the provisions of Order 36, rule 9 of the High Court Rules which provides as follows:

*“Where any judgment or order directs the payment of money, the Court or a Judge may, for any sufficient reason, order that the amount shall be paid by installments, with or without interest. The order may be made at the time of giving judgment, or at any time afterwards, and may be rescinded or varied upon sufficient cause, at any time. The order shall state that, upon the failure of any installment the whole amount remaining unpaid shall forthwith become due:*

*Provided that where there is a default in paying any one installment, there shall be no order for stay of execution on the balance.”*

It was submitted that in light of the aforesaid, it is the Defendants view that there are sufficient reasons for this Court to



order that the judgment sum be paid in installments as he has not disputed the said claim and is desirous to settle the said amount in installments as shown in the Affidavit in Support. Further, that he has shown in the Affidavit in Support that he has no sufficient means to pay the sum at once as the bus which he should have used to pay off the amount outstanding was completely broken down within a month of usage after having spent so much money to repair it. According to the Defendant, this is consistent with the opinion of the Supreme Court in the case of *Zambia Export and Import Bank Limited v. Mkuyu Farms Limited and Elias Andrew Spyron and Mary Langley Spyron*<sup>2</sup>, in which it was stated as follows:

*“It is quite clear from this order that a court may order that a judgment debt be satisfied by installments upon sufficient cause being shown by the judgment debtor.”*

The Defendant submitted that in light of the foregoing provision of the law and the given facts, there exists a serious prospect of the Defendant liquidating the judgment sum herein.

This application was also opposed by the Plaintiff who in the Skeleton Arguments filed in opposition submitted that the Defendant has not availed the Court any material upon which the Court can exercise its discretion to order payment in installments as required by Order 36, rule 9 of the High Court Rules. It was the Plaintiff's contention that the Court cannot be expected to order payment in installments without any evidence as to the Defendant's means, property, assets and liabilities.

In aid of his case, the Plaintiff cited the provisions of Order 36, rules 6 and 9 of the High Court Rules which state as follows:

*“(6) a person directed by a decree or order to pay money or do any other act is bound to obey the decree or order without any demand for payment or performance, and, if no time is therein expressed, he is bound to do so immediately after the decree or order has been made (except as to costs, the amount whereof may require to be ascertained by taxation), unless the time shall be enlarged by any subsequent order.*

*(9) Where any judgment or order directs the payment of money, the Court or a Judge may, for any sufficient reason, order that the amount shall be paid by installments, with or without interest. The order may be made at the time of giving judgment, or at any time afterwards, and may be rescinded or varied upon sufficient cause, at any time. The order shall state that, upon the failure of any installment, the whole amount remaining unpaid shall forthwith become due:*

*Provided that where there is a default in paying any one installment, there shall be no order for stay of execution on the balance.”* (Underlining by the Plaintiff for emphasis)

The Plaintiff submitted that the application lacks merit and should be dismissed with costs.

I have considered the application by the Defendant to liquidate the judgment sum in installments. I have examined the Affidavit in Support of the application and I concur with the submission on behalf of the Plaintiff that the Defendant has not availed the Court any material upon which the Court can exercise its discretion to order payment in installments as required by Order 36, rule 9 of the High Court Rules. Order 36, rule 9 of the High Court Rules makes



it clear that the court has the discretion to order the payment of an amount in installments but only upon being furnished with sufficient reason(s). The onus to show sufficient cause rests on the judgment debtor as stated by the Zambia Export and Import Bank Limited v. Mkuyu Farms Limited case cited by the Defendant above,

Further, the pronouncement of the Supreme Court regarding the requirements in applications for payment in installments in Zambia Export and Import Bank Limited v. Mkuyu Farms Limited, cannot be over emphasised. The Supreme Court in the said case had the following to say:

*“In the event that we found for the appellant, Mr. Shamwana asked for fourteen (14) days within which the respondents would have to apply to Court for a fresh order of payment by installments. This would involve examination on oath of the respondents as to their means or liability to liquidate the debt in one lump payment.” (Emphasis supplied).*

This clearly entails that there should be facts and evidence presented by an applicant, sufficient enough to stir a court to exercise its discretion in favour of such applicant; and this would involve examination on oath of the applicant as to his means or inability to liquidate the debt in one lump payment.

Therefore, sufficient grounds must precede an order to settle a judgment debt in installments and this requires evidence to be adduced such as the applicant’s income, nature and value of his property, as well as details of the indebtedness to other persons other than the judgment creditor. This is fortified by Order 47, rule

1 (3) of the White Book. The Defendant herein having failed to adduce evidence as to means, there is no basis upon which this Court can be moved to exercise its discretion in favour of the Defendant which would further delay the enjoyment by the Plaintiff of the fruits of his judgment. For these reasons, I am inclined to dismiss the application and do so accordingly.

The end result is that both applications have been unsuccessful and are dismissed with costs to the Plaintiff, to be agreed or taxed in default thereof.

Leave to appeal is denied.

**Delivered at Lusaka this 25<sup>th</sup> day of August, 2020**

  
**DR. W. S. MWENDA**  
**JUDGE**