

IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT LIVINGSTONE
(Civil Jurisdiction)

2017/HL/62

BETWEEN:

EURO AFRICA VENTURES LIMITED



PLAINTIFF

AND

SAEED OMAR ABUL KARIM

DEFENDANT

*Before Honourable Mr. Justice M.L. ZULU, at Lusaka the ^{21st} day
of May, 2020.*

*For the Plaintiff: Ms. R. Siamujayang'ombe, Messrs. Suba,
Tafeni & Associates*

*For the Defendant: Mr. M. C. Kanga, Messrs Makebi Zulu
Advocates*

RULING

Cases referred to:

1. Michael Chilufya Sata (2011) ZR 44.
2. Mulenga and Others v. Investrust Merchant Bank Limited (1999) ZR 101.
3. Watson Nkandu Bowa v. Fred Mubiana and Zesco Limited (2012) ZR 165.
4. Zambia Revenue Authority v. the Post Newspaper Ltd, SCZ judgment no. 18 of 2016.

By way of ex parte summons filed into court on 30th April, 2020, the Applicant applied for an Order staying execution of my judgment dated 10th March, 2020. In that judgment, I dismissed the Plaintiff's claims and entered judgment for the Defendant on his counter claim for damages for the breach of the contract by the Plaintiff in the sum of K5, 000. That is the judgment the Applicant seeks stayed pending hearing and determination of the appeal.

The application was accompanied by an affidavit deposed by **Siegfried Hantmut Papenfuss**. In his affidavit, the Applicant deposed that he had prospects of success in the Court of Appeal, as there was no agreement that the Defendant can install his own water pump and use it to pump water at the Plaintiff's expense. He added that this case involves the Plaintiff's access to water, which is the lifeline of its business, staff and guests who attend the lodge. He deposed that the effect of the judgment is that the Defendant is likely to disconnect water supply to the Plaintiff and thus, occasion irreparable injury and inconvenience especially in the times of Corona Virus Disease.

I proceeded to grant the Interim Order to Stay execution and invited parties for a hearing on 14th May, 2020. At the hearing, the Applicant relied on the affidavit and also gave oral evidence and relied on the **Michael Chilufya Sata case**¹, in which the court held that special circumstances and grounds should exist when granting the Order. He added that, courts ought to look at the likelihood of success and that in the present case, the Plaintiff had shown that there is likelihood of succeeding and that if this court does not exercise its discretion, this appeal will be rendered an academic exercise, and therefore, that this was a fit and proper case to grant the stay.

Mr. Kanga, counsel for the Defendant opposed this application. Though, he had not filed his affidavit in opposition at the time of hearing on account of late service by the Plaintiff, I allowed him to submit and also to file the affidavit.

In his affidavit in opposition filed on 14th May, 2020, Counsel deposed that the Plaintiff's proposed appeal has no real prospects of succeeding in the Court of Appeal and further that the Plaintiff has neither shown nor demonstrated that there are special circumstances or indeed that they will suffer irreparable injury.

In opposing the application, Counsel argued and relied also on the **Michael Chilufya Sata** case, and submitted that the holding in this case was that the filing of the application for stay does not warrant a party to be granted the Order sort as a matter of right, as the application being sort is a discretionary one that needs a certain threshold to be met. Mr. Kanga submitted that the applicant must show special circumstances which warrant granting of the application. Further, that the Applicant must show sufficient grounds of appeal that show a real likelihood of success, but that in the present application, the grounds exhibited suggest otherwise, therefore, the Plaintiff has failed to satisfy one of the requirement to prove for grant of the Order.

I have read the affidavits and taken into account the arguments and submissions. The issue for determination is whether this is a proper case to exercise my discretion to grant an Order staying execution of the judgment of 10th March, 2020. In the case of **Mulenga and Others v. Investrust Merchant Bank Limited**², the Supreme Court guided that more was required to persuade the trial court that it is desirable, necessary and just to stay a judgment pending appeal, as

a successful party should not be denied the immediate enjoyment of a judgment except on good and sufficient grounds.

In **Watson Nkandu Bowa v. Fred Mubiana and Zesco Limited**³, the Supreme Court restated the two-fold test that has to be applied when considering an applicant for a stay of execution of a judgment and similarly a ruling pending an appeal.

The Supreme Court guided that firstly, the Court must consider the prospects the appeal succeeding and secondly, the irreparable damage if a stay is not granted and the appellant's appeal succeeds. The Supreme Court further stated in the case of **Zambia Revenue Authority v. the Post Newspaper Ltd**⁴, that of the two tests, the prospects of success is the key consideration as the court should order a stay pending a possible victory and not loss. Therefore, there is no purpose staying a judgment for an appeal that is bound to fail.

In view of the above authorities, I will now consider whether the 1st Plaintiff has satisfied the two fold test. On the first test, I have carefully considered the Affidavit in support of this application and in particular, the memorandum of Appeal exhibited thereto as "**SHP2**", and I am of the considered view that the Plaintiff's

application has no prospects of success. I wish to emphasize that an application for a stay of execution must rather be born out of a careful and mature consideration of the judgment appealed against.

Only when prospects exist of the judgment being upset by the Appellant Court can an application for a stay be launched in order to forestall irreparable damage.

Thus, even where execution of judgment will result in the losing party suffering irreparable damage, if the appeal lacks any prospects of succeeding, no stay of execution shall be granted.

In this application, having previewed the grounds of appeal, I come to the conclusion that there are no prospect of the appeal succeeding, as the Plaintiff breached the terms of the agreement. On the second test, the Applicant has argued that unless the stay of execution is granted, the effect of the judgment is that the Defendant is likely to disconnect water supply to the Plaintiff and thus occasion irreparable injury and inconvenience. Having found that the appeal has no prospects of success, I see no reason why I should grant a stay pending a possible loss even if the issue involves water supply to the Plaintiff's business.

I, therefore, find that there are no good and sufficient grounds warranting the stay of judgment of 10th March, 2020.

In view of the foregoing, I accordingly dismiss the Plaintiff's application for stay of execution of the judgment pending appeal. I accordingly quash the exparte interim Order I had earlier granted on 6th May, 2020.

Costs to the Defendant to be taxed in default of agreement.

Dated the 21st day of May, 2020



Mathew L. Zulu
HIGH COURT JUDGE