

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

2017/HP/2139

**BETWEEN:**

VINCENT CHIRWA

1st PLAINTIFF

EVELIN CHIRWA

2nd PLAINTIFF**AND**NELLY SHIYANDA (sued as administrator of the estate
of the late Lazarus Mawele)**1st DEFENDANT**

ALFRED NJOBVU

2nd DEFENDANT

THE ATTORNEY GENERAL

3rd DEFENDANT

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the 27th day
of May 2020**

*For the Plaintiffs:**Mr. M. Chitundu, Messrs Barnaby Chitundu and
Khunga Advocates**For the 1st & 2nd Defendants:**Major J. A. Mwaaba (Rtd), Messrs Phiri, Mwansa,
Shilimi & Theu Legal Practitioners**For the 3rd Defendant:**No appearance*

R U L I N G

Cases Referred To:

1. *Sony Mulenga and Others v Investrust Merchant Bank Limited* (1999) Z.R. 101
2. *Zambia Revenue Authority v Post Newspapers Limited Appeal No. 36 of 2016*
3. *Nyampala Safaris (Z) Limited, Baobab Safaris (Z) Limited, Nyumbu Safaris (Z) Limited, Exclusive Safaris (Z) Limited, Busanga Trails (Z) Limited v Zambia Wildlife Authority, Zambia National Tender Board, Attorney General, Luangwa Crocodile and Safari Limited, Sofram and Safaris Limited, Leopard Ridge Safaris Limited, Swanepoel & Scandrol Safaris Limited* (2004) Z.R 49 (S.C)
4. *Tresphord Chali v Bwalya Emmanuel Kanyanta Ngandu SCZ/8/009/2014*

Legislation Referred To:

1. *High Court Act Chapter 27*

- 1.1 By summons dated 8th April 2020, the 2nd defendant seeks an order of stay execution of judgment pending an appeal at the Courts of Appeal. The application was made pursuant to Order 36 Rule 10 and Order XLVII Rule 5 of the High Court Rules and supported by the affidavit of **Afred Njobvu** filed into Court on the same day as the summons.
- 1.2 The matter came up for hearing on 27th May 2020 and learned counsel for the defendant totally placed reliance on the supporting affidavit. In response, learned counsel for the plaintiffs opposed the application citing several authorities notably among them, the cases of **Sony Mulenga and Others v Investrust Merchant Bank Limited**¹ and **Zambia Revenue Authority v Post Newspapers Limited**² on the purpose of stay of execution of judgment.
- 1.3 Counsel further contended that the 2nd defendant's appeal had dim prospects of success as the court had considered all the issues that were in dispute between the parties. In reply, counsel for the 2nd defendant argued that the appeal had high prospects of success and if the stay was not granted, it would amount to an academic exercise.

1.4 I have considered the application, evidence adduced, submissions of counsel and authorities cited therein. The question raised by this application is **whether in the circumstances of this case, a stay of execution of judgment pending appeal should be granted?** It is trite law that a Court will not grant a stay of execution of judgment unless there are good and reasonable grounds for doing so. What amounts to "*good and reasonable grounds*" is posited in **Order 59/13** of the **Rules of the Supreme Court**, which puts it thus:-

"Neither the Court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. The Court does not "make a practice of depriving a successful litigant of the fruits of his litigation..... but the Court is likely to grant a stay where the appeal would otherwise be rendered nugatory, or the appellant would suffer loss which could not be compensated in damages. The question whether or not to grant a stay is entirely in the discretion of the Court and the Court will grant it where the special circumstances of the case so require....but the Court made it clear that a stay should only be granted where there are good reasons for departing from the starting principle that the successful party should not be deprived of the fruits of the judgment in his favour."

1.5 In the case of **Nyampala Safaris and 4 Others v Wildlife Authority and 6 Others**³, the Supreme Court re-stated the position of law, when it declared that a stay should only be granted where good and convincing reasons have been advanced by a party. It further stated that the rationale for the position is that a successful litigant should not be deprived of the fruits of litigation as a matter of course. Put in another way, the purpose of a stay is to preserve the subject of a suit so that if a litigant does succeed on appeal, the award will not be

rendered nugatory. In exercising its discretion to grant or refuse a stay, a Court must consider the special circumstances of a case and its unique requirements. Accordingly, an applicant must show that substantial loss may result to him/her unless the order is made.

- 1.6 In my view, substantial loss does not include a process of execution. Even when execution has been levied and completed, this action will not itself amount to substantial loss as long as it is shown that the execution was lawful. Instead, an applicant must show that the execution will create a state of affairs that will irreparably affect the applicant as a successful party on appeal. While a Court has latitude in granting a stay, it is also required to ensure that a deserving litigant is not deprived of the fruits of judgment as a matter of course.
- 1.7 Considering the guidelines outlined above, the question is, has the 2nd defendant met the criteria set above so as to be granted a stay of execution of the judgment in question? After reviewing the facts and the law, I am not convinced that he 2nd defendant has demonstrated that this is a case in which I should exercise my discretion by granting a stay of execution of judgment. The fact that he has appealed the judgment of this Court is not enough. In the case of **Tresphord Chali v Bwalya Emmanuel Kanyanta Ngandu**⁴, the Supreme Court had this to say when it held *inter alia* that:

"The Court below held that the appellant had failed to prove his case. The court accordingly dismissed the action. The appellant wants to stay execution of that judgment. We are at a loss as to what the purpose of staying execution of that judgment is....."

- 1.8 It follows therefore, that where a litigant is unsuccessful in a trial Court, a stay of execution of judgment must not be granted because there is nothing to stay. Accordingly, I find no merit in this application and it is hereby dismissed. Costs are awarded to the plaintiffs to be taxed in default of agreement.

Dated this 27th day of May 2020.

M. Mapani-Kawimbe
M. Mapani-Kawimbe
HIGH COURT JUDGE