

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

*(Civil Jurisdiction)*

**2014/HP/1775**

**BETWEEN:**

**CHARLES TEMBO  
WEBSTER MOYO**



**1<sup>ST</sup> PLAINTIFF  
2<sup>ND</sup> PLAINTIFF**

**AND**

**MAHOGANY AIR CHARTERS LIMITED**

**DEFENDANT**

**Before Hon. Mr. Justice Mathew L. Zulu, at Lusaka the 11<sup>th</sup> day of  
September, 2020**

*For the Plaintiff:*

*Mr. T. K. Ndlovu, of Messrs. Batoka Chambers*

*For the Defendant:*

*Mr. M. G. Lumbwa, of Mesdames. Mushipe &  
Associates*

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**RULING**

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**Cases referred to:**

- 1. Ruth Kumbi v Caleb Robson Zulu, SCZ Judgement No. 19 of 2009**
- 2. Mothercare Ltd v Robson Books Ltd (1979) F.S.R 466.**
- 3. Sonny Paul Mulenga v Investrust Merchant Bank Ltd (1999) ZR 101**
- 4. Watson Nkandu Bowa v Fred Mubiana and ZESCO Limited (2012) ZR 165.**
- 5. Zambia Revenue Authority v The Post Newspapers Limited, SCZ Judgment No. 18 of 2016.**

**Legislation referred to:**

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

This is a Ruling on the Defendant's application for an Order to stay execution of a Judgment delivered on 26<sup>th</sup> March, 2020, pending determination of an application for an order to appeal out of time and an appeal to the Court of Appeal. The application is made pursuant to **Order 2 Rule 3, Order 36 Rule 10 and Order 47 Rule 5 of the High Court Rules, Chapter 27 of the Laws of Zambia.**

This application is supported by an Affidavit deposed to by Jim Belemu, who is the Chief Executive Officer in the Defendant Company. He states that the Judgement of this Court dated 26<sup>th</sup> March, 2020 in which this Court held that the Defendant owes the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs consultancy fees in the sum of USD2,500.00 and USD 550.00 respectively, does not reflect the true position in that the Defendant does not owe the Plaintiffs any money. He exhibited receipts to show that the Defendant fully paid the Plaintiffs their consultancy fees.

It was his evidence that the Defendant was unable to render instructions to its Advocates to appeal within 30 days of the Judgement because the law firm was temporarily closed due to the Covid19 pandemic. Therefore, the Defendant had since filed an



application to appeal out of time before the Court of Appeal. He said if the execution of the Judgement is not immediately stayed pending the application to appeal out of time and a subsequent appeal to the Court of Appeal, the Defendant will be prejudiced as the Plaintiff may proceed with taxation proceedings and the appeal will consequently be rendered nugatory.

This application was opposed by the Plaintiffs whose affidavit in opposition filed on 22<sup>nd</sup> June, 2020 disputed that they were fully paid their consultancy fees by the Defendant. According to the Plaintiffs, the payment vouchers exhibited by the Defendant were for a different job that they had done for the Defendant which only related to the opening of a route to Lubumbashi in the Democratic Republic of Congo.

The Plaintiffs explained that before the close of trial, they assisted the Defendant with professional works that needed urgent attention, on the understanding that those assignments were completely different and unrelated to this matter. They outlined the different works they had been engaged to do, and explained that the payments referred to

by the Defendant were for services they rendered in respect of those works and nothing was ever paid to them in respect of this case.

The Plaintiffs charged that the Defendant's intention was to delay them from enjoying the fruits of their judgment. It was their position that a stay of execution should not be granted as the intended appeal has no chance of success and is merely frivolous and vexatious.

In its affidavit in reply, the Defendant maintained that the receipts were for the consultancy fees in this matter and had nothing to do with the payments for other assignments which were separately paid. The Defendant said it paid the Plaintiffs the outstanding balance in order for them to withdraw this matter but was shocked to learn that the matter was not withdrawn. According to the Defendant, the Plaintiffs were only engaged for the second time after reconciling and liquidating the outstanding balance for consultancy fees.

When the matter came up for hearing, Counsel for the Plaintiffs relied on the Affidavit in Support and a list of authorities. He submitted that this application is seeking to maintain the status quo of the parties after the delivery of the judgment, in line with the reasoning of the Supreme Court in the case of **Ruth Kumbi v Caleb Robson**



**Zulu**<sup>1</sup>. Counsel also relied on the case of **Mothercare Ltd v Robson Books Ltd**<sup>2</sup>, where it was held that:

*“all that has to be seen is whether the plaintiff has prospects of success which in substance and reality exist. Odds against success no longer defeat the plaintiff unless they are so long that the plaintiff can have no expectation of success but only a hope.”*

It was his submission that the Defendant filed an application for extension of time in the Court of Appeal and therefore, its application was that the judgment must be stayed pending the determination of the application to appeal out of time.

In opposing the application, Counsel for the Defendant relied on the affidavit in opposition. Counsel submitted that the Defendant had not paid the Plaintiffs and the Defendant's aim was to delay the Plaintiffs' enjoyment of the fruits of their judgment. He said if the Defendant paid in full the parties would have entered into a consent judgment. Counsel submitted that the judgment of this Court was based on the evidence adduced by the parties and the Defendant could not bring new evidence. He stated that the payments made by the Defendant, if at all, relate to the new assignments which the Plaintiffs undertook on behalf of the Defendant regarding the setting up of an office in Lubumbashi in the Democratic of Congo. It was his

submission that this application has no merit, as the intended appeal has no chance of succeeding in the Court of Appeal and is an abuse of the court process.

Counsel for the Defendant responded to the submissions of Counsel for the Plaintiffs and denied that his client's aim was to delay the Plaintiffs from enjoying the fruits of their judgment. He submitted that the Defendant was merely exercising its right to appeal and therefore the costs of this application should be in the cause, should the Plaintiff's objection to the application be sustained.

I have carefully considered the affidavit evidence before me and the submissions made by Counsel for the parties. It is not in dispute that the Defendant intends to appeal against the Judgment of this Court dated 26<sup>th</sup> March, 2020 and has since lodged an application in the Court of Appeal to appeal out of time. It is against this backdrop that the Defendant now seeks to stay execution of the Judgment pending determination of the application to appeal out of time and the intended appeal. The law in **Order 36 Rule 10 of the High Court Rules** grants this Court discretion to stay execution of a judgment where there are sufficient grounds. The issue I have to determine,



therefore, is whether this is an appropriate case in which I can exercise my discretion to grant an order for a stay of execution.

It is trite law that an appeal does not automatically entitle an applicant to a stay of execution of the judgment appealed against.

The Supreme Court in the case of **Sonny Paul Mulenga v Investrust Merchant Bank Ltd**<sup>3</sup> made it clear 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. The most important considerations on which the Court exercises its discretion to grant a stay of execution are laid down in the case of **Watson Nkandu Bowa v Fred Mubiana and ZESCO Limited**<sup>4</sup>, where the Supreme Court held that:-

***“In an application for stay of execution pending appeal, the considerations are:- the prospects of the appeal succeeding and the irreparable damage if a stay is not granted and the appellant’s appeal succeeds.”***

This means that the Court cannot grant a stay of a judgment if there are no prospects of the appeal succeeding. There is no reason in law to stay execution of a judgment in which the appellant’s appeal is bound to fail and no irreparable damage will be occasioned to the

appellant if a stay is not granted. This was emphasized by the Supreme Court in the case of **Zambia Revenue Authority v The Post Newspapers Limited**<sup>5</sup>, when it said that:-

***“We wish to emphasize that the prospects of success of the pending appeal, is a key consideration in deciding whether or not to stay execution of the judgment appealed against.... In short, a court should Order a stay pending possible victory. It should not stay pending loss. If a court knows and says that the appeal will fail, then there is no reason in law to stay execution of the judgment appealed against.”***

In respect of this application before me, I have considered whether the Defendant has demonstrated that its intended appeal has prospects of succeeding and will likely suffer irreparable damage if the judgment is not stayed and its prospective appeal succeeds. The Defendant is contesting the Judgment of 26<sup>th</sup> March, 2020 in which this Court held that the Defendant owed the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs USD2,500.00 and USD 550.00 respectively, as outstanding consultancy fees. The Defendant has exhibited receipts to buttress its contention that it fully paid the Plaintiffs and does not owe them.



The Plaintiffs have opposed this application, contending that they were not fully paid and the Defendant's intended appeal has no prospects of success. They have stressed that the receipts exhibited by the Defendant were for completely different works that they had done for the Defendant, which related to the opening of a route to Lubumbashi in the Democratic Republic of Congo.

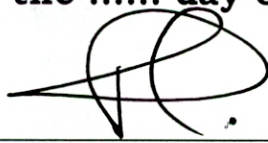
Receipts have been exhibited to demonstrate that the Defendant paid the Plaintiffs and it is clear to me that there is a dispute as to whether the Plaintiffs were paid their consultancy fees in full. This dispute can only be determined on appeal because the Judgment of this Court already pronounced on this matter. There being receipts showing that the Defendant made payments to the Plaintiffs, it is my considered view that the Defendant's intended appeal has prospects of success if the Court of Appeal will grant leave to appeal out of time. I therefore do not agree with the Plaintiffs that this application is intended to delay them from enjoying the fruits of their judgment. I take the view that if a stay of execution is not granted, the Plaintiffs will execute the judgment and the Defendant's prospective appeal will be rendered nugatory.

For the foregoing reasons, I order that the Judgment of 26<sup>th</sup> March 2020 is hereby stayed pending determination of the Defendant's application to appeal out of time and the intended appeal.

I award costs to the Plaintiffs.

Leave to appeal is granted.

Delivered at Lusaka the <sup>11<sup>th</sup></sup>..... day of ..... September, 2020.



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**MATHEW. L. ZULU**  
**HIGH COURT JUDGE**

