

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

2014/HP/1281

(Civil Jurisdiction)

BETWEEN:

CHONCHO DESIGNERS LIMITED

(T/A Choncho Express)



PLAINTIFF

AND

PAN AFRICAN BUILDING SOCIETY

DEFENDANT

CORAM: HONOURABLE JUSTICE MR. MWILA CHITABO, SC

For the Plaintiffs:

*Ms. Martha Mulenje of Mesdames Mushipe
& Associates*

For the Defendant:

*Mr. K. Musaila of Messrs Chonta Musaila
& Pindani Advocates*

R U L I N G

This is an application for stay of the Ruling of the Court dated 29th September, 2016. At the time of hearing, learned counsel for the plaintiff submitted that the Court misdirected itself in the said Ruling. She pointed out that the purported bailiff is threatening to possess a Higer Bus subject to these proceedings. It was her argument that denying a stay will result in disrupting the general balance of convenience between the partes.

It was her submission that the bailiff acted or is acting illegally as he is trying to possess the bus alluded without leave or order of the Court.

Requested to refer to any clause in the contract that prohibits the defendant to repossess the buses in the event of default to only do so after leave or order of the Court, the learned Counsel conceded that there appears to be no such clause in the contract.

She lastly argued that in the alternative, the court should grant a period of time to enable the plaintiff serve the supporting affidavit on the defendants Advocates.

The learned Mr. Musaila countered the submissions. He opposed the application in 2 grounds:

(1) That the exparte order of the Court dated 14th October, 2016 were only served on their chambers on 20th October, 2016 that is yesterday. In his view this was in breach of the orders and rules of the Court which mandates a party serve Court documents 2 clear days before the return date. He called in aid Order 30 Rule 18 of the High Court Act Cap 27 of the Laws of Zambia.

(2) Learned Senior Counsel pointed out that infact the supporting affidavit was not served on them by the plaintiffs Advocates.

Lastly counsel pointed out that the conduct of the plaintiff demonstrated an abuse of the exparte order. He thus urged the court to dismiss the application with the attending costs.

I am indebted on the submissions of the learned Attorneys. When the application was granted on 14th October, 2016, I had directed that all documents in respect of this application be served on the defendants Advocates and proof of service filed. This was complied with.

The plaintiffs Advocates selectively only served the summons for stay and exparte order only on the 20th of October, 2016. This was in breach of the Rules of the Court which requires a litigant to serve court documents 2 clear days before the return date.

In the case in casu, the plaintiff obtained an exparte order which they served on the eve of the interparte hearing without a supporting affidavit. This conduct disapproved. I should re-emphasize that Advocates and litigants who chose to ignore court orders and rules do so entirely at their own peril. (***See the case of Twampane Mining Ltd Co-operative Society v. E.M Storti Mining Ltd (2011) 3 ZR 67***)

Learned Counsel for the plaintiff alluded to the good prospects of succeeding in the appeal. She however did not point out the alleged misdirection on the part of the Court to enable it preview the alleged misdirection on the record on which to anchor the stay order. There is no mention of the whereabouts of the bus Higer Bus Reg. No. ALK 992. There is therefore no full disclosure.

In respect of the stay, the Honorable Chief Justice Ngulube (as he then was) succinctly and authoritatively pronounced himself in the case of ***Shamwana v Mwanawasa 1993/1994 ZR 149*** when he

pointed out that ex parte orders are in the rules unjust and extraordinary jurisdiction since it goes against one of the realms of natural justice "*audi alteram partem*" meaning "*hear the other party*". It was said in that case that the ex parte orders should only be given in emergent situations and a return date be given for interparte hearing.

The facts of this case discloses that the plaintiff by not serving the affidavit in support of the stay application on the defendants wants to ride on the stay order without giving the other party an opportunity to be heard.

On the forgoing, I have formed a very firm view that this is not a fit and proper case to grant a stay on account of the truancy of the plaintiff.

The application for stay is declined. Accordingly, the ex parte order staying execution granted on 14th October, 2016 is hereby discharged.

The costs are for the defendant.

Leave to appeal is granted.

Dated the ^{25th}..... day of October, 2016



Mwila Chitabo, SC
Judge