2016/HPC/0137

IN THE HIGH COURT FOR ZAMBIA
IN THE COMMERCIAL DIVISION
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF: Order 30 rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia

IN THE MATTER OF: The properties comprised in the following deeds; Debenture dated 7th February, 2007, Third Party Mortgage dated 7th February, 2007, Further Charge dated 16th May, 2008, Second Further Charge dated 22nd December, 2009, Third Further Charge dated 1st December, 2011, Fourth Further Charge dated 17th July 2012, Third Party Mortgage Debenture dated 8th November, 2012, Sixth Further Charge dated 14th April, 2014, Third Party Mortgage dated 5th March, 2014 relating to Stand Nos. 9296, 12529, 12530 and 36980 all situated in Lusaka and made between Indo-Zambia Bank Limited of the first part, Seebro International Trading Agencies Limited of the second part and variously Melcome Marketing and Distributors Limited, Raeys Investments Limited and Danyan Engineering Limited of the third part.

BETWEEN:

Indo-Zambia Bank Limited	Applicant
And	
Seebro International Trading Agencies Limited	1st Respondent
Melcome Marketing and Distributions Limited	2nd Respondent
Danyan Engineering Limited	3rd Respondent

Before: **Hon. Lady Justice Dr. Winnie S. Mwenda in Chambers at Lusaka the 12th day of December, 2016.**

For the Applicant: Mr. K.H. Makala of Makala and Company
For the Respondents: Mr. N. Yalenga of Nganga Yalenga and Associates

---

RULING

Cases referred to:

1. ***Central London Property Trust Limited v. High Trees House Limited (1947) K.B. 130***
2. ***Amalgamated Investment and Property Company Limited (In Liquidation) v. Texas Commerce International Bank Limited (1982) QB 84***
3. ***Sonny Paul Mulenga and Vismar Mulenga and Chainama Hotels Limited and Elephant Hotels Limited v. Investrust Merchant Bank Limited (1999) Z.R.101***

Legislation referred to:

1. ***Order 36 rule 10 of the High Court Rules, Chapter 27 of the Laws of Zambia***
2. ***Order 88/5/13 of the Supreme Court Practice, 1999 (White Book)***

This is an application by the Respondents herein for an order of stay of execution of the order granting leave to enter final judgment made on 17th June, 2016 pending the hearing of an application to re-open the foreclosure and pay judgment sum in instalments pursuant to Order 36 rule 10 of the High Court Rules, Chapter 27 of the Laws of Zambia.

The evidence gleaned from the Affidavit in Support of Stay of Execution of Judgment sworn by Marshall Mwanza, the Financial Controller of the 1st Respondent, is that this Court entered final judgment in the cause in favour of the Applicant on 17th June, 2016 which stipulated that the Respondents were to settle the sum claimed by the Applicant within Ninety (90) days from the date of the said order. That pursuant to the said judgment the Respondents had paid a total sum of K2,376,471.14 towards liquidation of the debt by 19th September, 2016 and having failed to settle the outstanding amounts, the Respondents engaged the Applicant with a view to re-negotiating the repayment period for the outstanding amount.

The parties duly agreed on the terms to vary the terms of the final judgment as evidenced by exhibit "MM1" being a letter from the Applicant's advocates to the Respondents' advocates. The Respondents delayed to execute the Consent Order agreed on because the Group Managing Director was out of the country and could not instruct the Respondents' advocates to sign the Order.

The Respondents' Group Managing Director returned to the jurisdiction sometime after 15th November, 2016 and duly instructed the Respondents' advocates to execute the Consent Order which Consent Order was duly executed and served on the Applicant's advocates on 17th November, 2016. Service of the same was duly acknowledged by the Applicant's advocates.

To the Respondents' surprise, the Applicant's advocates by return mail indicated that the Applicant had rescinded its decision and had given the Respondents up to end of November, 2016 to repay the full amount outstanding failure to which there would be foreclosure and sale of the mortgaged property.

In a further turn of events, the Applicant's advocates informed the Respondents' advocates that their instructions had changed from end of November, 2016 to immediate execution. That according to advice from the Respondents' Counsel, the conduct of the Plaintiff who having agreedto revise the payment terms and having received payment pursuant to the proposal then reneged on the undertaking, is highly prejudicial to the Respondents as they had built an expectation that they would be given up to end of November, 2016 to settle the debt due to the Applicant in full or face foreclosure and sale of the mortgaged properties.

In expectation of the extension of time the Respondents had entered into agreements with third parties for the financing of the repayments to the Applicant which arrangements had reached an advanced stage and could not be cancelled without the Respondents incurring a huge loss. That it would serve the interest of justice if this matter was stayed pending the determination of the Respondent's application to re-open foreclosure.

The Applicant opposed the application and filed an Affidavit in Opposition sworn by Kafwimbi Nachalwe, a Credit Officer in the employ of the Applicant, wherein she admitted that following the Respondents' failure to pay the judgment debt within the period directed in the judgment entered against them, they engaged the Applicant in negotiations with a view to enlarging the time within which to settle the outstanding portion of the judgment. In the end the parties agreed to seek the Court's endorsement of their proposal to extend the deadline for the liquidation of the outstanding portion of the judgment to 30th November, 2016. Accordingly, Counsel for the Applicant drafted a Consent Order varying the judgment on terms therein outlined, as per copy of the draft Consent Order proposing to vary the judgment exhibited as "KN1" in the Applicant's affidavit.

As acknowledged by the 1st Respondent in its affidavit in support, Counsel for the Applicant sent the Consent Order to the Respondents' advocates on 4th October, 2016.

On instructions from the Applicant, the advocates for the Applicant informed the Respondents through their advocates that the Applicant had withdrawn its accommodation of them due to inordinate delay on their part in executing the Consent Order and demanded immediate payment of the outstanding judgment debt.

The Applicant's decision to withdraw from the proposed agreement to vary the judgment was caused by the apparent reluctance on the part of the Respondents to execute the Consent Order. From the information the deponent had, whenever the Applicant inquired from the Respondents' offices as to why they were not instructing their Counsel to sign the Consent Order, the later would claim to have given the necessary instructions, a claim their Counsel would deny.

Counsel informed the deponent and she believed the same to be true, that what galvanised the Respondents into finally giving instructions to their Counsel to sign

the Consent Order was when the Applicant's Counsel on 16th November, 2016 informed his counterpart that the Applicant had instructed him to issue a Writ of Possession the next morning.

That as is evident from the Consent Order exhibited as "KM1", the document bears neither the endorsement of the Applicant's lawyers nor that of the Court, rendering it ineffectual.

The Respondents not only dragged their feet in giving instructions to their Counsel to endorse the Consent Order but failed and neglected to fulfil a pre-condition of the Agreement, namely, the payment of unapplied interest on the 1st Respondent's loan account amounting to K487,403.84 prior to signing the Order. With only a few days until the deadline of 30th November, 2016 that the Applicant initially gave the Respondents to pay the judgment debt in full, at the time of swearing the Affidavit there was no sign of them ever beating the deadline.

In paragraph 13 of the affidavit in support the 1st Respondent states that it was seeking a stay of enforcement of the judgment pending an application to re-open foreclosure while the order staying execution mentions a pending application for leave to appeal.

The deponent was informed by Counsel and verily believed the information to be true that there was no application on the case record as at the date of swearing the affidavit, namely, 25th November, 2016. There was no application before the Court whether to re-open the foreclosure or for leave to appeal. It was the deponent's belief that the application by the Respondents to stay enforcement of the judgment was an attempt to prevent the Applicant from enjoying the fruits of its victory.

When the application came up for hearing on 1st December, 2016, Mr. Yalenga, Counsel for the Respondents informed the Court that they had made an error in the heading of the summons which stated that it was an application for an order of stay of execution of judgment pending appeal when it should have read "pending

application to re-open foreclosure and pay judgment sum in instalments." Counsel sought leave of Court to amend the summons to reflect that it was pending an application to re-open foreclosure and pay judgment sum in instalments. Leave was granted by the Court to amend the summons accordingly.

Counsel for the Respondents thereafter reiterated what was essentially the evidence in the affidavit in support of the application and also submitted that his clients would also rely on the Skeleton Arguments filed into Court.

In response, Mr. Makala, Counsel for the Applicant submitted that his client opposed the application on the grounds outlined in the Affidavit in Opposition and Skeleton Arguments. Counsel also submitted that the only material consideration that the Court ought to address is whether as at the date of the Respondents' applying for and obtaining an ex-parte order of stay of execution of the judgment there existed grounds advanced by the Respondents which were sufficient and good enough to deny a judgment creditor immediate enjoyment of the fruits of its victory.

Counsel submitted further that the Courts in the authorities cited in the Skeleton Arguments are very clear on the grounds and the standards and describe the standards upon which a stay is granted as stringent.

Mr. Makala submitted that as at 24th November, 2016, there was no application pending before Court but only mention of intent to file documents which were only filed by the Respondents on 30th November, 2016. He contended that the absence at the material time of the application of a Notice of Intention to Re-open foreclosure, denied the Court of the opportunity to discharge its duty prior to granting the order of stay, namely, to preview the prospects of success of the application pending before Court.

Counsel argued that the Respondents failed in their duty to Court to bring to its attention the law that it must consider as it determined whether or not to grant a stay. He had no doubt that if the attention of the Court had been drawn to the

authorities cited for the grant of the stay, the Court would have easily rejected the application for stay. He submitted that the ex-parte order of stay ought not to have been granted and must be discharged with costs.

The Respondents would then submit a fresh application should they be so inclined, because there is now a basis for the Court to interrogate the prospects of success of the application.

Further, despite making the Consent Order the basis for the application for stay of execution, the Respondents omitted, understandably, to exhibit the Consent Order to the affidavit in support of the application. Instead, it was the Applicant that exhibited the Consent Order as "KN1" in the affidavit in opposition.

According to the Consent Order the Respondents were to have paid the judgment debt by 30th November, 2016 in default of which the Applicant could foreclose. It was pointed out that the extension agreed to by the Respondents had passed. Counsel questioned what the basis for the application to re-open the foreclosure was if not to continue to deny the Applicant the right to enforce execution of the judgment?

Counsel argued that it was necessary to be clear that for purposes of the application before Court, the document which the Respondents were seeking to rely on was damning to their argument. In conclusion, Counsel submitted that there was no basis for the grant of the stay at the material time and therefore the ex-parte order of stay must be vacated with costs.

In reply Mr. Yalenga submitted that it was the Respondent's contention that the Court was on firm ground to have granted the interim stay of execution as there was sufficient detail in the affidavit in support of ex-parte summons on which the Court was guided to make a *prima facie* decision.

Mr. Yalenga further submitted that there is at present an application which is sufficient to guide the Court as regards the prospects of success in the application. That the authorities cited by the Applicant, for which the Respondents were being admonished for not bringing the same to the attention of the Court, were not and are not applicable to the Respondents' pending application for the simple reason that there is no appeal. Counsel admitted that they erred when they referred to an appeal when they meant re-opening foreclosure. However, the prayer in the ex-parte summons clearly indicated that the stay was being sought for purposes of re-opening foreclosure.

Counsel submitted further that the Applicant had the right to immediate enjoyment of its fruits of success after the expiration of the Ninety (90) days within which the Respondents were to have liquidated all sums due but having instead opted to renegotiate with the Respondents and accepting part payment in lieu of its rights of execution these are grounds that ought to persuade this Court to sustain the order of stay pending determination of the Respondents' application to re-open foreclosure.

These were the respective cases for the parties.

I have carefully examined the affidavits filed by the parties hereto in relation to the application before Court. I have also perused the Skeleton Arguments filed by both parties and considered the oral submissions by learned Counsel on both sides.

It is common cause that final judgment was entered by this Court in favour of the Applicant on 17th June, 2016 in which the Respondents were ordered to settle the wholeoutstanding amount within 90 days of the date of judgment failure to which the Applicant could foreclose.

From the evidence adduced before Court, the Respondents did default in settling the outstanding amount whereupon the Applicant had the right to foreclose, take possession of the mortgaged property and exercise its right of sale in accordance

with the judgment, but the Applicant did not do so and instead entered into fresh negotiations with the Respondents which culminated into a Consent Order to vary the terms of the judgment. However, the Consent Order was not executed due to delays attributed to the Respondents in executing the same. The delay was explained by the Respondents as being due to fact that the Group Managing Director was out of the country and could not instruct the Respondents' advocates to sign the order. When the Consent Order was finally executed by the Respondents' advocates, the Applicant rescinded its decision and demanded immediate execution.

A perusal of the copy of the Consent Order varying Judgment produced and exhibited as "KN1" in the Affidavit in Opposition to Application for an Order Staying Execution Pending Application for Leave to Appeal, shows that it was a condition that the Respondents would pay unapplied interest on the 1st Respondents' loan account amounting to K487,403.84 before signing the Consent Order. There is no evidence before Court that the Respondents paid the money before instructing their Counsel to sign the Consent Order. Therefore, the Respondents defaulted on a condition precedent to the execution of the Consent Order. For this reason, the Respondents are estopped from pleadingthe defence of estoppel to prevent the Applicant from rescinding its decision to enter into a Consent Order with the Respondents.

It is the Respondents' argument that based on the Consent Order varying judgment that was agreed on by the parties, the Applicant agreed to liquidate the outstanding portion of the said judgment on the terms of the Consent Order and not as stipulated in the Judgment. Therefore, the Applicant is estopped from reneging on the Consent Order.

In support of their argument the Respondents cited the case of ***Central London Property Trust Limited v. High Trees House Limited (1)*** where Lord Denning explained the doctrine of promissory estoppels as follows:

"The principle of promissory estoppel applies whenever a representation is made, whether of facts or law, present or future, which is intended to be binding, intended to induce a person to act on it and does act on it.
Where by words or conduct, a person makes an unambiguous representation as to his future conduct, intending the representation to be relied on and to affect the legal relations between the parties, and the representee alters his position in reliance on it, the representor will be unable to act inconsistently with the representation if by so doing the representee would be prejudiced."

According to the Respondents, the above position was fortified by the case of ***Amalgamated Investment and Property Company Limited (In Liquidation) v. Texas Commerce International Bank Limited (2)*** where it was asserted thus:-

"When parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction, each will be stopped against the other from questioning the truth of the statement of facts so assumed."

So much for the discourse on the principle of promissory estoppel. It is,however, this Court's take that had the Respondents not defaulted on the condition precedent of settling unapplied interest on the 1st Respondent's loan account in the sum of K487,403.84 before signing the Consent Order as required by the same, they would have been justified in pleading promissory estoppel against the Applicant but since they defaulted on this critical issue which formed a condition precedent to the execution of the Consent Order, they are estopped from pleading promissory estoppel against the Applicant. In any event, execution of the Consent Order was not completed by the Applicant for reasons alluded to earlier, resulting in an ineffectual Consent Order. Consequently, the *status quo* prior to the signing of the Consent Order by the Respondent is what is prevailing.

Counsel for the Applicant submitted that the Court should have previewed the prospects of success of the intended appeal before granting the ex-parte order of

stay of execution of the judgment. However, Counsel for the Respondents submitted that there was an error in the heading of their application which indicated that they were applying for a stay of execution of judgment pending appeal when in actual fact the application was for stay of execution of the judgment pending re-opening of foreclosure. Therefore, there was no appeal whose prospects for success the Court couldhave considered by examining the grounds of appeal thereof.

The question which this Court should, admittedly, have addressed when considering the ex-parte application for stay and which it is addressing now is, as Mr. Makala correctly submitted, whether the Respondents have advanced sufficient grounds to deny the Applicant, which is the judgment creditor, immediate enjoyment of the fruits of its victory. In other words, have the Respondents advanced sufficient grounds to enable this Court to order a stay of execution of judgment which will deny the applicant immediate enjoyment of the fruits of its victory?

In the case of ***Sonny Paul Mulenga and Vismar Mulenga and Chainama Hotel Limited and Elephant Hotels Limited v. Investrust Merchant Bank Limited (3)*** the Supreme Court emphatically held that a successful party should be denied immediate enjoyment of judgment only on good and sufficient grounds.

The Respondents in the case in *casu* submitted that they are more than likely to pay the sums due on the judgment debt and remedy any other breach of obligations under the mortgage within a reasonable time if allowed to do so. However, the Respondents have adduced no cogent evidence to convince the Court, particularly in view of their history of defaulting on their agreement, that this would be the position. They have also not adduced any evidence to show that they have made concrete arrangements to ensure that they do not default again on the agreement if given an opportunity.

For the above reasons, I am not persuaded that this is a good case for the grant of a stay of execution of judgment pending the intended application. The application is

therefore dismissed for being without merit. The ex-parte order of stay of execution granted on 24th November, 2016 is discharged forthwith.

Costs of and incidental to the application herein are awarded to the Applicant to be agreed and in default thereof, to be taxed.

Leave to appeal is granted.

Dated at Lusaka the 12th day of December, 2016.

W. S. MWENDA (Dr)
HIGH COURT JUDGE