

IN THE HIGH COURT FOR ZAMBIA

IN THE COMMERCIAL DIVISION

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)



2015/HPC/0122

IN THE MATTER OF:

A MORTGAGE ACTION RELATING TO PROPERTIES
UNDER THE FIRST LEGAL MORTGAGE AND FURTHER
CHARGE OVER S/D47 OF FARM No. 3370, LUSAKA

BETWEEN:

AFRICA BANKING CORPORATION ZAMBIA LIMITED

APPLICANT

AND

CHAKAKA VILLAGE COUNTRY HOUSE LIMITED
(Sued as Customer)

1ST RESPONDENT

LAWRENCE SIKUTWA
(Sued as Personal Guarantor)

2ND RESPONDENT

CHAKAKA PROCUREMENT COMPANY LIMITED
(Sued as Corporate Guarantor)

3RD RESPONDENT

MADISON GENERAL INSURANCE COMPANY ZAMBIA LIMITED
(Sued as Financial Guarantor)

4TH RESPONDENT

Before: Hon. Madam Justice Dr. Winnie S. Mwenda in Chambers on the
12th day of December, 2016.

For the Applicant:

Mr. K. Chanda of Simeza Sangwa and
Associates

For the 1st, 2nd and 3rd Respondents:

Mr. M. Chiteba appearing with Mr. D. M.
Chakoleka of Mulenga Mundashi Kasonde
Legal Practitioners

For the 4th Respondent:

No Appearance

RULING

Cases referred to:

1. *Bank of Zambia v. Aaron Chungu, Access Financial Services Limited and Access Leasing Limited* SCZ Judgment No. 15 of 2008
2. *R. v. Jewitt* (1985) 2 SCR 128
3. *Aristogerasimos Vangelatos v. Demetre Vangelatos, Metro Investments Limited and King Quality Meat Products Limited*, SCZ Judgment No. 10 of 2007

Legislation referred to:

1. Order 59 Rule 13 of the Rules of the Supreme Court, 1999 Edition (White Book)
2. Order 51 of the Rules of the Supreme Court, Chapter 25 of the Laws of Zambia
3. High Court Act, Chapter 27 of the Laws of Zambia, Section 10 (1)
4. Rule 48 (1), (3) and (4) of the Rules of the Supreme Court, Chapter 25 of the Laws of Zambia
5. Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia

Works referred to:

1. *Halsbury's Laws of England 4th Edition (Reissue) Volume 37 Paragraph 931 at p.295 [Butterworths, London]*
2. *Halsbury's Laws of England 4th Edition, Volume 37 Paragraph 437 at p.325 [Butterworths, London 1982]*

This is an application by the 1st, 2nd and 3rd Respondents pursuant to Order 3 rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia as read together with Order 59 rule 13 (2) of the Rules of the Supreme Court, 1999 Edition (White Book), for stay of proceedings pending the determination of motions filed in the Supreme Court.

The background to this application is that on 9th December, 2015 this Court delivered a ruling ordering that the Respondent's counterclaim be tried separately from the Applicant's claim. On the same day, the Court delivered another ruling wherein the Applicant was given leave to amend its Affidavit in Reply. The 1st, 2nd, and 3rd Respondents (hereafter collectively referred to as "the Respondents"); appealed against the rulings of the Court and on 10th March, 2016 the Court granted an order of stay of proceedings before this Court pending determination of the appeals by the Supreme Court.

The reason given by the Court for granting the stay was that the nature of the two appeals were such that if successful they would lead to a re-opening of the proceedings in the High Court for purposes of re-litigating the action on the Originating Summons thereby rendering the proceedings nugatory and resulting in great costs to both parties as the matter would be heard twice.

The Respondents' appeals were dismissed by a single judge of the Supreme Court for failure to file the Records of Appeal within 60 days from the date of filing the appeals. On 4th August, 2016 the Respondents filed two motions in the Supreme Court to set aside the rulings of the single judge dismissing the Respondents' appeals and asking for the appeals to be determined on the merits.

The Respondents contend that if this Court proceeds to determine the main cause the motions in the Supreme Court will be rendered academic and nugatory and that it is in the interest of justice that the proceedings in this Court be stayed pending the determination of the motions in the Supreme Court.

The Applicant opposed the application and filed Skeleton Arguments from which the following grounds for opposing the application are extracted. The first ground is that the application for stay is an abuse of process aimed at circumventing the rulings of the single judge of the Supreme Court. The Applicant argues that the pending hearing of the Originating Summons is a direct result of the ruling of the Supreme Court and trying to get this Court to stay the proceedings which the Supreme Court Judge had allowed to continue is a clear abuse of the process of the Court as it will achieve the collateral purpose of circumventing the effects of the decision of the Supreme Court.

According to the Applicant what the Respondents are asking this Court to do is to stay the decision of the Supreme Court which dismissed the appeals and discharged the High Court's order of stay. The Applicant contends that the Respondents should instead have appealed to the single judge of the Supreme Court before whom the appeal went to stay the proceedings in the High Court pending hearing and determination of the motions by the full bench of the Supreme Court. The Applicant

cited, amongst others, the learned authors of Halsbury's Laws of England, 4th Edition (Reissue) Volume 37, at paragraph 931 as authority for the abuse of court process argument. The paragraph states as follows:-

"A party may be guilty of an abuse of the process of the court even though he may comply with the strict literal terms of an applicable rule of law, where he does so for improper or ulterior motives or purposes".

The Applicant further argued that the application for stay has no merit as the two motions in the Supreme Court which are the basis of the stay of the application are ill-fated and doomed to fail on account of incurable fundamental defects as they were filed without leave of the Supreme Court after the expiry of the time allowed.

The second ground advanced by the Applicant for opposing the application for stay of proceedings is that the existence of a pending appeal is a pre-condition for the grant of an order of stay of proceedings and the Respondents have not cited any authority that allows this Court to order a stay of its proceedings pending determination of a motion filed in the Supreme Court where there is no pending appeal since the appeals were dismissed by the Supreme Court.

The Applicant submitted that even Order 3 rule 2 of the High Court Rules does not assist the Respondents as it is a default provision. The Applicant also argued that the only provision in our rules dealing with the power of stay is Rule 51 of the Rules of the Supreme Court, Chapter 25 of the Laws of Zambia which stipulates that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.

The Applicant submitted that this is a fit and proper case for the dismissal of the Respondents' application to stay proceedings for want of jurisdiction by this Court and lack of merit. The Applicant also prays for costs.

The Respondents filed Skeleton Arguments in support of their case on 5th August, 2016 while the Applicant filed its Skeleton Arguments in Opposition to Summons for Stay of Proceedings pending Determination of Motion by Supreme Court on 9th August, 2016. The Applicant filed Further Skeleton Arguments on 17th August, 2016 which were followed by the Respondent's Skeleton Arguments in Reply filed on 25th August, 2016. A number of authorities were cited by both sides for which I am indebted.

In the submissions of 17th August, 2016 the Applicant contended that this Court is *functus officio* in so far as the stay of proceedings application is concerned and that it has no jurisdiction to entertain the second application. In that regard, the Applicant cited the case of ***Bank of Zambia v Aaron Chungu, Access Financial Services Limited and Access Leasing Limited (1)*** where the Supreme Court stated, while addressing the issue of the effect of a stay of execution granted by a single judge of the Court, that the order of stay had the effect of removing the proceedings from the High Court into the Supreme Court, thereby ousting the trial judge's jurisdiction in the matter. The Supreme Court stated that in short, the trial judge had no jurisdiction to entertain an application for committal for contempt in a matter that was already before the Supreme Court.

The Applicant argued that similarly the ruling of the single judge of the Supreme Court in the case in *casu* had the effect of removing the proceedings from the High Court into the Supreme Court and thereby ousting the High Court's jurisdiction in so far as the proceedings for the stay application were concerned. That this Court therefore, has no jurisdiction to entertain an application for stay when the matter is already before the Supreme Court and the rulings which have given rise to the application for stay were made by the Supreme Court.

The Applicant argued further that once an order has been made by a superior court, it is not open to the parties to make applications before the lower court which would have the effect of undermining the decision of the superior court. That any application therefore, to stay the proceedings herein can only be entertained by the judge who dismissed the appeals or the full bench of the Supreme Court as a High Court judge

cannot make a decision that has the effect of suspending the operation of the superior court's order.

In response, the Respondents argued that contrary to the Applicant's assertion, there are no ulterior or improper motives behind the application for stay of proceedings which is made in good faith by the Respondents on the basis of motions that have been filed before the Supreme Court which will have an impact on the proceedings before this Court.

The Respondents stressed that they are not asking for a stay of the decision of the single judge of the Supreme Court but of proceedings in the High Court in light of the motions that have been filed before the Supreme Court. The Respondents pointed out that the Applicant has not cited any legal provision that provides for a stay of a decision of a single judge of the Supreme Court.

The Respondents submitted that for the above reasons, the position taken by the Applicant that this application constitutes an abuse of the court process is misplaced and the authorities cited therein do not apply to the application before this Court.

Reacting to the argument that the motions filed in the Supreme Court have a fatal flaw in that the same have been filed out of time and without leave of the Supreme Court, the Respondents submitted that the submission by the Applicant in this regard is not only incompetent before this Court but also not supported by the law they are seeking to rely on in that the motions filed in the Supreme Court were filed pursuant to Order 48(4) of the Supreme Court Rules, Chapter 25 of the Laws of Zambia and not Order 48 (1).

With regards to the argument that the existence of an appeal is a pre-condition for the grant of a stay and that the Respondents had not cited any authorities to show that this Court can grant a stay of proceedings pending the determination of the motions in the Supreme Court, while agreeing that a stay of proceedings pending appeal can only be granted where there is an appeal, the Respondents submitted that a stay of

proceedings is not limited to instances where there is an appeal in place. Further, that the Respondents are not seeking a stay of proceedings pending appeal, hence their reliance on Order 3 rule 2 of the High Court Act as opposed to Order 51 of the Rules of the Supreme Court which only provides for a stay of proceedings pending appeal.

The Respondents argued that the definition of stay of proceedings cannot be limited to instances where there is an appeal. The Respondent cited a number of authorities which define stay of proceedings, one such authority being **R. V. Jewitt (2)** where the Canadian Supreme Court defined a stay of proceedings as:

"A stopping or arresting of judicial proceedings by the direction or order of a Court"

Halsbury's Laws of England, 4th Edition Volume 37 at paragraph 437 at page 325 states as follows:-

"A stay of proceedings arises under an order of the Court which puts a stop or "stay" on the further conduct of proceedings in the Court at the stage which they have reached, so that the parties are precluded thereafter from taking any further step in the proceedings. The object of the order is to avoid the trial or hearing of the action taking place, where the court thinks it is just and convenient to make the order, to prevent undue prejudice being occasioned to the opposite party or to prevent the abuse of process".

It was the Respondents argument that consequently this Court has the power to order a stay of proceedings under Order 3 rule 2 of the High Court Rules and also under its inherent jurisdiction where it thinks it just and convenient so as to prevent undue prejudice to a party. Thus the contention by the Applicant that there must always be an appeal for a stay of proceedings to be granted has no legal basis and must accordingly be dismissed.

The Respondents submitted that the Applicant's submission that this Court became *functus officio* in so far as stay of proceedings are concerned and has no jurisdiction to entertain a second application for stay of proceedings is not supported by the law or

facts of the case because the application before it is not for stay of proceedings pending appeal but pending determination of the two motions in the Supreme Court. Therefore, this submission has no merit.

Responding to the submission by the Applicant that this Court has no jurisdiction to hear the application before it because the proceedings are no longer in the High Court in line with the case of *Bank of Zambia v. Aaron Chungu, Access Leasing Limited and Access Financial Services Limited*, the Respondents submitted that the said case was quoted out of context as the issue for determination in that case was whether it is competent to allege and pursue before the High Court an order for committal for contempt alleging disobedience of an order of a superior court that is, whether an order made by the Supreme Court could be enforced by the High Court.

The Respondents argued that in the matter at hand the Respondents are not seeking to enforce an order of the Supreme Court and in any event, the order of the single judge of the Supreme Court did not have the effect of ousting the jurisdiction of this Court. If anything, the ruling of the single judge of the Supreme Court had the effect of removing the matter from the Supreme Court to the High Court by way of dismissal of the appeals.

It was submitted that the Respondents are seeking to revive the appeals by way of the motions filed in the Supreme Court. Therefore, the *Bank of Zambia and Aaron Chungu* case cited is totally inapplicable to the facts at hand and the argument by the Applicant is not supported by the law.

Reacting to the allegation that this Court undermined the decision of the single judge of the Supreme Court by granting an ex-parte order of stay, the Respondents argued that no such thing was done by the Court because the single judge of the Supreme Court did not direct this Court to undertake any steps in relation to this matter but simply dismissed the appeals. Consequently, the allegation has no basis at law and is not supported by the facts of this case. Similarly, the contention that the Supreme Court

dictated to this Court to continue with the proceedings is not supported by the law or facts since no such direction was given by the single judge of the Supreme Court.

It was the Respondents' submission in conclusion that this Court is vested with the requisite jurisdiction to hear the matter at hand and it is their prayer that the ex-parte order of stay of proceedings granted by this Court is confirmed.

I have carefully considered the affidavits filed by the parties hereto in support of their respective cases; the Skeleton Arguments filed by both parties and the oral submissions by learned counsel on both sides.

I have identified three issues that I am enjoined to consider and determine in this application and these are:-

- (i) Whether or not the grant of a stay of proceedings by this Court would be an abuse of process aimed at circumventing the ruling of the single judge of the Supreme Court;
- (ii) Whether or not the existence of a pending appeal is a pre-condition for the grant of an order of stay of proceedings; and
- (iii) Whether or not this Court is *functus officio* in so far as stay proceedings are concerned and has no jurisdiction to entertain the second stay application

I will now deal with the above issues seriatim.

(i) Whether grant of a stay of proceedings would amount to an abuse of process

I am of the view that contrary to the contention by the Applicant, a grant of a stay of proceedings by this Court would not amount to an abuse of process as it would not have the effect of circumventing the effects of the rulings of the single judge of the Supreme Court. Further, it would not have the effect of staying the decision of the Supreme Court which dismissed the appeals. I am of this view for the reasons that follow hereunder.

I agree with the submission by the Respondents that the application before this Court is for a stay of proceedings before the Court pending the determination of the two motions in the Supreme Court to set aside the rulings of the single judge of the Court. It is not for a stay of the decision of the single judge of the Supreme Court.

In my opinion, the dismissal of the appeals by the single judge of the Supreme Court removed the matter from the Supreme Court and brought it back into the High Court and therefore, the argument that the application which is before this Court for stay of the proceedings in the Court should have been made to the single judge of the Supreme Court who dismissed the appeals does not hold water.

It is my considered view that the reasoning which Mutuna J gave when granting the first stay is still applicable to the current application before this Court. It is still true that the nature of the two motions before the Supreme Court are such that if they are successful, they will lead to a re-opening of the proceedings for purposes of re-litigating the action on the Originating Summons thereby rendering the proceedings nugatory and resulting in great costs to both parties as the matter would be heard twice.

Indeed, as the Supreme Court decided in the case of ***Aristogerasimos Vangelatos v. Demetre Vangelatos, Metro Investments Limited and King Quality Meat Products Limited (3)***, the effects of a stay of proceedings is to suspend the rights the appellant may have in the proceedings in the court below pending the determination of the appeal in order to avoid a situation where the decision on appeal is rendered nugatory and merely academic. The same could be said for stay of proceedings pending determination of other applications and motions not necessarily involving appeals.

Regarding the Applicant's contention that the application for stay has no merit because the motions filed before the Supreme Court which are the basis of the stay application are ill-fated and doomed to fail because they were filed out of time and without leave of the Supreme Court, I am inclined to concur with the Respondents' argument that

this submission is incompetent before this Court and cannot be cited as a ground for rendering the application for stay of proceedings before this Court unmeritorious.

(ii) Whether or not the existence of a pending appeal is a pre-condition for the grant of an order of stay of proceedings

It is the Applicant's contention that the existence of a pending appeal is a pre-condition for the grant of an order of stay of proceedings and since there are no appeals pending in the Supreme Court, this Court cannot grant an order of stay of proceedings.

As submitted by the Respondents, a stay of proceedings is not limited to instances where there is an appeal in place. Whereas Rule 51 of the Rules of the Supreme Court governs stay of proceedings pending appeals to the Court, the High Court has been vested with the power to amongst other things, stay proceedings before it under Order 3 Rule 2 of the High Court Rules which provides as follows:-

"Subject to any particular rules, the Court or a Judge may, in all causes and matters make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not".

The Respondents are correct in their submission that Order 51 of the Supreme Court Rules does not provide for any other stay of proceedings other than a stay of proceedings pending appeal whereas Order 3 rule 2 of the High Court Rules gives the High Court a wide discretion to make interlocutory orders which the Court or Judge considers necessary for doing justice.

The evidence before this Court is that the Respondents have filed two motions in the Supreme Court challenging the decision of the single judge of the Court to dismiss their appeals. It is within the discretion of the Court as granted by Order 3 rule 2 to grant the interlocutory order being sought if the Court deems it necessary for doing justice.

Therefore, contrary to the submission by the Applicant that Order 3 rule 2 of the High Court Rules does not assist the Respondents because it is a default provision, the said

Order has assisted the Respondents in that their application for stay of proceedings was brought under the same Order, and rightly so.

The High Court can also exercise its power to stay proceedings under its inherent jurisdiction as stated by the authors of Halsbury's Laws of England, who elucidate the sources of the powers of a court to stay proceedings. I find the same not only illuminating but also persuasive and I am guided by the same.

The learned authors of Halsbury's Laws of England, 4th Edition state in paragraph 437 as follows:

"The court's power to stay proceedings may be exercised under particular statutory provisions or under the Rules of the Supreme Court or under the inherent jurisdiction or under one or all of these powers since they are cumulative and not exclusive, in their operation. The power may be exercised in respect of an action began by writ of summons, as well as proceedings began by originating summons or petition or by any mode of originating process."

I therefore, hold the view that the existence of a pending appeal is not a pre-condition for the grant of an order of stay of proceedings.

(iii) Whether or not this Court is *functus officio* for purposes of staying proceedings

In my view, this Court is not *functus officio* in so far as the application for stay of proceedings is concerned because the dismissal of the appeals by the Judge of the Supreme Court brought the matter back into the High Court's jurisdiction. The Applicant argued that this Court has no jurisdiction to hear the application for stay of proceedings because, on the authority of *Bank of Zambia v Aaron Chungu, Access Leasing Limited and Access Financial Services Limited*, the proceedings are no longer in the High Court.

It is apparent that the Applicant has quoted the *Bank of Zambia v. Aaron Chungu* case out of context because that case is distinguishable from the case in *casu* in that in the former case, as the Applicant has correctly submitted, the effect of the ruling of the single judge of the Supreme Court was to remove the proceedings from the High Court into the Supreme Court, thereby ousting the High Court's jurisdiction in so far as the stay of proceedings application was concerned.

On the other hand, in the case in *casu* the dismissal of the appeals by the single judge of the Supreme Court did not have the same effect. Indeed, if anything, the dismissal of the appeals had the effect of removing the matter from the Supreme Court back into the High Court, as correctly submitted by the Respondents. The Respondents are currently trying to revive the appeals in the Supreme Court through the motions they have filed.

Further, the submission by the Applicant that the application before this Court has the effect of undermining the decision of the Supreme Court has no legal basis because the Supreme Court did not give any directive to this Court which the Court is undermining by dealing with the application for stay before it. The Supreme Court simply dismissed the Respondents' appeals and as such, there is no decision of the Supreme Court which the High Court is staying by granting a stay of the proceedings before it.

For the aforementioned reasons, I find this to be a proper case for the grant of an order of stay of proceedings pending determination of the motions filed in the Supreme Court by the Respondents. The ex-parte order of stay of proceedings granted on 8th August, 2016 is confirmed. Costs in the cause.

Delivered at Lusaka this 12th day of December, 2016.



W. S. MWENDA (Dr)
HIGH COURT JUDGE