

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

(CONSTITUTIONAL JURISDICTION)

2016/HP/EP/021

**IN THE MATTER OF: ARTICLES 47(2), 51, 54, 72(2)(C) AND
73(1) OF THE CONSTITUTION OF
ZAMBIA, AMENDMENT ACT NO. 2 OF
2016.**

AND

**IN THE MATTER OF: SECTIONS 81, 89, 97(1), 98(C), 99 AND
100(2) OF THE ELECTORAL PROCES
ACT NO. 35 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: RULES 12 AND 15(A)(H) AND (K) OF THE
ELECTORAL CODE OF CONDUCT
RULES.**

**IN THE MATTER OF: THE MUNALI CONSTITUENCY
ELECTIONS HELD IN ZAMBIA ON THE
11TH AUGUST, 2016.**

BETWEEN:

DOREEN SEFUKE MWAMBA - PETITIONER

AND

NKANDU LUO - 1ST RESPONDENT

**ELECTORAL COMMISSION OF
ZAMBIA - 2ND RESPONDENTS**

THE ATTORNEY GENERAL - 3RD RESPONDENT

BEFORE:

Hon. Mr. Justice E.L. Musona

For the Petitioner : Dr. Henry Mbushi of Messrs HBM Advocates

For the 1st Respondent : Mr. B. Mutale S.C. with Mrs B. Mukuka and Mr. M. Bwalya of Messrs Ellis and Co.

For the 2nd Respondents: Mrs N.B. Chanda of Messrs A.M. Wood and Co.

For the 3rd Respondent : Mr. L. Kalaluka, Attorney General with Ms S. Sakala, Senior State Advocate.

RULING

Date : 20th December, 2016

Cases referred to:

- 1. Sonny P. Mulenga and Another and Chainama Hotels Ltd and Others SCZ Judgment No. 15 of 1999.**
- 2. Nyamala Safaris (Z) Ltd and Others v Zambia Wildlife Authority and Others SCZ 8/179/2003 (unreported)**
- 3. Zambia Revenue Authority and Post News Papers Ltd SCZ Judgment No. 18 of 2016 (unreported)**

Legislation referred to:

- 1. Order xi rule 7 of the Constitutional Court Rules S.1 No. 37 of 2016.**
- 2. Article 73(4) of the Constitution of Zambia**
- 3. S. 108(4) of the Electoral Process Act No. 35 of 2016.**

This is a ruling on an Application filed by F/Nkandu Luo seeking an order of court to stay the execution of its own judgment delivered on 22nd November, 2016 pending the determination of an appeal to the Constitutional Court.

The Application was made pursuant to order xi rule 7 of the Constitutional Court Rules Statutory Instrument No. 37 of 2016.

Order xi rule 7 of the Constitutional Court rules reads as follows:

“an appeal shall not operate as a stay of execution or of proceedings under the judgment appealed against unless the High Court or the court so orders and no intermediate act or proceedings shall be invalidated, except so far as the court may direct.”

The parties filed the necessary Affidavits in Support of their propositions as well as skeleton arguments. They also agreed to rely on those and to make no viva voce submissions. Accordingly, therefore, I proceeded to determine this Application for Stay of Execution of Judgment on those basis.

The Application is not without history. The history of this Application is that the Electoral Commission of Zambia conducted, inter alia, Parliamentary Elections in various Constituencies in Zambia including Munali Constituency on 11th August, 2016.

Among other contenders for the Munali Constituency Parliamentary seat were F/Doreen Sefuke Mwamba of the United Party for National Development (UPND) and F/Nkandu Luo of the Patriotic Front (PF).

Female Nkandu Luo of the Patriotic Front was declared winner. Dissatisfied with those election results, F/Doreen Sefuke Mwamba of the United Party for National Development (UPND) petitioned those elections results.

On 22nd November, 2016, this court delivered judgment on that election petition. The net result of that election petition was that the election of F/Nkandu Luo of the Patriotic Front as Member of Parliament for Munali constituency was declared null and void abinitio. Being dissatisfied with the nullification of the election result, F/Nkandu Luo of the Patriotic Front filed a Notice of Appeal in the Constitutional Court on 23rd November, 2016.

Having filed the Notice of Appeal in the constitutional Court, F/Nkandu Luo applied before this court for an order to stay the execution of this court's judgment pending the determination of the appeal. According to the 1st Respondent's Affidavit in Support of Summons for Stay of Execution of Judgment and her skeleton arguments, the grounds upon which this application for stay of execution of judgment is made are as follows:

1. From Paragraph 9 to paragraph 13 of the 1st Respondent's Affidavit in Support of Summons to Stay Execution of Judgment pending appeal showeth that:
 - (a) because following her disputed election she was appointed Minister of Higher Education, and immediately commenced duties.
 - (b) if the Stay of Execution of Judgment is not granted she will be barred from participating in the legislative process of this country.
 - (c) Munali Constituency will be deprived of an elected representative for three months.
 - (d) Because a vacancy in the Munali Parliamentary seat will result in a vacancy in the Office of Minister of Higher Education.
 - (e) If the by-election is held, candidates in this by-election will make reference to the findings contained in the judgment, thereby affecting public perception of her integrity.
2. Other reasons upon which the 1st Respondent begs this court to grant her the stay of execution of judgment pending appeal have been outlined in her skeleton arguments, these reasons are as follows:
 - (a) that her appeal has good prospects of success.
 - (b) that proof to a high degree of convincing clarity was not adduced regarding the allegation that the 1st Respondent used illegally obtained salaries and allowances in her campaigns.

- (c) that it was not proved that the 1st Respondent used a government vehicle or driver for purposes of her campaign.
- (d) that there was no evidence that the incident of 8th August, 2016 prevented the majority of the voters from voting for a candidate of their preference.
- (e) that the Petitioner produced no police report or medial report in respect of the event of 8th August, 2016.

The Petitioner in her Affidavit in Opposition to Summons for Stay of Execution of Judgment argued inter alia, as follows:

- (a) that the 1st Respondent has no chance of succeeding on her appeal because there are no new grounds or circumstances in her appeal that could change the position of the judgment being appealed.
- (b) that the argument by the 1st Respondent in her Affidavit in Support of Summons for Stay of Execution of Judgment that she has since been appointed Minister of Higher Education, and, that a vacancy in the Munali Parliamentary seat would deprive her participation in the Legislative Process of Zambia, deprive Munali representation and create a vacancy in the Office of Minister of Higher Education, is wishful thinking by the 1st Respondent because a ministerial position is not a bar to the nullification of Parliamentary Election, that the appointment of Minister of Higher Education is a prerogative of the President earned through honest means and that another person can be appointed as Minister of High Education.

(c) That the 1st Respondent was quoted in the mast newspaper issue No. 0022 of Thursday, December 1, 2016 at pages 1 and 2 headed:

“LUO TELLS TAXI AND BUS DRIVERS TO IGNORE LUSAKA CENTRAL AND MUNALI SEAT NULLIFICATIONS, THEY ARE LIES.”

Shows that the 1st Respondent has no respect for this court, has already started campaigning for a by-election using a ministerial position and government resources and that this does not show that the 1st Respondent is remorseful of her conduct in the last general elections. The Petitioner further undertook to make available a verbatim recording of statements made by the 1st Respondent if asked to do so. The mast newspaper cutting of Thursday 1st December, 2016 issue No. 0022 was exhibited.

I have considered the arguments and am grateful to parties for affording me the opportunity to have an insight of their thoughts. Clearly, the arguments by F/Nkandu Luo are that having had her Parliamentary seat for Munali Constituency nullified by this court, and having appealed to the Constitutional Court against the judgment of this court, she now wants the blessing of this court to allow her remain in the seat for the Munali Parliamentary Constituency and consequently remain in the Office of Minister of Higher Education until her appeal to the Constitutional Court is determined.

I have looked at her reasons for her desire to remain in the seat for the Munali Parliamentary Constituency. I shall now examine those reasons. Those reasons, inter alia, are that she was elected Member of Parliament for Munali Constituency and subsequently appointed Minister of Higher Education. Her argument is that if the Stay of Execution of Judgment is not granted the seat will be declared vacant. Her further fear is that when that seat is declared vacant she will lose her portfolio as Minister of Higher Education. I have looked at a plethora of authorities and am well guided.

In terms of the effect of an appeal on the judgment appealed against, the law is well settled. That law is found in order xi rule 7 of the Constitutional Court rules and provides as follows:

“An appeal shall not operate as a stay of execution or proceedings under the judgment appealed against unless the High Court or the court so orders and no intermediate act or proceedings be invalidated, except so far as the court may direct.”

What this means is that notwithstanding that a judgment has been appealed against, its execution can be effected unless an order to stay execution of the judgment appealed against has been applied for and granted. This was expounded by the Supreme Court of Zambia in the case of **Sonny P. Mulenga and Another and Chainama Hotels Limited and Others (1)** wherein it was stated that:

“In terms of our rules of the court, an appeal does not automatically operate as a stay of execution...”

It is, therefore, clear why the 1st Respondent made this application for the stay of execution upon filing her notice of appeal in the Constitutional Court.

I have also looked at Article 73(4) of the Constitution of Zambia. That Article provides as follows:

“A Member of Parliament whose election is petitioned shall hold the seat in National Assembly pending the determination of the election petition.”

This provision is very clear. The correct and reasonable interpretation of this provision is that, when an election petition is filed in the High Court, that Member of Parliament who has been dragged to court concerning the disputed election results shall still continue to remain as Member of Parliament, but when the High Court upholds the petition, that Member of Parliament ceases to be a Member of Parliament. The law is clear. What is clear is that the law refers to a Member of Parliament whose election has been petitioned, so only a Member of Parliament whose election has been petitioned can remain a Member of Parliament. The law does not say that even a Member of Parliament who appeals against the nullification of results can remain a Member of Parliament. The law must not be overstretched to include aspects which the legislature did not legislate upon.

The 1st Respondent has demonstrated that she fully understands Article 73(4) of the Constitution of Zambia. She has demonstrated this knowledge in the following respects:

- (a) When the election results were petitioned in the High Court she maintained her seat pending determination of the petition. That was proper because that is what the law says.
- (b) When her election was nullified she knew that she no longer maintained her parliamentary seat even if she had appealed to the Constitutional Court. That is why she applied ex-parte for a Stay of Execution of the Judgment to enable her hold her seat in parliament. This demonstrates that she understands too well that a Member of Parliament whose seat has been nullified cannot hold the seat even if an appeal to the Constitutional Court has been lodged.

I have also looked at **S. 108(4) of the Electoral Process Act No. 35 of 2016**, that section provides as follows:

“where the High Court or a tribunal determines that the Respondent was not duly elected, at the election concerned... the vacancy in the membership of the National Assembly or a council in respect of which that election was held shall be deemed to continue until duly filled.”

The above Section 108(4) of the Electoral Process Act No. 35 of 2016 is clear and does not in any way contradict Article 73(4) of the Constitution of Zambia, what it does, instead, is to agree with Article 73(4) of the Constitution of Zambia and further expounds in

simple and ordinary English the meaning of Article 73(4) of the Constitution of Zambia.

S. 108 (4) of the Electoral Process Act No. 35 of 2016 has shown that where an election result is nullified by a High Court or tribunal, that seat becomes vacant upon its nullification. Indeed, English language cannot be any more clearer than this.

The great question now is whether or not this court should stay its judgment.

The Petitioner has vehemently opposed this application for the stay of execution of the judgment. Of interest is the mast newspaper issue No. 0022 of Thursday, 1st December, 2016 which the Petitioner has exhibited. The Petitioner has further averred that she has a verbatim recording which she is willing to avail.

In that mast newspaper F/Nkandu Luo who is the 1st Respondent is alleged to have bragged to taxi and bus drivers who she addressed concerning the judgment of this court. That story in the mast newspaper makes sad reading because it demeaned the Judicial Process. The language used was also unpalatable street language. This exhibit was availed to the 1st Respondent by the Petitioner.

If this is true, then I find it disrespectful not only to court but also to the whole judicial system and perhaps also, lack of self-respect even to the person who is alleged to have uttered the alleged

disparaging remarks. I have said this because when these remarks were allegedly made the matter was before court. The appeal against the judgment of this court was sitting in the Constitutional Court, and an application for an order to stay execution of judgment was pending before this court. This is what makes it an unfortunate occurrence.

I note with pleasure that the learned Attorney General Mr Kalaluka and learned State Counsel Mr. Mutale are both appearing on the side of the Respondents from whom the unfortunate allegations have been reported. For now I will treat this as mere rumours from the press not capable of swaying my role of dispensing justice. I hope that learned counsel for Respondents shall give the 1st Respondent appropriate advise against such careless outbursts which are capable of putting the court and even the 1st Respondent into ridicule, disrepute and odium.

It is acceptable that the Judiciary is not immune to criticism but it is an affront to the Judicial system if people are let lose to comment on matters which are on appeal or applications for stay of execution of judgment pending appeal are before court. When a matter is in court, it is undesirable for anybody to comment on it. A matter is before court during trial, and the matter is still in court if after judgment an appeal is lodged against judgment or there is an application for stay of execution pending appeal.

It is trite law that a Stay of Execution is granted in order to halt something from being done. It is a stop order. This stop order can only be granted if there is an appeal pending in a superior court and also the stop order must specify with clarity what it is which is sought to be stopped in the order.

I have looked at a Plethora of authorities and I am well guided.

In the case of **Nyamala Safaris (Z) Ltd and Others v Zambia Wildlife Authority and Others (2)** it was held as follows:

“A stay of execution is only granted on good and convincing reason. The rationale for this is clear, which is that a successful litigant should not be deprived of the fruits of his litigation as a matter of course.”

What this means is that an order for stay of execution of judgment is not to be granted automatically. In order for a stay of execution of judgment to be granted, the applicant must show good and convincing reasons. I have not seen any good and convincing reasons to warrant an order for stay of execution of judgment. The reasons given by the 1st Respondent that if the order for stay is not granted she will be deprived of the participation in the legislative process of this country, that the people of Munali Constituency will be deprived of representation and that the office of Minister of Higher Education shall fall vacant are not good and convincing reasons, that is just a mere demonstration of her desire to cling to the Munali Constituency Parliamentary seat. The application for

an order for stay of execution must not be speculative, infinitive, made in a vacuum or plainly unclear. The Applicant for an order for stay of execution must show what it is, in the judgment which is sought to be stayed. Where the judgment contains an order for payment of some kind or the surrender of some property it is that payment or surrender of property which can be stayed pending the determination of an appeal and must be specified in the application. It is wrong and improper to apply for an order for stay of execution of judgment without disclosing what is sought to be stayed in the judgment.

I have also looked at the case of **Zambia Revenue authority and Post Newspapers Ltd (3)**, again, I have been well guided, in that case, the Supreme Court of Zambia at pg J19 stated as follows:

“where a judgment or ruling refuses judicial review or an injunction, there is nothing to stay; because such a judgment or ruling does not award a remedy, such as money or property, which can be obtained by court execution in short, a failed judgment or ruling cannot be stayed because it did not award anything. If there is nothing to execute about such a judgment or ruling, then there is nothing to stay about it. Only a judgment or ruling which awards a remedy and which can be enforced by court process can be stayed.”

In this case there is nothing to execute in the judgment and, therefore, an application for stay is not well founded. This application is destitute of merit and I dismiss it.

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For the avoidance of doubt, the ex-parte order which I granted on 28th November, 2016 has this day 20th December, 2016 been discharged inter partes. The Munali constituency Parliamentary seat remains nullified and vacant until determination of the appeal or any other order by the Constitutional Court. Until then, F/Nkandu Luo is not a Member of Parliament for Munali Constituency.

I order costs of this application in favour of the Petitioner.

Leave to appeal against this ruling is granted.

Delivered and signed in Chambers at Lusaka this the 20th Day of December, 2016.



Hon. Mr. Justice E.L. Musona

HIGH COURT JUDGE