

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

(Civil Jurisdiction)



2004/HP/1228

B E T W E E N :

FIATAXIS LIMITED

PLAINTIFF

AND

JOACHIM CHANI CHISHALA

1ST DEFENDANT

JOHN MUMBA

2ND DEFENDANT

CHRISTOPHER CHEWE

3RD DEFENDANT

YOHANI NGOMA

4TH DEFENDANT

NATHAN PHIRI

5TH DEFENDANT

DANIEL MFULA

6TH DEFENDANT

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the
26th day of April, 2017**

For the Plaintiff : Mr. B.J. Mwanza, Messrs Ituna Partners
*For the Defendant : Mr. A.D Mwansa, Messrs AD Mwansa Mumba &
Associates*

R U L I N G

Case Authorities Referred To:

1. *Nyampala Safris and 4 Others v Wildlife Authority and 6 Others (2004) Z.R. 49 (S.C)*
2. *Sonny Paul Mulenga, Vismar Mulenga, Chainama Hotels Limited and Elephants Head Hotel v Investment Merchant Bank Limited (1999) Z.R 101 (S.C)*
3. *Shelter for All, Evans Mukula Chomba v Kingfred Ramsey and Precious Ramsey SCZ/8/192/2009*

Legislation Referred To:

1. *High Court Act, Chapter 27*

This is Defendant's application to stay execution of judgment. It is filed pursuant to Order 59 Rule 13 (1) and (2) of the Rules of the Supreme Court. It is supported by an Affidavit.

The history of this matter is that on 30th December, 2004, the Plaintiff issued Writ of Summons to recover possession of Lot No. 3546, Lusaka, which was unlawfully acquired by the Defendants. Judgment was delivered on 21st February, 2017, wherein the Plaintiff succeeded in its claims.

At the hearing of this application, Learned Counsel for the Defendant relied on the Affidavit filed in Support. The gist of which is that the Defendants being dissatisfied with the Judgment of this Court intend to appeal to the Court of Appeal. The Defendants believe that their appeal is meritorious and has a high chance of succeeding.

Learned Counsel also contends that the Defendant's counterclaim has merit and that it raises an allegation of fraud which will affect the Plaintiff's title. The Defendants also raise the issue that this Court proceeded with the trial when it was informed by their Counsel's assistant, Ms. Doris N. Sondashi that Counsel was unwell, much to their disadvantage.

In opposing the application, Learned Counsel for the Plaintiff relied on the Affidavit in Opposition. It was contended that the Defendants have no lawful claim to the Plaintiff's property. Further, that the 1st Defendant was convicted by the Magistrate's Court for receiving money by false pretences after he illegally sold portions of the Plaintiff's property. The Plaintiff also contends that it is the registered and legal owner of Lot 3546/M and that the Defendants' appeal has no likelihood of succeeding.

I have carefully examined the Affidavits filed herein and the submissions advanced by the respective parties. The Defendants' application raises the question whether in the circumstances of this case, I can exercise my discretionary power to grant a stay of execution of judgment pending an appeal to the Court of Appeal.

It is a well settled principle of the law that the Court will not grant a stay of execution of judgment unless there are good and reasonable grounds for doing so. What amounts to “good and reasonable grounds” is posited in Order 59/13 of the Rules of the Supreme Court, which puts it thus:

“Neither the Court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. The Court does not make a practice of depriving a successful litigant of the fruits of his litigation... But the Court is likely to grant a stay where the appeal would otherwise be rendered nugatory, or the Appellant would suffer loss which could not be compensated in damages. The question whether or not to grant a stay is entirely in the discretion of the Court and the Court will grant it where the special circumstances of the case so require.... But the Court made it clear that a stay should only be granted where there are good reasons for departing from the starting principle that the successful party should not be deprived of the fruits of the judgment in his favour.”

In the case of **Nyampala Safaris and 4 others v Wildlife Authority and 6 others, Mambilima, JS¹**, as she then was, re-stated this position of law, when she declared that a stay should only be granted where good and convincing reasons have been advanced by a party. She went on to state that the rationale for the position is that a successful litigant should not be deprived of the fruit of litigation as a matter of course.

In the case of **Sonny Paul Mulenga, Vismar Mulenga, Chainama Hotels Limited and Elephants Head Hotel v Investrust Merchant Bank Limited²**, the Supreme Court held that:

- “(i) *In terms of our rules of Court, an appeal does not automatically operate as a stay of execution and it is pointless to request for a stay solely because an appeal has been entered.*
- (ii) *In exercising its discretion whether to grant a stay or not, the Court is entitled to preview the prospects of the proposed appeal succeeding.*
- (iii) *The successful party should not be denied immediate enjoyment unless there are good and sufficient grounds.”*

Considering the guidelines outlined in the above cited cases, the question is, have the Defendants met the criteria set as outlined above to provoke my discretionary power to grant a stay of execution of the judgment? In other words, have the Defendants demonstrated that there are good and convincing reason(s) for granting a stay of execution of judgment? Have they shown in their application that their appeal has prospects of succeeding and if a stay is not granted, then their appeal would be rendered nugatory and an academic exercise?

In applying the above principles to the application before me, I am of the firm view that the Defendants have not advanced good

granted and see no reason to deny the Plaintiff its fruits of judgment.

I accordingly, refuse to grant the Defendants a stay of execution of judgment for the reason that they have not demonstrated good and convincing reasons in their application.

Before I conclude, I wish to refer to the Defendants' Counsel's sentiment over my decision to proceed with trial. According to the Affidavit of Service filed herein, Learned Counsel was fully aware of the hearing date and if at all he was indisposed, he should have filed a notice of motion to adjourn.

Instead he chose to send persons who have no audience before me and who are not parties to these proceedings. In fact, none of the Defendants appeared at the commencement of trial. However, on the last day of trial, some unknown persons who upon inquiry were discovered not to be Defendants sought to address me. In my view, their presence was inconsequential and undesirable. Since the Defendants decided not to defend themselves before Court, and

at their own peril, they must now face the consequences of their actions.

I award costs to the Plaintiff to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 26th day of April, 2017.



M. Mapani-Kawimbe
HIGH COURT JUDGE