

IN THE HIGH COURT FOR ZAMBIA

2012/HPC/0191

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

FINANCE BANK ZAMBIA LIMITED

APPLICANT

AND

SOUTHERN AFRICAN TEACHERS'

DEVELOPMENT COLLEGE LIMITED

1ST RESPONDENT

SILVERSTER MUSA LAMBA KUNDA

2ND RESPONDENT

LYDIA GAVIYANO KUNDA

3RD RESPONDENT

Before the Hon. Lady Justice Irene Zeko Mbewe

For the Applicant : *Mr. M Moonga of Messrs Tembo, Ngulube and Associates*

For the Respondents : *N/A*

R U L I N G

Cases Referred To:

1. *New Plast Industries v The Commissioner of Lands and Attorney-General SCZ Judgment No 8 of 2001*

Legislation Referred to:

1. *High Court Rules, Cap 27 of the Laws of Zambia.*

This is the Respondents' application to set aside the Ruling setting aside the Order staying execution made pursuant to **Order 35 Rule 5 High Court Rules, Cap 27 of the Laws of Zambia.**

The accompanying affidavit dated 7th February 2017 is deposed to by Humphrey Hlazo Ndhlovu the Advocate seized with conduct of the matter. According to the deponent, on 17th December 2012 this Court granted the Respondents' leave to appeal against its Judgment so as to have the matter sent back for an assessment or reconciliation of the balance or amount owing to the Applicant. That when the appeal came up, the parties were engaged in discussions to enter a possible Consent Order so that the matter of the amount claimed is assessed by the Deputy Registrar. That it was agreed that execution of the Judgment would be stayed until the assessment was made. That a Consent Order was sent to the Respondents' Advocates but was misplaced, and in the meanwhile, Counsel for the Applicant made an application to discharge the Order staying execution and for possession of the property in

question. That the Respondents were not given an opportunity to be heard and the 2nd and 3rd Respondents face a possible eviction from the subject property. That the Respondents be heard on the merits. According to the Respondents, the 1st Respondent liquidated the loan obtained from the Applicant.

A supplementary affidavit was filed on 7th February 2017 deposed to by Lydia Gaviyawo Kunda the 3rd Respondent herein. It is deposed that the Respondents' were denied an opportunity to be heard as summons and supporting affidavit were not served on them by the Applicant. That on the 1st Respondent's account there were several unexplained debits and un-credited deposit slips. According to the deponent, a sum of K250,000 was credited to the 1st Respondent's account number 0070841630009 and an immediate debit of K157,205,551.10 (unrebased) was made on 17th March 2010. That the Applicant opened account number 0230104958001 without the 1st Respondent's application. That the Applicant kept on deducting interest loan liquidations and other charges and debited the 1st Respondent's account with a sum of K250,000,000.00 (unrebased) which action caused confusion in the 1st Respondent's account, and

that no explanation was given by the Applicant. It is deposed that the parties agreed to reconcile the accounts and enter a Consent Order to have the matter referred to the Deputy Registry for reconciliation of the entries on the 1st Respondent's account. That the Respondents' have not refused to have a reconciliation made before Court. According to the 1st Respondent, the Applicant is forcing a possession of the property which was secured by a loan which has since been paid, and therefore it is only fair and proper that this Court's Ruling and Order to set aside the stay of execution be set aside so that the matter is heard on its merits.

The opposing affidavit was deposed to by Richard Ngulube Counsel seized with conduct of the matter on behalf of the Applicant. It is deposed that an Order to stay execution was granted on 3rd September 2016 pending an appeal to the Supreme Court of this Court's Judgment of 8th August 2012. That after considerable delay, when the matter came up inter parte, the Court proceeded to hear the matter in the absence of the Respondents' Advocates as both parties had filed their respective affidavits which were on record. The Court then discharged the Order for stay of execution

pending appeal to the Supreme Court upon due consideration of the affidavit evidence on record. That the Court record shows that the then Counsel for the Applicant informed the Court that they had sent copies of a Consent Order to Counsel for the Respondents' but the same had not been executed.

Counsel for the Respondents' in their heads of argument contend that the Respondents were deprived from opposing the application on its merit. That it is trite law that except in ex parte applications, all contentious applications shall be served on the opposing parties. No authorities were cited in support of this argument. **Order X High Court Rules, Cap 27 of the Laws of Zambia** was cited in respect to personal service of court process. That the Applicant never served the summons on the Respondents or their Advocates. The Applicant, in its list of authorities, drew the Court's attention to the case of **New Plast v Commissioner of Lands and Attorney-General** in support of the proposition as to what constitutes a hearing.

I have considered the affidavit evidence and skeleton arguments and list of authorities.

The Respondents' application was scheduled for hearing on 11th July 2017, and on the 10th July 2017, Counsel for the Respondents' filed a notice of motion to adjourn stating that he was before the Supreme Court on the scheduled date of 11th July 2017. A perusal of the record shows that the Court had set the date for hearing of the present application on the 29th May 2017 and on the same date the notice of hearing was sent to both parties. I find that there was sufficient time from 29th May 2017 within which to make an application for an adjournment and not conveniently leave it until the last minute. Counsel for the Respondents' did not exhibit any cause list or notice of hearing to confirm the sittings in the Supreme Court. I concur with Counsel for the Applicant that the notice of intention to adjourn contravenes **Order 53 Rule 12 Rules of the High Court, Cap 27 of the Laws of Zambia.**

On 11th July 2017, I proceeded to hear the inter parte hearing of the Respondents' summons to set aside the Ruling setting aside the Order staying execution pending appeal dated 15th February 2016 in the absence of Counsel for the Respondents' since the Court had

on record the parties filed affidavits and supporting arguments and this would in no way prejudice the Respondents'.

A perusal of the record shows that on 15th March 2017 the matter did not proceed as the opposing affidavit was served late on Counsel for the Respondents'. When the matter came up on 29th May 2017, Counsel for the Respondents' was not present and no reasons were advanced for his absence. The matter was then adjourned to 11th July 2017.

The Respondents' application is premised on **Order 35 Rule 5, Rules of the High Court, Cap 27 of the Laws of Zambia** which provides as follows:

“5. Any judgment obtained against any party in the absence of such party may, on sufficient cause shown be set aside by the Court, upon such terms as may seem fit”.

It is clear from **Order 35 Rule 5 High Court Rules, Cap 27 of the Laws of Zambia** that the Court has jurisdiction to order a new trial if the Judgment has been obtained in the absence of a party.

The issue for determination is whether or not the Respondents' has in its application shown sufficient cause to warrant the setting aside of the Court Order of 15th February 2016 granted in the absence of the Respondents.

The predominant consideration is the explanation of the absence of the absent party that is most important, unless the absence was not deliberate but was due to accident, or mistake, the Court will be unlikely to set aside the Order. Other relevant considerations include the prospects of success of the Applicant in its appeal; the conduct of the Applicant; whether the successful party would be prejudiced if the Ruling is set aside; and the public interest in there being an end to litigation.

According to Counsel for the Respondents', the reasons for failing to attend the inter parte hearing of 5th January 2016 was as a result of the Applicant's failure to send the draft Consent Order to the Respondents, and that the summons to set aside the stay of execution pending appeal together with its supporting affidavit was never served on the Respondents' or their Advocates.

The background to this application is that Judgment was entered on 8th August 2012 in the absence of Counsel for the Respondent. An application was made to set aside Judgment on 30th October 2012 and the matter then came up on 8th November 2012 and was adjourned at the instance of Counsel for the Respondents' to 20th November 2012. On 20th November 2012, there was no appearance from Counsel for the Respondents and the application to set aside the Judgment of 8th August 2012 was dismissed with costs. An Order for leave to appeal to the Supreme Court against the Ruling of 20th November 2012 was granted on 17th December 2012. A writ of possession was filed on 28th May 2013. On 13th September 2013, an ex parte Order was granted staying execution pending the hearing of the appeal in the Supreme Court. The inter parte hearing was endorsed on the ex parte Order and was to be heard on 2nd October 2013. On that date Counsel for the Respondent sought an adjournment stating that the affidavit in opposition was served late. The matter was adjourned to 4th October 2013. On 4th October 2013, the parties agreed to stay execution and to settle by way of a Consent Order and matter was again adjourned. On 5th January 2016, the matter came up for the hearing for a stay of execution

pending appeal and Counsel for the Respondent was not in attendance and no explanation was given for their absence. The Court proceeded to hear the matter in the absence of Counsel for the Respondent based on the affidavit evidence on record. At the hearing, Counsel for the Applicant submitted that the Applicant had sent the Consent Order to the Respondents some time in 2013 and there was a failure to execute the Consent Order. In its subsequent Ruling of 15th February 2016, the Court dismissed the Respondent's application to stay execution pending appeal, and the ex parte stay of execution dated 13th September 2013 was discharged. There is a myriad of excuses for the delays in determining this matter.

In considering justice between the parties, the conduct of the person applying to set aside the Order has to be considered. A perusal of the records shows that Counsel for the Respondents' dragged their feet in this matter in almost a consistent pattern, thereby prejudicing the Applicant who is being denied the fruits of its Judgment. There was no progress made for over a period of two years in respect to the Consent Order.

Counsel for the Applicant argues that the mere fact that Counsel for the Respondents' was not present does not mean that there was no hearing and relied on the case of **New Plast Industries v The Commissioner of Lands and the Attorney-General** where it was held that:

"the content of what amounts to the hearing of the parties in any proceedings can take either the form of oral or written evidence. Where the evidence in support of an application is by way of affidavit, the deponent cannot be heard to say that he was denied the right of a fair hearing simply because he had not adduced oral evidence."

I find that there is force in this argument and I adopt the Supreme Court's decision in the aforesaid case. There was enough material before Court to properly consider the Respondents' application to stay execution pending appeal without the need for evidence oral or written or indeed submissions and therefore, I opine that no injustice or prejudice has been occasioned to the Respondents' herein. The 1st Respondent in its affidavit in support avers that the subject loan was paid in full. The record shows that Judgment was

entered in favour of the Applicant as the Respondents' did not show a defence on the merits nor did it raise serious issues.

Litigants should always be mindful that the Court's mandate is to adjudicate upon matters brought before it and not to be used as a playground for litigants who fold their arms and watch justice go by and fail to advance their cause.

The net sum is that the Respondents' application to set aside the Order of 15th February 2016 dismissing their application to stay execution pending appeal, made in the absence of the Respondents' lacks merit and I accordingly dismiss it.

Costs to the Applicant to be taxed in default of agreement.

Dated in Chambers this 1st August 2017.



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HON. IRENE ZEKO MBEWE
HIGH COURT JUDGE