

IT

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



2017/HPC/0260

BETWEEN:

KINGS CENTER

PLAINTIFF

AND

FOOD AGENTS OF ZAMBIA
MUSHE MILLING

1st DEFENDANT
2nd DEFENDANTS

Before Lady Justice B.G Lunguon 1st September, 2017

For the 2nd Defendant, Mr. M. Nkulukusa, Messrs Charles Siamutwa Legal Practitioners

RULING

Cases referred to:

1. *Stanley Mwambazi vs. Morester Farms Limited (1977) Z.R. 108 (S.C.);*
2. *Evans v Bartlam [1937] A.C. 473; [1937] 2 All E.R. 646.*

Legislation and Other Materials referred to:

1. *Order XXXVI., rule 9, High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;*
2. *Order XII., rule 2, High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;*
3. *Order XXX, rule 4, High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;*
4. *Order LIII., rule 10 (8), High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;*

5. Order XXXVI., rule 10, High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia.

This is the 2nd Defendant's application for an order of stay of execution of the Judgment in Default of Appearance entered in favour of the Plaintiff on the 21st July, 2017.

The application is made by Summons, stated to be issued pursuant to **Order XXXVI., r. 9 as read with Order XII., r. 2 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia.**

The application is supported by an Affidavit deposed to by Vikas Sharma, which was filed on 2nd August, 2017.

The Affidavit in Support reveals that the matter was commenced on 13th June, 2017 and that on 21st July, 2017 Judgment in Default of Appearance was entered. The delay in entering Appearance was attributed to administrative lapses in communicating the originating process within the 2nd Defendant Company.

According to the deposition of Mr Sharma, the 2nd Defendant has a defence on the merits, as evidenced by exhibit marked "**VS3**", a copy of the draft defence that the 2nd Defendant intends to file. Moreover, it was attested that the 2nd Defendant has since filed an application seeking to set aside of the Default Judgment.

When the matter came up for hearing, Counsel for the 2nd Defendant contended that the Court had power to order a stay of execution of any judgment in default obtained in the absence of a party, upon sufficient grounds.

Counsel submitted that the draft defence, exhibit "**VS3**", raised very potent triable issues, which he contended constituted sufficient ground upon which the Court could order a stay of the default judgment. Counsel buttressed his arguments by relying on the cases of **Stanley Mwambazi vs. Morester Farms Limited (1977) Z.R. 108 (S.C.)¹** and **Evans v Bartlam [1937] A.C. 473; [1937] 2 All E.R. 646²**.

The record reflects that the application, together with the *Ex-Parte* Order for stay, duly endorsed with a return date for *inter-parte* hearing were served on the Plaintiff on 24th August, 2017. The details of service are contained in an Affidavit of Service, deposed by Mulembe Likwasi, filed on 31st August, 2017.

Despite service having been effected, the Plaintiff was not in attendance at the hearing and no documents in opposition were filed. Consequently, considering that the application was of an urgent nature, I proceeded to hear the matter *ex-parte* pursuant to **Order XXX., r. 4 of the High Court Rules**, for purposes of expediency.

I now move to consider Orders XXXVI., r.9 and Order XII., r. 2, upon which the application was premised.

Order XXXVI, r.9 reads as follows:

"Where any judgment or order directs the payment of money, the Court or a Judge may, for any sufficient reason, order that the amount shall be paid by installments, with or without interest. The order may be made at the time of giving judgment, or at any time afterwards, and may be rescinded or varied upon sufficient cause, at any time. The order shall state that, upon the failure of any installment, the whole amount remaining unpaid shall forthwith become due:

Provided that where there is a default in paying any one installment, there shall be no order for stay of execution on the balance."

In my view, Order XXXVI., rule 9 is not an enabling provision, but rather an inhibiting one. That is, it does not grant the Court the power to order a stay of execution of any judgment. On the contrary, it restricts the Court's power to grant a stay of execution in cases where there has been a default in paying any one installment on a Judgment debt payable in installments.

The second limb upon which the application stands is Order XII., rule 2 of the High Court Rules, which reads:

"Where the writ of summons is endorsed for a liquidated demand and there are several defendants, of whom one or more appear to the writ, and another or others of them fail to appear, the plaintiff may enter final judgment, as in sub-rule (1), against such as have not appeared and may issue execution upon the judgment without prejudice to his right to proceed with the action against those that have appeared."

My interpretation of Order XII., rule 2 is that where there are more than one defendants in a matter began by writ of summons and any one of the defendants fails to enter appearance, whilst others enter appearance, the Plaintiff may enter final judgment against those who failed to do so, whilst proceeding with the action against those who entered appearance. Additionally, the Plaintiff is entitled, without prejudice to his right to proceed with the action against those that appeared, to issue execution upon the judgment obtained against those who failed to appear.

I have carefully studied the record and the Affidavit evidence on file. They disclose that there are two Defendants in this matter, neither of whom entered appearance. Consequently, Judgment in Default was entered against both Defendants. Subsequently, the Plaintiff issued execution against both Defendants by way of Writ of Fieri Facias filed on 1st August, 2017.

Given that neither of the Defendants entered Appearance, I do not see how Order XII., r.2 assists the 2nd Defendant's application. I take pause at this juncture to observe that the 2nd Defendant, in filing this application did not comply with **Order LIII, r. 10 (8) of the High Court Rules**. Order LIII., r.10 (8) prescribes a mandatory requirement for an applicant in an interlocutory application to file skeleton arguments of its case together with the interlocutory application.

Since the 2nd Defendant elected not to comply with Order LIII., r. 10 (8) of the High Rules, and in the absence of the said skeleton arguments, I will not veer into an escapade of trying to discern how the 2nd Defendant considers that Order XXXVI., r9 as read with Order XII., r.2 underpins its application. As such, in light of my reading of the Orders, and there being neither a judgment payable in instalments, nor a situation where some of more than one defendants entered appearance, I am of the settled mind that the cited orders do not apply to this application.

Moving to the cited case law, I have thoroughly studied the case of **Stanley Mwambazi vs. Morester Farms Limited (1977) Z.R. 108 (S.C.)**. That **was** an appeal from an order made by a High Court Judge refusing an application to set aside judgment in default of appearance. The ratiocination given in that case was for dismissing the default judgment and not for granting a stay of execution. The authority therefore does not offer any principle to support the grant of a stay of execution.

Similarly, in the case of **Evans vs. Bartlam**, Lord Atkin and Lord Wright ratiocinate on provisions with regard to the setting aside of judgments obtained in default. At this stage, I am not considering the application to set aside the Default Judgment. As such, I decline to give further consideration to the cited case law, for to do so would pre-empt the pending application to set aside the Default Judgment.

Having considered the Defendant's submissions, I am not persuaded by any of the authorities that were used to support their application for an order for stay of execution.

Notwithstanding the above, I am cognisant that the primary recourse for guidance on the grant, by this Court, of a stay of execution is **Order XXXVI., rule 10 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia**, which reads as follows:

"Except as provided for under rule 9, the Court or Judge may, on sufficient grounds, order stay of execution of judgment."

Order XXXVI., r.10 clearly gives this Court a general mandate to order a stay of execution of a judgment. However the mandate cannot be exercised carte blanche. There are two mandatory terms attached to this mandate. Firstly, the Court cannot order a stay of execution which is prohibited under rule 9 of Order XXXVI; and secondly, there must be sufficient ground upon which the stay must be rooted.

As has been observed, this application does not centre on a judgment payable in installments. That being the case, my focus is on the second qualification, the existence of a sufficient ground.

On the question of what constitutes sufficient ground, judicial precedents guide that the requirement is that the reasons upon which the application for stay are founded must be given with sufficient particularity in the circumstances of the case so as to

provide adequate justification for the grant of a stay of execution of judgment.

In casu, the rationale for applying for a stay of execution of the Judgment is that the Judgment was a Default Judgment which the 2nd Defendant has since applied to set aside.

In my view, the fact that the Default Judgment is exposed to the risk of being set aside, it is that exposure to obliteration which constitutes a sufficient ground upon which this Court may stay further execution of the said Judgment.

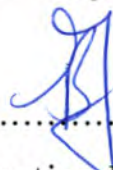
There being sufficient ground, I consider that this is an appropriate case to exercise my discretion to grant further execution of the default judgment of 21st July, 2017, pending determination of the application to set it aside.

Accordingly, further execution of the Default Judgment of 21st July, 2017, as against the 2nd Defendant, is stayed pursuant to Order XXXVI., r.10 of the High Court Rules.

Each party to bear its own costs.

Leave to appeal is granted.

Dated this 4th day of September, 2017



Justice B.G.Lungu

HIGH COURT JUDGE