

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

2017/HP/0764

**BETWEEN :**

ELIAS TEMBO

PLAINTIFF**AND**

BEAUTY MOYO

1ST DEFENDANT

THE ATTORNEY GENERAL

2ND DEFENDANT

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the 5th
day of October, 2017**

For the Plaintiff

:

*Mr. M. Katolo, Messrs Milner & Paul Legal
Practitioners*

R U L I N G

Cases Referred To:

1. *Nyampala Safaris 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 Investrust Merchant Bank Limited* (1999) Z.R 101 (S.C)
3. *Tresphord Chali v Bwalya Emmanuel Kanyanta Ngandu* SCZ/8/009/2014

Legislation Referred To:

1. *High Court Rules, Chapter 27*

By an ex-parte application, the Plaintiff seeks a stay of execution of ruling pending determination of an interlocutory

appeal pursuant to Order 3 Rule 2 of the High Court Rules. It is supported by an Affidavit.

The background of this application is that the Court discharged the ex-parte order of interim injunction granted to the Plaintiff on 8th August, 2017, for failing to meet the threshold of injunctive relief. The Plaintiff being dissatisfied with the ruling has lodged an appeal to the Court of Appeal.

The gist of the Affidavit in Support is that the Plaintiff is convinced that his appeal has high prospects of success because the dispute involves a peculiar piece of land. He contends that if an injunction is not granted, he may suffer loss, which cannot be atoned by an award of damages. The Plaintiff further contends that if the ruling is not stayed then his appeal will be rendered an entire academic exercise.

At the hearing, Learned Counsel for the Plaintiff relied on the Affidavit filed herein and the Skeleton Arguments. Learned Counsel submitted that the appeal had high prospects of succeeding granted that the question of ownership of land was valid for determination.

He argued that since the land in dispute was amenable to alienation by the 1st Defendant and considering its uniqueness in terms of location and size, a stay of execution was desirable. Counsel further submitted that since there is no judgment rendered herein, the Plaintiff has good cause to seek a stay.

I have seriously considered the application together with the Affidavit and Skeleton Arguments filed herein. I shall not reproduce the Skeleton Arguments suffice to state that they will be taken into account in the ruling. The application raises the question whether in the circumstances of this case, I should exercise my discretionary power to grant a stay of execution of my ruling dated 22nd September, 2017.

It is a well settled principle of the law that a 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 was 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, has the Plaintiff met the criteria set as outlined above in order for me to exercise my discretionary power to grant a stay of execution of the ruling in question?

I have come to the conclusion that the Plaintiff has not met the threshold for being granted a stay. It is trite in considering an application for a stay that I have a duty to examine the grounds of appeal, to determine whether an appeal has prospects of succeeding. This however, by no means, implies that I should delve into the merits of each ground of appeal. I have perused the Memorandum of Appeal and observe that it mainly assails findings of fact and does not raise difficult points of law. In my view, the appeal appears to have dim prospects of succeeding.

In the case of **Tresphord Chali Vs Bwalya Emmanuel Kanyanta Ngandu**³ the Supreme Court held that:

"The court below held that the appellant had failed to prove his case. The court accordingly dismissed the action. The appellant wants to stay execution of that judgment. We are at a loss to what the purpose of staying execution of that judgment is. The appellant sought some declarations. He failed to obtain any. For example the appellant's claim for a declaration that Farm L/19962/M belongs to him failed. Does he, by the stay of execution that he seeks, want that claim to be deemed to have succeeded until the appeal is determined? If that is what he wants then this application is untenable because this is not the purpose for which an order for

stay of execution of a judgment is granted. The same can be said about the other declarations that he sought. Therefore, we see no purpose for granting any stay of execution in this appeal. We dismiss the application, with costs to the respondent."

I discharged the ex-parte order of interim injunction granted to the Plaintiff because it did not meet the threshold of injunctive relief. Thus, what is there to stay? If I do grant a stay, then, I will be indirectly granting an injunction, when I have already declined to do so.

I therefore, refuse to stay my earlier ruling and dismiss this application. I make no order as to costs.

Dated this 5th day of October, 2017.


M. Mapani-Kawimbe
HIGH COURT JUDGE