

R1

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

1999/HP/1570



B E T W E E N :

KAYUNI SOCIAL SERVICES DEVELOPMENT
ASSOCIATION

PLAINTIFF

AND

THE ATTORNEY GENERAL
MUBILA SIANYAMA MWILU

**1ST DEFENDANT
2ND DEFENDANT**

IN THE MATTER OF:

**ORDER XLIII, RULE 1 OF THE HIGH
COURT RULES, CAP 27 OF THE LAWS
OF ZAMBIA**

IN THE MATTER OF:

**AN APPLICATION FOR
INTERPLEADER**

AND

IN THE MATTER BETWEEN:

THE SHERIFF OF ZAMBIA
HAMAANGABA MOOMPO
JOSIYA HAMALAMBO
SIMON SIMUCHEKA
ENOCK MEEMBA

**INTERPLEADER
1ST CLAIMANT
2ND CLAIMANT
3RD CLAIMANT
4TH CLAIMANT**

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the 7th
day of November, 2017**

<i>For the Plaintiff</i>	:	<i>No Appearance</i>
<i>For the 1st Defendant</i>	:	<i>No Appearance</i>
<i>For the 2nd Defendant</i>	:	<i>Mrs. L. Mushota, Messrs Mushota & Associates</i>
<i>For the Interpleader</i>	:	<i>No Appearance</i>
<i>For the Claimants</i>	:	<i>Ms. C. Bweupe, Messrs AKM Legal Practitioners</i>

R U L I N G

Cases Referred To:

1. *Sonny Paul Mulenga, Vismar Mulenga, Chainama Hotels Limited and Elephants Head Hotel v Investrust Merchant Bank Limited* (1999) Z.R 101 (S.C)
2. *Nyampala Safaris and 4 Others v Wildlife Authority and 6 Others* (2004) Z.R 49 (S.C)
3. *Tresphord Chali v Bwalya Emmanuel Kanyanta Ngandu* SCZ/8/009/2014

Legislation Referred To:

1. *High Court Rules, Chapter 27*
2. *Rules of the Supreme Court, 1999 Edition*

This is the 2nd Defendant's application for a stay of ruling pending appeal. It is made pursuant to order 30 Rule 10 of the High Court Rules and is supported by an Affidavit.

The background of this application is that on 14th July, 2017, the Court delivered a ruling wherein it held that the Claimants were rightfully entitled to the cattle, which were wrongly seized by the Undersheriff at the instruction of the 2nd Defendant. The Plaintiff being dissatisfied with the Ruling has lodged an appeal in the Court of Appeal.

The gist of the Affidavit in Support is that the 2nd Defendant is convinced that his appeal has high prospects of success. He contends that if the Ruling is not stayed then his appeal will be rendered nugatory.

The 1st, 2nd, 3rd and 4th Claimants filed a combined Affidavit in Opposition, which was sworn by **Hamaangaba Moompo**. He states that his Advocates advice is that a successful party should not be denied immediate enjoyment of the fruits of judgment unless there are good and sufficient grounds to do so. That the 2nd Defendant's appeal does not show sufficient grounds upon which this Court should stay execution of its Ruling. Further, he believes that the appeal has no prospects of success and the application for a stay is mischievous and only meant to protract this matter.

Mubila Sianyama Mwilu filed an Affidavit in Reply, where he reiterates that his appeal has high prospects of success.

Learned Counsel for the 1st, 2nd, 3rd and 4th Claimants filed skeleton arguments where she submitted that this Court is entitled to preview the prospects of an appeal in exercising its discretion whether to stay execution of its Ruling or not. She further submitted that the appeal had no prospects of success mainly because the *Writ of Fifta* was executed on the Claimants' property when they were not parties to the proceedings. She argued that this fact could not be altered even if the matter went as far as the Supreme Court.

Counsel further submitted that her perusal of the 2nd Defendant's grounds of appeal revealed that it had no prospects of success. She contended that the 2nd Defendant would not suffer any irreparable damage if the stay is not granted and that the animals seized are returned to the Claimants. Further, if the 2nd Defendant were to be successful on appeal, an award of compensation would be sufficient.

The 2nd Defendant's skeleton arguments in Reply were that guidelines on considering an application for stay of execution of judgment were clear. Firstly, a Court is empowered under the High Court Rules to grant orders of stay and that an appeal on its own does not operate as a stay of execution. She placed reliance on the case of **Sonny Paul Mulenga & Others v Investrust Merchant Bank Limited**¹. Counsel argued that the 2nd Defendant had justifiably appealed to the Court of Appeal and was entitled to an opportunity to be heard.

Counsel stated that the entire Ruling was liable to execution and therefore, if execution was done prior to determination of the appeal, the 2nd Defendant's appeal would be rendered nugatory. She prayed to

the Court to exercise its discretion in granting a stay. She contended that the stay of execution would not prejudice the Claimants as execution of the Ruling could still be levied after the appellate Court had disposed of the appeal.

Counsel submitted that the Court was only required to make a conclusion that an appeal had prospects of success or not.

At the hearing, learned Counsel for the 2nd Defendant relied on the Affidavit in Support. Learned Counsel for the Claimants who had not been served with process undertook to file an Affidavit in Opposition and skeleton arguments, which she would entirely rely on.

I have seriously considered the application together with the Affidavits and Skeleton Arguments filed herein. The application raises the question whether in the circumstances of this case, I can exercise my discretionary power to grant a stay of execution of my Ruling dated 14th July, 2017.

It is a well settled principle of the law that a Court will not grant a stay of execution of judgment unless they 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, JS²**, 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 Limited¹**, 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 cited cases, the question is, has the 2nd Defendant 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 2nd Defendant 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, it has 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."

The 2nd Defendant did not succeed in any of his claims. Therefore what is there to stay? If I do grant a stay, then, I will be indirectly changing the outcome of my Ruling, which is highly undesirable. I therefore, refuse to stay my earlier Ruling and dismiss this application.

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

Dated this 7th day of November, 2017.


M. Mapani-Kawimbe
HIGH COURT JUDGE