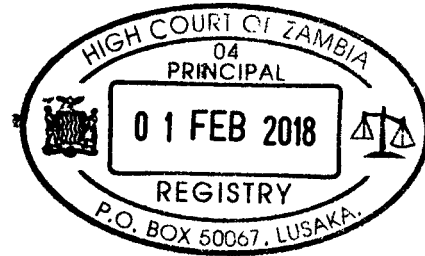


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2017/HP/0764



B E T W E E N :

ELIAS TEMBO

PLAINTIFF

AND

BEAUTY MOYO
THE ATTORNEY GENERAL

**1ST DEFENDANT
2ND DEFENDANT**

**Before Honorable Mrs. Justice M. Mapani-Kawimbe on the 1st day of
February, 2018**

For the Plaintiff : *Mr. M. J. Katolo, Milner and Paul Legal
Practitioners*

E X T E M P O R E R U L I N G

Cases Referred To:

1. *Watson Bowa Nkandu v Mubiana and Zesco Limited* SCZ Appeal No. 121/2011
2. *Sony Paul Mulenga, Vismar Mulenga, Chainama Hotels Limited and Elephants Head Hotel v Investrust Merchant Bank Limited* (1999) Z.R 101 (S.C)
3. *Nyampala Safaris and 4 Others v Wildlife Authority and 6 Others* (2004) Z.R 49 (S.C)
4. *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*

By *ex parte* summons made pursuant to Order III Rule 2 of the High Court Act, the Plaintiff seeks to stay of execution of Judgment delivered herein. The application is supported by an Affidavit.

The background facts are that the Plaintiff sued the Defendant for the possession of Stand LUS/24399, Lusaka. The Plaintiff claimed to have inchoate interest in the property based on Mr. Charles Lububi's offer letter. Judgment was delivered against the Plaintiff because he failed to prove his claims in Court.

At the hearing, Learned Counsel placed reliance on the Affidavit in Support. The gist of which, is that the Plaintiff is immensely aggrieved with the Judgment and lodged an appeal to the Court of Appeal on 26th January, 2018. Counsel also placed reliance on the case of **Watson Bowa Nkandu v Mubiana and Zesco Limited, Appeal¹**, where the Supreme Court reiterated its position in the case of **Sony Paul Mulenga and Vismar Mulenga, Chainama Hotels Limited and Elephants Head Hotel v Investrust Merchant Bank²** on stay of execution of judgments.

The Plaintiff believes that his appeal has high prospects of success and if his application is declined, he is likely to suffer irreparable injury because his action involves land. He asserts that land cannot be atoned by an award of damages. He prays to Court to grant him the application.

I have carefully examined the Affidavit filed herein and the submissions of Counsel. 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 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, JS³**, 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, has the Plaintiff met the criteria set as outlined above to provoke my discretionary power to grant a stay of execution of the judgment? Has he shown in his application that his appeal has prospects of succeeding and if a stay is not granted, then his appeal would be rendered nugatory?

In applying the above principles to the application before me, I am of the firm view that the Plaintiff has not advanced good reasons for a stay of execution of judgment. I have considered the appeal and it mainly attacks findings of facts and does not raise difficult points of law. It is unlikely to succeed.

The dispute between the parties concerns land, which is not a moveable asset. In the case of **Shelter For All, Evans Mukula Chomba v Kingfred Rumsey and Precious Ramsey**⁴, the Supreme Court stated that:

“land is an immovable asset and any developments on it have monetary value, which can easily be ascertained by assessment.”

Taking that principle of law into account, I hold that the Plaintiff will not suffer irreparable damage if a stay is not granted. I find no reason to deny the Defendants their fruits of judgment. Moreover, if I do not grant a stay, then I will be inadvertently changing the outcome of my decision, which is not my intention.

I accordingly, dismiss this application but make no order as to costs.

Dated this 1st day of February, 2018


M. Mapani-Kawimbe
HIGH COURT JUDGE