

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2014/HPC/0039

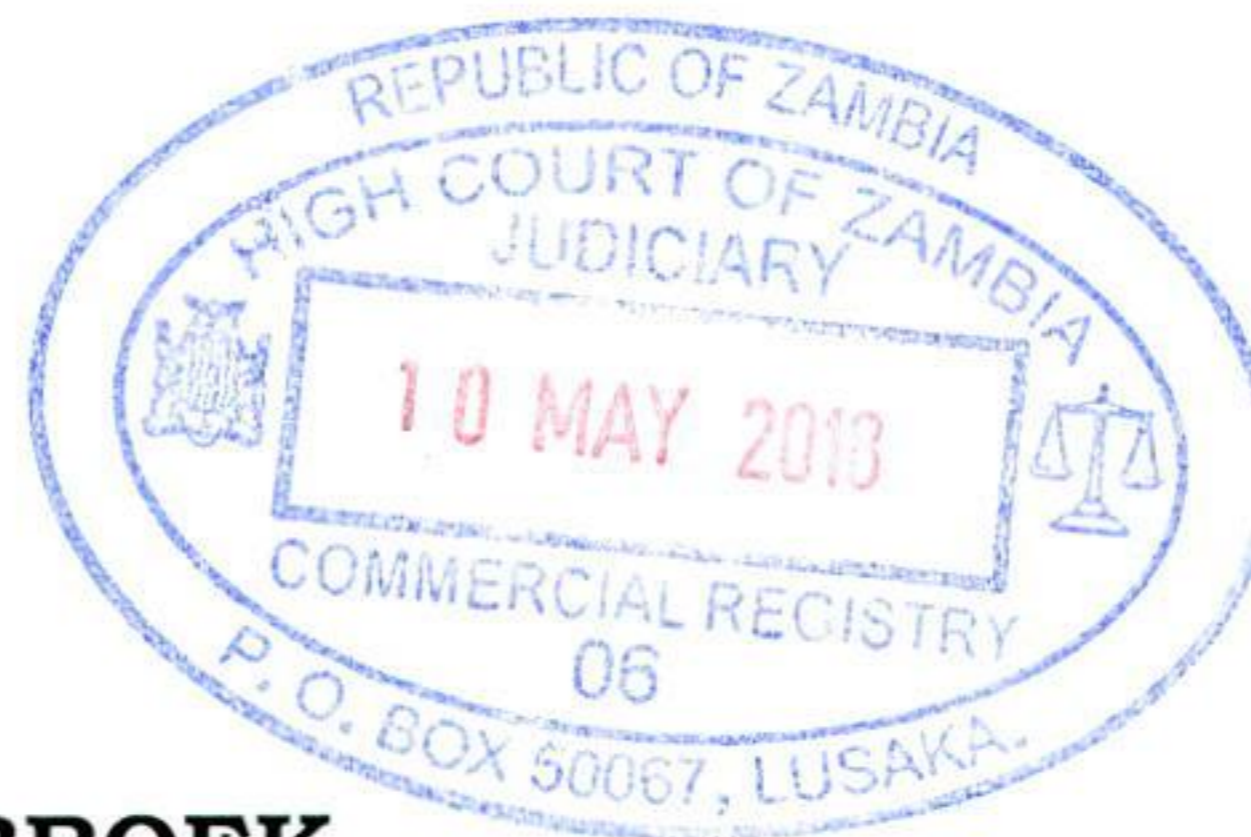
BETWEEN:

NANKHONDE KASONDE

JAN WILLEM VAN DEN BROEK

AND

MOFYA KASHIMBAYA



1ST PLAINTIFF

2ND PLAINTIFF

DEFENDANT

**CORAM: Hon. Madam Justice Dr. W.S. Mwenda in Chambers at
Lusaka on the 10th day of May, 2018**

For the Plaintiffs: Ms. M. Muma of Messrs. Corpus Legal
Practitioners

For the Defendant: Mr. K. Mwondela and Ms. C. Phiri of
Lloyd Jones and Collins

RULING

Cases referred to:

1. *Southern Cross Company Limited v. Nonc Systems Technology Limited* (2011/HK/223) [2012] ZMHC 19.
2. *Sonny Paul Mulenga & Vismer Mulenga (Both personally & Practising as SP Mulenga International) and Chainama Hotels Limited and Elephants Head Hotel Limited and Investrust Merchant Bank Limited*, S.C.Z. Judgment No. 15 of 1999.

3. *Kapiri Glass Products Limited v. Maruti Oil Industry Limited* (1993 - 1994) Z.R. 73 (H.C.).
4. *Luanshya Copper Mines Plc v. First Rand Ireland Plc & 2 Others*, SCZ/8/168/2009.
5. *Sunday Kawayo v. First Alliance Bank Zambia Limited*, SCZ/8/208 of 1997.
6. *Zambia Export and Import Bank Limited v. Mkuyu Farms Limited and Others*, SCZ Judgment No. 9 of 1993.
7. *African Banking Corporation Zambia Limited (T/A Bank ABC) v. Chat Milling Company Limited and 4 Others*, Ruling dated 3rd June, 2015.
8. *Bell Equipment Zambia Limited v. Scirocco Enterprises Limited*, 2015/HPC/0567.
9. *Zambia Revenue Authority v. The Post Newspaper*, SCZ Judgment No. 18 of 2016.

Legislation referred to:

- a. Order 36, Rule 10 of the High Court Rules, Chapter 27 of the Laws of Zambia.
- b. Order 36, Rule 9 of the High Court Rules, Chapter 27 of the Laws of Zambia.
- c. Order 45, Rule 11 of the Rules of the Supreme Court, 1999 Edition (the "White Book").
- d. Order 47, Rule 1 (1) (a) of the Rules of the Supreme Court, 1999 Edition (the "White Book").
- e. Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia.

There are two applications by the Defendant before this Court, namely, an application for an Order of Stay of Execution of Judgment and an application for an Order to pay the Judgment sum in instalments (hereinafter referred to as the "First Application" and "Second Application"), respectively.

The background to the Applications is that Judgment was entered against the Defendant on 15th June, 2016, in the sum of

K137,292,50. The Defendant indicated that he had no intentions of appealing the said Judgement and was willing to settle the Judgment debt, but in instalments.

The First Application is made pursuant to Order 36, Rule 10^a of the High Court Rules, Chapter 27 of the Laws of Zambia (hereinafter referred to as the "High Court Rules") which provides as follows:

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

Rule 9^b which is referred to in the said provision, in turn, provides 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."

The First Application is supported by an affidavit (hereinafter referred to as the "First Affidavit in Support"), sworn by the Defendant herein and whose testimony is that he is not inclined to appeal the Judgment and that he is only in a position to settle the Judgment debt if he is permitted to do so in instalments.

It is the deponent's further testimony that he has accordingly instructed his advocates to prepare and file an application to settle the Judgment debt in instalments. To support this assertion, the deponent has produced exhibits "MK1-1" to "MK1-3", being copies of the documents evidencing the said application.

Finally, it is the deponent's testimony that he verily believes that the application exhibited has reasonable prospects of succeeding and that unless a stay of execution of judgment is granted, the said application will be rendered nugatory.

The First Affidavit in Support is augmented by Skeleton Arguments, the core of which is that the Defendant has, through the application exhibited in the First Affidavit in Support, demonstrated good and sufficient grounds warranting an order of stay of execution of judgment. To fortify this submission, Counsel for the Defendant has referred the Court to the cases of *Southern Cross Company Limited v. Nonc Systems Technology Limited*¹ and *Sonny Paul Mulenga & Vismer Mulenga (Both personally & Practising as SP Mulenga International) and Chainama Hotels Limited and Elephants Head Hotel Limited and Investrust Merchant Bank Limited*².

Counsel for the Defendant has also submitted that this Court is clothed with the discretion to decide whether or not to grant a stay of execution of judgment and that such discretion should only be granted where there are sufficient grounds meriting the suspension

of the execution of the judgment. In this regard, Counsel for the Defendant has referred the Court to Order 36, Rule 10 of the High Court Rules, Orders 45, Rule 11^c and 47, Rule 1(1) (a)^d of the Rules of the Supreme Court, 1999 Edition (hereinafter referred to as the "White Book"), and further to the case of *Kapiri Glass Products Limited v. Maruti Oil Industry Limited*³.

The First Application is opposed and an affidavit (hereinafter referred to as the "First Affidavit in Opposition"), sworn by the 2nd Plaintiff on his and the 1st Plaintiff's behalf, was duly filed into court on 23rd March, 2017.

It is the deponent's testimony, in the said affidavit, that the Defendant's testimony as it relates to his residence is incorrect as the Plaintiffs' advocates had failed to effect service of the Judgment on the Defendant at the said address, where one Semba Engineering and Construction Company Limited refused to accept the intended service. That as a result, the Plaintiffs' advocates had to apply for substituted service as the Defendant's address remains unknown. To lend support to this assertion, the deponent has produced exhibit "JWB1", being a copy of the affidavit in support of *ex parte* summons for an order to serve the Judgment by substituted service.

Further, the deponent avers that he has been advised by his advocates that the Court cannot stay a money judgment for the mere convenience of the Defendant and that the Defendant has not

provided sufficient reasons, by way of disclosure of his assets and liabilities, to support his assertion that he is unable to settle the Judgment debt in a lump sum.

It is also the testimony of the deponent that the application exhibited in the First Affidavit in Support is incompetent as it is not supported by an affidavit of means.

The deponent has further averred that he has been advised by his advocates and believes that the granting of an order of stay of execution of judgment is not obtained as of right, that the Defendant has to show special circumstances that merit such grant; and that the Defendant is merely attempting to delay the process and deny the Plaintiffs the fruits of their Judgment.

It is the deponent's final testimony that the Defendant has failed to demonstrate any special circumstances to warrant a stay of execution of Judgment and that the Defendant's application exhibited in the First Affidavit in Support is unlikely to succeed.

The First Affidavit in Opposition is augmented by Skeleton Arguments, the gist of which is that the Defendant has failed to demonstrate sufficient reasons for the grant of an order to stay execution of the Judgment and that the Defendant's entire case is unmeritorious and not warranting an order for the stay of execution of judgment.

Submitting that the Court's powers in such applications are discretionary and that the granting of the said applications should be preceded by special circumstances warranting the grant, Counsel for the Plaintiffs referred the Court to Order 47, Rule 1(1) of the White Book (already cited above).

Further, Counsel for the Plaintiffs has also submitted that as a stay of execution of judgment is an equitable remedy, it is guided by the principle that 'he who comes to equity must come with clean hands' and that as the Defendant has not disclosed his true residential address, rendering personal service of the Judgment impossible. Therefore, the application for stay of execution has not been made in good faith.

To buttress the contention that the Defendant has not shown sufficient grounds for the grant of an order for stay of execution of judgment, save to serve its convenience, Counsel for the Plaintiffs has referred the Court to the case of *Luanshya Copper Mines Plc v. First Rand Ireland Plc & 2 Others*⁴.

Counsel for the Plaintiffs has finally submitted that the Defendant's First Affidavit in Support does not even address his capacity to pay the Judgment debt in instalments, therefore, failing to show his entitlement to a stay.

In reply, an affidavit (hereinafter referred to as the "First Affidavit in Reply"), sworn by the Defendant herein, was filed into court on 1st June, 2017.

It is the deponent's testimony in the said affidavit that the Plaintiffs' assertions as to his residence are incorrect as he had moved in pursuit of business opportunities at the time the Plaintiffs attempted to serve the Judgment on him.

Further, the deponent has challenged the Plaintiffs' assertion that this application has been made only for convenience and has averred, instead, that he has been advised by his advocates and verily believes that it is necessary as there is a *bona fide* application within the law pending determination.

The deponent has also averred that he has been advised by his advocates and verily believes that the Plaintiffs' testimony that the Defendant has failed to demonstrate sufficient reasons by disclosing his assets and liabilities or an affidavit of means is misplaced and therefore, extraneous.

Finally, it is the deponent's testimony that it is incorrect that he has failed to show any special circumstances to warrant a stay of execution of judgment and that it is incorrect that his application to pay the Judgment debt in instalments is unlikely to succeed.

The Second Application is made pursuant to Order 36 Rule 9 of the High Court Rules, which has already been cited and quoted above.

The Second Application is supported by an affidavit (hereinafter called the "Second Affidavit in Support"), sworn by the Defendant herein and whose testimony is that he is not inclined to appeal the Judgment and that he does not have the capacity to liquidate the entire Judgment sum in one lump sum as he is currently out of employment and is subsisting out of his savings which are not substantial. While the affidavit purports to have attached to it, exhibit "MK1" to augment these assertions, no such exhibit has been attached for the Court's examination.

Further the deponent has also deposed that his monthly income and expenditure have been exhibited in the affidavit as "MK2". However, the affidavit on the record does not contain such exhibit either.

It is the further testimony of the deponent that he had invested in a company called Anguloraso Zambia Limited, in which he owns 40% shares and was expecting to generate income beginning January, 2017, in the sum of US\$1,500.00. That in the premises, he proposes to liquidate the Judgment debt in monthly instalments of US\$750.00 with effect from January, 2017.

Finally, the deponent has deposed that he is willing to commit any dividends or profits received from Anguloraso Zambia Limited to liquidating the Judgment debt.

The Second Affidavit in Support is augmented by Skeleton Arguments, the crux of which is that, while the issue of payment of a Judgment debt in instalments is not a matter of right, the said issue lies in the discretion of the Court. Further that the Defendant having shown willingness to settle the Judgment debt, but for financial constraints, the Court should exercise its discretion in favour of the Defendant and grant the Second Application, which will still allow the Plaintiff's to enjoy the fruits of their Judgment.

Citing Order 47, Rule 1(3) of the White Book and the case of *Sunday Kawayia v. First Alliance Bank Zambia Limited*⁵, Counsel for the Defendant submitted that a court may order a Judgment debt to be paid in instalments, provided sufficient grounds are shown.

Further, Counsel for the Defendant referred the Court to the case of *Zambia Export and Import Bank Limited v. Mkuyu Farms Limited and Others*⁶, to fortify their submission that an order for the payment of any Judgment debt by instalments should be made only where the Judgment debtor has been examined as to his means and proved that he had no sufficient means to meet the Judgment debt in one lump payment.

Finally, Counsel for the Defendant referred the Court to Section 13^e of the High Court Act, Chapter 27 of the Laws of Zambia, contending that law and equity should be administered concurrently.

In opposing the Second Application, the Plaintiffs filed into court on 23rd March, 2017, an affidavit (hereinafter referred to as the "Second Affidavit in Opposition"), sworn by the 2nd Plaintiff on his and the 1st Plaintiff's behalf.

In the said affidavit the assertions as to the residence of the Defendant are maintained as addressed in the First Affidavit in Opposition.

The deponent has deposed that the Defendant has failed to inform the Court the reasons for him not being able to pay a lump sum and that he has not shown the Court that he has no other assets capable of being liquidated. That the Defendant has not provided a list of all his assets and liabilities and therefore, has not provided a clear picture to come to the conclusion that he is not capable of settling the Judgment debt in a lump sum.

The deponent has also deposed that he has been advised by his advocates and believes that the granting of an order to pay a judgment sum in instalments is not obtained as of right, but that the Defendant should give sufficient proof of his inability to pay the Judgment debt in full. That the Defendant has not shown that he is impecunious, but rather shown that he has savings and a monthly income from Anguloraso Zambia Limited, which can be applied towards payment of the Judgment debt.

The deponent has further deposed that despite the Defendant saying that he has savings, he has not shown any financial statements of how much money he has in his savings and that there is no proof that the Defendant's savings are insufficient to pay the lump sum amount.

The deponent has also averred that the Defendant has shown that despite his absence of employment, he was able to make an investment in Anguloraso Zambia Limited after the termination of his employment and 13 days after Judgment was entered against him. As evidence of this assertion, the deponent has produced exhibit "JWB2", being a printout obtained from the Patents and Companies Registration Agency (PACRA).

That the Defendant has not shown his inability to pay the lump sum but has shown the Court that he is more than likely to receive a substantial amount of funds in the near future, and that at the date of the Second Affidavit in Opposition, the Defendant had not made any payment into court to show commitment towards paying the Judgment sum in instalments.

It is the further testimony of the deponent that the Defendant has capacity to settle the Judgment debt in a lump sum and has not fully disclosed the extent of his assets and earnings, nor shown that he is undergoing financial difficulties to justify him paying in instalments.

That the application is calculated to buy the Defendant time in which to pay the Judgment debt and that the delay in the payment of the said sum has caused the Plaintiffs to suffer loss of profit that they would have received from completing the construction of their house on time.

Finally, that the Plaintiffs will be greatly prejudiced if an order to pay in instalments were to be granted, in that they have to incur additional legal fees.

The Second Affidavit in Opposition is augmented by Skeleton Arguments the main contention of which is that the application is incompetent as the Defendant has failed to file an affidavit of means to show that his assets and liabilities for the Court's consideration and has failed to demonstrate sufficient reasons for the application to pay in instalments.

Counsel has cited several cases, some of which have already been referred to above. Of the new cases cited, most notable is a High Court ruling in the case of *African Banking Corporation Zambia Limited (T/A BancABC) v. Chat Milling Company Limited and 4 Others*⁷, dated 3rd June, 2015, speaking to the requirement of a Defendant of the nature herein to provide an affidavit of means.

Counsel for the Plaintiffs has also referred the Court to the case of *Bell Equipment Zambia Limited v. Scirocco Enterprises Limited*⁸, which states that in such an application, the applicant should provide the court a full and comprehensive financial statement and list of assets and liabilities.

Finally, Counsel for the Plaintiffs has submitted that the Defendant's proposal of paying monthly instalments of US\$750.00 towards liquidating the Judgment debt would be to the detriment of the Plaintiffs who need the entire amount for the completion of the house, and that such arrangement will cause the Plaintiffs to suffer great loss and damage.

In reply, the Defendant filed in an affidavit (hereinafter referred to as the "Second Affidavit in Reply"), sworn by the said Defendant and filed into court on 23rd June, 2017.

In the said affidavit, the deponent has reiterated that the Plaintiffs' assertions as to his residence are incorrect and that his legal address remains the same. Further, that the Plaintiffs' assertions that he has failed to justify an order granting payment in instalments is incorrect and reiterates that he has sufficiently shown reasons warranting an order to pay in instalments.

The deponent has also testified that his investment in shares in Anguloraso Zambia Limited was from savings and not as the

Plaintiffs have put it, which, he says, is misleading and that contrary to the Plaintiffs' assertions, he has adequately shown that he is unable to settle the Judgment debt in a lump sum.

That in the event that this application is granted, he is ready to begin payments immediately and had at the time of this application, paid into court, the sum of K50,000.00 towards the liquidation of the Judgment debt. To this end, the deponent has produced exhibit "MK1", being a copy of the Notice of Payment into Court, dated 21st June, 2017.

It is the further testimony of the deponent that, contrary to the Plaintiffs' assertion, he has fully disclosed his assets for the time being, to the best of his ability and that the only other assets he has are two old model motor vehicles, in respect of which he has produced exhibits "MK2" and "MK3".

That he sold his real estate in order to satisfy the Judgment debt and has recovered part of the payment of the transaction which proceeds are going towards satisfying the Judgment debt and legal fees.

That he has been advised and believes that the Plaintiffs' assertion as to his failure to show anything tangible to support this application is, therefore, extraneous.

Finally, the deponent has deposed that contrary to the Plaintiffs' testimony he has adequately provided an affidavit of means and that it is not true that the Plaintiffs will lose the benefits of the Judgment debt if this application is granted.

No further submissions were made by both Counsel at the hearing of the Applications.

I have carefully considered the parties' affidavits and Skeleton Arguments in support of and in opposition to the Applications herein. I am indebted to Counsel for the plethora of resources consulted.

As a perusal of the record reveals that the Defendant is not disputing the Judgment debt owed to the Plaintiffs and has indicated that he has no intention of appealing the same, the next thing to do is to liquidate the Judgment debt, which the Defendant seeks to settle in instalments. the issues falling for determination, in my view are:

- (i) whether the circumstances herein are appropriate for the grant of an order to stay execution of Judgment; and
- (ii) whether the conditions preceding the grant of an order for payment of a Judgment debt in instalments, have been satisfied by the Defendant.

While I recognise that the recount of the Applications herein, as well as at the hearing on 28th June, 2017, are arranged in such a way that the application for stay of execution of judgment was considered

before the application for an order to settle Judgment debt in instalments, it is only logical that I proceed to address the Second Application before the First Application as the issues to consider are mutually inclusive.

In the Second Application, the Defendant has contended that he is unable to settle the Judgment debt as he has financial difficulties, although, he had proposed that he was ready settle the Judgment debt in monthly instalments of US\$750.00, beginning January, 2017.

Order 36, Rule 9 of the High Court Rules (already cited above), pursuant to which the Second Application has been made, provides adequate guidance on how a court ought to address such an application. The Order also gives the court room to exercise its discretion in considering such an issue and this point has adequately been brought to the fore by both Counsel, herein.

In pursuance of interpreting the said Order, the pronouncement of the Supreme Court in the case of *Zambia Export and Import Bank Limited v. Mkuyu Farms Limited and Others*, cited by Counsel on both sides herein cannot be over emphasised. The Court may order that a Judgment debt be satisfied by instalments upon sufficient cause being shown by the Judgment debtor.

Indeed, as correctly advanced by both Counsel, there should be facts and evidence presented by the applicant, sufficient enough to stir a court to exercise its discretion in favour of such applicant. This, as guided by the Supreme Court, would involve examination on oath of

the applicant as to their means or inability to liquidate the debt in one lump payment.

It is trite that a person in whose favour a judgment is rendered should not be denied the fruits of the judgment unless sufficient grounds exist justifying the same. This, therefore, places the responsibility to satisfy the court that the suspension of the execution of or alteration of the judgment as ordered is necessary, on the person seeking such suspension/alteration.

I have examined the evidence on the record and find that the Defendant has not adequately demonstrated that his are circumstances that justify an order to liquidate the Judgment debt in instalments. He has failed to substantiate his claim that he is unable to pay the Judgment debt in one lump sum and I tend to agree with Counsel for the Plaintiffs that the Defendant has made the Second Application merely for convenience.

The record shows that the Defendant has so far made two payments into court, namely, K50,000.00 paid on 21st June, 2017 and a subsequent K10,000.00, paid on 17th April, 2018.

I have noted that the period between the two payments is almost ten (10) months and I am of the view that the Defendant, knowing that he had every intention to settle the Judgment debt with an initial proposition of an instalments plan, could have done better than he has.

After the initial payment into court, of the sum of K50,000.00, the Judgment debt of K137,292.50 was reduced to K87,292.50. Assuming therefore, that the Defendant had taken the prudent initiative of paying into court his proposed monthly instalments of US\$750.00 in the said 10 months, he would have at least liquidated approximately US\$7,500.00. This would have translated to the liquidation of about K75,000.00 of the outstanding K87,292.50 and bringing the outstanding balance to about K12,292.50.

Contrary to the Defendant's assertion that he is desirous of liquidating the Judgment debt in monthly instalments, there is no proof on the record, to show that he has made any effort to reduce his liability to the Plaintiffs, from the time he made the first payment into court, on 21st June, 2017 to the next payment that followed on 17th April, 2018.

In the premises, I am of the view that the Defendant has had ample time to liquidate the Judgment debt and given that the Defendant on his own ingenuity made two payments into court, I see nothing that could have stopped him from reducing his indebtedness, in light of period involved and his alleged commitment to settling the debt. A trend is being created here which can only lead to the conclusion that the Defendant would not commit to paying the instalments consistently if the Application were to be granted.

In any event, the Defendant had indicated from the onset that he had no intentions of challenging the Judgment and therefore, must have had it at the back of his mind that he would have to settle the full amount at one point or another. Going by his proposed commitment plan, he has had enough time to save funds for the debt he has not denied.

To grant the Defendant's Second Application as prayed, and in the proposed monthly instalments of US\$750.00, would entail that the Judgment debt is settled in excess of 12 months. Such a period, in my view, is too long and would be prejudicial to the Plaintiffs whose fruits of the Judgment have already been delayed enough.

In view of the foregoing, the Application for an order to pay the Judgment debt in instalments is unsuccessful and accordingly, dismissed.

Turning to the First Application, for stay of execution of judgment, it is important to note that a stay is granted pending a subsequent action. The justification of the said subsequent action as having some merit is what, in turn, justifies an order for a stay.

The Supreme Court has clearly given guidance on the law relating to applications for granting of stay in the case of *Zambia Revenue Authority v. The Post Newspaper*⁹. The Supreme Court made the following pronouncement in the said case:

"...A party is not entitled to it as of right and such discretion must be exercised judiciously and on well-established principles. Firstly, the successful party should not be denied the immediate enjoyment of a Judgment, unless there are good and sufficient grounds. Stay of Execution should not be granted for mere convenience... Neither should it be granted on sympathetic or moral considerations."

Indeed, it is clear from the authority above that more has to be shown by an applicant, for the court to be inclined to grant an order for stay of execution.

The First Application herein, was made pending the Second Application. However, in order for the First Application to be successfully granted, the Court should be satisfied that the evidence sought to be advanced on the Second Application passes the test of 'sufficient grounds'. The evidence intended under the Second Application would, thus, either be in the form of an independent application as herein, or as a proposed application, in which case a draft of the application together with all its intended evidence would be exhibited in the affidavit of the First Application. The rationale is so that the Court can address its mind to the reasons an applicant has for seeking a stay of execution.

Therefore, since the reasons and evidence under the Second Application herein have been examined and found to be insufficient, it follows that the First Application must also fail. The Application for stay of execution of judgment is accordingly dismissed.

Costs to the Plaintiffs, to be agreed or taxed in default thereof.

Dated at Lusaka the 10th day of May, 2018.



**W.S. MWENDA (Dr.)
HIGH COURT JUDGE**