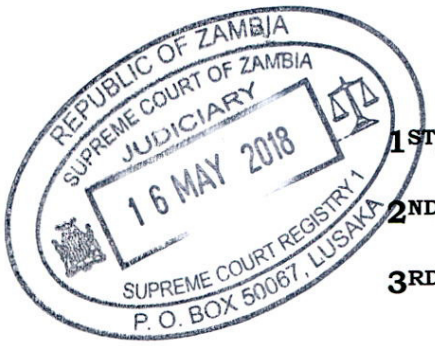
IT

IN THE SUPREME COURT OF ZAMBIA **SCZ/8/273/2015**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

JACKSON MAMBO SAKALA	**1ST APPLICANT**
ELIAS SAKALA	**2ND APPLICANT**
ZHYAME MZEZE	**3RD APPLICANT**

AND

JOHN WILLIAM KELLY CLAYTON	**1ST RESPONDENT**
KWATHU FARMS LIMITED	**2ND RESPONDENT**

CORAM: **Mwanamwambwa D.C.J., Phiri** and **Malila, JJS**

On 6th February 2018 and 16th May 2018

For the Applicants: *Ms. M. Mushipe of Messrs Mushipe & Associates.*

For the Respondents: *Mr. K. Wishimanga of Messrs A.M. Wood & Co.*

JUDGMENT

Mwanamwambwa, D.C.J., delivered the Judgment of the Court.

CASES REFERRED TO:

1. ***Anti-Corruption Commission v Barnnet Development Corporation Limited (2008) Z.R. 69 Vol. 1 (SC)***
2. ***Aristogerasimos Vangelatos and Vasiliko Vangelatos v Metro Investments Limited & Others, SCZ Ruling No. 21 of 2013***

3. ***Attorney General v Law Association of Zambia*** *(2008) Z.R. 21 Vol. 1 (S.C)*
4. ***Bank of Zambia v Jonas Tembo & Others*** *(SCZ Judgment No. 24 of 2002)*
5. ***Mwambazi v Morester Farms*** *Ltd (1977) Z.R. 108*
6. ***Noviello v Ele International Ltd*** *(1997) CA Transcript 265*
7. ***S.P Mulenga Associates International & Chainama Hotels Ltd v First Alliance Bank (Z) Ltd*** *(Appeal No. 182/2008)*
8. ***University of Zambia Council v Calder*** *(1998) S.J. 21 (S.C.)*
9. ***WT Lamb & Sons v Rider Same v Same*** *(1948) 2 ALL ER 402*
10. ***Zambia Revenue Authority v Post Newspapers Limited***, *Selected Judgment No. 18 of 2016*

LEGISLATION REFERRED TO:

1. ***Lands and Deeds Registry Act***, *Cap 185 of the Laws of Zambia, Sections 33 and 34(1)(c)*
2. ***Rules of the Supreme Court of England (White Book)*** *1999 Edition, Order 59/14/23*
3. ***Supreme Court Rules***, *Cap 25 of the Laws of Zambia, Rules 12 and 49(2)*

OTHER WORKS REFERRED TO:

Halsbury's Laws of England, *4th Ed. Vol. 17 pages 271 and 273, paragraphs 453 and 455*

This is a Notice of Motion to vary, discharge or reverse the dismissal, by a single Judge of this Court, of two applications made by the Applicants.

Facts are that the Respondents sued the Applicants in the High Court, in Cause No. **1999/HP/0684**. They were seeking to recover vacant possession of Farm 1957, Lusaka West. The Court delivered Judgment in November 2012. It found that the farm belonged to the Respondents. Further, that there were squatters on the land, but it had not been established that the Applicants were inside the farm. The Court granted the Respondents an order of possession of the land occupied by the squatters. It gave the squatters thirty days to vacate the land, failing which the Respondents would be at liberty to issue a Writ of Possession.

About two years later, in September 2014, the Respondents filed a Writ of Possession. Later that month, the Applicants applied for leave to appeal out of time against the Judgment of November, 2012. The Affidavit in support of the application indicated that the Applicants were dissatisfied with the Judgment. They also applied for a stay of execution of that Judgment, pending appeal.

Two reasons were advanced by the Applicants for their being out of time. Firstly, they stated that they only became aware of the Judgment four months after it had been delivered. Secondly, that they had difficulty retaining counsel to prosecute their appeal.

In a Ruling dated 26th August, 2015, the High Court observed that instead of appealing when they became aware of the Judgment, the Applicants commenced a fresh action, fourteen months later, in Cause No. **2014/HP/828**. It took the view that the Applicants had made a decision not to appeal. That they only changed their minds after their action in Cause No. 2014/HP/828 was thrown out by both the High Court and a single Judge of this Court.

Further, the Court found that the fact that the Applicants were parties to Cause No. 2014/HP/828 demonstrated that they did, in fact, have access to legal representation. Therefore, they could have attended to their appeal earlier than they did. That instead, it took them about one year and ten months to apply for leave to appeal out of time. On those grounds, the Court dismissed the application for leave to appeal out of time. It added that the application for stay of execution automatically fell away.

Dissatisfied with that Ruling of August, 2015, the Applicants applied before the same Court for leave to appeal against it. They also applied for an order staying execution of the Ruling, pending determination of the application for leave to appeal.

The learned High Court Judge stated that the grounds relied on by the Applicants were essentially the same as those advanced in their application to appeal out of time, which he dismissed. That the Applicants had provided no compelling reason why the Court should depart from its earlier reasoning that the Appeal had no prospect of success. The learned Judge dismissed the application to appeal against its Ruling of 26thAugust, 2015.

The Applicants then filed two applications before asingle Judge of this Court. The first application was for leave to appeal against the High Court Ruling of 26th August, 2015. The second one was for stay of execution of that Ruling, pending determination of the application for leave to appeal.

The single Judge noted that Counsel for the Applicants had spiritedly argued for stay of execution of the High Court Judgment of November, 2012.She, however, went on to point out that:

> ***"the ex parte summons for stay of execution pending hearing and determination of the application for leave to appeal the ruling dated 26th August, 2015 makes specific reference to stay of that ruling. So does the affidavit in support..."***[Emphasis ours]

On that basis, the single Judge held that the Applicants could not now extend their application to staying execution of the November, 2012 Judgment. In addition, they had not refuted the Respondents' assertion that execution of the Judgment had already occurred. Thus, the application for stay of its execution had come too late in the day. She also found that the High Court's refusal to grant the Applicants leave to appeal the Judgment out of time, and to stay its execution, could not be a subject of stay because it was a refusal to grant that which did not exist in the first place.

The single Judge also agreed with the High Court that after becoming aware of the Judgment, the Applicants opted for a fresh action. That their efforts to appeal out of time were meant to deprive the Respondents of the enjoyment of the fruits of a Judgment in their favour. She dismissed both applications, hence this Motion.

The Notice of Motion was accompanied by an Affidavit in Support, which was deposed to by the 1st Applicant. He stated that the application he filed before the learned single Judge was for leave to appeal against the Ruling of August, 2015, in tandem with an ex parte application for stay of execution of the November, 2012 Judgment. According to paragraphs 9(a) and 9(b) of the Affidavit in Support, the learned single Judge misdirected herself, respectively -

(a) in ignoring or at least failing to appreciate the circumstances shown by the applicants that were appropriate for a stay to be granted; and

(b) when she decided that the applications by the Applicants were just an attempt to deprive the Respondents of the enjoyment of the fruits of the Judgment in their favour without appreciating the reasonable prospects of success on appeal advanced by the Applicants in their affidavit evidence.

The Respondents filed an Affidavit in Opposition to the Notice of Motion. It was deposed to by the 1st Respondent. Reacting to paragraph 9(a) of the Affidavit in Support, he referred to page R14 of

the single Judge's Ruling (***page 21 of the record of motion***), where the single Judge stated the following:

> "...***the learned Judge refused to grant leave to appeal out of time against the Judgment of 14th November, 2012, and to stay execution of the Judgment. What then is there to stay? Definitely, the refusal by the Judge to grant what did not exist in the first place cannot be the subject of a stay***".

Regarding paragraph 9(b) of the Applicants' Affidavit, the 1st Respondent deposed that the single Judge did, in fact, consider the prospects of the appeal succeeding when she held, at page R17 of her Ruling (***page 24 of the record of motion***), that:

> "***The degree of prejudice to the Respondents if the appeal is granted is clear, especially that the proposed appeal has no reasonable prospect of success. The squatters on the Respondents' farm have no right to be there and the matter has been in court since 1999.***"

The Respondents' position was that until 24th September, 2014, the Applicants were represented, in the Court below, by Dove Chambers. Therefore, they were always aware of the November, 2012 Judgment but, rather than appeal, they chose to commence a fresh action, almost two years after the Judgment was delivered.

The Applicants filed an Affidavit in Reply, the gist of which was that they should have been allowed to appeal out of time because they have a genuine claim of right to the land in dispute. It was deposed that the Respondents extended their farm's boundaries to unjustly encompass the Applicant's land. Further, that the Respondents levied execution only on some parts of the properties in issue. That the Applicants applied for a stay in order to stop any further execution extending to their respective portions.

Both the Applicants and the Respondents filed heads of argument. Their respective Counsels supplemented the heads with oral submissions at the hearing of the Motion.

In their heads of argument, the Applicants reiterated that the learned single Judge failed to appreciate the special circumstances warranting a stay of execution of the November, 2012 Judgment. That

among those special circumstances was the need to avoid the application for leave to appeal being rendered nugatory, and to preserve the status quo and the Applicants' respective properties. They contended that the Respondents' conduct was not fitting for preserving the status quo, and warranted a stay of execution. In support of this argument, the Applicants quoted **Halsbury's Laws of England, 4th Ed. Vol. 17 pages 271 and 273, paragraphs 453 and 455**, as follows:

> "***A party against whom a Judgment has been given or an order made may apply to the Court for a stay of execution of the Judgment or order, or other relief on the ground of matters which have occurred since the date of the Judgment or order, and the Court may by order grant such relief on such terms as it thinks just... The Court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant a stay if there are special circumstances, which must be deposed to in the affidavit...***"

It was further stated that the Applicants are still in occupation of the land in dispute and, in the absence of a stay, are at risk of having their homes demolished by the Respondents. Therefore, there is still much to be stayed. They quoted Mwanamwambwa JS, as he then was, in the case of ***Aristogerasimos Vangelatos and Vasiliko Vangelatos v Metro Investments Limited & Others***[2] as follows:

> "***We now move on to the Stay of Execution of the High Court Judgment. The decision by the learned single Judge on leave, led to discharge of the Order of Stay of execution and indeed his refusal to stay execution of the High Court Judgment, pending appeal. The question is whether we can stay execution of the Judgment now. The answer is in the negative. Execution of the Judgment was done on 23rd April, 2012. That was about five (5) months before this motion was filed. The Plaintiffs took possession of the stand in dispute on that date. As of now, there is nothing to stay. So, we refuse to grant the stay.***"

Regarding the application for leave to appeal out of time, the Applicants stated that the single Judge failed to appreciate, from their affidavit evidence, the prospects of their appeal succeeding. They acknowledged that the single Judge, rightly and in the interest of Justice, decided to treat the application for leave to appeal the 26th August, 2015 Ruling as an application for leave to appeal the November, 2012 Judgment. Their contention is that she failed to appreciate the reasons for their delay in applying for leave to appeal that Judgment out of time. They maintained that they only became aware of the Judgment four months after it was delivered. That even so, they fully and frankly explained the reasons for the delay, as was accentuated in, among others, ***Noviello v Ele International Ltd*** [6] and ***WT Lamb & Sons v Rider, Same v Same***[9].

The Applicants added that since they were never established as squatters in the Court below, they cannot be subjected to a Writ of Possession except as directed by the Court.

In response, the Respondents submitted that from the Notice of Motion, the Applicants are clearly challenging the dismissal of their applications to stay execution of the High Court Ruling dated

26th August, 2015. They argued that the refusal to stay execution of the Ruling could not be the subject of a stay because that Ruling granted no remedy in the first place. Therefore, there was nothing to stay. For this submission, the Respondents relied on our holding in the case of ***Zambia Revenue Authority v Post Newspapers Limited***[10].

It was argued by the Respondents that, in any event, the Applicants applied for stay of execution of the November, 2012 Judgment after the Respondents had already executed the Writ of Possession. They called into aid the case of ***University of Zambia Council v Calder***[8], where we held that:

> "***When the order, direction, or decision made by a single judge has taken effect, nothing remains on the record that can be varied, discharged or reversed by the full court.***"

The Respondents went on to submit that the learned single Judge correctly dismissed the application to appeal out of time after considering the circumstances of the case, including its prospects of

success on appeal. That the Applicants do not have, and cannot be seen to claim any, right to the land in dispute.

In addition, the Respondents contended that the Applicants' application to appeal out of time against a Judgment delivered two years earlier, and which they knew about, is unreasonable. They urged us to apply the principle in ***Mwambazi v Morester Farms Ltd*** [5], that "*for this favourable treatment to be afforded, there must be no unreasonable delay, no mala fides and no improper conduct on the action on the part of the applicant*". Our attention was drawn to, among others, the case of ***S.P. Mulenga Associates International & Chainama Hotels Ltd v First Alliance Bank (Z) Ltd*** [7], where we held that:

> "***We have said time and again that Rules of Court are there to be observed, and litigants who choose not to abide by the said rules do so at their own peril. In this case, there is evidence of inordinate delay on the part of the Appellants and certainly, there is a clear display of lack of seriousness on their part***".

At the hearing of the Motion, Ms. Mushipe conceded that the High Court, in its November, 2012 Judgment, gave the Applicants thirty days within which to vacate the farm, but they did not do so. She justified their continued stay on the land by submitting that according to the 2012 Judgment, it had not been established that they were among the squatters inside the Respondents' farm. That the Respondents, in executing the Writ of Possession, went beyond the boundaries of their farm into the Applicants' land.

Ms Mushipe reiterated that the Applicants only became aware of the November, 2012 Judgment four months after it was delivered. She, however, confirmed that instead of appealing that Judgment, the Applicants chose to commence a fresh action in the High Court.

Counsel also confirmed that the Respondents hold title to the land in dispute. Her contention was that after delivery of the 2012 Judgment, the Respondents preyed on the Applicants' ignorance by extending the borders of the farm to engulf the Applicants' land.

Mr. Wishimanga refuted the assertion that the Respondents extended the boundaries of the farm after delivery of the Judgment. He stated that, in fact, the Respondents had generously hived off and

allocated part of the farm to the squatters, but the Applicants "*keep on fighting that they belong inside the farm*".

Ms. Mushipe, in reply, argued that there was no evidence of offer letters given to the Applicants by the Respondents.

We have intently examined the record and the grounds on which this motion is anchored. We have also keenly considered the submissions made, and the authorities cited by both Counsel.

This Motion is clearly about whether the learned single Judge properly dismissed the Applicants' applications for leave to appeal out of time against the High Court Judgment dated 14th November, 2012, and to grant a stay of execution of that Court's Ruling dated 26th August, 2015. We shall first deal with the refusal of the application to appeal out of time. This is because, in our view, the fate of the issue of stay of execution will depend on our position regarding the refusal of the application to appeal out of time.

The starting point is that **Rule 49(2)** of the **Supreme Court Rules** prescribes a period of thirty days within which a notice of appeal from a judgment complained of "***shall***" be filed. However, both

Order 59/14/23 of the **Rules of the Supreme Court of England** and **Rule 12** of the **Supreme Court Rules** provide for appeals out of time.

This Court has given guidance, in the case of ***Bank of Zambia v Jonas Tembo & Others*** [4], regarding leave to appeal out of time. In that case, the Industrial Relations Court granted the appellant leave to appeal out of time about five years after the judgment complained of. Although the question of granting leave to appeal was not the issue before us, we stated that we felt constrained to comment on it "***for the purpose of providing guidance in the future for appeals to this Court...***"We went on to emphasize that a party aggrieved by the decision of a lower court must appeal within reasonable time.

In the present case, the record shows that the Judgment complained of was delivered in November, 2012.The Applicants claim that they only came to know about it four months later. According to the second paragraph at page 36 of the record of motion, they were dissatisfied with the Judgment. However, as confirmed by Ms. Mushipe, instead of appealing against it, the Applicants chose to commence a fresh action in the High Court. They only applied to

appeal out of time in September, 2014. That is two months shy of two years from the date of the Judgment.

Still on this point, we feel constrained to comment on a patent inconsistency in the Applicants' story. Ms. Mushipe argued that it took the Applicants close to two years to apply for leave to appeal because "*according to how they comprehended the Judgment, they were protected in that they were not inside the farm*". Meanwhile, the Applicants themselves deposed, in the Affidavit in Support of the application to appeal out of time, that ***"[they] were dissatisfied with the Judgment of 14th November, 2012, which was delivered against them***". (*See second paragraph at* ***page 36*** *of the record of motion*). Their difficulty was retaining counsel.

Like the learned High Court Judge and the single Judge of this Court, we do not see, in these circumstances, anything resembling reasonable delay. The Applicants chose to sit on their rights. The view we take is that the ***S.P. Mulenga Associates Case***[7], cited by Mr. Wishimanga, must apply to the extent of its holding that the rules of Court" ***are there to be observed, and litigants who choose not to abide by the said rules do so at their own peril***".

In addition, both the learned High Court Judge and the learned single Judge of this Court dealt with the prospects of the Applicants succeeding on appeal. The learned High Court Judge, in his Ruling of August, 2015, observed that the main arguments the Applicants intended to present in the appeal were about the extent of the Respondents' land. That is our observation too.

We take into account paragraph 11 of the Applicants' Affidavit in Reply filed into this Court on 6th November, 2017. It was deposed therein that the learned single Judge should have allowed the Applicants to appeal out of time because they have a genuine claim of right to the land they are occupying. Meanwhile, it is common cause that the Respondents hold title to that land. The Applicants' only contention is that the Respondents unjustly obtained that title after the High Court had delivered the November, 2012 Judgment.

In our view, the issue regarding the Respondents' title to the land in dispute brings into play **sections 33**and **34(1)(c)** of the **Lands and Deeds Registry Act**. The import of the two provisions is that title to land can only be impeached on the ground of fraud or impropriety in its acquisition, as held by this Court in the case of ***ACC v Barnnet***

As for the November, 2012 Judgment, it is clear that when the Applicants applied for a stay of its execution, the Respondents had already executed the Writ of Possession. We are not persuaded by Ms. Mushipe's argument that the Applicants have remained on the land in dispute because the execution was partial. Our position remains as stated the case of ***University of Zambia Council v Calder*** [8], that:

> "***When the order, direction, or decision made by a single judge has taken effect, nothing remains on the record that can be varied, discharged or reversed by the full court.***"

Once execution had been set in motion through the Writ of Possession, indeed there was nothing left for the High Court or the learned single Judge of this Court to stay.

The Applicants' argument, as we understand it, is that they needed a stay of execution to preserve their respective properties so that the outcome of the intended appeal is not rendered nugatory. Having already come to the conclusion that the intended appeal has no reasonable prospects of success, we find that a stay would be of no more than academic value. We repeat our holding in the case of

Development Corporation Limited[1].Given the foregoing, and the correspondence appearing at pages 89 and 90 of the record, involving Chilanga District Council, the Commissioner of Lands and the Principal Private Secretary to the President, we find, on the face of it, as stated by the learned single Judge, that the intended appeal has no reasonable prospect of success.

We now come to the issue of the application for stay of execution. The learned single Judge noted that the application for stay of execution made specific reference to stay of the August, 2015 Ruling. The Applicants confirmed that the single Judge, in the interest of Justice, treated their application for leave to appeal that Ruling as an application for leave to appeal the November, 2012 Judgment.

It must be emphasized, in respect of the August, 2015 Ruling, that ***Zambia Revenue Authority v Post Newspapers Limited***[10] remains good law. We agree with Mr. Wishimanga that the learned single Judge was on firm ground in refusing to stay execution of that Ruling because the Ruling did not grant any remedy in the first place. Accordingly, there was nothing to stay.

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Attorney General v Law Association of Zambia[3] that this Court frowns upon making academic orders. Accordingly, we find that there was nothing compelling about the Applicants' purported special circumstances. The learned single Judge's refusal to grant a stay of execution of the August, 2015 Ruling or the November, 2012 Judgment cannot be faulted.

The Motion is dismissed in its entirety for want of merit. We award costs to the Respondents, to be taxed in default of agreement.

M S MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

G. S. PHIRI
SUPREME COURT JUDGE

M. MALILA
SUPREME COURT JUDGE