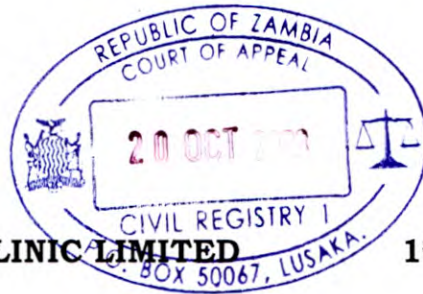


IN THE COURT OF APPEAL OF ZAMBIA

APPLICATION/63/2023

HOLDEN AT NDOLA

(Civil Jurisdiction)



BETWEEN:

LUSAKA PREMIER HEALTH CLINIC LIMITED 1ST APPLICANT

(In Receivership)

FINSBURY INVESTMENTS LIMITED 2ND APPLICANT

AND

MURRAY & ROBERTS CONSTRUCTION LIMITED 1ST RESPONDENT

KADDOURA CONSTRUCTION LIMITED 2ND RESPONDENT

CORAM: KONDOLO SC, NGULUBE, SHARPE-PHIRI JJA

On 24th August and 20th October, 2023

For the Applicants: Mr. J. Ilunga of Messrs Ilunga & Company

Mr. M. Mando of Messrs Mando Pasi Advocates

For the Respondents: Mr. C. Sianondo of Messrs Malambo & Co.

R U L I N G

KONDOLO SC JA delivered the Ruling of the Court.

CASES REFERRED TO:

- 1. Livingstone City Council v Godfrey Sinywibulula
SCZ/35/2008**

2. **Nairobi City Council v Resley (2002) 2 East African Law Report**
3. **Mirriam Banda Zimba v CFB Medical Centre Limited CAZ/08/344/2022**

LEGISLATION AND OTHER PUBLICATIONS REFERRED TO:

1. **Court of Appeal Act No. 7 of 2016**
2. **Court of Appeal Rules, S.I. 65 of 2016**

1. INTRODUCTION

1.1. This is the Applicants motion to vary, discharge or reverse the decision of Chashi JA, a single Judge of this court delivered on 4th August 2023 by which he refused the Applicants application for a stay of execution pending appeal.

2. MOTION

2.1. The motion is supported by an affidavit and relief is sought on the following ground;

“The single Judge erred in law and in fact when he dismissed the Applicant’s application for stay of execution

of judgement of trial Judge dated 24th April 2023 pending determination of appeal to this Court on the premise that the said application was incompetently before court because the notice and memorandum of appeal were a nullity as they were filed in this court when there was no requirement for leave.”

- 2.2. The motion is accompanied by a summons for a stay of execution of judgment pending determination of appeal equally supported by an affidavit.
- 2.3. It is attested that on 19th May 2023 the Applicants filed a notice of appeal and memorandum of appeal against the judgment of the High Court delivered in open court on 24th April 2023. That on 6th June 2023, the applicant filed an *ex parte* application for stay of execution of the said judgement but the trial Judge did not sign the order.
- 2.4. That the Applicants renewed the application before Patel JA, a single Judge of this Court, who dismissed the application after finding that there was no evidence on the record that leave to appeal to this court had been obtained and that there was nothing indicating that the application for stay had been refused.

- 2.5. That following the ruling by Patel JA, the Applicants reverted to the trial Court to enquire on the status of its application and they received a letter from the Court, which according to the Applicants, amounted to declining their application to stay execution of the judgement pending appeal. They proceeded to renew the application to a single Judge of this Court and they appeared before Judge Chashi who dismissed the matter on the basis that he had no jurisdiction to hear the application because the Applicants had failed to produce proof that they had been granted leave to appeal.
- 2.6. The Applicants attested to their belief that this Court is vested with power to entertain renewed applications.
- 2.7. In their skeleton arguments filed into Court, the Applicants argued that contrary to the position taken by Chashi JA, the notice of appeal and memorandum of appeal herein were properly filed as the judgement of the lower Court was delivered in open court and there was therefore no requirement to apply for leave to appeal.
- 2.8. In bolstering this position, the Applicant cited **section 23 Court of Appeal Act (CAZ)** which lists the types of decisions for which leave must be obtained before launching an appeal to

this Court. It was pointed out that decisions made in open Court were excluded from this list as the right of appeal from such matters was automatic provided the appeal was lodged within the prescribed time frame. The case of **Livingstone City Council v Godfrey Sinywibulula** ⁽¹⁾ was cited to that effect.

3. RESPONDENTS CASE

- 3.1. The Respondent in their affidavit in opposition pointed out that despite the proceedings before Chashi JA there was an earlier ruling by Patel JA where the application for stay was declined on account of the fact that there is no leave to appeal.
- 3.2. That the ruling of Patel JA was not challenged and is still valid. That this motion cannot be used to challenge the ruling of Patel JA.
- 3.3. That this was not a proper case for the Court to vary the decision of the single Judge.
- 3.4. The Respondent filed skeleton arguments citing **Order 10 Rule 4(1) to (7) Court of Appeal Rules (CAR)** to support the argument that any party wishing to appeal to this Court must obtain leave from the lower Court.

- 3.5. It was submitted that the cases cited by the Applicant related to the Supreme Court Rules and not to the Court of Appeal which was a new regime where leave was required.
- 3.6. It was submitted that, in any event Patel JA had denied the application for a stay of execution on account of there being no leave to appeal and her decision had not been set aside and was still subsisting and binding on the Applicants. That the full bench has no jurisdiction to touch her decision without the requisite application being made under **Order 10 Rule 2 (8) CAR**.
- 3.7. It was submitted that though the Applicants seek to assail the ruling of Chashi JA, the ruling of Patel JA remains unchallenged. The Kenyan case of **Nairobi City Council v Resley** ⁽²⁾ was cited where it states that every decision a party wishes to appeal against must be based on a notice of appeal filed against such a decision.
- 3.8. It was submitted that bringing an application before a Judge when the same application had been determined by another Judge made the latter Judge's decision a nullity and this application is equally a nullity.

4. THE HEARING

4.1. Applicants submissions

4.2. At the hearing, counsel for the Applicants opined that there were two questions before the Court;

1. Whether or not there is a requirement for a party to obtain leave to appeal against a judgement in a matter in which the High Court was exercising its original jurisdiction.

2. Whether or not the ex parte ruling of Patel JA robbed Chashi JA of jurisdiction to decide on the application for stay and effectively the jurisdiction of this Court.

4.3. It was submitted that sufficient arguments had been led with regard to the first question.

4.4. On the second question, it was submitted that Patel JA, did not decide the application on the merits. The Judge stated that the application had been brought to her prematurely as she had not seen any proof that leave to appeal was granted.

4.5. Counsel explained that after receiving Judge Patel's ruling, the Applicants went back to enquire from the lower Court on the fate of its application for a stay of execution. That instead of

delivering a ruling, the trial Judge wrote a letter saying that there was nothing to stay.

- 4.6. Following this, they renewed the application before this Court under the same cause number but the matter was allocated to Chashi, JA who made pronouncements, hence the application before Court.
- 4.7. Counsel clarified that they wished to assail Chashi JA's decision in so far as it stated that the notice of appeal and memorandum of appeal filed into Court in relation to this matter were a nullity because leave was not obtained. It was argued that in terms of **sections 23 and 25 CAR** in the circumstances of this case there was no requirement for the parties to obtain leave to appeal. The Applicants bolstered its argument by citing the case of **Mirriam Banda Zimba v CFB Medical Centre Limited** ⁽³⁾ in which this Court explained the requirements with regard to leave to appeal.
- 4.8. Counsel pointed out that following Patel JA's decision the Applicants obtained a decision from Musona J refusing the application before him. That the question was with regard to how to assail Judge Musona's decision; was it by motion

against Patel JA's Ruling or by a fresh renewed application that found itself before Chashi JA.

4.9. It was opined that that the only way to do it was by filing a renewed application hence the application determined by Chashi JA.

4.10. **Respondents Submissions**

4.11. Counsel for the Respondent pointed out that when the matter came up before Chashi JA, the Applicants did not bring it to his attention that the application before him was better determined by Patel JA as she had made an earlier ruling on the matter.

4.12. It was further pointed out that the case of **Mirriam Banda Zimba v CFB Medical Centre Limited (supra)** cited by the Applicants was by a single Judge of this Court and Order 10 rule 41 and 7 was not considered. It was opined that there is in fact no decision by the Supreme Court or this Court which has considered this rule.

4.13. It was further submitted that the ruling of Patel JA stated that the Applicants had to meet two requirements;

1. There should be a decision by the court below

2. The Applicants should obtain leave

4.14. It was argued that if the Applicants took the view that leave was not required they should have taken steps to proceed before the full Court to reverse the single Judge on the point regarding leave.

4.15. It was opined that Chashi JA lacked jurisdiction to interfere with Patel JA's decision on that point and the argument concluded that the motion did not state what it wanted the Court to do in the event that it reversed Chashi JA's ruling.

4.16. Applicants Submissions in Reply

4.17. On the issue of leave to appeal, it was submitted that if Order **10 rule 4 CAR** and **section 23 CAZ** were in conflict the provisions of the Act prevail, meaning that there is no requirement to obtain leave from decisions made in open Court.

4.18. It was pointed out that Patel JA did not order the Applicants to obtain leave but simply stated that she had not had sight of the order granting leave.

4.19. It was further pointed out that the application for stay was made in the same cause where Patel JA had conduct and the

administrative decision to have the second application heard by Judge Chashi could not in any way rob him of jurisdiction as there was no decision on the stay at the time.

4.20. That the application before Judge Chashi was a renewed application of the stay of execution refused by Musona J and in no way affected Judge Patel's Ruling. That the question was not whether Patel JA was right or wrong as the only issue for determination was whether Musona J was right in refusing the stay.

4.21. With regard to the argument on the reliefs being sought it was pointed out that this being a rehearing on the record the relief sought was the same as that originally sought before Musona J and the reliefs sought were therefore clear to the Court.

4.22. It was prayed that the application be granted.

5. DECISION

5.1. We have considered the record of motion and the arguments filed by the parties as well as the spirited submissions advanced at the hearing.

5.2. For clarity, we propose that we start at the beginning which is that the parties were involved in litigation before Musona J who

decided in favour of the Applicants. He ordered *inter alia* that the Respondents take possession and ownership of Stand No. 1292 Chelstone, Lusaka.

5.3. The sequence of events resulting in the application now before Court started when the Applicants applied for a stay of execution before the lower court and the application was accompanied by an order for the trial Judges signature to effect the stay.

5.4. A search conducted by the Applicants revealed that the trial Judge had not signed the order and that is what prompted the Applicants to renew their application before this Court. The application was heard by Patel JA who made the following two findings at page R3 of her ruling (page 27 Record of Motion)

1. I have considered the application before me seeking an order for stay of execution. However, the Applicant has not placed before this Court any document confirming that leave to appeal was granted by the court below. I am not satisfied that this is an exceptional circumstance to warrant this court to grant a

stay of execution without sight of leave having been obtained from the court below.

2. Further, I also note that there has been no refusal by the Court below to grant the stay of execution, save for conjecture and almost hearsay, on the part of the deponent.

5.5. These two findings led the Court to make the following decision;

“I am of the considered view that the application before me is incompetent and premature, and I accordingly decline to grant the ex parte application for stay of execution”.

5.6. The Applicants decided to revert to the lower Court for the purpose of obtaining a firm decision on their application for stay for which they were yet to receive a decision by Musona J.

5.7. Counsel for the Applicant misrepresented that after they enquired the Judge wrote them a letter stating that there was nothing to stay. What in fact happened was that after they enquired, it was not the Judge but the honourable Judges marshal who wrote to them. They were advised that the Judge had not signed the order because he had earlier on signed a

vesting order in relation to the subject matter of the litigation and there was therefore nothing to stay.

5.8. Now armed with what they believed was an order by the lower Court denying their application for a stay of execution they again renewed the application for a stay of execution before this Court but instead of appearing before Judge Patel, the matter was allocated to Judge Chashi.

5.9. After considering the matter, Chashi JA referred to Judge Patel's finding that there was no evidence that leave to appeal was granted and he proceeded to determine as follows;

***“In my view, what the aforestated entails is that the notice and memorandum of appeal which were filed in this Court without leave of the court are of no effect as they are a nullity. In the same breath, the application before me, which is anchored on the same cause, which was assigned to the nullified notice and memorandum of appeal is incompetently before me*”**

5.10. The Applicants argument that assailing Chashi JA's ruling has no effect on Judge Patel's ruling holds no water at all because it is quite clear to us that all Chashi JA did was amplify the

Patel JA's on the question of the absence of proof that leave to appeal was granted.

- 5.11. The actual decision on this issue was made by Patel JA and in our view, Judge Chashi correctly found that he lacked jurisdiction to determine the matter. He was in fact only confirming the finding made by Patel JA whose ruling he quoted. It is clear that Judge Patel believed that the Applicant ought to have obtained leave to appeal. Counsel for the Respondent is therefore quite right when he argues that the finding by Judge Patel which has never been set aside still binds the parties.
- 5.12. The Applicants have approached this issue as though it was introduced by Judge Chashi when in fact not. Judge Chashi had no jurisdiction to contradict Patel JA whose decision could only be assailed by moving the full Court to reverse it, in a similar manner as the motion now under consideration made under **section 9(b) CAZ as read with Order 10 Rule 2 (9) CAR.**
- 5.13. We cannot, at this stage, pronounce ourselves on the merits of the argument as to whether leave to appeal was in fact required because the effect of Patel JA's ruling was that leave

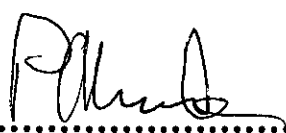
was required. We can only react to that question after being moved as indicated above.

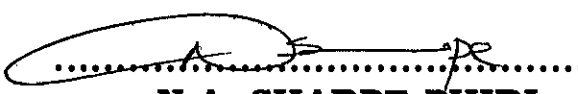
5.14. We in turn are equally robbed of jurisdiction because the foundational issue is the finding by Patel JA that the application before her was incompetent for failure by the Applicants to show that they had obtained leave to appeal to this Court.

5.15. Judge Patel's finding that the proceedings were incompetent was not challenged and continues to bind the parties, including this Court. On account of this, all the other issues and arguments raised and advanced by the parties are rendered academic.

5.16. In the premises, the renewed application to stay execution of the Judgement of the lower Court has no foot to stand on and is consequently dismissed with costs to the Respondent.


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M.M. KONDOLO SC
COURT OF APPEAL JUDGE


.....
P.C.M. NGULUBE
COURT OF APPEAL JUDGE


.....
N.A. SHARPE-PHIRI
COURT OF APPEAL JUDGE