

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

**CAZ/08/74/2023
Application 49/2023**

BETWEEN:

DAVID JEFFREY CHIPILINGU

APPELLANT

AND

ZCCM INVESTMENTS HOLDINGS PLC

1ST RESPONDENT

NORRIS BANDA

2ND RESPONDENT



Coram: Banda-Bobo, Patel and Chembe, JJA

On 28th September, 2023 and 25th October, 2023.

For the Appellant: Mrs. K. M. Nyimbiri, Legal Aid Counsel of Legal Aid Board

For the Respondents: 1st Respondent – Mr. B. Mbilima, In-House Legal Counsel
2nd Respondent – Mr. K. H. Makala of Makala and Co.

RULING

A. M. Banda-Bobo, JA delivered the Ruling of the Court.

Cases referred to:-

1. New Plast Industries v. Commissioner of Lands and Another (SCZ Judgment No. 8 of 2001)
2. Sonny Paul Mulenga and Others v. Investrust Merchant Bank (1999) ZR 101
3. Carmine and Watson Nkandu Bowa (suing as Administrator of the Estate of the late Ruth Bowa) v. Fred Mubian and ZESCO Limited (2012) ZR 165
4. Zambia Revenue Authority v. Post Newspaper Limited (SCZ Judgment No. 18 of 2016)

Legislation and Other Works referred to:-

- Rules of the Supreme Court, White Book, 1999 Edition (RSC)
- The Court of Appeal Act No. 7 of 2016

1.0 **Introduction**

1.1 This is Ruling on an application by Notice of Motion filed pursuant to Order 59 rule 13 and Order 47 rule 1 of the Rules of the Supreme Court, White Book, 1999 Edition (RSC), and **Order X rule 5 of the Court of Appeal Rules, Statutory Instrument No. 65 of 2016**

1.2 The applicant seeks an order of stay of execution of the judgment of Hon. Lady Justice Chanda Mwamba delivered on 30th December, 2022, pending the determination of the appeal.

2.0 **Background**

2.1 The brief background to the matter is that the applicant had instituted proceedings against the two respondents herein, seeking various reliefs. He unfortunately lost his case and all his reliefs were dismissed for lack of merit

3.0 **The Appeal**

3.1 Perturbed by the turn of events, he filed a Notice of Appeal and Memorandum of Appeal, fronting six grounds. The Memorandum of Appeal was filed on 10th February, 2023.

3.2 The Judgment in the lower court allowed for execution of judgment. To forestall such execution, the applicant applied

before the lower court for a stay of execution pending the determination of the appeal. The learned Judge in the lower court dismissed the application.

3.3 This prompted him to escalate the same to a single Judge of this Court by way of renewal of the same application.

4.0 **Decision by the single Judge**

4.1 The learned single Judge of this Court considered the application. He refused to grant the application, stating that:-

“After reading the judgment, the subject of the appeal and the grounds of appeal, I find no reason to grant an order of stay.”

4.2 It is that denial that has prompted the applicant to escalate the application to the full court.

5.0 **This Application**

5.1 The application is accompanied by an affidavit in support sworn by the appellant and attendant skeleton arguments.

5.2 The appellant averred that the 2nd respondent has made known his intentions to have the judgment of the lower court enforced.

That if this is done, he will be rendered destitute as he will have no shelter for his family.

- 5.3 As regards the grounds of appeal, it was his deposition that the appeal has merit and has high prospects of success. That if the stay is not granted, the appeal will be rendered an academic exercise.
- 5.4 The 2nd respondent filed an affidavit in opposition with skeleton arguments. The gist of her averments was that the applicant had, after judgment requested for three months to stay in the house as he looked for alternatives. That however, it has now been nine months, and he had not moved out. It was her assertion that granting the stay will greatly prejudice her, as she had not derived any economic benefit from the property for the last 22 years.
- 5.5 The applicant, with leave of court filed a Reply to the affidavit in opposition. He basically stated that the respondent will not be prejudiced if the stay of execution were to be granted. He reiterated that he had been advised that the appeal has high prospects of success.

6.0 **Skeleton Arguments**

6.1 Both parties filed skeleton arguments. However, for brevity, we do not intend to reproduce them herein, suffice to state that we shall refer to them where need arises.

7.0 **Hearing**

7.1 At the hearing, Mrs. Nyimbiri, counsel for the applicant sought and was granted leave to file a Reply. We however indicated that rather than adjourning the matter, we would render our Ruling based on the documents before us. We took comfort in the case of **New Plast Industries v. Commissioner of Lands and Another**¹

8.0 **Analysis and Decision**

8.1 We have carefully considered the motion, the affidavits for and against, the Reply and the Skeleton arguments placed before us by counsel.

8.2 The issue for resolution is whether we should reverse, vary or discharge the order of the single Judge who declined to grant a stay of execution.

8.3 Section 9(b) of the Court of Appeal Act No. 7 of 2016 provides that the orders of a single Judge can be varied, reversed or discharged. It is couched thus:-

“9(b) In civil matters, an order, direction or decision made or given in pursuance of the powers conferred by this Section may be varied, discharged or reversed by the court

8.4 As pointed out earlier in paragraph 4.0 this matter came before a single Judge, who declined to grant the order sought. The current application should therefore have been an application anchored under Section 9(b) of the Act, to vary, reverse or set aside the decision of a single Judge by the full court.

8.5 Be that as it may, we are of the view that this is not fatal to the application. We will therefore proceed to determine the application on its merit.

8.6 It is trite that a stay of execution pending appeal is a discretionary remedy. A party is not entitled to it as of right. However, it is also trite that the court’s discretion ought to be exercised judiciously and on well-established principles.

8.7 In considering whether to grant a stay of execution, one of the main issues to consider is whether there are prospects of success of the appeal. The case of **Sonny Paul Mulenga and Others v. Investrust Merchant Bank**² guides on the principles for granting or non-granting of applications to stay execution of judgment pending appeal.

8.8 The case of **Carmine and Watson Nkandu Bowa (suing as Administrator of the Estate of the late Ruth Bowa) v. Fred Mubiana and ZESCO Limited**³ illustrates thus:-

“It is settled law that in an application for a stay of execution pending appeal, the considerations are:-

- **The prospect of the appeal succeeding**
- **Irreparable damage if a stay is not granted, and the appellant’s appeal succeeds ...”**

8.9 In the case of **Zambia Revenue Authority v. Post Newspaper Limited**⁴ it was held that:-

“... 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 the mere convenience of the Post. Neither should it be granted purely on sympathetic or moral considerations. Secondly in

exercising its discretion, whether to grant a stay or not, the court is entitled to preview the prospects of success of the proposed appeal ...

We wish to emphasize that the prospects of success of the pending appeal is a key consideration, in deciding whether or not to stay execution of the judgment appealed against.” (underline by Court)

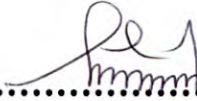
8.10 The above makes it clear that more is required to persuade this Court that it is desirable, necessary and just to stay the proceedings pending an appeal. Therefore the prospect of success is a key consideration in granting an order for stay of execution.

8.11 In trying to persuade court to grant the stay, the applicant merely states that the appeal has high prospects of success without pointing out what exactly it is he considers to be the factors that point to the success of the appeal.

9.0 We have, as did the single Judge of this Court, read the judgment of the court below, as well as the six grounds of appeal. We agree with the single judge that the grounds do not reveal any prospects of success of the appeal.

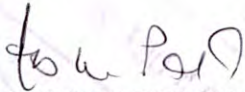
- 9.1 Without delving into the merits, the lower court found that the appellant was offered the house in issue in December, 1997. He was also informed of the change in the earlier conditions of sale, where he was required to pay the asking price of the property within 14 days from 13th January, 1998. He accepted the revised conditions by a letter dated 15th January, 1998. He went as far as to ask for an extension of time in which to pay, which request was rejected. Subsequently, the offer was withdrawn and the property offered to the 2nd respondent, who ultimately bought it.
- 9.2 Given the above facts, it is our view that the learned single Judge was on firm ground when he found no reason on which he could grant the order to stay execution of the judgment of the lower court. We can therefore not fault him for holding as he did.
- 9.3 It cannot be denied that on the basis of the evidence herein, there is a high possibility that the 2nd respondent will be prejudiced; and should not be denied the immediate enjoyment of her judgment.

9.4 We find no merit in the application. It is accordingly dismissed with costs. The same to be taxed in default of agreement.



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A. M. BANDA-BOBO
COURT OF APPEAL JUDGE



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A. N. PATEL, SC
COURT OF APPEAL JUDGE



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Y. CHEMBE
COURT OF APPEAL JUDGE