IN THE COURT OF APPEAL OF ZAMBIA **APPLICATION 41/2023**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN

CHARLES LAIMA **APPELLANT**

AND

PULSE FINANCIAL SERVICES LIMITED
(T/A Entreprenuership Financial Centre) **RESPONDENT**

CORAM: Chashi, Muzenga and Patel, JJA
On 31st October 2023 and 26th January 2024

For the Appellant: In person

For the Respondent: Mr. J. Shawa, In-house counsel

R U L I N G

Muzenga, JA, delivered the Ruling of the Court.

Cases referred to:

1. **Rosemary Nyangu v. Pamodzi Hotel PLC – SCZ/8/08/2021**
2. **Paul Manda v. Jacquiline Musonda Mubanga – CAZ No. 08/36/2021**
3. **Sonny Paul Mulenga and Others v. Investrust Merchant Bank Limited (1999) ZR 101**

4. **Nyampala Safaries and 4 Others v. Wildlife Authority and 6 others (2004) ZR 49**
5. **Eastern and Southern African Trade v. Finsbury Investment Limited – NOM/27/2022**
6. **Watson Nkandu Bowa (suing as Administrator of the Estate of the late Ruth Bowa) v. Fred Mubiana And Zesco Limited – Selected Judgment No. 21 of 2012**

1.0 INTRODUCTION

1.1 This is a renewed application for stay of execution of Judgment of Chenda, J, after a single Judge of this Court declined to grant the same.

2.0 BACKGROUND

2.1 The background to this application is that the appellant and the respondent entered into a Consent Judgment dated 21st January 2022 in a separate cause. They subsequently executed an amended Consent Judgment which was signed by the Court on 12th April 2022.

2.2 Four months later, the appellant took out proceedings by way of writ of summons challenging the amended Consent Judgment on grounds of fraud and misrepresentation.

2.3 The allegations by the appellant were that the amended Consent Judgment was not initialed or signed on the substantive page as was done on the initial Consent Judgment and that the respondent altered

or included clauses which were not agreed upon. Further that the amended Consent Judgment, despite having been signed in April 2022, backdated the repayment instalments to January 2022, thereby placing the appellant in immediate default.

2.4 The respondent stated that the gist of the amendment to the Consent Judgment was in order to correct the error on the property number subject to foreclosure on default.

2.5 The trial court dismissed the appellant's case on account of not having established the allegations to the required standard.

2.6 The appellant, being dissatisfied with the decision of the court below, lodged an appeal on the following grounds:

1. **The learned Judge in the court below erred in law and fact when he held that there was no fraud and or misrepresentation in the manner the Consent Judgment dated 21st January 2022 was procured in the face of unchallenged evidence to the effect that, the appellant was made to sign on a separate page not attached to the main body of the Consent and clear the main body had its contents changed after signing.**

2. **The learned Judge in the court below erred in law and fact when despite evidence on record to the effect that part of the conditions to be included in the amended Consent is variation of monthly installments removal of the forfeiture clause and that the Consent takes effect on signing as opposed**

to back dating to create a default for the appellant proceeded to hold that there was no fraud and or misrepresentation.

3. The learned Judge in the court below erred in law and fact when he held that evidence of DW1 was not shaken when clearly he admitted under cross examination that the amended Consent Judgment was different to the initial Consent had the main body and appellant's signature on the same page while the amended Consent had the signature of the appellant on totally a different page which is unprecedented given the fact that was intended to be changed was only the property number.

2.7 An application for stay was made before a single Judge of this Court, after the lower court declined it. The single Judge of this Court dismissed the application.

2.8 He now renews the same before this Court.

3.0 APPELLANT'S ARGUMENTS

3.1 The appellant's arguments were not properly couched, and as it will become clear later, we are constrained to enumerate the same, save to state that he contended that the appeal has high prospects of success.

3.2 He urged us to stay execution of the High Court Judgment.

4.0 RESPONDENT'S ARGUMENTS

4.1 Learned counsel for the respondent opposed the application and in doing so condemned the manner in which the appellant couched his arguments. Counsel argued that the arguments were premised on challenging the Ruling of the single Judge of this Court. It was learned counsel's contention that the motion was incompetent and must be dismissed on that score alone. Reliance for this argument was placed on the case of **Rosemary Nyangu v. Pamodzi Hotel PLC.**[1]

4.2 Learned counsel further argued that for a single Judge's decision to be reversed, there must be justifiable and probable cause, and in this case, the appellant has demonstrated none. For this argument, we were referred to our decision in the case of **Paul Manda v. Jacqueline Musonda Mubanga**[2].

4.3 Regarding the prospects of the appeal succeeding, counsel submitted that there are no prospects of the appeal succeeding and as such a stay should not be granted. Learned counsel relied on the **Sonny Paul Mulenga and Others v. Investrust Merchant Bank Limited**[3] case and the case of **Nyampala Safaries and 4 Others v. Wildlife Authority and 6 Others**[4] for this argument.

5.0 THE HEARING

5.1 At the hearing of this motion, the parties informed us that they would entirely rely on their respective documents

6.0 DECISION OF THE COURT

6.1 We have carefully considered the notice of motion, the affidavits and arguments for and against the motion. The issue is whether it is necessary and just to grant a stay of execution.

6.2 Learned counsel for the respondent has argued that the motion is incompetently before us, on account that the appellant argued it as if it was an appeal. We agree that the appellant's arguments largely aimed at faulting the single Judge of this court's decision. In the **Rosemary Nyangu** case, supra, the Supreme Court dismissed a motion to the full court which had grounds couched as though it were an appeal from a single Judge. Following the **Rosemary Nyangu** decision, we equally dismissed a motion which had grounds couched as though it was an appeal from a decision of a single Judge of this court in the case of **Eastern and Southern African Trade v. Finsbury Investment Limited**[5] .

6.3 The appellant's motion herein has no grounds couched in the manner discussed in the cases *supra* and the affidavit in support of the motion does not raise any grounds but simply state the facts on which the motion is premised. It is the appellant's arguments which seem to attack the ruling of the single Judge of this Court.

6.4 It is trite that a renewal application to this court should not be couched as an appeal to this court. However, this case is distinguishable from the **Rosemary Nyangu** and **Eastern and Southern African Trade** cases as the Motion and the affidavit clearly indicate that it was a renewal application. We hold the view that the irregularity in the arguments cannot invalidate a motion which has properly been supported by an affidavit. We shall thus proceed to determine the motion on its merits.

6.5 The Supreme Court has in a plethora of cases guided on what must be taken into consideration when deciding whether or not to grant a stay. In the case **Sonny Paul Mulenga** *supra* the Supreme Court stated that:

> **"In terms of our rules of court, an appeal does not automatically operate as a stay of execution and it is utterly pointless to ask for a stay solely because an appeal has been entered. More is required to be**

> **advanced to persuade the court below or this court that it is desirable, necessary and just to stay a judgment pending appeal. The successful party should be denied immediate enjoyment of a judgment only on good and sufficient grounds.....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."**

6.6 In a subsequent case of **Watson Nkandu Bowa (suing as Administrator of the Estate of the late Ruth Bowa) v. Fred Mubiana and Zesco Limited**[6] the Supreme Court stated that the case of **Sonny Paul Mulenga** supra, governs the granting or non-granting of applications to stay execution of judgments pending appeal. The apex court went on to state that:

> **"In an application for stay of execution pending appeal, the considerations are: the prospect of the appeal succeeding and the irreparable damage if a stay is not granted and the appellants' appeal succeeds."**

6.7 We have perused through the three grounds of appeal filed by the applicant. We are satisfied that they raise arguable issues, and without delving into the merits or demerits of the appeal, we hold the view that there is a likelihood of the appeal succeeding. We are also of the considered view that if a stay is not granted, the respondent may foreclose and possibly sell the subject property. Further, the cause

involves real property, which if not stayed, in the event of success, the appellant will suffer irreparable damage. Additionally, if a stay is not granted, the appeal will be merely academic and execution of the judgment may have far reaching consequences.

6.8 In the circumstances, we find it desirable, necessary and just to grant a stay. We thus defer the enjoyment of the fruits of the judgment of the court below until the appeal is determined.

7.0 CONCLUSION

7.1 Having found merit in the motion, we grant a stay of execution of the Judgment of the lower court dated the 23rd March 2023.

7.2 Costs will abide the outcome of the appeal.

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J. CHASHI

COURT OF APPEAL JUDGE

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K. MUZENGA

COURT OF APPEAL JUDGE

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A. N. PATEL, SC

COURT OF APPEAL JUDGE