

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

APPLICATION 94/2023

BETWEEN

ZESCO LIMITED

AND

EL SEWEDY ILLUMINATION

ZAMBIA ELECTROMETER LIMITED

ATTORNEY GENERAL



APPELLANT

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

CORAM: Muzenga, Patel and Chembe, JJA
On 7th December 2023 and 29th December 2023

For the Appellant: Mr. G. Hakainsi of Messrs LM Chambers

For the 1st Respondent: Mr. M. Nkunika & Mr. N. Mwila of Simeza
Sangwa Advocates

R U L I N G

Muzenga, JA, delivered the Ruling of the Court.

Cases referred to:

- 1. Burden Mufungwe and Another v. Moshen Zarad Hainder and Another – CAZ/06/062/2019**
- 2. Zambia Revenue Authority v. Post News Papers Limited – SCZ Judgment No. 18 of 2016**

3. **Attorney General v. LAZ (2008) Vol. 1 ZR 21**
4. **Molly Pelekamoyo Washington v. New Plaza – CAZ Appeal No. 147 of 2021**
5. **Lazarous Kamukwamba and Others v. First Quantum Mining – SCZ Appeal No. 136 of 2012**
6. **Attorney General v. Major Samuel Mbumwae and Others – SCZ Appeal No. 3 of 2010**
7. **Trusted Society of Human Rights Alliance v. Mumo Matemu and Another – Petition No. 12 of 2013**
8. **Francis Maruatetu and Another v. The Republic – Petition No. 15 of 2015**
9. **John Mumba, Danny Museteka and Others v. Zambia Red Cross Society (2006) ZR 137**
10. **Zambia Revenue Authority v. Post News Papers Limited – SCZ Judgment No. 51 of 2014**
11. **Salomon v. Salomon (1897) AC 22**
12. **Associated Chemicals Limited v. Hill and Delamain & Ellis & Company –SCZ Judgment No. 7 of 1998**
13. **Abel Mulenga And Others v. Mabvuto Adan Avuta Chikumbi and Others and The Attorney General (2006) ZR 33)**
14. **Finsbury Investments Limited and Others v. Antonio Ventriglia and Another – SCZ Judgment No. 17 of 2013**
15. **Charles Mulando Alias Chief Liteta v. Phanwell Chikalasha Alias Chief Chitanda, Morgan Ngulube Alias Chief Chamuka And Munokalya Siloka Mukuni Alias Chief Munokalya Mukuni XIX – CAZ/08/434/2021**
16. **Sonny Paul Mulenga & Others v. Investrust Merchant Bank Limited (1996) ZR 10**
17. **Fred Mmembe and Another v. Abel Mboozi and 5 Others – SCZ Appeal No. 7 of 2021**

Legislation referred to:

1. **The Court of Appeal Rules, Statutory Instrument No. 65 of 2016.**
2. **The Court of Appeal Act, No. 7 of 2016.**

1.0 INTRODUCTION

- 1.1 This is a renewed application for stay of enforcement/execution of a charging order issued by the High Court pending the determination of the appeal pursuant to **Order 10 Rule 2(8)** and **Rule 5 of the Court of Appeal Rules, 2016 (CARs)** and **Section 9(b)** of the **Court of Appeal Act, 2016**.

2.0 BACKGROUND

- 2.1 The background to this application is that the 1st respondent sued the 2nd respondent in the court below claiming a sum of USD1,288,112.00 among other claims. A judgment in default of appearance was entered against the 2nd respondent on 23rd September 2022.
- 2.2 When the 2nd respondent failed to settle the judgment debt, the 1st respondent applied for a charging order *nisi* in respect of Stand No. 5252, Ndola which was granted on 3rd November 2022, after which the matter was set down for hearing of an application to make the charging order absolute.
- 2.3 It was at this point that the appellant applied on 6th December 2022 to be joined to the proceedings in the court below as intervening party claiming an interest in the subject property, which application

the court below denied. Disconsolate with the aforementioned Ruling, the appellant lodged an appeal to this court.

- 2.4 The appellant then proceeded to make an application for stay of proceedings and enforcement/execution of the Charging Order issued in respect of Stand No. 5252 Ndola pending determination of the appeal. The lower court declined the application on account that the appellant was not a party to the proceedings.
- 2.5 The appellant then proceeded to renew the application before the single judge of this court, who declined to grant it on the grounds that the appeal had no prospects of success. The appellant thus moved the full court to renew the application, culminating into this Ruling.

3.0 APPLICANTS' ARGUMENTS

- 3.1 Learned counsel for the applicant argued that an appeal does not operate as a stay, hence the within application. Counsel contended that before granting a stay, the court must preview the grounds of appeal in order to ascertain if the prospects of success exist. For this argument, counsel relied on the cases of **Burden Mufungwe and Another v. Moshen Zarad Hainder and Another**¹, and **Zambia Revenue Authority v. Post News Papers Limited**.² It was learned counsel's submission that the pending appeal has high

prospects of success as can be gleaned from the grounds of appeal contained in the memorandum of appeal.

3.2 Counsel further submitted that if a stay is not granted, the 2nd respondent will sell the charged property and the appeal will be rendered nugatory. Counsel argued that the Apex court has time and again expressed the undesirability of determining a matter where the orders sought would serve no purpose for being academic. Reliance was placed on the case of **Attorney General v. LAZ.**³

3.3 It was contended that the pending appeal raises a point of law relating to charging orders issued under **Order 50 of the Rules of the Supreme Court of England, 1999 Edition.** Reliance was placed on our decision in the case of **Molly Pelekamoyo Washington v. New Plaza.**⁴

3.4 Counsel prayed that the application for stay be granted.

4.0 1ST RESPONDENT'S ARGUMENTS

4.1 Counsel for the respondent opposed the application and in doing so posed three questions for our determination. The first being whether the appellant being a non-party, only appealing against the ruling relating to joinder can seek an order to stay a charging order which is not the subject of the appeal.

- 4.2 In support of the first issue, learned counsel contended that a non-party cannot take out an application that has a bearing on an existing order, until the joinder has been made. Counsel argued that the appeal has nothing to do with a charging order and that it has to do with a ruling refusing joinder. Reliance was placed on the cases of **Lazarous Kamukwamba and Others v. First Quantum Mining**⁵ and **Attorney General v. Major Samuel Mbumwae and Others**⁶ among other cases in support of this argument. It was learned counsel's contention that a non-party has no *locus* to take out an application that has an adverse effect on an existing matter. Therefore, an order to stay a charging order will be contrary to the law cited by counsel.
- 4.3 The second issue raised by counsel is whether the appellant even as an intervenor can stay execution of any orders made in this action? On this issue, counsel argued that even assuming the appellant was made an intervenor, it would not have acquired the right to stay execution as intervenor in this matter. In placing reliance on the Kenyan cases of **Trusted Society of Human Rights Alliance v. Mumo Matemu and Another**⁷ and **Francis Maruatetu and Another v. The Republic**,⁸ learned counsel submitted that an intervenor cannot raise issues such as an

application to stay proceedings or indeed to stay execution in an action in which he has been joined as an intervenor when the principal parties to the action have not made such an application. It was contended that the order sought by the appellant is beyond the scope of issues or applications the intervenor can take in an action.

- 4.4 The third issue learned counsel raised is whether the appellant has met the threshold for the grant of a stay. Under this limb, learned counsel for the 1st respondent has submitted that there is nothing to stay herein as the proceedings in the court below terminated by the issuance of a charging order absolute. Counsel argued further that the charging order has since been registered with the Lands and Deeds Registry. It was learned counsel's submission that when there is nothing to stay, an order for stay cannot be made. Reliance was placed on the cases of **John Mumba, Danny Museteka and Others v. Zambia Red Cross Society**⁹ and **Zambia Revenue Authority v. Post News Papers Limited**.¹⁰
- 4.5 It was counsel's argument that the appellant has not demonstrated the likelihood of the appeal succeeding. It was contended that the appellant being a shareholder in the 2nd respondent company is a separate legal entity and as such has no interest, legal or equitable

rights in its property. Reliance was placed on the cases of **Salomon v. Salomon**¹¹ and **Associated Chemicals Limited v. Hill and Delamain & Ellis & Company**.¹² It was counsel's contention that there are no prospects of the appeal succeeding.

- 4.6 We were urged to dismiss the application for want of merit with costs.

5.0 AT THE HEARING

- 5.1 At the hearing of the application, the parties informed the court that they would rely on their various filed documents and augmented briefly.

6.0 DECISION OF THE COURT

- 6.1 We have meticulously considered the appellant's application, affidavits, skeleton arguments for and against the motion. We shall first consider the issue of *locus standi* raised by learned counsel for the 1st respondent.
- 6.2 Counsel contended that the appellant, having not been joined to the cause in the court below cannot seek to stay a charging order in the matter in which it was not a party. The general rule is that only parties to an action can seek remedies under the said cause. A person must ordinarily apply to be joined to the proceedings and the court will not ordinarily grant the application unless the intended

party discloses sufficient interest or *locus standi* (see **Abel Mulenga And Others v. Mabvuto Adan Avuta Chikumbi and Others and The Attorney General**.¹³

- 6.3 It is not in dispute that the appellant is and was not a party to the proceedings in the court below. It can therefore, in a way, be considered to be a stranger to the proceedings. In our jurisdiction, it is very rare that a stranger may obtain an order in proceedings in which they are not parties. We have said '**very rare**' but not impossible. The Supreme Court was faced with such a situation for the first time in the case of **Finsbury Investments Limited and Others v. Antonio Ventriglia and Another**¹⁴ where the apex court had the following to say:

"In this regard, we agree with counsel for the applicants that there is case law, albeit none from our jurisdiction, to the effect that one does not need to be a party to the proceedings in which an injunction arose for them to have *locus standi* to apply for the dissolution of that injunction. We must reiterate, however, that this is the first time that this court has been faced with an application, by strangers to an action, to discharge an injunction granted in a matter in which they are not parties.

We have painstakingly scrutinized the authorities that discuss legal principles relating to a non-party having *locus standi* to apply for the discharge of an injunction which affects them. These authorities establish that a non-party can approach a court, to have an injunction

discharged, if that non-party can show that they have been affected by the injunction."

- 6.4 It is clear therefore that a stranger to proceedings may actually obtain an order from court under very exceptional circumstances. A single judge of this court in the case of **Charles Mulando Alias Chief Liteta v. Phanwell Chikalasha Alias Chief Chitanda, Morgan Ngulube Alias Chief Chamuka And Munokalya Siloka Mukuni Alias Chief Munokalya Mukuni XIX**,¹⁵ after referring to the Finsbury case *supra* had the following to say:

"In order for stranger to be allowed to apply to dissolve an injunction, mere inconveniency, discomfort, disapproval or dissatisfaction is not sufficient. The stranger must be affected personally or materially, otherwise he will be left with no option but to apply to join proceedings. If a stranger will be allowed willy nilly to make applications in causes in which they are not parties, it would lead to busy bodies turning our justice system into a mockery. These rules of *locus standi* are well intended and must be followed."

- 6.5 We therefore hold the firm view that even if considered as a complete stranger, the appellant would still, in the circumstances be entitled to seek to stay or injunct an order that would be injurious to it.

- 6.6 In *casu*, the appellant is not a complete stranger. It applied to join proceedings in the court below, with a view that they challenge the charging order made in respect of property to which it alleges has interest in. Having lost the bid to be joined, it appealed the ruling to this court. In these proceedings before us, the appellant is entitled to apply to stay the execution of the order in the court below. Whether or not the application would be granted depends on whether the threshold has been satisfied.
- 6.7 We have no hesitation therefore in stating that an appellant, in the circumstances of this case, is entitled to apply for a stay and this court has the jurisdiction to hear the same on the basis of the pending appeal before us. We therefore find no merit in this argument and we dismiss it.
- 6.8 The second issue seems to be challenging the scope of the intervenor's rights. We see it unwise at this stage to consider what an intervenor once joined, can or cannot do. Doing so would have prejudicial effect as those are issues the lower court will have to determine should the appellant be joined as an intervenor. We have already held that the appellant is entitled to apply for a stay.
- 6.9 Counsel contended in the third issue that there is currently nothing to stay as proceedings in the High Court terminated upon the

charging order *nisi* being made absolute and that the same was since registered in the Lands and Deeds Registry. We agree with counsel, only to the extent that proceedings in the High Court cannot be stayed as currently there are no existing proceedings. However, we do not agree that the registration of the charging order means that a stay cannot be issued. It would have been different if the charged property has since been sold. It is our considered view that a stay is still tenable as execution is not completed.

6.10 We now turn to consider the gist of this application. 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 & Others v. Investrust Merchant Bank Limited**¹⁶ 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."

6.11 Learned counsel for the appellant vigorously submitted that the pending appeal has high prospects of success whereas learned counsel for the 1st respondent has with equal force argued that the appeal is bereft of merit. There is an interesting argument by learned counsel that the appellant being a shareholder has no interest whatsoever in the property belonging to the 2nd respondent due to separate legal personality between a company and its shareholders.

6.12 We must state that this is a long standing principle and it is still good law. However, we cannot also turn a blind eye to the fact the owners of a limited company have interest in the stake of the company as they may stand to lose should anything detrimental happen to it or its properties. This position was recently recognised by the Supreme Court in the case of **Fred Mmembe and Another v. Abel Mboosi and 5 Others**¹⁷, a case which dealt with the Liquidation of the Post News Paper, in the following terms:

"8.50 It is, in our view, elementary fairness and justice that a person whose property rights (shareholding) is to be adversely affected, should know before hand and be afforded an early opportunity, if he so wishes, to make representation to dissuade the decision makers.

8.51 The bottom line, in our considered view, is that the first appellant was an interested party and in the peculiar circumstances of this case, was competent to challenge a consent judgment that adversely affected his rights. Such challenge could be by whatever means lawfully available, including commencing a fresh action."

6.13 We therefore hold the view that shareholders have interest in a company they form. Having a very strict approach may stop a shareholder from suing in occasions where the company has clearly embarked on a self-destruction mode detrimental to the shareholders.

6.14 We have had sight of the grounds of appeal and without delving deep into the merits of this case, we hold that the appeal has reasonable prospects of success. We say so especially in the light of the manner in which the High Court was moved to obtain the charging order. If this argument holds water, then the charging order is a nullity. We cannot thus refuse to grant a stay, consequently facilitating the enforcement of a possibly void order.

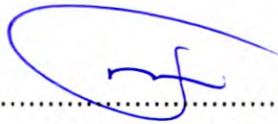
6.15 We therefore find it necessary and just to grant a stay of execution of the charging order. We therefore grant the application. The charging order issued by the lower court dated 15th June 2023 is

hereby stayed until determination of the appeal or until further order of this court.

7.0 CONCLUSION

7.1 Having found merit in the application, we have granted a stay of execution of the charging order absolute pending determination of the appeal.

7.2 Costs will be in the cause.



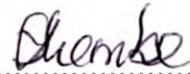
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K. MUZENGA

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