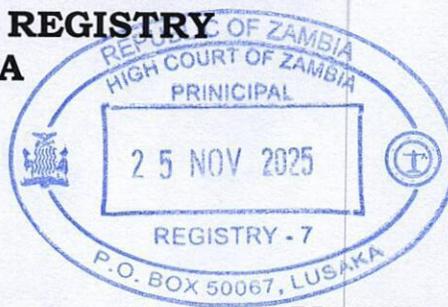


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2023/HP/1292



BETWEEN:

THABANI WALIMA

PLAINTIFF

AND

SIBESO INGOMBE

1ST DEFENDANT

GETRUDE MULAMBWA

2ND DEFENDANT

BEFORE: HONOURABLE, LADY JUSTICE G. C. CHAWATAMA

IN CHAMBERS ON 25TH NOVEMBER, 2025.

For the Plaintiff : Ms. E. Mushanga of Messers Mazuba Banda &
Company
For the Defendants : Ms. E. N. Phiri of Messers Legal Aid Board

EX TEMPORE RULING

CASES REFERRED TO:

1. *Nyampala Safaris (Z) Limited and Others v Zambia Wildlife Authority and Others* (2004) Z.R 49
2. *Water Wells Limited v Wilson Samuel Jackson* (1984) Z.R 98
3. *Stantley Mwambazi v Morester Farms Limited* (1977) Z.R 108
4. *National Breweries PLC v Chakama Investment Limited Appeal No. 6 of 2022*
5. *Access Bank Zambia Limited v Group Five/ZCON business Park Joint Ventures (Suing as a firm) SCZ 8/52/2014/2016*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The High Court Act Chapter 27 of the Laws of Zambia.*
2. *The Rules of the Supreme Court (Whitebook) 1999 edition.*

1.0 INTRODUCTION

1.1 This is a Ruling on an application by the Defendant for a stay of execution of a writ of elegit. The application was made pursuant to ***Order 36, Rule 10 of the High Court Rules, Chapter 27 of the Laws of Zambia.***

2.0 AFFIDAVIT EVIDENCE

2.1 The affidavit in support of the summons was sworn by Getrude Kufekisa Mulambwa, the 2nd Defendant. She deposed that this Court entered judgment in default against the Defendants. That the Defendant was unaware of the proceedings that led to the entry of judgment in default against the Defendants, as they were not served with the process and notices of hearing

2.2 That the Plaintiff then took out a writ of elegit upon house no. 48, Luntanya Street, Libala stage 2, which belongs to the estate of the late Mr. Lubinda Ingombe and has since been receiving rentals at the rate of K5,000 per month since June, 2024. A copy of the certificate of title and the writ of elegit was exhibited and marked "GM1-2 respectively.

2.3 In opposing, the Defendant filed an affidavit in opposition. The sum total of the affidavit was that the affidavit of service dated 21st August, 2023, on record shows that the Defendants were served with the writ of summons and statement of claim dated 27th July, 2023. Also, that the

Defendants have not met the requirements needed to be satisfied to set aside a default judgment in that they do not have a defence on the merits.

3.0 ANALYSIS AND THE DECISION OF THIS COURT

- 3.1 At the hearing of this matter, counsel for the respective parties relied on the affidavit recast above and briefly augmented, repeating the affidavit evidence.
- 3.2 I have carefully considered the application before me. The question for determination is whether or not the stay of execution of the writ of elegit ought to be granted pending application to set aside the judgment in default of appearance and defence.
- 3.3 The evidence on record reveals that the Plaintiff on the 27th July, 2023 commenced this matter. An affidavit of service filed on the 21st August, 2023, stated that on the 27th July, 2023, the Plaintiff served the Defendant at their house the writ of summons and statement of claim, but that the Defendant refused to acknowledge receipt or sign on the return copy. According to the writ of summons, the Defendants were required to file the defence within fourteen (14) days from the 27th July, 2023. The 1st and 2nd Defendants did not file any appearance or defence. The Plaintiff obtained a judgment in default of defence on the 31st August, 2023. Furthermore, this Court in the ruling for writ

of elegit observed that the Plaintiff attempted to execute and recover the judgment sum at the Defendant's house and that execution was unsuccessful as there were no goods worth seizing. These findings of facts play a critical role in this application.

- 3.4 This is more so that the thrust of the 1st and 2nd Defendant's argument in support of the application to stay execution is that they were not aware of the proceedings until the writ of elegit was granted by this Court.
- 3.5 On the other hand, the kernel of the Plaintiff's opposition to the application was that the Defendants were fully aware of the proceedings, as evidenced by the affidavit of service on record. Further that the Defendants have not exhibited any defence or proposed defence on the merits to warrant the stay and possible setting aside the judgment in default of appearance and defence.
- 3.6 I have considered the above arguments. I wish to state from the outset that a grant of a stay of execution is a discretionary and equitable remedy. It should be granted where the Applicant would suffer loss which could not be compensated in damages and where special circumstances of the case so require, or where, if the stay is not granted, the matter will be rendered nugatory academically. It is also a well-settled principle of law that a Court should not grant a stay of execution of judgment unless there are good and reasonable grounds for doing so. The Supreme Court of Zambia in the

case of *Nyampala Safaris and 4 Others v Wildlife Authority and 6 Others*¹ observed that a stay should only be granted where good and convincing reasons have been advanced by a party. The rationale is that a successful litigant should not be deprived of the fruit of litigation as a matter of course.

3.7 Furthermore, the settled position of the law regarding setting aside a judgment in default is that the applicant must demonstrate that it has a defence on the merits in order to succeed. In addition, the applicant must give an explanation of the default; however, it is the defence on the merits that is more important to consider. The cases of *Water Wells Limited v Jackson*² and *Mwambazi v Morester Farms limited*³ are cases on point of the aforementioned position of the law.

3.8 In this matter, the Defendants have not filed or exhibited their proposed defence. Counsel, for the Defendants merely informed this Court that the Defendants were not aware of the proceedings. This Court prodded counsel for the Defendants, Miss Mushanga, whether she was aware that there was an affidavit of service on record; she did not offer any explanation.

3.9 It is thus evident from the above that, without the proposed defence, there is no arguable defence on the merits. Furthermore, it is my considered view that the 1st and 2nd Defendant has not sufficiently explained with cogent reasons for the default. This is more so, because the 1st and 2nd Defendants, upon refusing receipt of the writ of summons

and statement of claim, had the liberty to pursue the Plaintiff's claims. They did not do so or make any appearance or file documents until this Court delivered the Ruling on the writ of *elegit* on the 6th May, 2024. The 1st and 2nd Defendants sat on their right until 6th January, 2025, when the Defendants filed summons to stay execution of the writ of *elegit* after a period of more than 6 months had lapsed.

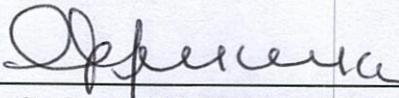
3.10 Rules of procedure in relation to court proceedings do not exist in a vacuum and are meant to assist the court in dispensing justice in a fair, just, and orderly manner. A party that wants only to disobey the court's directives cannot cry foul. This position was aptly opined by the Court of Appeal in the case of *National Breweries PLC v Chakama Investment Limited*⁴.

3.11 It is my firm view that there was an unreasonable delay on the part of the 1st and 2nd Defendants and a lackluster approach to litigation in this matter. In *Access Bank Zambia Limited v Group Five/ZCON Business Park Joint Ventures (Suing as a firm)*⁵, the Supreme Court pronounced that the Courts cannot aid in bending or circumventing the rules under the guise of doing justice through hearing matters on their merits.

3.12 For these reasons, the 1st and 2nd Defendant's application to stay execution of the writ of *elegit* pending an application to set aside judgment in default of appearance and defence fails for lack of merit. The same is therefore dismissed. I make no orders as regards costs.

3.13 Leave to appeal is hereby granted.

DELIVERED AT LUSAKA, THIS 25TH DAY OF NOVEMBER, 2025.



G.C. CHAWATAMA
HIGH COURT JUDGE

