

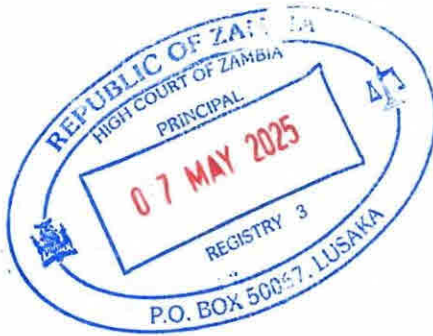
**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2017/HP/1735

(Civil Jurisdiction)

BETWEEN:

BINWELL MUTAKA



PLAINTIFF

AND

MWANZA MULAWO

1ST DEFENDANT

VERONICA CHIPAMPE

2ND DEFENDANT

LUSAKA CITY COUNCIL

3RD DEFENDANT

THE COMMISSIONER OF LANDS

4TH DEFENDANT

THE ATTORNEY GENERAL

5TH DEFENDANT

Before the Honourable Mrs. Justice R. Chibbabbuka on the 7th day of May, 2025

For the Plaintiff: Mr H.M Mulunda, Messrs Hibajene Mulunda
Advocates
For the 1st Defendant: N/A
For the 2nd Defendant: Ms R Samanjamba, Messrs Nkusuwila Nachalwe
Advocates
For the 3rd Defendant: Mr J Chinene, In-house Counsel

RULING

Cases referred to:

1. *Nyampala Safaris Limited and Others vs Zambia Wildlife Authority and Others* SCZ/8/179/2009.
2. *Mulenga, Vismar Mulenga, Chainama Hotels Limited and Elephants Head Hotel vs Investrust Merchant Bank Limited* SCZ Judgment No. 15 of 1999.
3. *Zambia Revenue Authority vs Post Newspaper Limited* SCZ No. 18/2016
4. *Richard M. Chizyuka and another vs Credit Bank Limited* Appeal No. 8/113/99.

Legislation referred to:

The High Court Act, Chapter 27 of the Laws of Zambia.

1.0 Introduction

I shall refer to the parties as plaintiffs and defendants as that is how they have been referred to in the application.

This court entered a judgment in this matter on 21st September, 2022 which the plaintiff herein appealed against by filing a Notice of Appeal and Memorandum of Appeal. The plaintiff now seeks an order of this court staying execution of the said judgment pending the hearing and determination of the appeal.

The application for stay of execution is made by summons pursuant to *Order 36 Rule 10* of the *High Court Rules, High Court Act, Chapter 27* of the *Laws of Zambia* and supported by an affidavit. The application was filed on 17th May, 2024.

2.0 The Plaintiff's Affidavit in Support.

In support of the application, the plaintiff swears that the judgment in this matter was entered on 21st September, 2022 but the court did not grant him leave to appeal. He was subsequently granted leave to appeal to the Court of Appeal on 17th April, 2024. He has since appealed against this court's judgment and believes his appeal is meritorious and has prospects of success. He is the legitimate owner of the subject property having been allocated the same by the committee representing the victims of the Ng'ombe displaced residents and hence needs to be protected.

He was the first person to erect a building on the said land which was demolished by the 1st and 2nd Defendants. Unless the judgment is stayed, the appeal may be rendered an academic exercise and nugatory. There is a real danger that the 1st and 2nd defendants will assume possession of the property subject of the appeal which will prejudice him. No prejudice will be occasioned to the defendants by the grant of the order sought.

2.1 The Plaintiff's Supporting Arguments

In support of the application, the plaintiff filed skeleton arguments wherein counsel argued that the application has been made pursuant to *Order 36 Rule 10 of the High Court Rules, Chapter 27 of the Laws of Zambia*. Counsel argued that the grounds on which the appeal has been made are sufficient and convincing. For this argument counsel relied on the case of **Nyampala Safaris Limited and Others vs Zambia Wildlife Authority and Others**¹.

That the law on stay of execution was laid down in the case of **Mulenga, Vismar Mulenga, Chainama Hotels Limited and Elephants Head Hotel vs Investrust Merchant Bank Limited**² wherein the court held that an appeal does not automatically operate as a stay of execution. More should be advanced to persuade the court to grant a stay of execution. In the case of **Zambia Revenue Authority vs Post Newspaper Limited**,³ it was held that the court will only grant a stay of execution where there are good and compelling reasons for doing so. Counsel prayed that this court grants the order staying the judgment pending appeal.

3.0 The 2nd Defendant Affidavit in Opposition

The 2nd defendant filed an affidavit in opposition on 12th September, 2024 where she deposed that the plaintiff's appeal is neither meritorious nor has any prospects of success before the Court of Appeal. The plaintiff has not provided satisfactory reasons to entitle him to the order sought save to state that the appeal is meritorious and has prospects of success. The plaintiff is not a legitimate owner of the subject property. The property for which she obtained a valid certificate of title was given to her mother by the Ng'ombe displaced people's committee. The certificate of title she obtained from the Ministry of Lands has never been challenged by the plaintiff and hence she proceeded to develop the property.

The appeal lacks merit and does not have any prospects of success and hence no irreparable damage will be occasioned to the plaintiff. In the unlikely event

that the plaintiff succeeds on appeal, the property will be there for him to possess and she will be the one to lose out due to the mass developments she has made on the property. She is the beneficial owner and hence there is no danger of possession arising from her occupying her own property. The appeal is aimed at preventing her from quietly enjoying the property as granted by the judgment passed in her favour. The grounds of appeal lack substance.

3.1 The 2nd Defendant's Supporting Arguments

The 2nd defendant filed supporting arguments on 12th September, 2024 wherein counsel argued that an order of stay of execution is granted discretionarily upon the applicant satisfying certain conditions as per the holding in the case of **Richard M. Chizyuka and another vs Credit Bank Limited Appeal**.⁴ That the plaintiff in *casu* has no letter of offer or certificate of title save for a list of names belonging to the Ng'ombe displaced people thus he has no good claim to the property. The 2nd defendant on the other hand has a valid certificate of title in her possession which was never challenged at trial. That on the foregoing, the appeal has no prospects of succeeding and is bound to fail.

That the 2nd defendant has heavily invested in the property and hence is the one likely to suffer damage in the event that the plaintiff succeeds at appeal. The plaintiff will on the other hand not suffer any damage that cannot be atoned for by an award of damages. This appeal will not be rendered nugatory as it is bound to fail. Counsel referred to the **Zambia Revenue Authority** case for the argument that there is no purpose staying a judgment for an appeal that is bound to fail. Counsel argued that the 2nd defendant has demonstrated how the appeal is bound to fail. That this application lacks merit and hence should be dismissed.

4.0 At the Hearing

4.1 At the hearing held on 13th August, 2024, the plaintiff's counsel entirely relied on the affidavit and skeleton arguments filed in support of the application.

4.2 The defendants had not filed their opposing documents and sought leave to file the same, which was granted. The 2nd defendant proceeded to file her affidavit in opposition and skeleton arguments on 12th September, 2024, which have been referred to earlier in this ruling.

5.0 Decision of the Court

I am indebted to counsel for the arguments. I have carefully considered the same.

The application herein is made pursuant to *Order 36 Rule 10* of the *High Court Rules*, of the *High Court Act, Chapter 27* of the *Laws of Zambia*. The rule provides as follows:

“Except as provided for under rule 9, the Court or Judge may, on sufficient grounds, order stay of execution of judgment.”

It is trite law that an appeal does not operate as a stay of execution. The party seeking an order of the court staying execution must show that there are good and reasonable grounds that warrant the grant of the order. An order of stay of execution of judgment may be granted where the appellant would suffer loss which could not be compensated in damages, where special circumstances of the case so require, or where if the stay is not granted, the appeal will be rendered nugatory or academic. The Supreme Court in the **Sonny Paul Mulenga**, case 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

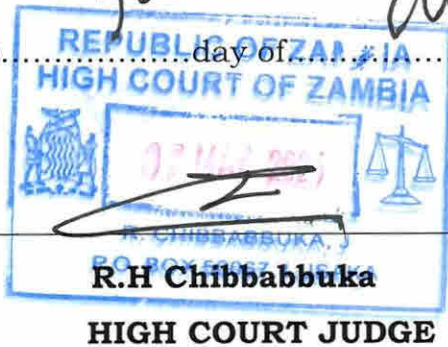
*desirable, necessary and just to stay a judgment pending appeal.
The successful party should be denied immediate enjoyment of a
judgment only on good and sufficient grounds.”*

In view of the guidelines outlined above, the question is, has the plaintiff demonstrated that there are good and convincing reasons for granting an order of a stay of execution of judgment? I have carefully perused the affidavit in support of this application in which the plaintiff has exhibited a memorandum of appeal containing 12 grounds of appeal which he believes have prospects of success. I have carefully reviewed the said grounds of appeal, and I regrettably do not share the same opinion as the plaintiff. In my opinion, the appeal has little prospects of success.

In addition, there is no evidence that the property in question may be disposed of pending the hearing and determination of the appeal. I see no reason to grant the order sought and therefore accordingly dismiss the application with costs to the 2nd defendant to be taxed in default of agreement.

Leave to appeal is granted.

Dated at Lusaka this..... day of..... 2025

Jha *May*

R.H Chibbabbuka
HIGH COURT JUDGE