

IN THE HIGH COURT FOR ZAMBIA

2018/HP/0815

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)



BETWEEN:

JANUS VALENTIN JENSEN (Suing in his capacity as
Executor of the estate of the late Kathrine Walentin Jensen)

PLAINTIFF

AND

LOUANN CHALCRAFT (Sued in her capacity as Executrix
of the Estate of the later Peter John Chalcraft)

DEFENDANT

**Before the Honourable Mrs Justice Ruth Chibbabbuka on the 11th March,
2025**

For the Plaintiff:

Mr B. Mhoni, Messrs Chalwe & Kabalata Legal
Practitioners

For the Defendant:

Mrs T.M Putta, Messrs Theotis Mutemi, Legal
Practitioners

RULING

Cases referred to:

1. *Shaw Vs Holland* (1900) 2 Ch. 305
2. *Micheal Chilufya Sata Vs Chanda Chimba and Others* (2010/HP/1282)
3. *Wilson Vs Church* (No. 2) [1879] 12 Chd 454 at pages 458 to 459
4. *Sonny Paul Mulenga Vs Investrust Merchant Bank Limited* (1999) ZR 101 (SC)

Legislation referred to:

Rules of the Supreme Court, White Book, 1999 Edition
The High Court Act, Chapter 27 of the Laws of Zambia

Other works referred to:

Halsbury's Law of England, 4th Edition, Volume 37 at paragraph 437

1.0 Introduction

The delay in delivering this Ruling is regretted and due to the heavy work load. The defendant on the 22nd September, 2022 filed an application by way of Summons for an Order for Stay of Proceedings pending appeal. The application was made pursuant to *Order 47 Rule 5* of the *High Court Rules* of the *High Court Act, Chapter 27* of the *Laws of Zambia* and *Order 59 Rule 13 (1) (a)* of the *Rules of the Supreme Court of England, 1965, 1999 Edition (The White book)*.

2.0 The defendant's affidavit evidence

The defendant on even date filed an affidavit in support of the application for stay of proceedings wherein she deposed as follows:

The record will show that the defendant entered a defence on the 7th June, 2018 and on the 27th June, 2019, she caused to be filed a Notice of Motion to raise preliminary issues on account of the following:

- (i) That the action was statute barred;
- (ii) That the agreement forming the basis of the respondent's claim was contrary to *Section 4* of the *Statute of Frauds Act 1677*;
- (iii) That the agreement made between the parties resulted in the creation of a Trust which was in contravention of the *Trust Restrictions Act, Chapter 63* of the *Laws of Zambia*.

On the 22nd October, 2019, the honourable Deputy Registrar delivered a Ruling in favour of the plaintiff which the defendant appealed to a judge in chambers. On the 29th April, 2022, the honourable Judge in Chambers delivered its Ruling in favour of the plaintiff. Being dissatisfied with the Ruling of the Court, the defendant appealed to the Court of Appeal on the 13th May, 2022. In the absence of a stay, the Court will proceed to conduct trial and may render the appeal an academic exercise.

2.1 The defendant's skeleton arguments

Counsel for the defendant referred to *Order 47 Rule 5 of the High Court Rules*, of the *High Court Act, Chapter 27 of the Laws of Zambia*, and *Order 59 Rule 13 (1) (a) of the Rules of the Supreme Court of England, 1965, 1999 Edition (The White book)*. Counsel argued that *Order 47 Rule 5 of the High Court Rules and, order 59 Rule 13 (1) (a) of the Rule of the Supreme Court*, clothe this Court with jurisdiction to grant this interlocutory application.

For the rationale for an order of stay of proceedings, counsel referred to the **Halsbury's Law of England, 4th Edition, Volume 37 at paragraph 437** which provides that:

"A stay of proceedings arises under an order of the court which puts a stop or "stay" on the further conduct of the proceedings in that court at the stage which they have then reached, so that the parties are precluded from taking any further step in the proceedings. The object of the order is to avoid the trial or hearing of the action taking place, where the court thinks it just and convenient to make an order, to prevent undue prejudice being occasioned to the opposite party or to prevent the abuse of process. The order is made generally in the exercise of the court's discretionary jurisdiction, and by way of summary process, that is without a trial on the substantive merits of the case and at any rate in the exercise of its inherent jurisdiction...."

Counsel went on to argue that, there are special and sufficient grounds for this court to grant the defendant's application to stay these proceedings. That this appeal has prospects of success because honourable Judge Banda Bobo erred when she held that the agreement between the plaintiff and the defendant created a resulting trust. Further, that the appeal also raises the Judge's failure to consider the defendant's defence when rendering its ruling on the preliminary issue before it. To buttress this argument the court was referred to the cases of

Shaw VS Holland¹, and Micheal Chilufya Sata Vs Chanda Chimba and Others².

It was counsel's further argument that the net effect of a stay of proceedings is, to suspend the rights which a party may have in the proceedings in the court below pending the determination of the appeal, so as to avoid a scenario where the decision of the appellate court is rendered nugatory and merely academic. To buttress this argument the Court was referred to *Order 59 Rule 13 Sub-rule 2* of the *Rules of the Supreme Court of England*, and the case of **Wilson Vs Church³**. Counsel contended that the Judge in her ruling proceeded to determine the main matter in issue by holding that a resulting trust was created by an agreement between the plaintiff and the defendant, albeit in the absence of evidence, and thus rendering it difficult for the defendant to proceed. That the defendant will suffer great prejudice should the matter be concluded.

Counsel prayed that the proceedings be stayed pending the determination of the appeal.

3.0 The plaintiff's affidavit in opposition

The plaintiff filed an affidavit in opposition on the 7th October, 2022 deposed to by Buchizya Mhoni, counsel for the plaintiff. I have not reproduced the same as the averments therein consist of extraneous matter by way of legal arguments and conclusions instead of facts.

3.1 The plaintiff's list of authorities and skeleton arguments

Counsel referred to **Halsbury's Laws of England, 4th Edition, Volume 37** for the position that an order for the stay of proceedings is made sparingly and only in exceptional circumstances. Further, that it was held in the case of **Sonny Paul Mulenga Vs Investrust Merchant Bank Limited⁴** that in exercising its discretion whether to grant a stay or not, the court is entitled to preview the prospects of the proposed appeal. Counsel argued further that a successful party should not be denied immediate enjoyment of the fruits of the judgment or ruling

as was held in the case of **Sata Vs Chanda Chimba**. It was counsel's further argument that there are no special circumstances in the case in *casu*, that would warrant this court to exercise its discretion to stay these proceedings. To buttress this argument, reference was made to the case of **Shaw Vs Holland**.

Counsel argued that the defendant at her own instance invoked *Order 14A* of the *Rules of the Supreme Court of England* which has the effect of determining or disposing of a matter without proceeding to full trial. That the defendant called upon the court to make a determination on two questions of law, firstly whether or not the matter was statute barred and secondly whether or not a trust can be deemed to have been created. It was counsel's considered view that the court was on *terra firma* when it firstly found that the cause of action arose only 2013 when the defendant refused to honour the agreement and not on the date of contract being sometime in 2005. That as such the claim was brought within the prescribed period of 12 years and is not statute barred.

It was further argued that the lower court justly held that the agreement between the plaintiff and the defendant created a resulting trust, by virtue of the plaintiff paying the purchase price for the property. Counsel contended that the claims by the defendant that the learned High Court Judge (as she was then), Justice Banda-Bobo, misdirected herself by not considering the defendant's defence are wholly misdirected and unsubstantiated. That the defendant resorted to raising preliminary issues in order to dispose of the case before trial, and after the application did not go as planned, the defendant now seeks to fault the learned judge's decision. It was counsel's argument that one cannot enjoy both of two desirable but mutually exclusive alternatives. Counsel submitted that the learned High Court Judge and Deputy Registrar were on firm ground when they held that the defendant's case lacked merit. That there are no exceptional circumstances presented by the defendant, which can warrant this court to exercise its discretion and make an order to stay these proceedings.

On the foregoing arguments, counsel beseeched this court to dismiss the application to stay proceedings, with costs so that the plaintiff should in the interest of justice reap the ruling in its favour.

4.0 The hearing

4.1 The defendant's arguments

Counsel for the defendant relied on the affidavit in support of the application, as well as the skeleton arguments, and list of authorities all filed into court on the 28th September, 2022. In their arguments, counsel reiterated what was in their written submissions, as such I will not reproduce the same.

4.2 The plaintiff's arguments

In opposing the application, counsel for the plaintiff relied on the plaintiff's affidavit in opposition, as well as the list of authorities, and skeleton arguments filed into Court on the 7th October, 2022. Equally in their arguments, counsel reiterated what was in their written submissions, as such I will not reproduce the same.

4.3 The defendant's arguments in reply

In reply, counsel argued that the defendant is at liberty to challenge the decision of this court based, on the grounds advanced in the Notice and Memorandum of Appeal, notwithstanding that the defendant made an application that the court ruled against.

5.0 The decision of the Court

I am indebted to counsel for their submissions and arguments which I have carefully considered.

The crux of this matter is whether the appeal against this Court's Ruling of the 21st January, 2022 has any prospects of success. It has been argued by both counsel that in its discretion, whether to grant a stay or not, the court is entitled to review the prospects of the proposed appeal. The case of **Sonny Paul Mulenga**

Vs Investrust Merchant Bank Limited is instructive in this regard. The defendant has filed the following grounds of appeal, to the Court of Appeal

1. The learned High Court Judge erred in law and in fact when she held that the agreement between the plaintiff and the defendant created a resulting trust based on solely on the reading of the plaintiff's statement of claim without having regard to the defendant's defence.
2. The learned High Court Judge erred in law and in fact when she made a finding of fact that the plaintiff never intended to give the beneficial interest in equity to the defendant at a preliminary stage in the absence of any evidence to that effect.
3. The learned High Court Judge erred in law and in fact when she prematurely held that the defendant failed to show proof of payment of consideration, and further found that the plaintiff never relinquished or abandoned her interest in the property when the matter did not proceed to trial and in the absence of evidence on record.
4. The learned High Court Judge erred in law and in fact when she failed to determine the legal issue raised on a point of law and proceeded to make findings of fact determining the main matter at preliminary stage.
5. Any further ground which the appellant may seek to add on further perusal of the Ruling with leave of the court.

The aforesaid grounds arise out of a ruling, that was delivered by this court on the 29th April, 2022 emanating from an appeal from the ruling of Hon. Mikalile, Deputy Registrar (as she was then). In the ruling by this Court, one sole ground of appeal from the Deputy Registrar's decision was determined as the other two grounds had been abandoned.

In the said sole ground of appeal, the Deputy Registrar was being faulted for holding that the matter should proceed to trial, so as to determine whether a trust had been created in this matter, contrary to the *Trust Restrictions Act*,

Chapter 63 of the Laws of Zambia, despite the plaintiff admitting to the fact that a trust has indeed been unintentionally created by the plaintiff.

The argument raised by the defendant, both before the Deputy Registrar and before this court on appeal, was that since the parties entered into an agreement relating to real property, whose outcome was that the property would vest at a future date, such agreement is not enforceable at law as it is contrary to the provisions of the *Trust Restrictions Act, Chapter 63 of the Laws of Zambia*. That consequently, the contract entered into by the parties was unlawful and in contravention of *Section 3 of the Trust Restriction Act*. On the other hand, the plaintiff argued that a trust may be created in two ways, vis, expressly created or by way of a resulting or constructive trust. That on the face of it, the *Act* does restrict the creation of future trusts, but that however, in the matter before court, a resulting trust was created by virtue of the plaintiff paying the purchase price of the property in question.

Upon assessing the aforementioned arguments on appeal, from the Deputy Registrar, this court found that a resulting trust was created as the plaintiff never envisaged to relinquish or abandon her interest in the property, nor did she intend to part away with her legal interest in the property permanently. This court also found that, the defendant had not shown any proof that any consideration was paid by the defendant for the property and neither had the defendant provided evidence, to show that the plaintiff has relinquished or abandoned her interest in the property. That on this basis, the contract entered into by the parties was not unlawful or unenforceable. The appeal was dismissed and it was ordered that the matter proceed to trial.

From the arguments that have been canvassed by the defendant in this application, it is apparent that their argument is that, this court has delved into the main matter that is before court in the absence of evidence. To put things in context, the first relief sought in the plaintiff's writ of summons and statement of claim is couched as follows:

“Specific performance of an oral agreement between the plaintiff and the defendant made sometime in 2005 for the purchase of the property known as Stand No. F/287a/D (Siver Rivers Ranch) which was to be held in trust for the plaintiff as per the agreement.”

In the preliminary issue that was filed by the defendant three questions were raised, which the learned Deputy Registrar dismissed and emanating from that dismissal, the defendant appealed again on three grounds, to a single Judge of the High Court where upon two grounds of appeal were abandoned, and the sole ground of appeal remained which is couched as follows:

“The learned Deputy Registrar erred in fact and law when she held that the matter should proceed to trial so as to determine whether a trust had been created in this matter contrary to the Trusts Restriction Act, Chapter 63 of the Laws of Zambia, despite the plaintiff admitting to the fact that a trust had indeed been unintentionally created by the plaintiff.”

On appeal to this court as already stated above, this court found that a resulting trust was created, as the plaintiff never envisaged to relinquish or abandon her interest in the property, nor did she intend to part away with her legal interest in the property permanently.

Evidently, the issue of a trust having been created through the plaintiff’s and defendant’s transaction, is one that needs to be interrogated at trial. Hence, arriving at a decision that the same had been created before the receipt of evidence from both parties was premature. As such I agree with counsel for the defendant’s position in that regard.

Consequently, I do not accept the arguments advanced by the plaintiff in relation to the defendant resorting to attacking this court’s decision on the basis that the employment of *Order 14A* of the *Rules of the Supreme Court* by the defendant to dispose of the matter before trial, did not attain a desirable outcome. I also do not agree with the plaintiff’s arguments advanced that the defendant cannot enjoy both of two desirable but mutually exclusive alternatives. It is my

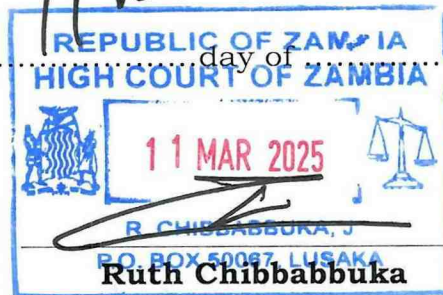
considered view, that the critical issue is not that the defendant's reliance on *Order 14A* of the *Rules of the Supreme Court* not having yielded a desirable result, has now led to the defendant resorting to using the appeal process so as to thwart the plaintiff's claims. Rather, the issue that has been brought to the fore by counsel for the defendant, which position I agree with, is that the defendant is at liberty to challenge the decision of this court, on the basis of the grounds of appeal that the defendant has raised, and more particularly on the findings which this court made that delved into the main matter which ought to be interrogated at trial.

The upshot of the matter is that I find that upon review of the findings of this Court's ruling delivered on the 29th April, 2022, the appeal against the same has prospects of success. Accordingly, the application for stay of proceedings is granted as prayed.

Costs are in the cause.

Leave to appeal is granted.

Dated the day of 2025



Ruth Chibbabbuka
HIGH COURT JUDGE