

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



2018/HP/1124

BETWEEN:

NEW PLAZA ENTERPRISES LIMITED**PLAINTIFF**

AND

MOLLY PELEKAMOYO**DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 9th DAY
OF APRIL, 2024**

For the Plaintiff : Mr. M. Chitundu, Messrs Barnaby Chitundu & Khunga
Advocates

For the Defendant : M.r G. Hakainsi, Messrs LM Chambers

R U L I N G

CASES REFERRED TO:

1. *Wilson v Church (No 2) 12 CH D 454*
2. *Farmers' Co-operative (N.R.) LTD. v. Joan Margaret Drake 1963-1964 Z. and N.R.L.R. 74*
3. *Linotype Hell Ltd v Baker 1992 4 ALL ER 887*
4. *Sonny Paul Mulenga and others v Investrust Merchant Bank Limited 1999 ZR 101*
5. *Rosemary Mulenga, Attorney General, Commissioner of Lands v Mwanamuto Investments Limited SCZ Judgment No 8 of 2012*
6. *Zambia Revenue Authority v Post Newspapers Limited SCZ No 18 of 2016*
7. *Emmanuel Mponda v Mwamba Mulenga and two others Selected Judgment No 42 of 2017*
8. *Sub-Saharan Management Consultants (PVT) Limited v Sirituta Investments (PVT) Limited & others HH-249-12*

LEGISLATION REFERRED TO:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*
2. *The Rules of the Supreme Court of England, 1999 Edition*

1. INTRODUCTION

- 1.1 This Ruling is on two applications, the first being on an application for leave to issue a Writ of Elegit, which was filed on 10th October, 2023, by New Plaza Enterprises Limited, the Plaintiff herein. The application was made pursuant to ***Order XLII Rules 3 and 4 of the High Court Rules, Chapter 27 of the Laws of Zambia.***
- 1.2 The second application was for a stay of execution of the default Judgment pending determination of the appeal, which was filed by Molly Pelekamoyo, the Defendant herein. That application was filed on 1st February, 2024, and was made pursuant to ***Order XXXVI Rule 10 of the High Court Rules, Chapter 27 of the Laws of Zambia.***
- 1.3 The application for leave to issue a Writ of Elegit was supported by an affidavit and a List of Authorities and Skeleton Arguments. In opposing the application, Molly Pelekamoyo filed an affidavit in opposition and a List of Authorities and Skeleton Arguments in opposition on 5th February, 2024. New Plaza Enterprises Limited filed an affidavit in reply on 7th February, 2024.
- 1.4 With regard to the application to stay execution of the default Judgment pending appeal, Molly Pelekamoyo filed an affidavit and a List of Authorities and Skeleton Arguments in support of the application. New Plaza Enterprises Limited filed an affidavit in opposition and a List of Authorities and Skeleton Arguments in opposition on 19th February, 2024. Thereafter, Molly Pelekamoyo filed an affidavit in reply and a

List of Authorities and Skeleton Arguments in reply on 23rd February, 2024.

2. BACKGROUND

2.1 After New Plaza Enterprises Limited obtained an Order for leave to issue and serve the Writ of Summons and statement of claim outside jurisdiction on 10th July, 2018, the Writ of Summons and statement of claim were filed on 11th July, 2018, in which New Plaza Enterprises Limited sought the following reliefs:

- i. An Order that Molly Pelekamoyo pays New Plaza Enterprises Limited the current market value of the property, to be assessed by the Court;*
- ii. Damages for loss of opportunity by New Plaza Enterprises Limited to purchase the property;*
- iii. Damages for breach of contract;*
- iv. Interest on the amount found due;*
- v. Any other relief that the Court may deem fit;*
- vi. Costs.*

2.2 Judgment in default of appearance and defence for the reliefs claimed, was obtained on 23rd October, 2018. Thereafter, New Plaza Enterprises Limited took out an application for assessment of the damages. On 24th July, 2019, the District Registrar delivered a Ruling on assessment, in which New Plaza Enterprises Limited was awarded the amount of ZMW120, 000.00 as repayment of the purchase price and damages for breach of contract in the sum of ZMW2, 380, 000.0, bringing the total amount due to ZMW2, 500, 000.00.

- 2.3 The said amount was directed to attract interest at Seven (7) percent per annum from the date of issue of the Writ of Summons until Judgment, and thereafter at the Bank of Zambia lending rate until payment. New Plaza Enterprises Limited was also awarded costs, to be taxed in default of agreement.
- 2.4 The record shows that on 13th February, 2020, the Deputy Registrar granted a Charging Order absolute. Then on 6th November, 2020, Molly Pelekamoyo filed summons to set aside the default Judgment, and an ex-parte summons to stay execution of the default Judgment. A preliminary issue was raised to that application.
- 2.5 In a Ruling dated 8th June, 2021, the District Registrar upheld the preliminary issue, and directed that an original affidavit be filed in support of the application. Then on 18th February, 2021, Molly Pelekamoyo applied to discharge the Charging Order absolute, which was granted on 13th February, 2020.
- 2.6 The affidavit in support of the summons to stay execution and to set aside the default Judgment was refiled on 16th June, 2021. Opposition was filed to the applications, and on the applications being heard, the District Registrar in a Ruling dated 24th February, 2022, declined to stay execution of the default Judgment, as Molly Pelekamoyo had not advanced good and sufficient grounds.
- 2.7 The District Registrar further declined to set aside the default Judgment on the basis that Molly Pelekamoyo had

not advanced sufficient reasons for her absence. In respect of the application to set aside the Charging Order, the District Registrar found it otiose to consider the application, as she had declined to stay execution of the default Judgment and to set aside the said Judgment, more so as the Order had been perfected by the Judge.

- 2.8 Molly Pelekamoyo thereafter on 3rd March, 2022, relaunched the application to stay execution of the default Judgment before the Judge, this time premised on the fact that she had appealed to the said Judge at Chambers. The Notice of Appeal against the Ruling of the District Registrar was filed on 3rd March, 2022.
- 2.9 The Hon Judge who had conduct of the matter then, in a Ruling dated 28th August, 2023, noted that after the Judgment in default was entered on 23rd October, 2018, the application to set aside the default Judgment and to stay execution of the said default Judgment was only filed on 9th November, 2020. It was further noted that in the meantime, New Plaza Enterprises Limited had taken several steps to execute the Judgment.
- 2.10 The Hon Judge further observed that an action was commenced in the Commercial Division of the High Court, in which New Plaza Enterprises Limited was granted possession of the property. It was therefore the Hon Judge's conclusion, that even though Molly Pelekamoyo had exhibited a defence, the applications prayed for could not be

granted. Accordingly, the Hon Judge declined to grant the applications.

- 2.11 Thereafter, the applications which are subject of this Ruling were filed.

3. SUBMISSIONS AT THE HEARING

APPLICATION FOR LEAVE TO ISSUE WRIT OF ELEGIT SUBMISSIONS BY COUNSEL FOR NEW PLAZA ENTERPRISES LIMITED

- 3.1 In making the application, Counsel relied on the affidavit which was filed in support of the application, together with the List of Authorities and Skeleton Arguments in support. He augmented his submissions, by stating that there is a Judgment in the sum of K2, 500, 000.00 which was assessed. Counsel added that payment of the Judgment sum had been pending for over Four (4) years.
- 3.2 Still in submission, Counsel stated that Molly Pelekamoyo, the Judgment Debtor herein, is not resident within the jurisdiction of the Court, and she has no moveable assets, except the subject property.
- 3.3 The contention was that there being no Order to stay execution of the Judgment, leave to issue the Writ of Elegit should be granted, so that New Plaza Enterprises Limited as Judgment Creditor, could enjoy the fruits of the Judgment.

RESPONSE BY COUNSEL FOR MOLLY PELEKAMOYO

- 3.4 The response that Counsel for Molly Pelekamoyo gave, was that in opposing the application, reliance was placed on the affidavit in opposition and the List of Authorities and

Skeleton Arguments in opposition, which were filed on 5th February, 2024. Counsel stated that they emphasized, in light of the appeal that had been filed, and which was pending before the Court of Appeal, that it would not be in the interests of justice to allow enforcement of the default Judgment, which had been impugned.

- 3.5 Counsel asked this Court to exercise its' judicial discretion to ensure that the administration of justice remains orderly, by ensuring that the processes are followed, and enforced on their merits. It was added that a number of reasons had been highlighted in the affidavit in opposition and List of Authorities and Skeleton Arguments in opposition as to why the application should not be granted.
- 3.6 It was also Counsel's submission that granting the application, would render the appeal nugatory and an academic exercise, if Molly Pelekamoyo succeeded. The prayer was accordingly, that the application should not be granted.

REPLY BY COUNSEL FOR NEW PLAZA ENTERPRISES LIMITED

- 3.7 Reliance, in reply, was placed on the affidavit in reply dated 7th February, 2024.

APPLICATION TO STAY EXECUTION OF THE DEFAULT JUDGMENT

SUBMISSIONS BY COUNSEL FOR MOLLY PELEKAMOYO

- 3.8 Counsel in submission, stated that they relied on the affidavit which was filed in support of the application,

together with the List of Authorities and Skeleton Arguments in support. By way of augmenting, Counsel submitted that the default Judgment should be stayed, which Judgment was not obtained on its' merits. He added that the Judgment was entered as Molly Pelekamoyo delayed to enter appearance and file her defence.

- 3.9 Continuing in submission, Counsel stated that the grounds of appeal that had been advanced, had high prospects of success, and the requirements for the grant of a stay of execution had therefore been met. It was also Counsel's contention, that granting the stay of execution would enable the process of the appeal to be conducted smoothly, and to be heard on its' merits.

RESPONSE BY COUNSEL FOR NEW PLAZA ENTERPRISES LIMITED

- 3.10 Counsel in response, submitted that they relied on the affidavit in opposition and List of Authorities and Skeleton Arguments in opposition, in opposing the application. His submission was that those documents showed that my Two (2) colleagues had declined to grant the application, as Molly Pelekamoyo was served the originating process, and she did not respond to it. Thus, this went to show that there were no prospects of success of the appeal.
- 3.11 Counsel also submitted that a default Judgment is a Judgment of the Court that is valid, and has the full force of the law. It was noted that the appeal was filed in September, 2023, and the application to stay execution was only filed

Six (6) months later, after New Plaza Enterprises Limited as Judgment Creditor, filed the application for leave to issue a Writ of Elegit.

- 3.12 The view taken by Counsel, was that Molly Pelekamoyo as Judgment Debtor, had put New Plaza Enterprises Limited to great cost, and this Court should not entertain the application to stay execution of the Judgment. Counsel added that Molly Pelekamoyo went to sleep, and she only woke up, at the point of execution.

REPLY BY COUNSEL FOR MOLLY PELEKAMOYO

- 3.13 In reply, Counsel stated that he relied on the affidavit in reply and the List of Authorities and Skeleton Arguments which were filed on 23rd February, 2024. He stated that the Hon Judge that previously had conduct of the matter, was transferred to Livingstone, and that explained the failure to file the documents.
- 3.14 It was also Counsel's submission, that they had in the List of Authorities and Skeleton Arguments, cited authorities that had held that although the reason for default is considered, it is the defence on the merits, that is the more important consideration. Counsel reiterated that the appeal has prospects of success, and he noted that while New Plaza Enterprises Limited had cited authorities on the existence of special circumstances in granting a stay, his contention was that the distinction between those authorities and the matter at hand, was that in those authorities, the matters had

proceeded to full trial, and Judgments were rendered on their merits.

- 3.15 It was however his submission, that in this case, the Court is dealing with a default Judgment, and that in the absence of a stay of execution, the appeal if successful, would be rendered nugatory.

4. DECISION OF THIS COURT

- 4.1 I have considered the applications.

APPLICATION FOR LEAVE TO ISSUE WRIT OF ELEGIT

- 4.2 This application was made pursuant to **Order XLII Rules 3 and 4 of the High Court Rules, Chapter 27 of the Laws of Zambia**, which provide as follows:

“3. On any levy on the property of any person to satisfy an Order or Judgment of Court for the payment of money, the real property of such person shall only be sold if the personal property is insufficient.

4. In any proceedings by way of elegit any inquisition shall be conducted without oath by the Sheriff, Deputy Sheriff or Under-Sheriff, sitting without a jury, but he may in his discretion sit with assessors, and shall have all the powers of the Court for the summoning of such assessors and payment of their proper fees and expenses, and the High Court may at the request of any party to any such proceedings issue subpoenas for the attendance of witnesses, for payment of whose fees

and expenses the Sheriff, Deputy Sheriff or Under-Sheriff may at his discretion make provision by order against any party to such proceedings.”

- 4.3 The gist of the application, is that there is a pending Judgment sum owing by Molly Pelekamoyo to New Plaza Enterprises Limited, in the amount of ZMW2, 500, 000.00, which was assessed by the Court, as shown by exhibit ‘BN2’ to the affidavit filed in support of the application. It was also deposed, that by an action which was filed in the Commercial Division of the High Court, New Plaza Enterprises Limited obtained an Order to enforce the Charging Order.
- 4.4 However, by a Judgment by the Court of Appeal dated 23rd October, 2018, it was held that Charging Orders do not apply in this jurisdiction, and on 21st September, 2021, the said Court of Appeal set aside the Charging Order.
- 4.5 The averment in the affidavit, was also that Molly Pelekamoyo applied to stay execution of the default Judgment before the District Registrar, who declined to grant the application. Thereafter, Molly Pelekamoyo renewed the application before the Hon Judge, who equally declined to grant the application.
- 4.6 It was stated that Molly Pelekamoyo is resident outside the Court’s jurisdiction, and the only known property that she owns, within this Court’s jurisdiction, is the property F/441a/62 Roma Lusaka, as shown by exhibit ‘BN4’, a copy of the Lands Register.

- 4.7 The averment was further that this Court has jurisdiction to Order that the said property be put in rent, and the proceeds thereof, applied towards payment of the costs and interest thereon, through the issuance of a Writ of Elegit.
- 4.8 In the List of Authorities and Skeleton Arguments in support of the application, the case of ***Farmers Co-operative (N.R.) LTD. v. Joan Margaret Drake*** ⁽²⁾ was relied on as having held that:
- “A Judgment creditor to whom legal possession has been delivered under a writ of elegit is a tenant by elegit under the Judgment debtors (Halsbury 1st edition., Vol. 14, page 69.) Under the Judgments Act, 1864.”***
- 4.9 The kernel of the opposition, was that as evidenced by exhibit ‘EN1’ to the affidavit in opposition, which was the Notice of appeal and the Memorandum of Appeal, an appeal had been lodged in the Court of Appeal, against the refusal to set aside the default Judgment.
- 4.10 The argument in List of authorities and Skeleton Arguments in opposition, was that there is an appeal pending in the Court of Appeal, against the refusal to set aside the default Judgment. Therefore, granting leave to issue a Writ of Elegit, would be a recipe for confusion, should Molly Pelakamoyo succeed on appeal.
- 4.11 ***Order 18/19/18 of the Rules of the Supreme Court of England*** was cited, as providing as follows on abuse of the Court process:

“This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. See also “Inherent jurisdiction”, para. 18/19/26.

The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances and for this purpose considerations of public policy and the interests of justice may be very material.”

- 4.12 Further reliance was placed on the case of ***Emmanuel Mponda v Mwamba Mulenga and two others*** ⁽⁷⁾, stating that the Supreme Court in that matter, noted that Judges are required to ensure that a case uses its’ appropriate share of the resources of the Court.
- 4.13 Indeed, in this matter, after a default Judgment was obtained on 23rd August, 2018, the District Registrar assessed the damages at a total sum of ZMW2, 500, 000.00. The record further shows that New Plaza Enterprises Limited has taken steps to enforce the payment of the Judgment sum. It will further be seen, that Molly Pelekameyo made applications before the District Registrar, and thereafter, the

Hon Judge to stay execution and to set aside the default Judgment, which applications were declined.

- 4.14 An appeal against the decision of the Hon Judge has since been filed in the Court of Appeal. In view, of the pending appeal before the Court of Appeal, it would not be prudent to proceed with any enforcement of the Judgment, as such enforcement may prejudice Molly Pelekamoyo should she succeed on appeal.
- 4.15 On that basis, I decline to grant an Order for leave to issue a Writ of Elegit. Suffice to note, that in the case of ***Farmers Co-Operative (N.R.) LTD. v. Joan Margaret Drake*** ⁽²⁾ the Court stated that:

“A Judgment creditor to whom legal possession has been delivered under a writ of elegit is a tenant by elegit under the Judgment debtors (Halsbury 1st edition., Vol. 14, page 69.) Under the Judgments Act, 1864 (27 and 28 Vict. c. 112) he may apply by petition (now by originating summons) for an order for sale of the land to which the writ relates. Before granting the order, the court or judge may direct inquiries as to the title, nature and particulars of the interest of the Judgment debtor in the land, but it need not do so when those matters are clear.”

- 4.16 The application therefore fails.

APPLICATION TO STAY EXECUTION OF THE DEFAULT JUDGMENT PENDING APPEAL

4.17 This application was made pursuant to **Order 36 Rule 10 of the High Court Rules, Chapter 27 of the Laws of Zambia, Order X Rule 5 of the Court of Appeal Rules** and **Order 59 Rule 13 of the Rules of the Supreme Court of England, 1999 Edition.**

4.18 **Order 36 Rule 10 of the High Court Rules**, states that:

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

4.19 The provisions of **Order X Rule 5 of the Court of Appeal Rules** are:

“An appeal shall not operate as a stay of execution or of proceedings under the Judgment appealed against unless the High Court, quasi judicial body unless the Court so orders and no intermediate act or proceeding shall be invalidated, except so far as the Court may direct.”

4.20 **Order 59 Rule 13 of the Rules of the Supreme Court of England**, states that:

“(1) Except so far as the Court below or the Court of Appeal or a single Judge may otherwise direct -
(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below;

(b) no intermediate act or proceeding shall be invalidated by an appeal.”

4.21 As regards this application, the reasons advanced were the same as those that were raised in the application in opposition to the application for leave to issue a Writ of Elegit. Principally, as can be seen from those reasons, it is that Molly Pelekamoyo has appealed the Ruling of the Judge to the Court of Appeal, and not granting the stay of execution of the default Judgment, will render the appeal, if successful, nugatory and an academic exercise.

4.22 In the List of Authorities and Skeleton Arguments in support of the application, the explanatory notes in ***Order 59/13/2 of the Rules of the Supreme Court of England*** were stated as providing that:

“But the court is likely to grant a stay where the appeal would otherwise be rendered nugatory (Wilson v. Church (No. 2) (1879) 12 Ch.D. 454 at 458, 459, CA), or the appellant would suffer loss which could not be compensated in damages. The question whether or not to grant a stay is entirely in the discretion of the Court, and the Court will grant it where the special circumstances of the case so require.”

4.23 Other authorities cited were the cases of ***Wilson v Church*** ⁽¹⁾ and ***Linotype Hell Ltd v Baker*** ⁽³⁾ which respectively held that when a party is appealing, exercising undoubtedly the right to appeal, the Court ought to see to it, that the appeal

if successful, will not be rendered nugatory, and that if the stay is not granted, the defendant will be ruined.

- 4.24 The case of ***Zambia Revenue Authority v Post Newspapers Limited*** ⁽⁶⁾ was quoted, as having held that the prospects of success of the appeal, is a key consideration in deciding whether to grant a stay of execution.
- 4.25 In opposition, the contention was that insufficient reasons had been advanced to stay execution of the Judgment, which is now Six (6) years old. It was also stated that the appeal has no prospects of success.
- 4.26 New Plaza Enterprises Limited in the List of Authorities and Skeleton Arguments in opposition, reiterated that the appeal has no prospects of success, and that no good reasons to stay execution of the Judgment had been advanced.
- 4.27 The case of ***Zambia Revenue Authority v Post Newspapers Limited*** ⁽⁶⁾ was cited, as having held that the key consideration in granting a stay of execution, is that the appeal has prospects of success.
- 4.28 Further reliance was placed on the case of ***Sub-Saharan Management Consultants (PVT) Limited v Sirituta Investments (PVT) Limited & others*** ⁽⁸⁾ as having held that the purpose of a stay of execution, is to prevent irreparable damage or prejudice from being suffered by a prospective appellant. Therefore, the argument was that the Court has to be satisfied that no injustice will be occasioned, if a stay of execution is not granted.

- 4.29 That in so doing, the Court will have regard to the prospects of success of the appeal, potentiality of irreparable harm or prejudice being occasioned to either of the parties, and the balance of hardship or inconvenience.
- 4.30 The cases of ***Sonny Paul Mulenga and others v Investrust Merchant Bank Limited*** ⁽⁴⁾ and ***Rosemary Mulenga, Attorney General, Commissioner of Lands v Mwanamuto Investments Limited*** ⁽⁵⁾ were also relied on, as having held that in granting for a stay of execution, this is done for good and convincing reasons.
- 4.31 The argument was that Molly Pelekamoyo had argued that she was not served the Court process, hence the reason for her failure to file a defence. However, this was contrary to the proof of service that was on the Court record. It was further argued that while Molly Pelekamoyo had argued that she did not sell the property to New Plaza Enterprises Limited, there was a contract of sale dated 3rd July, 2021, which she signed.
- 4.32 It was also stated that Molly Pelekamoyo had contended that she obtained a loan from New Plaza Enterprises Limited, and that she did not sell the property to it. Therefore, there were no prospects of success of the appeal.
- 4.33 The record does indeed show, as I have already observed, that a Default Judgment was obtained against Molly Pelekamoyo. Further perusal of the record, shows that Molly Pelekamoyo applied to set aside the Default Judgment before the District Registrar and the Judge of the High Court, which

applications were unsuccessful. An appeal to the Court of Appeal has been launched against the Ruling of the High Court.

- 4.34 It is not in contention that the said appeal is pending determination before the Court of Appeal. I have taken note of the reasons given in opposition to the application, as regards the appeal having no prospects of success and that no good and sufficient reasons have been advanced in applying for a stay of execution of the default Judgment.
- 4.35 However, there being an appeal before the Court of Appeal, and in Order that the said appeal should not be rendered nugatory, and in Order to prevent any irreparable damage being suffered, should Molly Pelekamoyo succeed on appeal, I grant the application to stay execution of the Default Judgment pending appeal.
- 4.36 Costs shall be in cause, and leave to appeal is granted.

DATED AT LUSAKA THE 9th DAY OF APRIL, 2024

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE

