

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

(Civil Jurisdiction)



2019/HP/1709

BETWEEN:

ELIAS TEMBO

PLAINTIFF

AND

GREATWALL FINANCIAL SERVICES LIMITED

DEFENDANT

Coram: Chigali Mikalile, J. on the 16th day of August, 2023

For the Plaintiff: Mr. E. Chibeluka, Messrs Chibeluka & Partners

For the Defendant: Messrs L.M Chambers

RULING

Cases referred to:

1. Sonny Paul Mulenga and Others v Investrust Merchant Bank Limited (1999) ZR 101
2. Zambia Revenue Authority v Post Newspapers Limited SCZ Judgment No. 18 of 2016.
3. Nyampala Safaris and Others v Zambia Wildlife Authority and Others, SCZ No. 6 of 2004

Introduction

1. This is a ruling on application by the plaintiff for an order for stay of assessment of damages and taxation of legal costs proceedings pending hearing of the appeal pursuant to Order 47 Rule 5 of the High Court Rules, Cap 27 (HCR) and Order 59 Rule 13(1) of the Rules of Supreme Court, 1999 Edition (RSC).
2. Judgment in the matter was delivered on 21st April, 2023 in which both parties partially succeeded.

Plaintiff's affidavit evidence and skeleton arguments

3. In the affidavit, the plaintiff avers that he has partially appealed against this Court's Judgment to the Court of Appeal and that his appeal has real prospects of success. His appeal will be rendered nugatory and a mere academic exercise if an order for stay is not granted.
4. In the skeleton arguments, Counsel for the plaintiff cited Order 47 rule 5 HCR and Order 59 rule 13(1) RSC which provisions state as follows:

O.47(5) An appeal shall not operate as a stay of execution or of proceedings under the judgment or decision appealed from, except so far as the court below or the Court may order, and no intermediate act or proceeding shall be invalidated, except so far as the court below may direct.

O.59/13/1 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) ---

5. Also cited was the case of **Sonny Paul Mulenga & Another v. Investrust Merchant Bank Limited**¹ wherein it was held that an appeal does not automatically operate as a stay of execution and it is pointless to ask for a stay solely because an appeal has been entered.

6. It was argued by counsel that the plaintiff is not seeking an order for stay of proceedings merely on the ground that an appeal has been lodged but because there are good and sufficient grounds for granting the stay.

7. Counsel further cited the case of **Zambia Revenue Authority v. The Post Newspaper Limited**² where the Supreme Court held that:

Stay of execution pending appeal is a discretionary remedy. A party is not entitled to it as of right. And such discretion must be exercised judiciously and on well established principles. Firstly, the successful party should not be denied the immediate enjoyment of a judgment, unless there are good and sufficient grounds. Secondly, in exercising its discretion whether to grant a stay or not, the Court is entitled to preview the prospects of success on the proposed appeal.

8. It was argued that the plaintiff's appeal has prospects of success, therefore, this is a proper case in which Court may exercise its discretion by granting an order for stay of proceedings pending appeal. It was further argued that there will be no prejudice on the defendant if the stay is granted whereas the same cannot be said about the plaintiff if it is not.

Defendant's affidavit and skeleton arguments

9. The affidavit was sworn by Feng Shenghu, a Deputy Manager in the defendant company. He averred that the mere fact that the plaintiff has filed an appeal does not make it mandatory for the Court to stay the assessment of damages and taxation of legal costs proceedings.

10. According to Mr. Shenghu, the plaintiff's appeal lodged in the Court of Appeal has no prospects of success going by the grounds of appeal presented only challenging the findings of fact made by this Court as opposed to grounds based on the point of law. Further, the plaintiff has not applied to stay the execution/enforcement of the Judgment of this Court but has only applied to stay the assessment of damages and taxation of legal costs proceedings.

11. Mr. Shenghu averred that the plaintiff's application was prematurely made because there were no assessment of damages

and taxation of legal costs proceedings which had been begun by the defendant at the time of the filing of the plaintiff's application. In any case, since the law specifically provides that taxation of costs ought to be commenced within 90 days of the judgment awarding costs, taxation should be allowed to commence as it has nothing to do with the appeal but is only the process determining the quantum of costs. The plaintiff will be at liberty to file an appropriate application after the conclusion of taxation if he wishes to stop payment.

12. The deponent further deposed that throughout his affidavit, the plaintiff has only claimed that his appeal has prospects of success but he has not presented special circumstances for this court to exercise its discretion to confirm the order of stay. As a matter of fact, in his pleadings and during trial, the plaintiff's argument was that the transaction was a loan but he has abandoned that argument on appeal. He has instead taken issue with some findings of fact based on the evidence presented before court.

13. According to Mr. Shenghu, the plaintiff's appeal is only meant to prolong litigation even when his appeal has no prospects of success.

14. In the skeleton arguments, counsel for the defendant submitted that this Court has power to grant a stay of execution of judgment where a party seeks to appeal against the judgment

to the Court of Appeal. However, the plaintiff has not applied to stay execution or enforcement of judgment but has applied to stay assessment of damages and taxation of legal costs proceedings pending appeal. The plaintiff's application was therefore premature as there was nothing to stay.

15. It was argued that under the rules of this Court, there is no procedure for applying to stay possible or eminent proceedings when the same have not been commenced.

16. For the argument that the fact that a party has filed an appeal does not make it mandatory for the Court to stay the assessment of damages and taxation of legal costs proceedings, counsel relied on **Sonny Paul Mulenga & Others v. Investrust Bank Limited**¹.

17. For the argument that the applicant for an order of stay must demonstrate special circumstances, the case of **Nyampala Safaris & Others v. Zambia Wildlife Authority & Others**³ was relied on. It was submitted that the plaintiff had failed to demonstrate good and convincing reasons for staying the non-existence assessment of damages proceedings. According to counsel, this is not a proper case for the Court to confirm the order of stay dated 20th June, 2023 granted to the plaintiff. In any case, the Court of Appeal cannot interfere with findings of fact made by this Court unless the findings are perverse and made without evidence in support.

Plaintiff's reply

18. Counsel for the plaintiff argued that though the defendant had not taken out assessment of damages and taxation proceedings at the time the plaintiff filed his application for stay, the plaintiff's application is competently before Court premised on Order 47 rule 5 HCR and Order 59/13/1 RSC, 1999 Edition. According to counsel, the two provisions do not prescribe the stage at which a party may apply for stay of proceedings, therefore, the defendant's argument that the application is premature is legally unsustainable.
19. Counsel also argued that the defendant had not cited any authority to support its argument that an application for a stay can only be filed after the other party has taken out proceedings which the other party wishes to stay. Relying still on Order 47 rule 5, it was argued that the Court has jurisdiction to grant an order for stay of proceedings on the application by the party that has appealed at any stage before or after the other party has taken out the proceedings.
20. It was further argued that the plaintiff has disclosed sufficient grounds and circumstances meriting the grant of an order for stay of proceedings pending appeal. According to counsel, the grounds of appeal exhibited to the plaintiff's affidavit

reveal that the appeal is fit for determination by the Court above and has real prospects of success.

21. Damages for inconvenience are special damages proof of which is a matter of law and fact. Further, the issue whether the defendant is entitled to legal costs when both the plaintiff and defendant partially succeeded in their respective claims is equally a matter of law and fact fit for appeal.
22. Thus, counsel prayed that the Court confirms the *ex-parte* Order dated 20th June, 2023.

Consideration and decision

23. I have considered the application, the affidavit evidence and skeleton arguments filed by the parties.
24. The first issue for consideration is whether or not the within application was brought prematurely. To answer this question, I have carefully examined Order 47 rule 5 HCR which states: "*An appeal shall not operate as a stay of execution or of proceedings under the judgment or decision appealed from...*"
25. From the foregoing wording, it is clear to see that the Court may order a stay not only to suspend execution of a judgment but also to suspend proceedings under a judgment where an appeal has been lodged.

26. I have further looked up the definition of the word 'stay' in Black's Law Dictionary (8th edition) and it says at page 1453:

*"The postponement or halting of a proceeding, judgment, or the like" OR
"An order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding."*

27. It is clear to see from this definition that there must be something to be halted by the grant of a stay. This could either be a judgment or a proceeding.

28. The plaintiff in this case is seeking to halt assessment of damages and taxation of legal costs. As has been admitted by him, at the time of filing his application, there were no such proceedings that had been filed. In the circumstances, I tend to agree with the defendant that the application was premature.

29. Nevertheless, I ask myself if the plaintiff was deserving of an order of stay in the event that he had properly asked the Court to halt execution of the judgment that was delivered in the matter.

30. The authorities cited earlier in the ruling are instructive that a stay of execution ought to be granted on good and sufficient grounds.

31. I have carefully perused the grounds of appeal exhibited to the plaintiff's affidavit and I agree with the defendant's submission that the appeal is assailing the Court's findings of

fact based on the evidence availed at trial. In my view, the prospects of success on appeal are fairly dim.

32. In the circumstances, the application for stay of assessment of damages and taxation of legal costs proceedings is dismissed with costs not only for being premature but also for lacking merit. Thus, the *ex-parte* order granted on 20th June, 2023 is accordingly vacated.

33. Leave to appeal is granted

Dated this 16th day of August, 2023



M. Chigali Mikalile

HIGH COURT JUDGE