

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

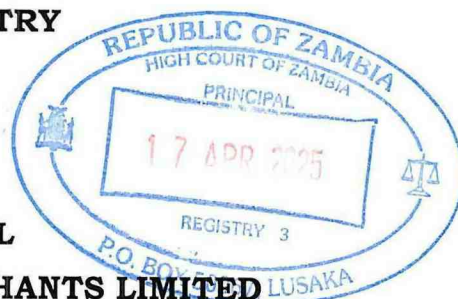
**2019/HP/0606**

*(Civil Jurisdiction)*

**BETWEEN:**

**LIVINSTONE CITY COUNCIL**

**REDWOOD TIMBER MERCHANTS LIMITED**



**1<sup>ST</sup> PLAINTIFF**

**2<sup>ND</sup> PLAINTIFF**

**AND**

**LIVINSTONE MOTOR ASSEMBLERS LIMITED  
(IN LIQUIDATION)**

**1<sup>ST</sup> DEFENDANT**

**GERMANE MUTALE KAULUNG'OMBE**

**2<sup>ND</sup> DEFENDANT**

**Before the Honourable Mrs. Justice R. Chibbabbuka on the 17<sup>th</sup> day of  
April, 2025**

For the 2<sup>nd</sup> Plaintiff: Mrs. M.P Nkunika, Messrs Milner & Paul, Legal  
Practitioners

For the Defendants: Mr. W. Chirwa, Messrs Wila Mutofwe & Associates

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## **RULING**

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### **Cases referred to:**

1. *Kings Center vs Food Agents of Zambia and Mushe Milling 2017/HPC/0260*
2. *Sonny Paul Mulenga, Vismar Mulenga, Chainama Hotels Limited and Elephants Head Hotel vs Investrust Merchant Bank Limited SCZ Judgment No. 15 of 1999.*
3. *Carmine Watson Nkandu Bowa (sued as administrator of the estate of Ruth Bowa) vs Fred Mubiana and Another (2012) ZR 165*
4. *Marcus Kampumba Achiume (1983) ZR 1 (SC)*
5. *Kekelwa Samuel Kongwa vs Meamui Georgina Kongwa SCZ/8/05/2019*

### **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 3<sup>rd</sup> February, 2025 which the defendants herein appealed against by filing a Notice of Appeal and Memorandum of Appeal on 24<sup>th</sup> February, 2025. The defendants now seek an order of this court staying of execution of the judgment pending the hearing and determination of the appeal. The application is made by summons pursuant to *36 Rule 10 of the High Court Rules*, as read together with *Order 47 Rule 5 of the High Court Act, Chapter 27 of the Laws of Zambia*, and supported by an affidavit. The application was filed on 28<sup>th</sup> February, 2025.

## **2.0 The Defendants' Affidavit in Support.**

In support of the application, the 2<sup>nd</sup> defendant deposes that the defendants being displeased with the judgment rendered by this court in this cause have appealed against the same, and that their appeal has favourable prospects. A mere appeal does not itself stay the execution of a judgment and hence it is necessary that the execution of the judgment be stayed.

## **2.1 The Defendants' Supporting Arguments**

In support of the application, the defendants 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 further referred to *Order 47 Rule 5 of the High Court Rules* in arguing that an appeal alone does not operate as a stay of execution of a court's decision. That it is in the defendants' best interest that execution of this court's judgment be stayed pending the hearing and determination of the appeal.

Counsel argued that the grounds on which the appeal has been made are sufficient and show high chance of success. That the law the defendants have relied on give the defendants an opportunity to be heard on the viable grounds placed before the superior court while protecting their interest in the affected properties. Counsel prayed that this court grants an order staying the judgment pending appeal.

### **3.0 The 2<sup>nd</sup> Plaintiff's Affidavit in Opposition**

The 2<sup>nd</sup> plaintiff filed an affidavit in opposition on 24<sup>th</sup> March, 2025 wherein Mbanandi P. Nkunika deposed that the contents of paragraph 1 to 3 which refer to the fact that a judgment was delivered by this court which the defendants have since appealed against are not disputed. That the defendants have not demonstrated how the grounds of appeal in the memorandum of appeal have prospects of success neither have they shown any special circumstances to warrant this court's grant of a stay of execution. The defendants have failed to demonstrate what irreparable damage that may be occasioned should a stay not be granted. The stay of execution will prejudice the plaintiffs as the defendants slept on their rights by not presenting any evidence before the court nor participating in the trial of this matter despite filing a defence.

### **3.1 The 2<sup>nd</sup> Plaintiff's Supporting Arguments**

The 2<sup>nd</sup> plaintiff filed supporting arguments on 24<sup>th</sup> March, 2025 wherein counsel relied on the case of **Kings Center vs Food Agents of Zambia and Mushe Milling**<sup>1</sup> for the argument that there must be sufficient grounds on which a stay must be rooted, and that on the question of what constitutes sufficient grounds, judicial precedent guides that the requirement is that the reasons upon which the application for stay are founded must be given with sufficient particularity in the circumstances of the case so as to provide adequate justification for the grant of a stay of execution of judgment.

Counsel further referred to the case of **Sonny Paul Mulenga, Vismar Mulenga, Chainama Hotels Limited and Elephants Head Hotel vs Investrust Merchant Bank Limited**<sup>2</sup> for the argument that a successful party should not be denied immediate enjoyment of a judgment unless there are good and sufficient grounds. Counsel argued that more is required to be advanced to persuade the court that it is desirable and just to grant an order of stay of execution of a judgment pending appeal. Further that in the case of **Carmine**

**Watson Nkandu Bowa (sued as administrator of the estate of Ruth Bowa) vs Fred Mubiana and Another**<sup>3</sup> the Supreme Court re-affirmed the two-fold test on stay of execution pending appeal when it held that:

*“In an application for stay of execution pending appeal, the considerations are, the prospects of an appeal succeeding and the irreparable damage if a stay is not granted and the appellant’s appeal succeeds.”*

That it is clear from the authorities cited that a stay of execution of judgment is not granted as a matter of right but is contingent on the applicant showing that the appeal has high prospects of success, that there are special circumstances warranting the grant of the stay and that the applicant will suffer irreparable damage if the stay of execution is not granted and the appeal succeeds. That the defendants’ application herein has not met the set criteria as the defendants have failed to demonstrate the aforementioned conditions. The defendants have not shown why the plaintiffs should be denied immediate enjoyment of the fruits of the judgment.

Counsel argued that the memorandum of appeal contains grounds that seek to assail both findings of facts and law when the law is clear on instances in which the appellate court may reverse the findings of fact of a trial court, one such authority being **Marcus Kampumba Achiume**.<sup>4</sup> Further that in the case of **Kekelwa Samuel Kongwa vs Meamui Georgina Kongwa**<sup>5</sup> the court held that an appeal that is anchored on findings of fact alone, even if it can be demonstrated that those findings were perverse or without consideration of evidence does not qualify as raising a point of law for an appeal to be successful. That the threshold for overturning findings of facts is relatively high and in *casu*, the defendants did not tender before court any evidence to show that the Consent Order in cause no. 2014/HL/73 was indeed executed as agreed and whether the Food Reserve Agency purchased the property.

That the defendants sat on their rights by failing to present evidence before the court for the court to consider. The defendants have not demonstrated compelling reasons for this court to grant a stay of execution. Counsel prayed for the dismissal of the application with costs to the 2<sup>nd</sup> plaintiff.

#### **4.0 At the Hearing**

**4.1** At the hearing, the defendants' counsel entirely relied on the affidavit and skeleton arguments filed in support of the application.

**4.2** Counsel for the plaintiffs equally relied on the affidavit filed in opposition as well as the skeleton arguments. Counsel prayed for the dismissal of the application with costs to the 2<sup>nd</sup> plaintiff.

**4.3** In response, counsel argued that the notice and memorandum of appeal disclose the grounds of appeal. That the disclosure itself is sufficient demonstration of whether or not the appeal has reasonable prospects of success. Counsel prayed that the application be granted so as to not render the appeal nugatory.

#### **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.”*

The defendants have also relied on *Order 47 Rule 5* of the *Rules of the High Court*, which provides that:

*“An appeal shall not operate as a stay of execution 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.”*

A careful reading of *Order 47 Rule 5* of the *High Court Rules* clearly shows that the *order* relates to appeals from the subordinate court to the High Court. That notwithstanding, the principle that an appeal does not operate as a stay of execution is true even with appeals to the Court of Appeal from the High Court. The person seeking an order of the court staying execution must show that there are good and reasonable grounds that warrant the grant of an order of the discretionary remedy of stay of execution of judgment.

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:

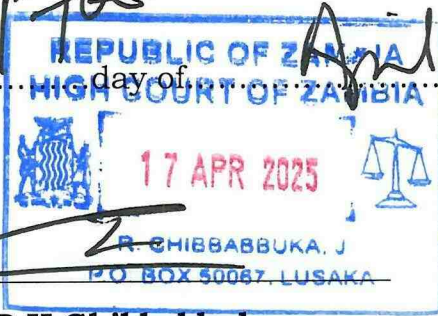
*“In terms of our rules of court, an appeal does not automatically operate as a stay of execution and it is utterly pointless to ask for a stay solely because an appeal has been entered. More is required to be advanced to persuade the court below or this court that it is desirable, necessary and just 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, have the defendants 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 2<sup>nd</sup> defendant avers that an appeal with prospects of success has been lodged. I have carefully reviewed the said grounds of appeal, and I regrettably do not share the same opinion as the defendants. In my opinion, the appeal has little prospects of success.

Further, there is no evidence adduced herein to warrant any apprehension that pending the determination of the appeal, the plaintiffs may deal with the subject property in a way that may render the appeal nugatory or academic. I see no reason to grant the order sought and therefore accordingly dismiss the application with costs to the 2<sup>nd</sup> plaintiff.

Leave to appeal is granted.

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

*[Handwritten signature]*  


**R.H Chibbabbuka**  
**HIGH COURT JUDGE**