

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

2021/HP/0714

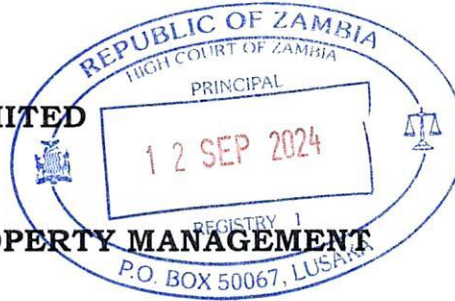
BETWEEN:

BONAZA CASH EXPRESS LIMITED

AND

LANDMARK REALTORS PROPERTY MANAGEMENT

LUCY LUNGU



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

**BEFORE THE HONOURABLE MR. JUSTICE S. V. SILOKA ON THIS 12TH
DAY OF SEPTEMBER, 2024.**

For the Plaintiff: Ms. N. Adam from Mmes D. Findlay & Associates

For the 1st Defendant: M. W Chirwa Messer's Willa Mutofwe & Associates

For the 2nd Defendant: Mr. M.M Manyepa Messer's Victor Kachoka Legal
Practitioners

R U L I N G

CASES REFERRED TO:

1. *Shilling Bob Zinka Vs The Attorney General (1990-1992) ZR 73 (SC);*
2. *R Vs Chancellor of the University of Cambridge Ex p Bentley (1723);*
3. *General Medical Council Vs Spackman (1994) A.C. 627;*
4. *B.P. Zambia Plc Vs Inter Land Motors Limited (2001) ZR. 14;*
5. *Chifuti Maxwell Vs Mwansa and Another (Appeal No. 9 of 2016);*
6. *Development Bank of Zambia & Mary Ncube (Receiver) Vs Christopher Mwanza & 6 Others (SCZ/8/103/08);*
7. *Pamutende Farms Limited & Another Vs Alessandra Valenza (Appeal No. 81 of 2023);*

8. *Ministry of Foreign Affairs, Trade and Industry Vs Vehicles and Supplies Limited* (1919) 4 ALL E.R 65;
9. *Finance Bank Zambia Limited Vs Official Receiver (As Interim Receiver of the Estate of Dimitrios Mono Kandilos (in Bankruptcy) and Another* (SCZ/8/37/2019);
10. *Rosemary Bwalya Vs Mwanamuto Investment Limited and 2 Others* (CAZ /08/139/2017), and
11. *Sonny Paul Mulenga & Others Vs Investment Merchant Bank* (SCZ) Judgment No. 15 of 1999.

LEGISLATION REFERRED TO:

1. *High Court Act Chapter 27 of the Laws of Zambia.*

OTHER WORKS REFERRED TO:

1. *The Halsbury's Laws of England (37th Edition) 1987, Vol.37.*
2. *Zuckerman, Adrian (2013) Zuckerman on Civil Procedure: Principles of Practice, 3 Edition (Sweet & Maxwell London).*

1.0 INTRODUCTION

- 1.1 This Application was commenced by the 2nd Defendant on the 17th of May, 2024 by Summons accompanied by an Affidavit in Support and Skeleton Arguments of even dates.

2.0 2ND DEFENDANT'S AFFIDAVIT EVIDENCE IN SUPPORT

- 2.1 Affidavit Evidence in Support was deposed to by Lucy Lungu who deposed that she is the 2nd Defendant in the matter

therefore duly competent to swear the Affidavit from facts within her personal knowledge.

- 2.2 The Deponent deposed that the Plaintiff herein commenced this Matter seeking the removal of the Caveat placed on Subdivision 402 of Farm 401a, Makeni, Lusaka a property belonging to her.
- 2.3 The Deponent also deposed that the Plaintiff seeks this relief on the backdrop of a Judgement on Assessment rendered by the Learned Honourable A. N. Chisanga sitting as Deputy Registrar, in which Proceedings the Deponent claims she was not heard.
- 2.4 It was further deposed by the Deponent that she has filed an Application to set aside the said Judgment because it is the one that has given the Plaintiff the right of action herein.
- 2.5 The Deponent further deposed that the decision of this Court has the potential of two Courts passing two conflicting decisions.
- 2.6 It was the further deposition of the Deponent that this Honourable Court is clothed with the jurisdiction to stay proceedings pending determination of the Application to set aside judgement made in absence of a Party in order to avoid rendering conflicting decisions.

2.7 The Deponent also deposed that the Plaintiff will not be prejudiced in anyway in the recovery of what is established as they have leased out the subject premises and they are receiving rentals on a monthly basis.

2.8 That to the converse it will ensure a more just resolution to these proceedings as she will be furnished an opportunity to be heard on all the issues in controversy between the Parties.

3.0 2ND DEFENDANT'S SKELETON ARGUMENTS IN SUPPORT

3.1 In support of the Application, Counsel for the Applicant submitted that this Application is anchored on **Order 3 rule 2** of the **High Court Act Chapter 27** of the **Laws of Zambia** this section provides:

“2. subject to any particular rules, the Court or a Judge may, in any causes or matter, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not”.

3.2 It was submitted that this Honourable Court is clothed with the jurisdiction to grant the Stay of Proceedings. It was Counsel's submission that it is not this Court's province to delve into the

merits of the Application to set aside Judgment made in absence of a Party under Cause Number 2020/HPC/0446.

3.3 However, Counsel submitted that they fervently believe that to determine this Application before Court, this Court ought to consider the likelihood of success of the Application before the other Court.

3.4 It was submitted that the exhibit marked “**LL1**” shows that the 2nd Defendant was in possession of the receipts of payment that would reduce the amount being claimed by the Plaintiff, but the 2nd Defendant was not heard in the proceedings on Assessment.

3.5 It was Counsel’s submission that Courts in this jurisdiction have guided that decisions granted in the absence of a Party can be set aside on good reason. Counsel referred the Court to the case of **Shilling Bob Zinka Vs The Attorney General**⁽¹⁾ where the Court stated as follows:

“The principles of Natural Justice - an English Law legacy - are implicit in the concept of fair adjudication. These principles are substantive principles and are two-fold, namely, that no man shall be a judge in his own cause, that is an adjudicator shall be disinterested and unbiased

(nemo judex in causa sua); and that no man shall be condemned unheard, that is, Parties shall be given adequate notice and opportunity to be heard (audi alteram partem)”.

3.6 In emphasizing the right to be heard, Counsel referred the Court to the case of **R Vs Chancellor of the University of Cambridge Ex p Bentley**⁽²⁾ that states:

“Even God himself did not pass sentence on Adam before he was called upon to make his defense”.

3.7 Counsel further drew the Court’s attention to the case of **General Medical Council Vs Spackman**⁽³⁾ where the Court had the following to say:

“If the principles of Natural Justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of departure from the essential principles of justice, that decision must be declared to be no decision”.

3.8 It was also submitted that if this Honourable Court proceeded to hear and determine this matter it was more likely to result into two Courts passing two conflicting decisions, which would bring the judicial system into disrepute as guided in the case of

B.P. Zambia Plc Vs Inter Land Motors Limited⁽⁴⁾ in which the Court stated that:

“The administration of justice would be brought into disrepute if a Party managed to get conflicting decisions which undermined each other from two or more different judges over the same subject matter”.

3.9 It was also Counsel’s submission that it is in the interest of justice, orderly resolution of disputes and in avoiding conflicting decisions by Courts of equal standing that proceedings in this matter must be stayed pending determination of the Application in proceedings under Cause Number 2020/HPC/0446.

4.0 PLAINTIFF’S AFFIDAVIT IN OPPOSITION

4.1 The Affidavit in opposition was deposed to by Chilonje Phiri, Assistance Manager in the employ of the Plaintiff’s company.

4.2 The Deponent deposed that 2nd defendant filed for the removal of a caveat placed by the 1st Defendant on the basis that it was lodged fraudulently.

4.3 The Deponent deposed that the Plaintiff’s right of action herein would not automatically fall away if the Application under Cause Number 2020/HPC/0446 is successful as the matter

herein is clearly against the third Party's (the 1st Defendant herein) placing of a Caveat on the property in question.

- 4.4 It was also deposed that contrary to what is stated in Paragraph 11 of the Affidavit in Support, there is no potential for this Court to render a conflicting decision with another Court as the issues tabled for determination before this Court are completely independent and separate from the issues before the Court under Cause Number 2020/HPC/0446.
- 4.5 It was further deposed by the Deponent that even if the 2nd Defendant's Application to set aside the Judgment under Cause Number 2020/HPC/0446 is successful, the issues raised before this Court will require determination as there are independent and in relation to potential fraud committed by the 1st and 2nd Defendants as well as the right of the 1st Defendant who is not a party to the action under Cause Number 2020/HPC/0446 to maintain the Caveat.
- 4.6 The Deponent also deposed that should this action be stayed, the Plaintiff shall suffer great prejudice as this Matter was commenced by the Plaintiff in 2021, almost three years ago with no conclusion.

- 4.7 It was further deposed that in any case, contrary to what is stated in Paragraph 10 of the Affidavit in Support, the 2nd Defendant's Application under Cause Number 2020/PC/0446 does not have any reasonable prospects of success.
- 4.8 The Deponent deposed that this is an attempt by the 2nd Defendant to delay these Proceedings and waste the Courts' time, as it is evident that she sat back for over four (4) years and did not challenge the Judgment on Assessment delivered by the Court under Cause Number 2020/HPC/0446 despite being represented by Advocates in that Court.
- 4.9 The Deponent further deposed that this is an application meant to waste the Honourable Court's time and resources in an attempt to deprive and delay the Plaintiff from proceedings with the matter on its merit.

5.0 PLAINTIFF'S SKELETON ARGUMENTS IN OPPOSITION

- 5.1 In opposing the Application, Counsel for the Respondent premised her Application for Stay of Proceedings on **Order III Rule 2** of the **High Court Rules of the High Court Act, Chapter 27 of the Laws of Zambia** which clearly states that

the Court has jurisdiction to grant any Order that it considers necessary for doing justice.

5.2 It was submitted that it is evident from the above provision that in order for the Court to grant the Application herein, the Court must consider whether it is in the interest of justice to do so.

5.3 It was also submitted by counsel for the Plaintiff, that there is no danger of conflicting decisions being rendered by the Courts as the proceedings herein are entirely different.

5.4 It was further submitted that the matter herein is in relation to the removal of a Caveat placed by a third Party, the 1st Defendant herein, on the basis that the same was placed fraudulently. As such, this Honourable Court's jurisdiction is limited to the issue as to whether or not the Caveat in question was fraudulently placed and who has a better right to the Property.

5.5 Further, it was submitted that the outcome of the 2nd Defendant's Application under Cause Number 2020/HPC/0446 shall not have any impact whatsoever on the proceedings herein as.

- 5.6 This is so firstly because, the 1st Defendant who placed the Caveat is not a party under Cause Number 2020/HPC/0446; and secondly, even if the Judgment is set aside by the Court under Cause Number 2020/HPC/0446, that decision will not bar the Plaintiff from pursuing its action before this Court to determine whether or not the Caveat placed by the 1st Defendant ought to be set aside.
- 5.7 It was the Plaintiff's submission that the Application by the 2nd Defendant to set aside the Judgment is premised on the fact that the amount adjudged to be paid is not correct.
- 5.8 However, the Application filed by her marked as exhibit "**LLI**" in her Affidavit clearly shows that she has not challenged the fact that the property in question was pledged by herself as security to the Plaintiff.
- 5.9 Further that, clearly, even if the Court under Cause Number 2020/HPC/0446 grants the 2nd Defendant's Application, the same will only impact the assessment of the amount due to the Plaintiff and not its right to the property in question as security for payment.

- 5.10 It was counsel's submission that this is not a proper case to stay the proceedings as the same are independent and not related to the issues tabled for determination before Court under Cause Number 2020/HPC/0446.
- 5.11 Counsel further submitted that there is no prospect for success of the 2nd Defendant's Application to set aside Judgment under Cause Number 2020/PC/0446 as the same was delivered in 2020 and that the 2nd Defendant duly accepted the Judgment and admitted liability.
- 5.12 It was submitted that the 2nd Defendant cannot suddenly awake and decide to challenge the Judgment some four years later when she had ample opportunity to do so but sat back and did nothing despite being represented by Counsel.
- 5.13 It was also Counsel's submission that, it is trite that in considering whether or not a Judgment ought to be set aside for being granted in the absence of a Party, the Court must consider the reasons for the absence and not the merits. Counsel referred the Court to the case of **Chifuti Maxwell Vs Mwansa and Another**⁽⁵⁾ wherein the Supreme Court clearly provided guidance as follows:

“Where a Judgement has been given after trial, it is the explanation for the absence of the absent Party that is most important; unless the absence was not deliberate but was due to accident or mistake, the Court will be unlikely to allow a rehearing. The primary consideration for the Judge at the hearing of an Application to set aside a Judgement are, therefore, the reasons for the absence of the Party applying and not defence on the merit.”

5.14 It was further submitted that the proceedings herein were commenced in 2021, and the filing of this application by the 2nd Defendant are a ploy to prevent the plaintiff herein from enjoying the fruits of its Judgement.

5.15 Counsel drew the courts attention to the case of **Development Bank of Zambia & Mary Ncube (Receiver) Vs Christopher Mwanza**⁽⁶⁾ where the Court pronounced that:

“There must be finality to litigation and a party that is clearly in default should reap the consequences of its inertia and cannot be allowed to roam the courts like a headless chicken keeping the other party in suspense, more so that the party was represented by Counsel”.

5.16 It was further submitted that the 2nd Defendant's Application for Stay of Proceedings is ill-founded in fact and law and ought not to be entertained by this Court.

6.0 THE HEARING

6.1 The Matter came for Hearing on the 20th June, 2024. During the Hearing, both Parties informed the Court that they would rely on the documents already placed on record.

7.1 ISSUES FOR DETERMINATION

7.1 The following issues has been framed for determination:

i. Whether the Application is properly before Court?

ii. Whether the Court can grant the Stay of Proceedings as prayed?

8.0 ANALYSIS AND DECISION

8.1 I have considered the Affidavit Evidence adduced by both Parties and the competing Skeleton Arguments filed into Court.

i. Whether the Application is properly before Court?

8.2 The Application was brought pursuant to **Order III Rule 2** of the **High Court Rules Chapter 27 of the Laws of Zambia** which provides as follows:

“2. subject to any particular rules, the Court or a Judge may, in any causes or matter, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not”

8.3 In the case of ***Pamutende Farms Limited & another vs Alessandra Valenza***⁽⁷⁾ the Court of Appeal stated that:

“It trite that the High Court has general judicious power for the fair administration of justice to make any interlocutory orders it considers necessary for doing justice. This includes the power to stay the whole or any part of any proceedings or judgment either generally or until a specified date or occurrence. This general power is founded in order 3 Rule 3 of the High Court Rules.”

8.4 From this position it is clear that this Court is clothed with the authority to grant any order that is necessary to do justice in a matter. Therefore, it goes without saying that the Court under this provision is clothed with the jurisdiction to grant the order sought. However, the said power and jurisdiction is to be used in befitting circumstances where it is properly demonstrated that an injustice will otherwise occur if the power is not invoked.

ii. Whether the Court can grant the Stay of Proceedings as prayed?

8.5 In resolving the issue stated above guidance will be sought from the case of *Ministry of Foreign Affairs, Trade and Industry Vs Vehicles and Supplies Limited*⁽⁸⁾ wherein Lord Oliver described a Stay of Proceedings in the following terms (at p. 71):

“A stay of proceedings is an order which puts a stop to the further conduct of proceedings in court before a tribunal at the stage which they have reached, the object being to avoid the hearing or trial taking place. It simply means that the relevant court or tribunal cannot, whilst the stay endures, effectively entertain any further proceedings except for the purpose of lifting the stay.”

8.6 This above guidance was adopted by the Zambian Supreme Court in the case of *Finance Bank Zambia Limited Vs Official Receiver (as Interim Receiver of the Estate of Dimitrios Mono Kandilos in Bankruptcy) and Another*⁽⁹⁾.

8.7 As regards under what circumstances Stay of Proceedings can be granted, the **Learned Authors of Halsbury’s Laws of England (37th Edition) 1987, Vol. 37. at paragraph 930** is quite instructive when he posits thus:

“The stay of proceedings is a serious, grave and fundamental interruption in the right a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay should not be imposed unless the proceedings beyond all reasonable doubt ought not to continue.” (emphasis mine)

8.8 From the foregoing, it is clear that a Stay of Proceedings cannot be granted as a matter of right. In fact, a Stay of Proceedings should be granted in exceptional and special circumstances warranting it. This was stated by the Court of Appeal in the case of ***Rosemary Bwalya Vs Mwanamuto Investment Limited and 2 Others***⁽¹⁰⁾ in which the Court stated the following:

“It is trite that for a stay of proceedings to be granted there must be special circumstances demonstrated by the Applicant to satisfy the Court that there are good and convincing grounds to warrant a stay pending either an appeal or outcome of any proceedings. Aside from exceptional circumstances to justify the stay of proceedings, merit of the appeal or complaint must be shown and irreparable harm if the stay of proceedings is not granted.”

8.9 The question I ask myself at this point is, has the Applicant made out its case to warrant the stay of these proceedings? Counsel for the Applicant argued that the proceedings under Cause Number 2020/HPC/0446 are so interlinked with these proceedings that there is a likelihood of having conflicting decisions. Further, that the Application in Cause Number 2020/HPC/0446 has high prospects of success as such the stay is necessary. The Plaintiff on its part submits that there is no link between the two causes to result in conflicting decisions, in any case the Application under Cause Number 2020/HPC/0446 has no prospect of success.

8.10 I have considered the arguments of both Parties as a starting point, it is my considered view that Stay of Proceedings cannot be granted because there are no special and compelling circumstances for me to do so. I say so firstly because there is no likelihood of conflicting decisions. This is so because the issue in Cause Number 2020/HPC/0446 are different from Cause Number 2021/HP/0714; which cause is as regards a caveat which is totally a different matter.

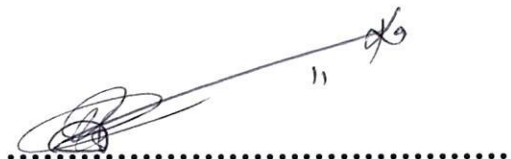
8.11 Secondly, the Application for Stay is declined because, the matter in Cause Number 2020/HPC/0446 has no prospect of success as guided in **Sonny Paul Mulenga & Others Vs Investment Merchant Bank**⁽¹¹⁾.

8.12 In my view, there are no prospects of success because the 2nd Defendant admitted liability and sat on his rights as she took 4 years to challenge the said Judgment. Further the Judgment was entered in her absence and no good reasons were advanced. As guided in the **Chifuti Maxwell Vs Mwansa and Another**⁽⁵⁾ case cited above a Judgment cannot be set side where no proper reasons have been advanced to justify a Party's absence.

9.0 CONCLUSION

9.1 In view of the forgoing analysis and for the avoidance of doubt, the Application for Stay of Proceedings fails for want of merit and is accordingly dismissed. The Matter will proceed to trial. Costs are for the Plaintiff, to be taxed in default of agreement.

DELIVERED AT LUSAKA THIS 12TH SEPTEMBER, 2024.



**S. V. SILOKA
HIGH COURT JUDGE**