

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
FAMILY & CHILDREN'S DIVISION  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

**2019/HPF/D338**

**BETWEEN:**



**FREDA MULEMWA MOONGWA MWATAMEWENYU PETITIONER  
AND**

**GIBON MWATAMEWENYU**

**RESPONDENT**

*Before the Honourable Mrs. Justice M.M. Bah-Matandala  
Dated this 29<sup>th</sup> May, 2024.*

*For the Petitioner: Mrs. Chifeta & Mrs T. C. Mwango – Messrs. National Legal Aid  
Clinic for Women*

*For the Respondent: Mr. A. Simutowe- Messrs. Chila Nyirongo Mwende Legal  
Practitioners*

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## **RULING**

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**Legislation Referred To:**

1. *The High Court of Zambia Rules Chapter 27 Of the Laws of Zambia*
2. *The Supreme Rules of England 1965 (1999) Edition White Book*

**Cases Referred To:**

1. *Zambia Revenue Authority vs Post Newspapers Limited and Nyampala Safaris Zambia Limited & Others vs. Zambia Wildlife Authority & Others*
2. *Sonny Paul Mulenga and Vismer Mulenga & Chainama Hotels Limited & Elephants Head Hotel & Invest trust Merchant Bank Limited Selected Judgment No. 15 of 1999*

### **1.0 INTRODUCTION**

1.1 On 3<sup>rd</sup> October, 2019 **FREDA MULEMWA MOONGWA MWATAMEWENYU** the Petitioner herein filed a Divorce

Petition pursuant to **Section 8 and 9(1) (b) of the Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia** against the Respondent **GIBON MWATAMEWENYU** on the ground that the Respondent had behaved in such a way that the Petitioner could not be reasonably expected to continue living with the Respondent. On the 17<sup>th</sup> September, 2020 the marriage was dissolved.

- 1.2 Subsequently, the Petitioner applied for maintenance and property settlement and the Honourable Registrar delivered a judgment in favour of the Petitioner dated 22<sup>nd</sup> June, 2023.
- 1.3 Following the aforesaid judgment, the Appellant being the Respondent in the divorce Petition filed an application to stay the execution of the Honourable Registrar's Judgment.
- 1.4 Therefore, this is an application by the Appellant for an order to stay execution of the Registrar's judgment dated 22<sup>nd</sup> June, 2023 pending determination of the Appeal. The application is made pursuant to **Order 36 rule 10 of the**

*High Court Rules Chapter 27 of the Laws of Zambia and Order 45 rule 11 of the Rules of the Supreme Court of England 1999 edition.*

**2.0 THE APPLICANTS AFFIDAVIT IN SUPPORT OF APPLICATION**

- 2.1 An affidavit in support was filed by **Gibon Mwatamewenyu** the Appellant herein upon being dissatisfied with the judgment aforementioned.
- 2.2 The Appellant on 28<sup>th</sup> June, 2023 filed a Notice of Appeal. the Appellant applied for an order of stay of execution of the judgment pending the hearing and determination of the appeal.
- 2.3 The deponent states that he is dissatisfied with the whole judgment and he has nevertheless not attached the grounds of the appeal. The deponent states that the intended appeal has good prospects of success and that the Respondent will not be prejudiced by the grant of the relief sought.

### **3.0 THE RESPONDENT'S AFFIDAVIT IN OPPOSITION**

- 3.1 The Respondent filed an affidavit in opposition deposed to by Freda Mulemwa Moongwa.
- 3.2 The deponent states that the Appellant has not exhibited before this Court his grounds of Appeal so as to enable this Court to arrive at a proper conclusion whether the appeal has prospects of success so as to warrant the grant of the order to stay execution of the judgment of the Honourable Registrar.
- 3.3 Further the Respondent has stated that granting a stay of execution on the whole judgment including the order for maintenance will greatly prejudice the Respondent and the children subject of the maintenance order as the Respondent has indicated that she is financially burdened and cannot continue to solely provide for the children if a stay is granted.

### **4.0 SKELETON ARGUMENTS IN SUPPORT OF APPLICATION**

- 4.1 The Counsel for the Appellant Mr. Simutowe filed a list of authorities and skeleton arguments on behalf of the Appellant in which it was submitted that the rationale for

granting a stay of execution of judgment is to ensure that the appeal when heard is not rendered nugatory or useless. I was referred to the cases of ***Zambia Revenue Authority vs Post Newspapers Limited and Nyampala Safaris Zambia Limited & Others vs. Zambia Wildlife Authority & Others***<sup>1</sup> as authorities.

4.2 Counsel for the Appellant contends that the appeal has good prospects of success.

## **5.0 SKELETON ARGUMENTS IN OPPOSITION**

5.1 The Respondent filed skeleton arguments dated 4<sup>th</sup> September, 2023. It was submitted that a perusal of the arguments shows that the main issue to be determined is whether the Respondent has demonstrated good and sufficient grounds for this Court to grant him an order for stay of execution of the judgment.

5.2 The Respondent referred me to order 36 rule 10 of the High Court Act which provides as follows;

***“except as provided for under rule 9, the court or judge may, on sufficient grounds, order stay of execution of judgment.”***

5.3 Further reference was made to the Explanatory Note 59/13/2 under Order 59, rule 13 of the Rules of the Supreme Court 1965(199) Edition) White Book which notes I have taken note of but I shall not recite herein. Reference was also had to the case of **Sonny Paul Mulenga and Vismer Mulenga & Chainama Hotels Limited & Elephants Head Hotel & Invest trust Merchant Bank Limited Selected Judgment No. 15 of 1999<sup>2</sup>** where it was held 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 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 the Judgment only on a good and sufficient grounds.”***

The Supreme Court further stated that;

***“In exercising its discretion whether to grant a stay or not, the court is entitled to preview the prospects of the proposed appeal.”***

- 5.4 The Respondent in view of the cited law, contended that this Court has discretion to grant an order of stay of execution of the judgment pending determination of the appeal but the Respondent has indicated that she is currently financially burdened and has also mentioned that she and the children will be greatly prejudiced if the stay is granted.
- 5.5 Further, it has been argued that the Appellant has not advanced sufficient reasons to show that the appeal has prospects of success. The Appellant has only filed a Notice of Appeal against the whole judgment of the Honourable Registrar but has not advanced any grounds of appeal. Reference is made to order 30 rule 10(1) of the High Court Act which provides guidance of an appeal from the

decision of the Registrar to a single judge in chambers. The order provides as follows-

***“Any person affected by any decision, order or direction of the Registrar may appeal therefrom to a Judge at chambers, such appeal shall be by Notice in writing to attend before the judge without a fresh summons, within seven days after the decision, order or direction complained of, or such further time as may be allowed by a Judge or Registrar. Unless otherwise ordered, there shall be at least one clear day between service of the Notice of Appeal and the day of hearing. An appeal from the decision, order or direction of the Registrar shall be no stay of the proceedings unless so ordered by a Judge or Registrar.”***

5.6 It has been contended that the provisions of order 30 rule 10(1) are clear on what should constitute a Notice of Appeal and a perusal of the Notice of Appeal filed by the

Respondent shows that it is irregular as it does not meet the requirements of order 30 rule 10(1) and there are no grounds of appeal advanced for consideration.

## **6.0 CONSIDERATION AND DECISION**

- 6.1 I have considered the application for a stay of judgment pending appeal, as well as the affidavits, arguments and authorities cited.
- 6.2 It is trite that an appeal does not operate automatically as a stay of execution of judgment. An appellant is required to persuade the Court that it is desirable and just to stay the judgment. Further the considerations are, the prospects of the appeal of the appeal succeeding and the irreparable damages to be sufficient if not granted a stay and appeal succeeds.
- 6.3 Special circumstances must be shown that are out of the ordinary to warrant the grant of an order for stay of execution. I will not repeat the plethora of decisions on the above principles.
- 6.4 The Appellant has argued that the appeal has prospects of success in that he has issues with the whole judgment of

the Honourable Registrar. The Appellant has not provided any specific grounds which should form the basis of my consideration that the Appellant is not satisfied with the judgment herein.

6.5 As regards the issue of irreparable injury, the Appellant contends that he will suffer injury that cannot be atoned for by way of damages if the stay is not granted and that he will be prejudiced. Further that in the event of the appeal succeeding the appeal will be rendered nugatory.

6.6 It is trite as held in the case of **Zambia Revenue Authority vs Post Newspapers Limited**, that only a judgment or ruling that awards a remedy such a money or property which can be obtained by court execution, can be stayed.

6.7 In staying such a judgment, the Supreme Court guided in the **Sonny Paul Mulenga & Others vs. Investtrust Merchant Bank**<sup>3</sup> that;

***“An appeal does not automatically operate as a stay of execution and that it is pointless to ask for a stay solely because***

***an appeal has been entered. More is required to be advanced to provide the court that it is desirable, necessary and just to stay a judgment pending appeal. A successful party should only be denied the immediate enjoyment of the judgment on good and sufficient grounds.”***

6.8 Further, in arriving at a decision whether or not to stay execution of a judgment pending appeal, the Court is enjoined to consider the prospects of success of the appeal in issue. I have perused the judgment which is the subject of appeal and it is my understanding upon critically analyzing it that the Honourable Registrar had clearly evaluated the evidence, facts and arrived at the right determination of the issues. The claims were rightly considered in arriving at the amount to be paid for maintenance. Further the judgment critically evaluated the evidence in arriving at the settlement of the property to be shared between the parties.

6.9 Furthermore, and most importantly I have noted that the Appellant has not shown any grounds of appeal of which I am expected to analyze in order to arrive at a finding of the prospects of success of the appeal herein. Therefore, on the aforesaid reasons, I am of the view that the said appeal has no prospects of success. I find that the Honourable Registrar considered the claims on the evidence, the applicable law and indeed rendered a just decision.

6.10 I find no compelling reason to grant a stay of execution as suggested by the Counsel for the Appellant. I do not see any irreparable injury to be suffered that cannot be atoned for by way of damages. More is required to be advanced.

6.11 The Appellant having failed to demonstrate that the appeal has prospects of success and that he will not suffer irreparable loss which cannot be atoned for in damages if the appeal succeeds I dismiss the application. I accordingly decline the application for the stay of execution pending appeal.

6.12 There must be finality to litigation and a successful litigant should not be stopped from enjoying the fruits of her judgment.

6.13 For the forgoing reasons, the application to stay execution of judgment of the Honourable Registrar is dismissed.

6.14 The interim order that was granted on the 6<sup>th</sup> December, 2023 is discharged and the judgment of the Honourable Registrar remains in force.

6.15 Costs granted to the Respondent to be taxed in default of agreement.

7.0 I order accordingly.

Dated at Lusaka, this 29<sup>th</sup> May, 2024.

  
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**M.M. Bah-Matandala**  
**HIGH COURT JUDGE**

