

IN THE HIGH COURT OF ZAMBIA

2020/HP/D/F/299

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

DOMINIC TWINJIKA

AND

BARBARA HATOONGO MOYO TWINJIKA



PETITIONER

RESPONDENT

BEFORE THE HONOURABLE MR. JUSTICE S.V SILOKA ON THIS 14TH DAY OF MAY 2025.

For the Petitioner: Mr. N. Bota – Messer's Makebi Zulu Advocates

For the Respondent: Ms. N. Mwila & Mr. T. Banda- Messer's Simeza Sangwa & Associates.

RULING

CASES REFERRED TO:

1. *Nyampala safaris (Zambia) Limited and Others v Zambia Wild Authority and Others (2004) ZR 49;*
2. *Sonny Paul Mulenga and others vs. Investrust Merchant Bank Limited (1999) ZR 101 (SC);*
3. *Attorney General v L.A.Z Vol 1 (2008) ZR 21;*
4. *Zambia Revenue Authority v the Post Newspaper Limited SCZ No. 18 of 2016;*
5. *Michelo Special Georges Mwinga (Sued as Mortgagor and Guarantor) and Florence Kachesa Mwiinga (Sued as Mortgagor and Guarantor) vs Zambia National Commercial Bank Plc SCZ No. 51/2014;*

6. *Choonga v ZESCO Recreation Club, Itzhi Tezhi Appeal No 168/2013;*
7. *Avondale Housing Project Limited (1982) Z.R 172 (S.C.); and*
8. *Watson Nkandu Bowa (suing as Administrator of the Estate of the late Ruth Bowa) vs Fred Mubiana and ZESCO Limited (2012) ZR 165.*

LEGISLATION AND OTHER WORKS 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 (White Book);*
3. *Odgers on Civil Court Action 24th Edition; and*
4. *Halsbury Law of England Vol 17(1).*

1.0. INTRODUCTION

- 1.1. This application was commenced by the Petitioner by summons accompanied by an Affidavit in support and skeleton arguments of even dates.

2.0. PETITIONERS AFFIDAVIT EVIDENCE IN SUPPORT

- 2.1. The Affidavit in support was deposed to by Dominic Twinjika, who deposed that he is the Petitioner herein therefore competent to depose to the Affidavit.
- 2.2. The Deponent deposed that on the 20th of March 2025, this Honourable Court delivered a combined ruling where it vested property No. F/378a/B/435 and Mercedes Benz C-Class registration No. BAL 7304 in the Respondent.

- 2.3. The Deponent also deposed that dissatisfied with the said Combined Ruling, he is desirous of appeal against it to the Court of Appeal, as such he caused to be filed into Court an application for leave to appeal.
- 2.4. The Deponent further deposed that the basis upon which the Court granted the vesting Order was solely on a contract of sale between the Petitioner and a Chibwe Mubanga who had no legal or equitable interest in the property in issue and could not pass any title or interest to anyone.
- 2.5. That after diligently seeking counsel from his Advocates on record, he has been advised and believes the same to be true that there are substantive issues of contention that necessitate determination by the Court of Appeal contained in the draft Memorandum of Appeal.
- 2.6. The Deponent deposed that he is advised by Counsel that the proposed grounds of appeal have good prospects of success and that he can apply to this Honourable Court for an Order for a Stay of execution of the combined ruling of the Court dated 20th March 2025 pending the hearing and determination of the application for leave to appeal and determination of the appeal.
- 2.7. It was further deposed by the Deponent that he is advised by Counsel and verily believes the same to be true that if the Stay of Execution is not granted, himself and other beneficiaries of his mother's estate will suffer irreparable damage and the appeal will be rendered academic.
- 3.0. **PETITIONERS SKELETON ARGUMENTS IN SUPPORT**

3.1. In support of the application, Counsel for Petitioner submitted that this Application is made pursuant to Order 36 Rule 10 of the High Court Rules Chapter 27 of the Laws of Zambia and submitted that the above provision clothes this Honourable Court with the Power to make an interlocutory Order for stay.

3.2. Counsel further referred the Court to Order 59 Rule 13 of the Supreme Court of England (White Book) which provides thus:

“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.”

3.3. It was Counsel’s submission that in light of the above provision, he verily believes that this application is properly before Court.

3.4. Counsel referred the Court to **Odgers on Civil Court Action, 24th Edition, Page 460, paragraph 24.47** where it was stated that:

“Although the court will not without good reasons delay a successful Plaintiff in Obtaining the fruits of his Judgement, it has power to Stay Execution if Justice requires that the Defendant should have this protection.”

3.5. It was Counsel’s submission that it will not only be in the interest of justice but also prudent that this Honourable Court exercises its discretion and grant the stay of execution of the Combined ruling.

- 3.6. Counsel drew the Courts attention to the case of **Nyampala Safaris (Zambia) Limited and Others v Zambia Wildlife Authority and Others**

⁽¹⁾ where it was stated that:

“There is need to show which irreparable injury they will suffer if they are to succeed without a stay being granted.”

- 3.7. It was Counsel’s submission that if the Stay of Execution of the Combined ruling is not granted the Petitioner will suffer irreparable damage as his mother’s property will be lost.
- 3.8. Counsel also submitted that in line with the Decision of the Supreme Court in the case of **Sony Paul Mulenga Vismer Mulenga (Both personally and practicing as S.P Mulenga International) v Chainama Hotel Limited and Others** ⁽²⁾, the Court expressed the undesirability of determining appeals where the orders sought would serve no purpose for being academic after issues had been overtaken by events as was the case in **Attorney General v L.A.Z Vol 1** ⁽³⁾.
- 3.9. Further, Counsel submitted that this Court must safeguard the rights of the Petitioner from being rendered meaningless or academic in the absence of a stay. Further that from the authorities cited above it is clear that the question whether or not to grant a stay is entirely at the discretion of the Court and the Court will grant it where the circumstances of the case so require.

3.10. It was Counsel's prayer that this discretion of the Court be exercised in favour of the Petitioner who has demonstrated special circumstances and that it is in the interest of justice that this stay be granted.

4.0. **RESPONDENTS AFFIDAVIT EVIDENCE IN OPPOSITION**

- 4.1. The Affidavit in opposition was deposed to by Barbara Hatoongo Moyo Twinjika, who deposed that she is the Respondent in this action, by reason thereof competent to depose to the Affidavit.
- 4.2. The Deponent deposed that on the 25th of March 2022, a judgement was rendered in her favour ordering Property No. F/378a/B/435 and Mercedes Benz C-Class Registration No. BAL 7304 to her. Following the Judgement, she filed an application to vest the property into her name and subsequently caused to be filed a Writ of possession on the 20th of September 2022.
- 4.3. The Deponent also deposed that on the 20th of March 2025, this Honourable Court rendered a Combined Ruling which ordered that the property be transferred into the Respondent's name. Further on the 24th of March 2025, the Petitioner filed an application for Stay of Execution of the Combined Ruling rendered in the Respondents favour.
- 4.4. The Deponent further deposed that she is advised by her advocates on record and verily believe the same to be true that the Petitioner's application for a stay of execution pending appeal does not demonstrate that his appeal has any prospects of success as the issues raised in the intended appeal are new and will not be entertained by the Court of Appeal.

4.5. It was also deposed that she is advised by her Advocates and believes the same to be true that the Petitioners application does not disclose any special circumstances or sufficient reason upon which the Court may grant an order for stay.

4.6. Further that she is advised by Counsel that the Petitioner will not suffer any irreparable damage if the Order for stay is not granted. That however, she will be greatly prejudiced by an order estopping her from enjoying the fruits of the Combined Ruling rendered in her favour dated 20th March 2025.

5.0. **RESPONDENTS SKELETON ARGUMENTS IN OPPOSITION**

5.1. In opposing the application Counsel for the Respondent drew the Courts attention to **Halsbury Law of England Vol 17(1)** where in the learned authors state as follows:

“The Court has an absolute and unfettered discretion as to whether it will make an order granting a stay of execution pending an appeal, and as to the terms upon which a stay will be granted and will, as a rule, only grant a stay if there are special circumstances, which must be deposed to in an affidavit unless the application is made at the hearing.”

- 5.2. Counsel drew the Courts attention to the case of **Zambia Revenue Authority v the Post Newspaper Limited** ⁽⁴⁾ wherein the supreme Court stated thus:

“A party is not entitled to a stay 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. A stay should not be granted for mere convenience of the party. Neither should it be granted purely on sympathetic or moral considerations. Secondly, in exercising its discretion, whether to grant a stay or not, the Court is entitled to preview the prospects of success of the proposed appeal.”

- 5.3. It was Counsel’s submission that the criteria to be satisfied before a Court can grant a stay of execution pending appeal is that first the appeal must have prospects of success, secondly there must be sufficient grounds or special circumstances and lastly the Appellant must be liable to suffer irreparable damage if the stay is not granted and the Appeal succeeds.
- 5.4. It was Counsel’s submission that the Appeal has no prospects of success. To buttress this point Counsel drew the Courts attention to the case of **Michelo Special Georges Mwinga (Sued as Mortgagor and Guarantor)**

and Florence Kachesa Mwiinga (Sued as Mortgagor and Guarantor) vs Zambia National Commercial Bank Plc ⁽⁵⁾, where the Court held:

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

- 5.5. It was Counsel’s submission that in the present case the Petitioner has failed to demonstrate how his appeal has prospects of success, he has simply stated that his intended appeal has prospects of success.
- 5.6. Further, it was Counsel’s submission that the grounds of appeal are devoid of merit and the appeal is bound to fail. It was Counsel’s submission that this is because the Petitioners grounds of appeal seek to raise new issues concerning the legality of the Contract of sale relating to the Property in issue, the capacity of the vendor and how the Property should be distributed.
- 5.7. It was Counsel’s submission that these issues were not raised by the Petitioner before the Registrar or before this Court and therefore cannot be entertained on appeal. Counsel drew the Court attention to the case of **Choonga v ZESCO Recreation Club, Itezhi Tezhi** ⁽⁶⁾ where it was held that:

“We have Considered the arguments raised in ground one of the appeals. We do agree with Mr. Sike that the issue of ZESCO recreation Club being a separate legal entity from ZESCO Limited was not raised by the appellant in his complaint or in

evidence at the hearing of the matter. We therefore, are preclude from considering the issue on appeal. We take this position in view of the many authorities in which we have stated that where an issue was not raised in the Court below, it is not competent for a party to raise it on appeal.”

- 5.8. It was Counsel’s submission that where new issues are raised on appeal the appeal is doomed to fail, the Petitioners intended appeal raises new issues and will fail on appeal.
- 5.9. Further, it was Counsel’s submission that the Petitioner has failed to show in his grounds how this Court misapplied the evidence on record or made perverse findings to warrant the Appellate Court to overturn the Combined Ruling.
- 5.10. To buttress this point Counsel drew the Courts attention to the case of **Avondale Housing Project Limited** ⁽⁷⁾, wherein the following was stated:
- “Before this Court can reverse findings of fact made by a trial Judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper new of the evidence, no trial court acting correctly could reasonably make.”**
- 5.11. It was Counsel’s submission that the Petitioner is required to show from the intended appeal that this Court misapplied the evidence or made perverse findings. It was submitted that the Petitioner’s grounds of appeal

have no prospects of success as they have not shown how the Court's findings were perverse or how it misapplied the evidence.

5.12. It was Counsel's submission that the intended appeal is merely meant to deny the Respondent from enjoying the fruits of the Ruling in her favour.

5.13. Counsel also addressed the Court on the second criteria to be satisfied before a Court can grant a stay; the existence of special circumstances.

5.14. It was Counsel's submission that this criteria has not been satisfied, instead the Petitioner has only asserted that special circumstances must exist for the Court to grant such an order, without producing any evidence to that effect.

5.15. With regards the third criteria to be satisfied, Counsel submitted that no irreparable damage will be suffered by the Petitioner. Further that it is trite law that for a stay to be granted an applicant must show irreparable injury they will suffer if their appeal succeeds without a stay being granted, this is as stated in **Nyampala Safaris Zambia Limited and Another v Zambia Wildlife Authority** ⁽¹⁾.

5.16. It was Counsel's submission that the Petitioner has not shown how he will suffer irreparable injury if the stay is not granted. Counsel submitted that assuming the appeal succeeds the Petitioner would not face ruin or irreparable injury, this is because the property can simply be transferred back into the name of Suzen Ngweshi.

5.17. Counsel further submitted that the grant of the stay of execution will prejudice the Respondent as it will deprive her from enjoying the fruits of the Ruling rendered in her favor.

5.18. It was Counsel's submission that the Supreme Court in **Nyampala Safaris Zambia Limited and Others vs Zambia Wildlife Authority** ⁽¹⁾ held that:

"A stay of execution is granted on good and convincing reasons. The rationale of this position is clear. Which is that a successful litigant should not be deprived of the fruits of litigation as a matter of course. The application must therefore clearly demonstrate the basis of which a stay should be granted."

5.19. It was Counsel's submission that if this Honourable Court grants the Stay of Execution, the Respondent will be prejudiced as she will be deprived of her right to enjoy the fruits of litigation.

6.0. PETITIONERS AFFIDAVIT EVIDENCE IN REPLY

6.1. The Affidavit in reply was deposed to by Dominic Twinjika who deposed that he is the Petitioner in this matter therefore competent to depose to the Affidavit.

6.2. The Deponent deposed that contrary to the Respondents position, he is advised by his Advocates on record that the grounds of Appeal raised directly arise from the Combined Ruling of this Honourable Court and do not introduce new issues.

6.3. The Deponent also deposed that the basis upon which the Court granted the vesting Order was solely on a contract of sale between the Petitioner

and a Chibwe Mubanga who had no legal or equitable interest in the property in issue and could not pass any title.

- 6.4. Further, that he is advised by Counsel on record and verily believes the same to be true that this Honourable Court made a finding of fact by relying on the evidence on record and subsequently awarding the alleged matrimonial home to the Respondent.
- 6.5. The Deponent further deposed that he is advised by Counsel that his application provides sufficient grounds upon which this Honourable Court can exercise its discretion not to discharge the *Ex-parte* Order for stay granted by this Honourable Court on 25th March, 2025.
- 6.6. The Deponent also deposed that both him and the beneficiaries of his late mother's estate will suffer irreparable damage if the Respondent proceeds to execute the combined ruling of this Court, as discharging the stay will render the appeal nugatory.
- 6.7. Further, it was deposed that after diligently seeking counsel from his Advocates on record, he has been advised that there are substantive issues of contention that necessitate determination by the Court of Appeal contained in the draft memorandum of Appeal.
- 7.0. **PETITIONERS SKELETON ARGUMENTS IN REPLY**
- 7.1. In reply, Counsel for the Petitioner submitted that this application places its reliance on **Order 36 Rule 10 of the High Court rules Chapter 27 of the laws of Zambia**, which clothes the Court with the power to Order a stay of execution of Judgement.

- 7.2. It was Counsel's submission that contrary to the Respondents assertions that the Petitioner has not met the criteria to enable this Court to grant a stay, it was his submission that the Affidavit in support demonstrates that the Petitioner has met all the requirements to enable this Court to maintain the order for stay.
- 7.3. It was also Counsel's submission that himself and other beneficiaries of his mother's estate will suffer irreparable damage if the Respondent takes possession of the house subject to the intended appeal as the said house will be lost and the appeal rendered academic.
- 7.4. Counsel submitted that while a successful plaintiff should not be unduly delayed in enjoying the fruits of their judgment, a stay may be granted when the interest of Justice demands such protection for the Applicant. Further that the balance of justice tilts heavily in favour of granting a stay until the intended appeal is determined by the Court of Appeal.
- 7.5. Counsel drew the Courts attention to the case of **Nyampala Safaris (Zambia) Limited v Zambia Wildlife Authority** ⁽¹⁾, to place emphasis on the need to show irreparable harm if a stay is not granted as a condition for a stay. The Petitioner submitted that the basis upon which the court granted the vesting order was solely on the contract of sale between the Petitioner and Chibwe Mubanga who had no legal or equitable interest in the property.

7.6. It was Counsel's submission that in light of these facts this Court should exercise its discretion to stay execution of the Combined ruling pending the hearing and determination of the appeal.

7.7. It was Counsel's submission that the intended appeal has high prospects of success, hence he urges this Court to stay the Combined Ruling, as doing so will be in line with the decision of the Supreme Court in the case of **Sonny Paul Mulenga and Others vs. Investrust Merchant Bank Limited** (2).

7.8. It was Counsel's submission that the Supreme Court has time and again expressed the undesirability of determining appeal where the orders sought would serve no purpose for being academic after issues had been overtaken by events.

8.0. **HEARING**

8.1. The matter came up for hearing on the 10th day of April 2025, and at the hearing Counsel on both sides relied on the documents on record.

9.0. **ISSUES FOR DETERMINATION**

9.1. The issue below has been framed for determination:

- i. **Whether or not this is a proper case for the Court to exercise its discretion to grant an Order staying execution of the Combined Ruling pending appeal?**

10.0. **ANALYSIS AND DECISION**

10.1. I have considered the affidavit evidence adduced by both parties and the competing skeleton arguments filed into court.

i) **Whether or not this is a proper case for the Court to exercise its discretion to grant an Order staying execution of the Combined Ruling pending appeal?**

10.2. The Supreme Court has in plethora of cases guided on what must be taken into consideration when deciding whether or not to grant a stay. In the case of **Sonny Paul Mulenga and Others vs. Investrust Merchant Bank Limited** ⁽²⁾ the Supreme Court 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 Judgement pending appeal. The successful party should be denied immediate enjoyment of a judgement only on good and sufficient grounds... In exercising its discretion whether to grant a stay or not, the court is entitled to preview the prospects of success of the proposed appeal.”

10.3. Further in the case of **Watson Nkandu Bowa (suing as Administrator of the Estate of the late Ruth Bowa) vs Fred Mubiana and ZESCO Limited** ⁽⁸⁾ the Court went on to state that:

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

- 10.4. In view of the authorities above, the question that begs to be answered is whether the Petitioner has established before Court that the appeal has prospects of success and whether irreparable damage will be occasioned to the Petitioner if a stay is not granted and the appellant's appeal succeeds.
- 10.5. I must from the onset mention that it is the prospects of success of the appeal that is the main consideration for granting a stay, as stated in a plethora of cases.
- 10.6. Looking at the facts at hand, having considered the Affidavit in support of the Application, the Memorandum of Appeal exhibited and marked “CT3” and the Skeleton arguments in support of the Application, I am of the considered view that the Petitioner's application has no prospects of success.
- 10.7. This is because a preview of the grounds of appeal reveals new issues of lack of requisite capacity of the Vendor to make a legal sale hence affecting the legality of the Contract of sale of the Property in question.
- 10.8. These issues were not raised before the Registrar in the settlement proceedings neither were they raised in this Court during the hearing of the two Rulings that have been combined. It is on this premise that I find

that this appeal has no real prospects of success as the Court of Appeal frowns upon the practice of raising issues before it that were not raised in the Court below.

10.9. With regards the second element as to whether irreparable damage will be occasioned to the Petitioner if a stay is not granted and the appellant's appeal succeeds. I am of the considered view that no irreparable damage will be occasioned to the Petitioner if the stay is not granted. This is because the Title can be moved back into the name of the late Susen Ngwenshi, should the appeal become successful.

10.10. Having found that the appeal has no prospects of success the application for Stay of Execution cannot be granted. I am fortified in my finding by the case of **Nyampala Safaris Zambia Limited and Others vs Zambia Wildlife Authority** ⁽¹⁾ wherein the supreme Court guided that:

“A stay of execution is granted on good and convincing reasons. The rationale of this position is clear. Which is that a successful litigant should not be deprived of the fruits of litigation as a, matter of Course...”

10.11. Having found that the appeal has no prospects of success and that no irreparable damage will be occasioned if the stay is not granted, I find that it is not necessary nor just to exercise my discretion to grant a stay pending appeal and deny the Respondent the immediate enjoyment of her Ruling.

10.12. I therefore find that there are no good and sufficient grounds warranting the stay of the Combined Ruling of 20th March 2025.

11.0. **CONCLUSION**

11.1. In view of the foregoing, I accordingly dismiss the Petitioners application for stay of execution of the Combined Ruling pending appeal. Costs to the Respondent to be taxed in default of agreement.

DELIVERED AT LUSAKA THIS 14TH DAY OF MAY 2025.

