

RICHARD M. CHIZYUKA, BETTY B.M. CHIZYUKA AND CREDIT AFRICA BANK LIMITED

SUPREME COURT
LEWANIKA, J.S.

25TH JUNE AND AUGUST, 1999.
APPEAL NO. 8/113/99

Flynote

Civil Procedure – Stay of Writ of Possession

Headnote

The respondents granted to the applicants overdraft facilities and the applicants duly surrendered the title deeds of their property to the respondents. The applicants defaulted in their payments and the respondent instituted proceedings to foreclose by way of originating summons pursuant to Order 88 of the Rules of the Supreme Court. On 28th May, 1997, a consent judgment was entered in the respondents' favour. The applicants failed to pay according to the order and the respondents obtained a writ of possession. The applicants were then granted a stay of execution for 60 days within which the parties would agree on payment. When the applicants still failed to pay, they were given seven days by the court to pay. When they failed yet again to pay, the respondents obtained a writ of possession. When the applicants sought to set it aside, the court ruled against them.

Held:

- (1) The application to set aside a writ of possession can only be granted where there are prospects of succeeding on appeal.

For the Applicants: A.R. Zikonda and N. Okware of Zikonda Association.

For the Respondent: J. Naik and M. Sikaulu of Jitesh Naik & Co.

Judgment

LEWANIKA, J.S.: delivered the Ruling.

This is an application for a stay of execution of the writ of possession granted to the respondent pending the determination of the appeal to the Supreme Court.

This action arose out of overdraft facilities extended to the applicants created by the applicants surrendering title deeds of their property being Stand No. 200 Jesmondine, Lusaka.

The applicants defaulted in their payments and the respondent instituted proceedings to foreclose by way of originating summons pursuant to Order 88 of the Rules of the Supreme Court. On 28th May, 1997, a consent judgment was entered in favour of the respondent, who was the plaintiff, in the following terms:

1. The defendant pay the sum of K83,067,077 being the amount outstanding by virtue of an equitable mortgage entered between the parties, plus interest thereon at the agreed rate of 84% per annum from the 1st day of May, 1997, until judgment and at 6% per annum thereafter, in eighteen (18) equal monthly instalments commencing 30th June, 1997 and on the 30th of every other month thereafter, until full and final settlement of the debt on 30th November, 1998.
2. In the event that the defendant fails or neglects to pay any one of the instalments and interest then the whole amount outstanding shall become payable and the following order shall take effect:
 - (i) An Order of foreclosure in respect of all that piece of land in extent 2547

square metres together with the unexhausted improvements thereon more or less being Stand No. 200 situated at Jesmondine, Lusaka in the Lusaka Province of the Republic of Zambia which piece of land is more particularly delineated and described on Diagram No. 456 of 1991 is hereby granted, subject to the defendant's right of redemption.

(ii) The defendants deliver up possession of the said property to the plaintiff, and

3. Costs to the plaintiff in any event.

It would appear from the evidence on record that the agreed instalments were not paid because on the 23rd July, 1997, the plaintiff filed a praecipe of writ of possession and obtained a writ of possession on the same day.

On 23rd April, 1998, the defendants now the applicants filed an *ex parte* summons to set aside the writ of possession and to vary the Order. On 24th April, 1998, the applicants were granted an order for stay of execution of the writ of possession on the following terms:

"Upon hearing counsel for the applicant and upon reading the affidavit of Richard Moonze Chizyuka together with the exhibits herein, and upon being satisfied that there was a failure by both parties to agree on the actual figures payable under the judgment as regards compound interest. It is hereby ordered and directed that execution of the writ of possession issued herein be and is hereby stayed for the period of 60 days from this 23rd day of April, 1998.

It is further ordered that within the said period the parties do reconcile their figures on interest payable in accordance with the consent judgment and the law on interest and that the repayment schedule be retained and in default of any one instalment the other party be at liberty to execute the writ of possession."

On 29th April, 1998, the plaintiff filed a summons to discharge the order staying execution. This application was heard *inter partes* on 29th June, 1998, and the relevant part of the Ruling of the learned trial Judge reads as follows:

"..... I therefore vacate my order of stay of execution of the consent judgment in this matter. However, I will grant the defendants a period of seven days from today's date within which they should seek to sit down with counsel for the plaintiff and possibly agree on the remaining aspects of the consent judgment. This therefore means that after seven days from today's date, the stay of execution will automatically fall away."

Following this ruling the plaintiff on 15th September, 1998, filed a praecipe of writ of possession and a writ of possession was issued on the same day. On 20th April, 1999, the applicants filed on *ex parte* summons to stay execution of the writ of possession pending the determination of an application to set aside the writ of possession. An order staying the writ was granted on 22nd April, 1999. The application to set aside the writ of possession was heard on 17th May, 1999, and dismissed by the learned trial Judge. It is against that order that the applicants have appealed to the Supreme Court.

I have gone to some trouble to set out the history of these proceedings just to illustrate how much latitude was granted to the applicants by the learned trial Judge. The writ of possession which the applicants seek to set aside arose from the consent judgment entered into by the parties on 28th May, 1997. The terms of the consent judgment are very clear and the said consent judgment has not been set aside or varied save that the respondent of its own volition deducted penal interest to reduce the agreed amount from K83,067,077.67 to K68,450,181.60 as at 1st June, 1997. I have considered the submissions advanced by counsel for the applicants and for the respondent and I can only grant the application for a stay if I am of the opinion that there are prospects of the applicants succeeding with their appeal, in my view no such prospects exist and I am accordingly dismissing the application for a stay with costs. The costs are to be taxed in default of agreement.

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