**IN THE SUPREME COURT FOR ZAMBIA SCZ/8/045/2011**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)

**BETWEEN:**

**PERCY SILLITOE APPELLANT**

**AND**

**STANBIC BANK ZAMBIA LIMITED 1st RESPONDENT**

**NPS CARRIES LIMITED 2nd RESPONDENT**

***Before Hon. Mrs. Justice E.N.C Muyovwe on the 23rd May, 2012***

For the Appellant: Mr. R. Mainza, Messrs Mainza and Company

For the 1st Respondent: Mr. A. Kalikiti, Mambwe Siwila and

 Partners

For the 2nd Respondent: No Appearance

**R U L I N G**

**Cases referred to:**

1. **Sonny Paul Mulenga and Others vs. Investment Merchant Bank Limited (1999) Z.R. at page 1**
2. **Turnkey Properties vs. Lusaka** **West Development Company and Others (1984) Z.R. page 85**

This is the Appellants application for an Order to stay the sale of subdivision 126 of Farm No. 737 Emmasdale of Lusaka pending the determination of the appeal. The application is made pursuant to **Rule 48(1) as read Rule 51** of the **Supreme Court Rules under Cap. 25 of the Laws of Zambia.**

In his affidavit in support the Appellant states that the on 3rd February, 2012 the lower Court dismissed his application to join the High Court proceedings under Cause No. 2010/HPC/127. The Appellant then filed an appeal to the Supreme Court and also applied for a stay of execution of the Ruling dated 3rd August, 2011 where the lower Court granted the Respondent liberty to exercise its rights under the Lease facility Agreements and the Third Party Mortgage. His application for a stay pending appeal to the Supreme Court was rejected on the ground that the appeal was unlikely to succeed. According to the Appellant, the appeal is likely to succeed as Neil Paul Sillitoe who pledged the disputed property is not the legal owner of the said property as it is still in the name of the late Alexander John Sillitoe. That the Appellant never gave consent to Neil Paul Sillitoe to use the property as collateral and the title deed has always been in his possession. That the 1st Respondent intends to sell the property in order to recover moneys advanced to the 2nd Respondent when the deceased was neither a shareholder or Director, in the 2nd Respondent Company. That the sale should be stayed in order to prevent the deceased’s estate from diminishing and that this is the major asset owned by the estate.

The affidavit in opposition sworn by Mazuba Mooya states inter, alia, that the Court below dismissed the Appellant’s applications on the ground that the appeal was unlikely to succeed. That the 2nd Respondent through its Director Neil Paul Sillitoe pledged the property in issue as further security and the 1st Respondent prepared a mortgage deed but same could not be registered as the subdivision of the property was not complete. The subdivision was being undertaken by AKM Legal Practitioners on instructions from Neil Paul Sillitoe and that the 1st Respondent has over the years been following up on the subdivision with the said legal firm. That the 1st Respondent has been a mortgagee of the said property with rights over it. That if the application is granted the 1st Respondent will suffer irreparable damage as it will have no other means of recovering its money and yet the Appellant will get the property back once its subdivided. That this application should be dismissed in the interest of equity, justice and fairness.

Mr. Mainza, Counsel for the Appellants submitted that he was relying on the affidavit in support filed herein. He submitted that the gist of the application is that the Appellant has appealed against the decision of the lower Court granting the 1st Respondent leave to dispose of the property in question at a stage when the matter was coming up for hearing of the interlocutory application for an injunction. That the Appellant is the administrator of the estate of the deceased who owned the property in issue and that he was denied leave to join the proceedings by the Court below despite having demonstrated that he has an interest in the property in question by virtue of being an administrator. He submitted that in the event that the 1st Respondent proceeds with the sale of the property before the appeal is heard, the estate of the late Alexander John Sillitoe which comprises of the property in question will suffer irreparable injury as the said estate will be diminished and the beneficiaries will be deprived of the said estate. Mr. Mainza stated that he is alive to the holding in **Sonny Paul Mulenga and Others vs. Investrust Merchant Bank Limited¹.** Counsel submitted that the Appellant has demonstrated in his affidavit that it is necessary and desirable to stay the sale of the property in question pending the determination of appeal.

Counsel further argued that the ruling of the lower Court which authorised the 1st Respondent to proceed with the sale of the property is in conflict with the judgment of the Supreme Court in **Turnkey Properties vs. Lusaka** **West Development Company and Others²** where the Supreme Court said that it is improper for a Court hearing an interlocutory application to make comments which may have an effect of pre-empting the decision of issues which are to be decided on the merits at the trial. Mr. Mainza argued that the question whether or not the 1st Respondent was entitled to possession of the property in question ought not to have been commented on by the Judge in the course of the application for an interlocutory injunction. He contended that the appeal by the Appellant has prospect of succeeding and urged this Court to exercise its discretion to grant the Appellant an Order staying the sale of the property in question until the determination of the main appeal by the Supreme Court.

On the other hand, Mr. Kalikiti Counsel for the 1st Respondent submitted that he was relying on the affidavit in opposition filed herein. He contended that the Court below was on firm ground when he denied the Appellant an injunction. That the Court was not commenting on the matter its not his learned friend refers to as comments is in fact the Ruling made by the Court below as he exercised his discretion. That his position was made clear in the case of **Sonny Mulenga** cited by his learned friend. Mr. Kalikiti relying on the **Sonny Mulenga** argued that the Court below was merely exercising its discretion in stating that the appeal had no prospects of success.

Counsel submitted that from the affidavit in opposition it is evident that the subdivision was pledged to the bank as security for the facility which was obtained by Niel Sillitoe and that this was confirmed by another law firm AKM Legal Practitioners who were given instruction to subdivide and create a mortgage. That AKM Legal Practitioners gave comfort to the bank in their letter which is Exhibited MM3 and that the subdivision was also confirmed by the Council which approved the application for subdivision as shown in Exhibit MM4. Mr. Kalikiti submitted that, the bank was assured that the said transaction was above board. That, therefore, there was an equitable mortgage on the property. He submitted that the subdivision of the said property could not have been done without submitting the relevant documents to the relevant authorities and that the parties were, therefore, aware of the transaction. Mr. Kalikiti contended that the only party who will suffer irreparable injury in this case is the bank which financed the business as they will have no asset to fall on against the monies advanced.

In response, Mr. Mainza submitted that both affidavits show that the person who pledged the subdivision had no authority to do so because he was not the legal owner of the property he was subdividing and that he did not obtain the consent of the administrator. That in fact nothing has been produced by the bank to show that the person whom they advanced the banking facility to had the authority to mortgage a portion of the deceased’s estate which they are calling a subdivision. He argued that the instructions to AKM Legal Practitioners by Niel Paul Sillitoe to subdivide the property were legal and that all transactions arising from those instructions are null and void including the purported mortgage in favour of the bank. That the equitable mortgage alluded to does not exist as the title deed was never lodged with the bank. He submitted that this is a proper case in which this Court ought to grant a stay of sale of the property in question in order to enable the Supreme Court examine the transaction to ascertain whether it is in conformity with the law.

I have considered the application together with the affidavit evidence filed on behalf of the parties and the submissions by learned Counsel.

It is common cause that the property in issue was offered as security to the 1st Respondent by Neil Paul Sillitoe, a Director in the 2nd Respondent Company. That AKM Legal Practitioners were handling the subdivision of the property in issue on instructions from the Niel Paul Sillitoe. That the title deeds are in the name of late Alexander Paul Sillitoe. The Appellant is the administrator of the estate and claims that he never consented to the property being offered as collateral to the 1st Respondent. That the title deeds have always been in the custody of the Appellant.

I must say that this case raises a lot of important questions: Did Nil Paul Sillitoe have the authority to offer the property as security got his loan? How was the property offered as security without the knowledge of the administrator of the estate who had custody of title deeds which are still in the name of the deceased? Did the 1st Respondent have an equitable mortgage over the property? In my view, if the application for stay of sale is not granted it will render the appeal nugatory. Looking at the circumstances of this case, I feel that the appeal has some prospects of success and it will not be just to shut out the Appellant even at this stage.

In the premises, I grant the application as prayed.

**Delivered in Chambers on this 23rd day of May, 2012**

**E.N.C. MUYOVWE**

**SUPREME COURT JUDGE**