

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

2013/HP/0382

BETWEEN:

**LUKEN INVESTMENTS LTD
AND**



PLAINTIFF

RATOYAR LIMITED

1ST DEFENDANT

YARED TEKLEMARIAM YEMANE

2ND DEFENDANT

DESTA TEKLEMARIAM YEMANE

3RD DEFENDANT

SIMRET BUZU GHEBRESILASSIE

4TH DEFENDANT

YEMANE RAIWA

5TH DEFENDANT

BEFORE HONOURABLE MR JUSTICE M. CHITABO, SC

*For the Plaintiff: Mr. P.H Yangailo of Messrs P.H Yangailo & Co
with Mr. S. Simwanza of Messrs simwanza
Lungu and Co. assisted by Mr. N. Kabwe of the
same Chambers*

For the 1st Defendant: N/A

For the 2nd Defendant: N/A

*For the 3rd, 4th & 5th
Defendant: Mr. N. Okware of Messrs Okware &
Associates*

RULING

Cases referred to:

1. *Hakainde Hichilema and another v. The Attorney General* 2016/HP 1738 dated 23rd May, 2017 (unreported)
2. *Michael Chilufya Sata v. Chanda Chimba and another v. The Attorney General* (2011) 2 ZR 444
3. *Zambia Revenue Authority v. Post Newspaper Limited; Appeal No. 36 of 2016, SCZ/87/2015* (unreported)

Legislation referred to:

1. *High Court Rules, Chapter 27 of the Laws of Zambia*
2. *Rules of the Supreme Court of England, 1999 Edition, White Book*

This is an application for stay of proceedings pending appeal to the Court of Appeal (CAZ/08/24/2017) provoked by the Court's Judgment dated 12th January, 2017 dismissing the Plaintiff's action with costs for the 1st, 3rd and 5th defendants wherein the Plaintiff sought for a declaration that the Plaintiff is the lawfully registered owner of Stand No. 12731 Lusaka being the bonafide purchaser of the said plot and for the entry of Judgment on the counterclaim, upholding the defendants prayer for revocation of the Plaintiffs certificate of title on account of fraud with costs to the Defendants as aforesaid.

The application was anchored under Order 3 Rule 2 of the High Court Rules¹ and was supported by two affidavits in support and a supplementary one deposed to by one **Lukman Ismail Adam** on behalf of the Plaintiff.

The gravamen of which was that the Plaintiff has lodged an appeal to the superior Court of the Court of Appeal. He argues that there are prospects of succeeding in the appeal. He points out that the Plaintiff had made extensive and substantial unexhausted improvements on the property and stay denied, the Plaintiff will suffer irreparable damages that cannot be sufficiently atoned by damages.

The application was opposed by an affidavit deposed to by one **Simret Bizu Ghebreselaste** on behalf of the other Defendants. The essence of which is that the Plaintiff has not demonstrated how the appeal has any chance of success. The Defendants Advocates also filed in skeleton arguments in opposition wherein they made reference to a number of authorities in support of their objection.

At the hearing of the application the Learned Counsel robustly argued their respective positions. I am unable to replicate the submissions but I assure the parties as it will be clear in the Ruling that I have factored in the relevant guidelines in considering whether to grant or deny the stay order. The submissions of Learned Counsel were of help.

The application was anchored under Order 3 Rule of the High Court Rules¹, which provides as follows:-

“Subject to any particular rules, the Court or Judge may in all causes and manners make an 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”

My understanding of this Rule in the manner it has been crafted is that this rule cannot be resorted to if there is or are specific Rules dealing with the subject matter.

In our High Court Rules, that is Chapter 27 of the Laws of Zambia, Order XLVII which provides for appeals from the High Court to the Superior Court does not provide for stay applications. However, Order 59/13/1 of the Supreme Court of England², provides as follows:-

“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 decisions of the Court below;

(b).....”

Under Order 59/13/1¹ it is explained that if an appellant wishes to have a stay of the execution, he must make express application for one.

“The current position is that the Rules of the Supreme Court (white Book) no longer enjoy the force of law in themselves. The Rules are to be resorted to only when it is necessary to fill a lacuna or gap in our own rules of procedure”

This position was clearly laid down in holding No. 1 in the case of **Michael Chilufya Sata**² by his Lordship Dr. Matibini, SCJ (as he then was).

Thus in the absence of a specific rule providing for stay applications of Judgment pending appeal, Order 59/13/1 of the White Book automatically kicks in the fill the lacuna as a default Rule. Order 3 Rule 2 of the High Court Act¹ in the circumstances is inapplicable.

I will therefore proceed on the basis that the stay application is anchored under Order 59/13/2 of the White Book².

Faced with the stay application, I visited the Ruling of this Court dated 23rd May, 2017 in the case of **Hakainde Hichilema and another v. The Attorney General**¹ where I discussed the celebrated case of **Michael Chilufya Sata v. Chanda Chimba III and 3 others**² where his Lordship Dr. Matibini SCJ (as he then was) in orderly concise fashion laid down the guidelines the Court may follow in considering whether to grant or not to grant a stay of Judgment.

In the Hichilema case, at pages R6 – R8 I observed as follows:-

*“I then had occasion to visit the case of the Court of last resort of **Zambia Revenue Authority and Post Newspaper Limited**⁵, where his Lordship Mervin Sitwala Mwanamwambwa DCJ reading the Judgment of the Court compressed the guidelines to consider as to when to grant or refuse a stay application. He put it this way at page J119:-*

“Further where a Judgment or Ruling is stayable the principles state that stay of execution pending appeal is a discretionary remedy. A party is not entitled to it as a matter of right. And such discretions 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 reasons. Stay of execution should not be granted for the convenience of the Post Newspaper. Neither should it be granted purely on sympathetic or moral consideration.

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. In particular, where the judgment appealed against involves payment of money, the appellant must show that if such money is not paid, then there will be no reasonable prospect of recovering it in the event of the appeal succeeding. Such proof is what amounts to good and sufficient grounds warranting stay. See

(a) Rules of the Supreme Court [1999]; Order 59 Rule 3

(b) Sonny Mulenga and another v. Investments Merchant Bank Limited (1999) ZR 101

(c) Carmin and Watson Nkandu Bowa (sued as Administrator of the estate of the Ruth Bowa vs. Fred Mubonda and ZESCO Limited (2012) ZR 165)

His Lordship continued at page 20:-

“We wish to emphasise that the prospects of success of the pending appeal is a key consideration in deciding whether or not to stay execution of the Judgment appealed against. Here we wish to affirm the two fold test as stated in our decision in Carmine case”

Having explored the law, I now turn to the case in casu.

In respect of the ground that there are prospects of succeeding in the appeal, suffice it that upon reviewing the Judgment I find no ground to persuade me to reach upon a conclusion that there are any prospects of succeeding. This ground is destitute of merit.

In respect of the ground that stay refused, the Appellant will suffer irreparable damage if the appeal was to succeed, there appears to be some force in this ground. The Appellant has demonstrated that considerable amounts of money have been expended in acquisition and massive development of the property subject to these proceedings.

In the event that the stay was denied, the Respondents upon possession of the property might deal with it in a manner they deem fit and proper for example, by demolishing or by assigning the property to another person.

The record also reveals that the Directors and shareholders of the 1st Defendant are all based outside jurisdiction.

There is no evidence which has been placed on record that in the event of the superior Court of Appeal not agreeing with my

Judgment and reversing the same, the Appellant will be placed in the same situation as it was in before the Judgment.

In any event, it is trite law that where a dispute relates to a right in land or such other legal rights the consideration of irreparable damage is not a factor.

As instructively pronounced in the ***Zambia Revenue Authority v. Post Newspaper***², the grant or refusal of stay application is a discretionary remedy by the Court, and not a right of a party. But in exercising the discretion, the Court should do so judiciously.

On the foregoing, I have reached on a firm view that this is a fit and proper case to grant a stay, and I so grant the same. I therefore confirm the interim order of 25th January, 2017 staying the Judgment delivered on 12th January, 2017 and make it interlocutory pending the determination of the Appeal herein or until a further Order of the Court.

Ordinarily, the successful party harvests the costs unless cause is shown why he or she should be deprived of the same. The costs however are in the discretion of the Court, but in exercising that discretion, the Court should do so judiciously.

In casu, at Judgment level, the Respondents took the day with the attending costs which has provoked the Appellant to launch the appeal.

The justice of the case is that I make no order as to the costs of and incidental to this application. Put differently, each party is to bear its own costs.

Leave to appeal to the superior Court of Appeal is granted.

Delivered under my hand and seal this 21st day of July, 2017

A handwritten signature in black ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the right.

Mwila Chitabo, SC

Judge