

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

**2017/HP/1661**



**BETWEEN:**

**BERNARD MUKUPA CHISANGA & 25 OTHERS** **PLAINTIFFS**

**AND**

**KABWE MUNICIPAL COUNCIL** **DEFENDANT**

*Before Hon. Mr. Justice Mathew L. Zulu, at Lusaka the  
23<sup>rd</sup> day of April, 2018*

*For the Plaintiffs:* Hon. T.S Ngulube, Messrs. Tutwa S. Ngulube & Company  
*For the Defendant:* Mr. Siwale, Director of Legal Services, Kabwe Municipal Council

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**RULING**

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**Cases referred to:**

- 1. Zambia Revenue Authority v. T & G Transport (SCZ Judgment No.2 of 2007).**
- 2. NFC Africa Mining Plc v. Techro Zambia Ltd (S.C.Z No.22 of 2009).**
- 3. Twampane Mining Co-operative Society Ltd v. E & M Storti Mining Ltd.(S.C.Z Judgment No.20 of 2011).**

- 4. *Grindlay Bank International Zambia Ltd v. Nahar Investments Ltd(1990-1992) Z.R.86***
- 5. *Ndola City Council v. Charles Mwansa (1994) S.J 78(S.C)***
- 6. *Bowa v. Mubiana and Zesco Ltd Judgment No.21 of 2012.***
- 7. *Nyampala Safaris v. Zawa and another (2004) Z.R.49.***
- 8. *Zambia Revenue Authority v. The Post Newspaper Limited (Appeal No.36 of 2016) at page 19.***
- 9. *Mumba and Others v. Zambia Red Cross Society(2006) Z.R. 137***
- 10. *Smith v. Cosworth Casting Processes Limited [1997]4ALL ER at 840.***

**Legislation referred to:**

- 1. *The Court of Appeal Act No. 7 of 2016 of the Laws of Zambia.***
- 2. *The High Court Rules, Cap 27 of the Laws of Zambia.***
- 3. *Order 59 of the Rules of the Supreme Court, 1999 edition (White book)***

This is a combined ruling on the plaintiffs' ex parte application for leave to appeal to the Court of Appeal and for an order staying execution of the Ruling discharging the plaintiffs' ex parte Interim Order of Injunction dated 8<sup>th</sup> December, 2017 pending an application for leave to appeal to the Court of Appeal pursuant to Order 45 Rule 5 of the High Court Rules, Chapter 27 of the Laws of

Zambia and Order 10 Rule 5 of the Court of Appeal Rules, Act No. 7 of 2016.

The plaintiffs' respective applications are supported by Affidavits, both deposed by Bernard Makupa Chisanga, the first plaintiff in this matter. The gist of the deponent's averments in both Affidavits is that the plaintiffs have an arguable case and high prospects of success on appeal because the court: misapplied the principles of damages being an adequate remedy for land, seemed to have presumed that the procedure of re-entry was followed when in fact not and ignored the fact that the defendant's agency was revoked at the time of the purported re-entry of the plots in issue. The deponent avers that leave to appeal is necessary and that unless a stay of execution of the Ruling is granted the matter will be rendered an academic exercise.

The defendant only filed an opposition to the plaintiffs' application for a stay of execution of the Ruling by way of an Affidavit dated 20<sup>th</sup> December, 2017 deposed by Mwamba Mwandawe, a Senior Legal Assistant in the defendant Council. He deposed that more is required to grant a stay of execution of the Ruling pending an

appeal. He avers that the plaintiffs' appeal has no prospects of success and that the plaintiffs are raising issues which will be determined at trial.

The plaintiffs in response to the Affidavit in Opposition to the application for a stay filed an Affidavit in Reply on 21<sup>st</sup> December, 2017, in which they essentially reiterated the averments in the Affidavit in Support.

When the matter came up for the hearing of the applications for leave to appeal and for an order to stay execution of the Ruling on 22<sup>nd</sup> December, 2017, the plaintiffs relied on the Summons and Affidavits filed in respect of the two applications. Counsel for the plaintiffs also made oral arguments. The gist of the plaintiffs' arguments in relation to the application for leave to appeal is that it is mandatory to obtain leave to appeal as the Ruling in this matter was delivered in chambers and that the requirement of leave goes to jurisdiction. Counsel submitted that there was need for strict adherence to the rules of court. He relied on the following authorities: **Zambia Revenue Authority v. T & G Transport<sup>1</sup>**, **NFC Africa Mining Plc v. Techro Zambia Ltd<sup>2</sup>**, **Twampane Mining Co-**

**operative Society Ltd v. E & M Storti Mining Ltd<sup>3</sup>, Grindlay Bank International (Z) Ltd v. Nahar Investments Ltd<sup>4</sup> and Ndola City Council v. Charles Mwansa<sup>5</sup>.**

The defendant's Counsel opposed the application for leave to appeal on the basis that the application was made pursuant to the wrong rules as Order 45 Rule 5 of the High Court Rules refers to Arbitration and that as such the Affidavit was improperly before court. However, the defendant's arguments were vehemently opposed by the plaintiffs' Counsel on the basis that the defendant did not file an affidavit in opposition to the application for leave to appeal.

In relation to the second application which is for stay of execution of the Ruling pending appeal, Counsel for the plaintiffs argued that there was sufficient material before the court to grant a stay.

The gist of the defendant's opposition to the application for a stay was that the application was wrongly made pursuant to Order 45 Rule 5 of the High Court Rules and that Practice Direction No. 1 of 2002 stipulates that the correct law must be cited failing which the application should not be entertained. He also submitted that the

court must consider the prospects of appeal and that damage will be irreparable citing **Bowa v. Mubiana and Zesco Ltd**<sup>6</sup> as authority for his arguments. Counsel contended that the plaintiffs have not met the requirements highlighted in the above case.

In reply, Counsel for the plaintiffs contended that even if a wrong Order was cited, the said error could not defeat the application. He further cited *inter alia* the case of **Nyampala Safaris v. Zawa and another**<sup>7</sup> as authority for the application for a stay of execution.

I have carefully considered the affidavit evidence before me and the oral arguments by Counsel. The issues for determination are whether this is a proper case where I should exercise my discretion to grant leave to appeal to the Court of Appeal and a stay of execution of the Ruling dated 8<sup>th</sup> December, 2017. I shall firstly deal with the application for a stay after which I shall determine the application for leave to appeal.

The plaintiffs seek an order staying execution of the Ruling of 8<sup>th</sup> December, 2017 discharging an *ex parte* Order of Interim Injunction granted to the plaintiffs on 4<sup>th</sup> October 2017. The case of

**Zambia Revenue Authority v. The Post Newspaper**<sup>8</sup> is instructive and it provides-

**Where a judgment or a ruling refuses judicial review or an injunction, there is nothing to stay because such a judgment or ruling does not award a remedy such as money or property which can be obtained by execution. In short, a failed judgment or ruling cannot be stayed because it did not award anything. If there is nothing to execute about such a judgment, or ruling then there is nothing to stay about it. Only a judgment or ruling which awards a remedy and which can be enforced can be stayed.** (Underlining for emphasis only).

In the case of **Mumba and others v. Zambia Red Cross Society**<sup>9</sup>, the Supreme Court stated the following:

**We wish to emphasize the point that when a court grants an ex-parte injunction which is later dissolved, the only remedy remaining, to the party applying for it, is to appeal against such refusal. The appeal against that refusal will undoubtedly be a fresh application before the full Court because a single judge of the Court has no jurisdiction to grant an injunction. The grant of stay in this case by the single judge of this Court amounted to a grant of a fresh injunction to plaintiffs, which should not have been the case.**(underlining for emphasis only).

I am bound by the above authorities and I find that there is nothing to stay in this matter as no remedy that is capable of being enforced

by execution was granted by this court in the Ruling discharging the injunction. I further find that having discharged the injunction, this court cannot proceed to grant a stay of the Ruling as it will in effect amount to this court granting a fresh injunction. I, accordingly dismiss the application.

The second application is for leave to Appeal to the Court of Appeal. It is not in dispute that leave must be obtained in order to appeal to the Court of Appeal against an order made in chambers. This is provided by section 23 of the Court of Appeal Act No. 7 of 2016. I must at this juncture mention that even though the plaintiffs wrongly cited Order 45 Rule 5 of the High Court Rules in making both applications, I am of the considered view that the same cannot be a basis for dismissing the applications as this court nonetheless has the authority to grant a stay and leave to appeal. With that said, Order 59/14/18 of the Rules of the Supreme Court is instructive on the circumstances that would warrant the grant of leave to appeal and it states that the general test is that the grounds of appeal must have a realistic prospect of success. I am further persuaded by the English case of **Smith v. Crossworth**



**Casting Processes Ltd**<sup>9</sup> where the Court of Appeal reiterated that the court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on appeal. The Court further stated the following:

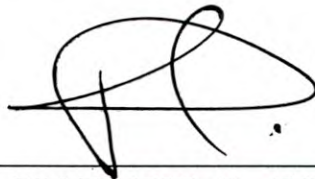
***There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying.***

The Plaintiffs in this matter contend that they have an arguable case warranting the grant of leave to appeal to the Court of Appeal. I have perused what appear to be the plaintiffs' intended grounds of appeal which have been set out in the Affidavit in Support of the Application for a stay at paragraph 18 to 22 and I am of the considered view that the plaintiffs' intended appeal has no realistic prospects of success as the plaintiffs are *inter alia* introducing arguments that were not advanced before this court in relation to the Ruling appealed against and the plaintiffs have also delved into matters which can only be determined at trial. I further see no other

reason why leave ought to be granted. I accordingly dismiss this application.

In view of the above, I find that the plaintiffs are not entitled to the reliefs sought and I accordingly dismiss both applications for leave to appeal to the Court of Appeal and for an order staying execution of the Ruling dated 8<sup>th</sup> December, 2017 with costs to the defendant to be taxed in default of agreement.

Delivered at Lusaka the <sup>23<sup>rd</sup></sup>.....day of April 2018.



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**MATHEW. L. ZULU**  
**HIGH COURT JUDGE**