

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

**2012/HP/1073**

**B E T W E E N :**

CHOONGO HAMANYATI MWEEMBA

**AND**

MUBANGA KASAKULA  
DIANA MOYO  
JOHN CHISHIBA  
SEVENTH DAY ADVENTIST CHURCH  
GEORGE CHAPENDEKA TEMBO  
SATELLITE FARMERS COOPERATIVE



**PLAINTIFF**

**1<sup>ST</sup> DEFENDANT**  
**2<sup>ND</sup> DEFENDANT**  
**3<sup>RD</sup> DEFENDANT**  
**4<sup>TH</sup> DEFENDANT**  
**5<sup>TH</sup> DEFENDANT**  
**6<sup>TH</sup> DEFENDANT**

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the  
14<sup>th</sup> day of September, 2017**

*For the Plaintiff :* Mr. Z. Simposya & Mr. F. Zulu of MSK Advocates  
*For the Defendants:* Mr. I. C. Ng'onga, Messrs I.C Ng'onga & Co.

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**R U L I N G**

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**Cases Referred To:**

1. *Nyampala Safaris and 4 others v Wildlife Authority and 6 others (2004) Z.R. 49 (S.C.)*
2. *Sonny Paul Mulenga, Vismar Mulenga, Chainama Hotels Limited and Elephants Head Hotel v Investrust Merchant Bank Limited (1999) Z.R. 101 (S.C.)*
3. *Tresphord Chali v Bwalya Emmanuel Kanyanta Ngandu SCZ/8/009/2014*

**Legislation Referred To:**

1. *High Court Act, Chapter 27*

This is the Plaintiff's application for a stay of proceedings and execution of judgment filed pursuant to Order X Rule 5 of the Rules of the Court of Appeal, 2016 and is supported by an Affidavit.

The background of this application is that the Plaintiff commenced this action where he sought to be declared as the legitimate owner of Subdivision No. 5 of Subdivision C of farm 175a against the Defendants. In the Judgment delivered on 25<sup>th</sup> July, 2017, the Plaintiff failed to prove all his claims and they were subsequently dismissed.

At the hearing of this application, Learned Counsel for the Plaintiff relied on the Affidavit of Support, the gist of which reveals that the Plaintiff being dissatisfied with the judgment of this Court has lodged an appeal before the Court of Appeal. He believes that his appeal is meritorious and has high prospects of success.

The Defendant did not file an Affidavit in Opposition and did not challenge the application at the hearing.

I have anxiously considered this application together with the contents of the Affidavit filed in Support. The application raises the question whether in the circumstances of this case, a stay of

proceedings and execution of judgment pending appeal should be granted.

It is a well settled principle of the law that the Court will not grant a stay of execution of judgment unless they are good and reasonable grounds for doing so. What amounts to "*good and reasonable grounds*" is posited in Order 59/13 of the Rules of the Supreme Court, which puts it thus:-

**"Neither the court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. The Court does not "make a practice of depriving a successful litigant of the fruits of his litigation.....But the Court is likely to grant a stay where the appeal would otherwise be rendered nugatory, or the appellant would suffer loss which could not be compensated in damages. The question whether or not to grant a stay is entirely in the discretion of the Court and the Court will grant it where the special circumstances of the case so require.....but the Court made it clear that a stay should only be granted where there are good reasons for departing from the starting principle that the successful party should not be deprived of the fruits of the judgment in his favour"**

In the case of **Nyampala Safaris and 4 others v Wildlife Authority and 6 others, Mambilima, JS<sup>1</sup>**, as she then was, re-stated this position of law, when she declared that a stay should only be granted where good and convincing reasons have been advanced by a party. She went on to state that the rationale for the

position was that a successful litigant should not be deprived of the fruit of litigation as a matter of course.

In the case of **Sonny Paul Mulenga, Vismar Mulenga, Chainama Hotels Limited and Elephants Head Hotel v Investrust Merchant Bank Limited<sup>2</sup>**, the Supreme Court held that:

- “(i) In terms of our rules of court, an appeal does not automatically operate as a stay of execution and it is pointless to request for a stay solely because an appeal has been entered.**
- (ii) In exercising its discretion whether to grant a stay or not, the court is entitled to preview the prospects of the proposed appeal succeeding.**
- (iii) The successful party should not be denied immediate enjoyment unless there are good and sufficient grounds”.**

Considering the guidelines outlined in the above cited cases, the question is, has the Plaintiff met the criteria set as outlined above in order for me to exercise my discretionary power to grant a stay of execution of the judgment in question?

I have come to the conclusion that the Plaintiff has not met the threshold for granting a stay. It is trite, in considering an application for a stay that I have a duty to examine the grounds of appeal, to determine whether an Applicant has prospects of succeeding. This however by no means implies that I should delve into the merits of each ground of appeal. A careful review of the

Memorandum of Appeal shows that it does not raise difficult points of law but rather attacks findings of facts. In my view, it has less prospects of succeeding.

In the case of **Tresphord Chali Vs Bwalya Emmanuel Kanyanta Ngandu**<sup>3</sup> the Supreme Court held that:

**"The court below held that the appellant had failed to prove his case. The court accordingly dismissed the action. The appellant wants to stay execution of that judgment. We are at a loss to what the purpose of staying execution of that judgment is. The appellant sought some declarations. He failed to obtain any. For example the appellant's claim for a declaration that Farm L/19962/M belongs to him failed. Does he, by the stay of execution that he seeks, want that claim to be deemed to have succeeded until the appeal is determined? If that is what he wants then this application is untenable because this is not the purpose for which an order for stay of execution of a judgment is granted. The same can be said about the other declarations that he sought. Therefore, we see no purpose for granting any stay of execution in this appeal. We dismiss the application, with costs to the respondent.**

In casu, the Plaintiff has not succeeded in any his claims. Therefore, what is there to stay? Assuming that the Plaintiff does succeed on appeal, I have no doubt that an award for damages will atone his loss. Consequently, I shall not grant him a stay of proceedings and execution of Judgment. By arriving at this decision, I am convinced that the Plaintiff's appeal will not be rendered nugatory nor an academic exercise.

Accordingly, I dismiss this application but make no order as to costs.

Dated this 14<sup>th</sup> day of September, 2017.

*M. Mapani*  
M. Mapani-Kawimbe  
**HIGH COURT JUDGE**