

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

2017/HP/0552



BETWEEN:

NATHAN KABWITA MULONGA
(Suing in his capacity as National
Secretary of the Forum for Democracy
and Development)

PLAINTIFF

AND

CHIFUMU BANDA
LAWRENCE MWELWA
YOTAM MUTAYACHALO

1st DEFENDANT
2nd DEFENDANT
3rd DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 7th DAY OF JULY,
2017**

For the Plaintiff

: *Mr M. Sitali, Milner and Paul
Legal Practitioners*

For the 1st Defendant

: *In person*

For the 2nd and 3rd Defendants

: *Mr M.M. Munansangu, AMC Legal
Practitioners*

R U L I N G

CASES REFERRED TO:

1. *Linotype- Hell Finance Limited V Baker 1992 4 ALL ER 887*
2. *Sonny Paul Mulenga and three others V Investrust Merchant Bank
SCZ No 15 of 1999*
3. *Zampost and Steve Damian Kamanga SCZ 2000*
4. *Hybrid Poultry Farm Zambia Limited V John Mashongwe SCZ of
2006*

5. *Luanshya Copper Mines V Firstrand Island PLC and Others SCZ 2009*
6. *John Kunda V Keren Motors Zambia Limited 2012 Vol 2 ZR 228*
7. *Major Richard Kachingwe V Nevers Mumba 2013 Vol 3 ZR 17*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*
2. *The Rule of the Supreme Court, 1999 edition*
3. *Halsbury's Laws of England 4th edition, Volume 6 (2003) re-issue*

This is a ruling on an application made by the Plaintiff, for an order to stay execution of the ruling dated 26th May, 2017, made pursuant to Order 36 Rule 10 of the High Court Rules, Chapter 27 of the Laws of Zambia, as read with Order 59 Rule 13 of the Rules of the Supreme Court, 1999 edition.

Counsel relied on the affidavit filed in support of the application on 7th June 2017, as well as the affidavit in reply, and skeleton arguments filed on 29th June, 2017. It was his submission that the Order 36 Rule 10 of the High Court Rules clothes this court with jurisdiction to grant stays of execution, where sufficient grounds are shown. That there are a plethora of authorities to this effect, among them the case of **LINOTYPE-HELL FINANCE LIMITED V BAKER 1992 4 ALL ER 887**.

Counsel submitted that in that case it was held inter alia that a court can grant a stay where it is shown that execution will lead to an applicant being ruined, and also where the appeal has prospects of success. That the affidavit filed in support of the application, in particular exhibit "NKM2", shows the grounds of appeal upon which the applicant relies. He stated that the said grounds of appeal demonstrate some prospect of success.

Thus the issue is whether the ruling dated 26th May, 2017 will render the appeal nugatory. His view was that if the ruling is not stayed, the appeal will be rendered nugatory, as the reliefs claimed by the Plaintiff will be determined by a different tribunal. He prayed that the application be granted.

In response, State Counsel as 1st Defendant, submitted that the application was misconceived, and should be dismissed, as the Plaintiff has to show good reasons for departing from the starting principle in cases of such a nature that a successful party should not be deprived the fruits of a judgment in his favour. That the case of **JOHN KUNDA V KEREN MOTORS ZAMBIA LIMITED 2012 Vol 2 ZR 228** re-echoed that a successful party should only be denied the immediate enjoyment of a judgment, on good and sufficient grounds.

State Counsel further submitted that the affidavit in support of the application filed by the Plaintiff on 7th June, 2017 does not show good and sufficient grounds warranting the grant of the order sought. This is because in paragraph 4 of the said affidavit, the Plaintiff merely states that the Defendants are demanding compliance with the ruling, which he argued is legal in any case. That more importantly in paragraph 6, it is merely stated that the appeal has a high chance of success, as the grounds of appeal have merit.

State Counsel submitted that this court in its ruling merely directed the attention of the parties to the provisions of article 60 of the Forum for Democracy and Development (FDD) constitution, which the parties are obliged to honour, if at all they are worth their existence. His view was that there is clearly a dispute between the purportedly expelled

members, which include the defendants, and many others, and their party the FDD. That exhibited to the affidavit in opposition is a letter addressed to the Plaintiff drawing to his attention, the said disputes.

Reference was made to the case of **MAJOR RICHARD KACHINGWE V NEVERS MUMBA 2013 Vol 3 ZR 17** where the court guided that ***“it is not the role of the court to decide who should and who should not associate with others belonging to a club, or who should lead such a club. That is best left to the general membership to decide in accordance with their rules or the constitution”***.

State Counsel also stated that the Plaintiff seeks orders by way of declaration that firstly the Save FDD Committee is null and void, secondly that the save FDD Committee members are not members of the FDD, and an injunction to restrain the Defendants by themselves, servants or agents from holding meetings and issuing press statements, as the main reliefs in this matter. That these reliefs sought in short are asking the court to stop the said FDD members from associating with one another, which is contrary to the rules regulating clubs.

It was also State Counsel's submission that it is not the role of the courts to decide who should associate with the Save FDD Committee in the party. Further that the role of the courts in connection with clubs is restricted to enquiring into the legality of decisions in relation to the members' rights or to ensure that the rules themselves comply with the tenets of natural justice, and that decisions are made without malice.

Further in the submissions it was stated that an attempt was made by the Plaintiff to rely on the provisions of article 54 of the FDD constitution, but State Counsel submitted that it could not be denied

that the said constitution allows an aggrieved member to appeal as far as the national convention. That even the affidavit in reply filed on 28th June, 2017 by the Plaintiff had exhibited 'NKM1', a letter reminding the disciplined person, of their right of appeal to the national convention. State Counsel stated that there was no merit in the application, and the matter should proceed to arbitration.

Counsel for the 2nd and 3rd Defendants adopted the submissions made by State Counsel, stating that the 2nd and 3rd Defendants were in the same position as him. He however invited the court to look at the case of **SONNY PAUL MULENGA AND THREE OTHERS V INVESTRUST MERCHANT BANK SCZ No 15 of 1999**, as well as the cases of **HYBRID POULTRY FARM ZAMBIA LIMITED V JOHN MASHONGWE SCZ of 2006**, **ZAMPOST AND STEVE DAMIAN KAMANGA SCZ 2000**, and **LUANSHYA COPPER MINES V FIRSTRAND ISLAND PLC AND OTHERS SCZ 2009**.

It was submitted that all the above cases cement the principle that the court should exercise its discretion in granting stays of execution by looking at whether the applicant has prospects of success, or whether it is simply an attempt to deny a successful litigant from enjoying the fruits of a judgment. Further reference was made to Order 59 Rule 13 of the Rules of the Supreme Court, 1999 edition, which guides that it is a settled principle of law that for a court to grant a stay, an applicant must show that there are good and convincing reasons for doing so.

The contention was the Plaintiff had not shown that there are good and convincing reasons warranting the grant of the stay of execution sought. In conclusion Counsel stated that it is trite that a stay is not only a

discretionary, but an equitable remedy. That the Plaintiff in this case cannot be said to have come to equity with clean hands, by ignoring the provisions of the FDD constitution, which provides for the avenue of arbitration of any disputes, but wants to convince the court that the Defendants are not members of the FDD. He prayed that the application be denied, as it lacked merit.

In reply the earlier submissions were reiterated. With regard to the submissions on the prospects of success of the appeal, Counsel referred to exhibit 'NKM2' on the affidavit in reply. His submission was that on the strength of exhibit 'NMK2' on the affidavit in reply it was their argument that the Defendants are not members of the FDD, and that they had not adduced any evidence to prove that they had any intentions of appealing the decision to expel them, if at all such an appellate structure is available.

Further that the Defendants had also not shown the court that in the statutes of the FDD, lies an appellate structure against a disciplinary decision made by the National Policy Committee. Therefore the prospects of success of the appeal were high, and the stay ought to be granted.

Counsel additionally argued that exhibit 'CKB1' on the affidavit in opposition, and State Counsel state that a dispute had been declared. That the said letter could not warrant a declaration of a dispute, as it was authored by an organization which is not part of the party structures, as provided in article 60 the FDD constitution. Counsel prayed that the application be granted, as the Plaintiff would be ruined, and the subject matter or the appeal would be rendered nugatory.

I have considered the application. The application was brought pursuant to Order 36 Rule 10 of the High Court Rules, Chapter 27 of the Laws of Zambia, and Order 59 Rule 13 of the Rules of the Supreme Court, 1999 edition. Order 36 Rule 10 of the High Court Rules provides that;

“except as provided for under rule 9, the Court or Judge may, on sufficient grounds, order stay of execution of judgment”.

Order 59 Rule 13 of the Rules of the Supreme Court, 1999 edition on the hand states that;

“(1) 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 decision of the court below;

(b) no intermediate act or proceeding shall be invalidated by an appeal.”

The primary consideration in granting an order of stay of a judgment or an order is that there are sufficient grounds for doing so, as can be seen from the above provisions, and the cases cited. The prospects of success of an appeal is one such sufficient ground.

The Defendant's argued that the Plaintiff has not shown that there are prospects of success of the appeal, as the affidavit in support of the application merely states that the Defendants have been demanding compliance with the court's ruling, as one such reason, and that the grounds of appeal have merit. The court's attention was drawn to the case of ***MAJOR RICHARD KACHINGWE V NEVERS MUMBA 2013 Vol 3***

ZR 17 where the court guided on what role the court plays in relation to the affairs of political parties which are clubs.

As observed by State Counsel among the reliefs sought by the Plaintiff in this matter is for declaratory orders that the Save FDD Committee is null and void, that members of the Save FDD Committee are not members of the FDD, and an injunction restraining the Defendants by themselves, their servants or agents from holding meetings, issuing press statements, and conducting any activities under the guise of the Save FDD Committee.

My ruling of 26th May, 2017 was on a preliminary issue raised that the article 60 of the FDD constitution provides that disputes within the party must be resolved by arbitration, which preliminary issue I upheld. The Plaintiff seeks a stay of the said ruling. The authorities cited above by the parties, as well as the law state that for a stay of execution to be granted, there must be sufficient grounds. The Plaintiff submitted that the grounds of appeal filed have prospects of success.

In the case of **MAJOR RICHARD KACHINGWE V NEVERS MUMBA 2013 Vol 3 ZR 17** the court had referred to *Halsbury's Laws of England, 4th edition, volume 6 (2003 re-issue)* at paragraph 134-139, which provides that every member on admission to a club is deemed to have accepted to be bound by the rules and/or constitution, and it is these individual contracts that link them together. That in disciplinary matters, the disciplinary body of a club acts in a quasi-judicial capacity, and therefore its decisions taken against an erring member must be in strict compliance with the club rules and/or the constitution. That they must also comply with the rules of natural justice as demands that the erring

member being informed of the allegations against him, being accorded an opportunity to answer to such charges and/or be subjected to a fair hearing.

The Defendants challenge the propriety or legality of the disciplinary proceedings that were taken against them, and in line with article 60 of the FDD constitution requested that the matter be referred to arbitration. Without going into the merits of the matter, but taking into account the that political parties are clubs, that are governed by their own rules, and the fact that the FDD in article 60 of its constitution provides that disputes within the party must be resolved by arbitration, and the limited role that the court plays in such cases, are factors, in my view, which weigh against the prospects of success of the appeal in this matter.

On that basis it is my finding that insufficient grounds have been advanced warranting the stay of execution of my ruling dated 26th May, 2017. I accordingly decline to grant the same, and the application is dismissed. Costs of the application go the Defendants to be taxed in default of agreement. Leave to appeal is granted.

DATED THE 7th DAY OF JULY, 2017

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**