

IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Commercial Registry)



2012/HPC/0399

B E T W E E N :

**CITEZENS ECONOMIC EMPOWERMENT
COMMISSION**

PLAINTIFF ✓

AND

**TRIPPLE "O" ENTERPRISES
OBBINO MBEWE**

**1st DEFENDANT
2nd DEFENDANT**

For the Defendants, Mr Shadrick Mbeve, Messrs Keith Mweemba Advocates

RULING

CASES REFERRED TO:

- 1. Ernest Kabwe Chiombe vs. Sampa Kasongo Mulilo Chiombe, Appeal 12/2016;*
- 2. Codeco Limited vs. Elias Kangwa & Others, Appeal No. 199/2012.*

LEGISLATION AND OTHER MATERIALS REFERRED TO:

- 1. Order XXXIX, rule 2 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;*

2. Thomas A Zonay, *Judicial Discretion, Ten Guidelines For Its Use*, (2015) National Judicial College, Reno, Nevada, USA;

3. *Oxford Advanced Learners Dictionary*, A.S Hornby, 7th Edition, at page 77.

On 20th February, 2016, this Court heard an application on the part of the Defendants for special leave to file a summons for review of the Court's Ruling of 7th August, 2014.

The application was made by way of summons issued pursuant to ***Order XXXIX, rule 2 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia***. The application was supported by an Affidavit in Support, deposed by Obinno Mbewe, the 2nd Defendant. Skeleton Arguments and List of Authorities filed on 23rd September, 2015 further buttressed the application.

According to the Affidavit in Support, the Defendant's, being dissatisfied with of the Ruling of the Court dated 7th August, 2014; seek to have that Ruling reviewed. It was deposed that the Applicants indicated to their lawyers their intention to move the Court to review its Ruling. However, the lawyers were attested to have communicated their decision declining to take up those instructions in August, 2015. In essence, the delay in applying to have the matter reviewed was attributed to delayed or ill communication between the Applicant and its original lawyers.

At this stage, it is desirable to chronologize the germane events leading up to this application for the purpose of clothing it with perspective.

On 19th July, 2012, the Plaintiff instituted proceedings against the Defendants by way of Originating Summons.

On 20th September, 2012, Judgment was rendered in favour of the Plaintiff, wherein the Defendants were ordered to liquidate the Judgment Debt of K250, 000,000.000 (pre-rebasing), within 45 days from the date of Judgment. In default of payment within the prescribed period, the Plaintiff was given liberty to take possession, foreclose and exercise its power of sale over the mortgaged property.

An application to set aside the Judgment was filed on 1st October, 2012, on which date the Defendants obtained a stay of execution pending determination of the application to set aside the Judgment of 20th September, 2012.

On 22nd March, 2013, the Defendants applied for an order to pay the Judgment Debt in installments and obtained an ex-parte order staying the sale of the mortgaged property pending determination of the application for installment payments.

The application to set aside the Judgment of 20th September, 2012 was abandoned by Counsel for the Defendants at its hearing on 26th March, 2013. In abandoning the application, Counsel for the Defendants conceded that the application to dismiss the Judgment was premised on the misconception that the Judgment was a default Judgment, when in fact, Judgment was rendered on the merits.

The Defendant's application to stay execution and to pay the Judgment Debt in installments was heard on 29th July, 2014, culminating in the Ruling of 7th August, 2014. In that Ruling, the Court dismissed the application and discharged the ex parte order staying execution. The Court's ratiocination for dismissing the application was that the Defendant's failed to satisfy the criteria of demonstrating sufficient reason or special circumstances or cause to warrant the exercise of the Court's discretion to order installment payments.

The Applicant now seeks special leave to file a summons for review of the Court's Ruling of 7th August, 2014.

I must begin by highlighting that the Court of Appeal has had occasion to pronounce itself on the application of Order XXXIX, rules 1 and 2 in the case of ***Ernest Kabwe Chiombe vs. Sampa Kasongo Mulilo Chiombe, appeal 12/2016¹***, wherein it explicated

that the courts powers as vested by rules 1 and 2 are discretionary. The discretionary nature of the power had previously been articulated by the Supreme Court in the case of **Codeco Limited Vs. Elias Kangwa & Others, Appeal No. 199/2012²**, where the Court stated as follows:

"... Firstly the power of the Judge of High Court to review his own judgment or decision is discretionary. Secondly the law prescribes a limited time frame of fourteen days from the date of the Judgment or decision to be reviewed within which an application for review may be made. Thereafter, prior special leave of the Court is required and is in the discretion of the court."

In the case before me, the Ruling that is at the heart of the Defendant's application for special leave was issued on 7th August, 2014, meaning an application for review would have been in time if filed within 14 days from 7th August, 2017. That is, no later than 21st August, 2014. It is not in contention that no such application was made.

Given the expiry of the period within which the Defendants had to file an application for review, any proclivity to have the Ruling reviewed thereafter birthed the mandatory requirement to obtain special leave to apply for special leave to apply for review. Hence the application now before me.

As has been highlighted, the application before me beckons the use of judicial discretion. The erudition on judicial discretion by Judge

Thomas *A Zonay, Judicial Discretion, Ten Guidelines For Its Use, (2015) National Judicial College, Reno, Nevada, USA*, is that judicial discretion is the act of making a choice in the absence of a fixed rule. The choice, it is said, must not be made arbitrarily or capriciously but with regard to what is fair and equitable under the circumstances and the law. Clearly, discretion involves situational circumstances.

I have perspicaciously examined the affidavit evidence in support which reveals that a period in excess of one year passed from the date of the Ruling to the date of the application for special leave. The delay was attributed to ill communication between the Defendant's and their lawyers. No explanation was tendered as to why the Defendant's failed to either engage their lawyers or seek the services of other lawyers during the entire year of silence.

I have also considered that the Ruling which the Defendant's seek to review lifted a stay of execution of a Judgment which allowed the successful party to, inter alia, exercise its right of sale of in respect of the mortgaged property. Without delving into the merits of review itself, I must peripherally consider the legal and practical ramifications of granting special leave to review. Should leave be granted and a review considered favourably, it is foreseeable that the Judgment Creditor indeed enforced or took considerable steps to enforce its Judgment. The domino effect of that would be to import unsuspecting third party interests in these proceedings.

Bearing in mind the foregoing, I pause to reflect whether it would be just and equitable to veer into permitting special leave to review a Ruling where the Defendants slept on their rights to apply for review or indeed obtain special leave to review for a period in excess of 12 months.

During my intermission, I noticed that in the **Codeco** case, the Supreme Court agreed that in that case, where the litigant waited for a period of 3 months from the date of Judgment to apply for special leave to review, the 3 months delay constituted an inordinate delay. In so doing, the Court relied on the **Oxford Advanced Learners Dictionary, A.S Hornby, 7th Edition, at page 77** to guide it in defining the term inordinate as "**far more than is usual or expected**".

I am persuaded that it is neither usual or expected that in circumstances such as the one at hand, it would take 12 months to engage lawyers or seek alternative representation to pursue an application to obtain special leave to review.

Accordingly, on the evidence before me, and bearing in mind all the circumstances of the case and likely import as alluded to above, I am of the settled mind that it would neither be equitable nor would it serve the interest of justice to exercise my discretion to grant special leave to the Defendants to file a summons for review.

Consequently, the application fails and is dismissed. Consequently, the ex parte order for stay of sale of the mortgaged property pending this Ruling stands discharged.

Leave to appeal is granted.

This 7th Day of September 2017



.....
Lady Justice B.G.Lungu

HIGH COURT