

APPEAL NO. 23/2013

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

IN THE MATTER OF:

AN APPLICATION FOR AN ORDER FOR
COMMITTAL PROCEEDINGS
ORDER 52 RULE 4(1) OF THE RULES OF
THE SUPREME COURT – 1999 EDITION

BETWEEN:

VICTOR SISHEMO

APPLICANT

AND

OSWARD SIKAZWE

CONTEMNOR



CORAM: Phiri, Muyovwe and Malila, JJS

On 15th October, 2014 and 21st February, 2020

For the Applicant: Dr. Overs Banda of Messrs O.M.M.
Banda and Company

For the Contemnor: Messrs Marshall Chambers

RULING

PHIRI, JS, delivered the Ruling of the Court.

Cases referred to:

1. Walter Manzi, Mfune, Simpemba and 60 Others Vs Kingford Sikazwe (Trading as Dwika Enterprises) SCZ/8/167/2006; Appeal No, 180/2006
2. Victor K. Sishemo v Osward Sikazwe; SCZ/8/377/2012; Appeal No. 23/2013

Legislation and other works referred to:

1. The Rules of the Supreme Court (White Book) – 1999 Edition

2. Rules of Supreme Court, Chapter 25 of the Laws of Zambia

We sincerely regret the delay in delivering this ruling. The Appellant, who is the Applicant in this case sought an order for committal of the contemnor, who is the Respondent in the Appeal, for disobeying the order of stay of execution pending appeal.

There was previous High Court litigation involving the property which is subject of this motion. That litigation was under cause numbers 2001/HP/0942, and 2002/HP/0772. The present motion arose from the decision of Mwikisa J; in the High Court Cause No. 2009/HP/0590 between the Applicant and the Respondent relating to stand No F/378a/A/1342 and stand No. F/378a/A/1420. In her ruling, Mwikisa J, held that this case had already been finally decided in favour of the Respondent and discharged the *ex parte* injunction order which she had earlier granted against the Respondent.

The background to this motion is related to our previous judgments related to the property in dispute under Appeal numbers 180/2006 and 023/2013 which were between the same parties.

The brief facts were that the property in dispute was initially owned by Avondale Housing Development Limited, a subsidiary of the Zambia State Insurance Corporation (ZSIC), a parastatal body. When the subsidiary company was liquidated, the property reverted to the Zambia State Insurance Corporation which, in turn, sold it to Kingford Sikazwe (since deceased) whose estate was now administered by Osward Sikazwe the Respondent.

In the meanwhile, the property (R Ext. /S/DA 378a) was erroneously demarcated by the Lusaka City Council and subdivided into 60 renumbered market stands which the Council offered to new developers including the Appellant, who equally erroneously believed that the market stands were on state land which was available for development.

The erroneous demarcations and subdivisions of the Remaining Extent (R. Ext. S/DA 378a) were later reversed by the Lusaka City Council and the property was renumbered as F/378a/A/1424. Nyangulu. J. entered judgment in favour of the Respondent under cause No. 2002/HP/0772 and the squatters who included the Appellant were ordered to vacate their stands.

Ownership of this property was first contested before Nyangulu J. dissatisfied with the decision of Nyangulu J, the Appellant launched an appeal to this court under **Appeal No. 180/2006¹**. The Supreme Court upheld the High Court judgment. Thereafter the Appellant launched a fresh action in the High Court under Cause No. 2009/HP/0590 on the basis of his understanding that the property referred to in the Supreme Court judgment was different from that which the Lusaka City Council offered him. Under Cause No. 2009/HP/0590 before Mwikisa J, the Appellant sought and obtained an *ex parte* injunction order against the Respondent. This order was later discharged and the entire case under Cause No. 2009/HP/0590 was dismissed with costs. The discharge followed a motion by the Respondent before Mwikisa J, who also pronounced that the case had already been determined by the Supreme Court under Appeal No. 180/2006; and that Cause No. 2009/HP/0590 was an abuse of court process. The Appellant Appealed against the decision of Mwikisa J. and on the 10th of April, 2013, he obtained an *ex parte* order of Stay of Execution pending appeal before a single Judge of this Court. It is that event which spawned the motion for committal proceedings against the Respondent for allegedly disobeying the

order staying execution pursuant to **Order 52 Rule 4 (1) of the Rules of the Supreme Court.** The Appellant's allegation was that the Respondent was developing the properties which were a subject of the pending appeal.

The motion before us is supported by an affidavit sworn by the Appellant in which he avers that his lawyers served an amended order to Stay Execution pending appeal on the contemnor and his lawyers, Marshal Chambers, on the 15th of April, 2013; but despite being aware of the order, the contemnor began developing the land in front of the disputed properties for purposes of building a fence, thereby enclosing his property; and that on stand No. F/378a/A/1420 the contemnor had put building materials and excavated the land on what was used as parking space, as a result of which he (the Applicant) was losing business and found it increasingly difficult to access his properties.

At the hearing of the motion, very spirited arguments were presented on behalf of the Applicant and the Respondent. For reasons that will shortly become apparent, we see no need to recast them in this ruling.

What immediately comes to our mind is the nature of the *ex parte* order of Stay of Execution given the peculiar circumstances of this case and its background. As we stated earlier, the property in issue has been previously litigated in the court below under cause numbers 2001/HP/0942; 2002/HP/0772 and 2009/HP/0590.

The claim for ownership of the property in issue was fully litigated before Nyangulu J. who on 10th May, 2006 entered judgment in favour of the Respondent and ordered the Appellant and 60 others to vacate the alleged contemnor's land within three (3) months from the date of the judgment. The Applicant appealed against that judgment to this court which on 22nd December, 2008 under Appeal No. 180/2006, dismissed the appeal and upheld Nyangulu J's judgment with costs. From that stage onward the alleged contemnor became the judgment creditor, entitled to the fruits of his judgment.

Following the Supreme Court judgment, the alleged contemnor issued a Writ of Possession against the Applicant, as expected of a successful litigant, in respect of the portion of the disputed property which he still occupied. The Applicant made a failed attempt to stay execution of the Writ of Possession before F. M. Chishimba J. on the

25th February, 2011 on the ground that the Applicant's application for Stay would amount to staying the Supreme Court judgment under Appeal No. 180/2006 which was delivered on the 22nd December, 2008.

In the meanwhile, the Applicant commenced a fresh action under Cause No. 2009/HP/0590 in which he claimed that the alleged contemnor (Respondent) was interfering with his properties which he identified as F/378a/A/1342 and F/378a/1420. This is the matter which was eventually found by Mwikisa J. to be a case of forum shopping and an abuse of court process. Yet, this is the case that gave rise to the order of the single Judge of this court to issue an order of Stay of Execution which in turn triggered the present motion.

In our recent judgment on the same facts in the case of **Victor K. Sishemo - v - Oscar Sikazwe, SCZ Appeal No. 023/2013²**; we said that the property number that we presented in our earlier judgment which upheld Nyangulu J.'s judgment under Appeal No. 180/2006, was incorrectly presented and that, that property should have been properly and correctly specified and written as Stand No. F/378a/A/1424. It was for this reason that we invoked the

provisions of **Order 78 of the Rules of the Supreme Court, Chapter 25 of the Laws of Zambia**, and corrected our judgment in Appeal No. 180/2006 delivered on 22nd December, 2008 by deleting Stand No. F/378a/A/142 and replacing it with Stand No. F/378a/A/1424 which, according to the evidence on record, cancelled the 60 business plots wrongly created by the Lusaka City Council in 2001; which plots the Lusaka City Council formerly withdrew in 2003.

The correct status therefore is that stand No. F/378a/A/1342 and stand No. F/378a/A/1420 upon which the Applicant's case is premised do not exist.

In his application for Stay of Execution before the single Judge of this court, the Applicant pleaded his property as F/378a/A/1342 and F/378a/A/1420. In his ruling delivered on 22nd January, 2013, the single Judge had this to say:

"I have perused the supporting affidavit and considered Counsel's submission. I note that the Supreme Court dealt with Rem of S/D 'A' of Farm 378a Avondale, Lusaka, whereas this matter concerns properties No. F/38/A/1342 and F/378a/A/1420. On the evidence before me, I am satisfied that the Appellant has an arguable appeal. Therefore, I am of the view that this is a fit and proper case in which to grant a Stay of Execution, pending trial. Accordingly, I hereby grant the Appellant Stay of an order staying execution pending appeal."

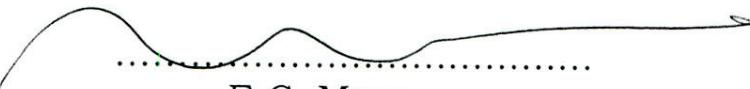
In an earlier motion before Mwikisa J. the Applicant, sought the committal of Oscar Sikazwe to Prison for the alleged disobedience of the *ex parte* order of Stay of Execution of the order by Mwikisa J. to discharge her *ex parte* injunction order and her setting aside of the order to commence contempt proceedings against the Respondent, which orders were earlier given, on the ground that the case had already been concluded by the Supreme Court in the alleged contemnor's favour. Clearly, the Applicant obtained his subsequent order of stay from the single Judge of this Court through deception and caprice because his alleged properties did not exist and the question of the renumbered property had long been litigated and resolved in favour of the alleged contemnor. He chose to ignore the facts as found by the court below and confirmed by this court in its judgment under Appeal No. 180/2006; and he deliberately read into that judgment the existence of his two purported properties which were non-existent. Much as we frown upon the misconception that orders improperly obtained need not be obeyed, we are satisfied that the alleged contemnor was aware that the order of the court whether given wrongly or not, must be obeyed and we take it that Osward Sikazwe did obey the order of Mwikisa J. and as an affected party, he

took the correct step to apply to the court for relief from compliance on the ground that the case had already been heard and determined. It was the Applicant who employed every effort to circumvent the judgment of the Supreme Court.

We find no merit in the motion. We award costs to the alleged contemnor, to be taxed in disagreement.



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G.S. Phiri
SUPREME COURT JUDGE



E.C. Muyowwe
SUPREME COURT JUDGE



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M. Malila
SUPREME COURT JUDGE