

## Cephas Kufamiti and Benjamin Banda v the people

Supreme Court

Sakala, Chirwa and Chibesakunda, J.J.S.  
22nd May, 2001 and 5th January, 2002.  
(SCZ Judgment No 2 of 2002).

### Flynote

*Civil procedure – Stay of execution – Supreme Court has no jurisdiction to stay its own final judgment.*

### Headnote

This is an application by way of notice of motion for a stay of execution of death sentences pending determination of the applicants petition in cause number 2000/HP/1018 before the High Court. In that petition, the applicants are challenging the constitutionality of the death sentences imposed on them following upon their convictions for the offence of armed aggravated robbery.

#### Held:

The rules and the decisions of the Supreme Court do not allow an unsuccessful party to apply for stay of the Supreme Court's judgment.

#### Work referred to:

*Halsbury Laws of England, 4th Edition Volume 37, Para. 437*

#### Legislation referred to:

1. Constitution of Zambia Cap. 1 Articles 12 and 15
2. Supreme Court Act Cap. 25 Rules 18 and 26, s. 18

#### Cases referred to:

- (1) *Lewis and Others v Attorney-General of Jamaica* (2000) 9 BHRC 121; (2000) 5 LRC 253
- (2) *National Bank of Greece and Athens SA v Metliss* 1958 AC 509 – 525
- (3) *The Scrowby, Scrowby v Scrowby* (1897) 1 Ch 741-751
- (4) *The Attorney-General v Tall and Another* (1995-1997) ZR 54
- (5) *Trinity Engineering (PVT) Limited v Zambia National Commercial Bank Limited* (1995-1997) Z.R. 189

*K. Hangandu of Central Chambers* for the appellants.  
*C.F.R Mchenga, Senior State Advocate* for the respondent.

### Judgment

**SAKALA, J.S.** delivered the ruling of the court:

This is an application by the way of notice of motion for a Stay of Execution of death sentences pending determination of the applicants' petition in cause No. 2000/HP/1018 before the High Court. In that petition, the applicants are challenging the constitutionality of the death sentences imposed on them following upon their convictions for the offence of armed aggravated robbery. The application is supported by an affidavit. The history of the application is that on 3rd April, 2001, this court dismissed the applicants' appeals against their convictions and sentences. Subsequent to the dismissal of their appeals, they petitioned the High Court challenging the constitutionality of the death sentence imposed on them. While their petition before the High Court was pending Judgment, they applied to this court for stay of their death sentences pursuant to rule 26 of the Supreme Court Rules. Paragraphs 4,5, and 6 of the affidavit in support of the application read as follows:-

4. The basis of our application aforesaid is that in spite of our appeals being dismissed, we have by Petition filed in the High Court at Lusaka (Cause – No. 2000/HP/1081) contested the constitutionality of our sentences (and argued that they violate our fundamental rights to life (in Article 12) and the protection given to us not to suffer torture or any punishment that is inhuman and degrading (per Article 15). In the event that the Petition is successful, the death sentences imposed on us and affirmed on April 3 by this Court may not be executed.

5. The petition was adjourned to March 26, 2001 for judgment which judgment is still pending. We are advised by our Counsel that our available legal challenges against sentence have in the circumstances not been exhausted, and will only be considered as having exhausted when the Petition has been fully determined as by law provided.

6. We are advised by Counsel that following the April 3 Judgment of this court (dismissing our appeals), the State is at liberty to execute our sentences because the only restriction, which no longer hinders the State anymore, was rule 18 (1) of Cap. 25 which provides that death sentences may not be executed during the time of a pending appeal before this Court. Our appeals have since been dismissed and thus determined, in accordance with rule 18 (1)."

On behalf of the applicants, Mr. Hang'andu filed detailed heads of argument in addition to the oral submissions. In the oral submissions, Mr. Hang'andu indicated that the applicants were praying that their death sentences be stayed pending the determination of the petition in the High Court which should also include the pending appeal to the Supreme Court should there be an appeal. Counsel pointed out that the question raised is whether this court has jurisdiction to entertain this kind of application. He submitted that this court had such power to entertain this application based on inherent jurisdiction, common law, rules of natural justice and above all the Constitution. Counsel submitted that this court has inherent jurisdiction by its very existence to determine how a judgment may be enforced or to control any proceedings in order that aims of justice may be served. In support of this submission, Counsel cited Halsbury's Laws of England (1), where it stated:-

"The Court's power to stay proceedings may be exercised under particular statutory provisions, or under the rules of the Supreme court or under the Court's inherent jurisdiction, or under one or all of these powers, since they are cumulative, not exclusive in their operation..."

However, Mr. Hang'andu was quick to concede that the rules of this court do not allow

unsuccessful party to apply for stay of this Court's Judgment. But Counsel contended that in a case like the present, where there are proceedings before the High Court, the applicants have no fall back to have their rights protected; submitting that because this court has inherent jurisdiction, if need arises, the Court can appropriately exercise its inherent jurisdiction to stay its own judgment. On the application of common law for the court to say its own judgment, Mr. Hang'andu cited the case of *Lewis & Others Vs. Attorney-General of Jamaica (2)* where the Privy Council was asked to rule on whether the State of Jamaica could execute a petitioner's death sentences notwithstanding pending petitions before the Inter-American Commission on Human Rights or the United Nations Human Rights Committee for protection of their fundamental rights not to suffer cruel, inhuman or degrading treatment. According to Counsel, the case was seemingly on all fours with the applicant's case and that if the court accepted the *Lewis* case, the applicants must be protected pending their petition in the High Court.

In summarizing his oral submissions, Mr. Hang'andu pointed out that although there are no specific rules governing the applicants application, this court must accept the application on the basis of due process of law, natural justice, international law and Article 18 of the Constitution. Counsel urged the court to stay the death sentences pending determination of the petition or determination of the appeal should there be an appeal. He submitted that the application has a basis in substantive law rather than in procedural law. In the written heads of argument Mr. Hang'andu cited a number of authorities in support of his arguments and submissions. Among the authorities he cited is the case of *National Bank of Greece and Athens SA v Metlis (3)* where Viscount Simonds stated.

"In the end and in the absence of authority binding on this House the question is simply: what does justice demand in such a case as this? If I have to base my opinion on any principle, I would venture to say it was the principle of rationale justice."

He also cited the case of *Re Scrowby, Scrowby V Scrowby (4)* where Lindlay L.J. observed:

"If I thought that injustice has been done to him, I should have found some method I have no doubt, of getting rid of the technical objection."

Counsel also cited the case of the *Attorney-General Vs Tall and Another (5)* where this court sustained the High Court's joinder of the Attorney-General to make the order in the interest of justice.

Mr. Hang'andu invited the court to distinguish the case of *Trinity Engineering (PVT) Limited Vs. Zambia National Commercial Bank Limited (6)* where we categorically stated:

"Judgment of this court are final and there can be no stay of a final judgment." Counsel pointed out that as opposed to our decision in the *Trinity* case, this is a criminal case in which what is sought to be stayed is the eminent execution of the death sentence. Mr. Hang'andu contended that there are circumstances in this case warranting a stay of the applicant's death sentences; these circumstances being that the applicants have lost the right to a statutory and mandatory stay under Rule 18 (1) of the Supreme Court Act, Cap. 25, since their appeals had been dismissed and that upon receipt of recommendation of the Advisory Committee on the Prerogative of Mercy, the President may sanction their execution by issuing their death warrants under section 305 (3) and (5) of the Criminal Procedure Code Cap. 88.

In his short reply, Mr. Mchenga, on behalf of the State, pointed out that according to section 18 of the Supreme Court Act, this court has no jurisdiction to stay execution of a sentence only if there is an appeal before it. He submitted that it is common knowledge that the applicants' appeals were dismissed before this court submitting that a stay is not therefore available under Section 18. He argued that there was no appeal before this court but that if there were appeals before this court then the application would have been competent.

We have considered the spirited arguments and submissions by Mr. Hang'andu. We have also perused and examined the authorities cited in the submissions. In our considered opinion, the authorities have been cited out of context. And indeed, they do not support the applicant's application. In short, the authorities are irrelevant to the facts of the application before us. Indeed, Mr. Hang'andu himself was quick to concede that the rules of this court, and we may add, the decisions of this court, do not allow an unsuccessful party to apply for stay of this Court's judgment. Above all, this court may not grant stay of matters before it either by way of appeal or by way of motion. This court is now being asked to grant stay of its final judgment on account of some proceedings, not before it but before the High Court.

In the cases cited, particularly the *Lewis* case, the issues raised did not centre on a petition before a lower court. They centered on a petition of mercy before the very Privy Council. Above all, in the *Lewis* case, the Jamaican Privy Council had refused to recommend that the prerogative of mercy be exercised in his favour. Thus, he petitioned the United Nations Human Rights Committee and the Inter-American Commission of Human Rights. This was done to stay warrants of execution which had in fact been issued. There is no evidence in the present application that warrants of execution have been issued. The point must however, be made that, unlike the Supreme Court of Zambia, the Privy Council of Jamaica has jurisdiction to entertain and consider applications relating to the exercise of the prerogative of mercy. This is not the position in Zambia. The *Lewis* case cannot therefore assist the applicants.

In the instant application, by way of analogy only, the appellant's application could perhaps be competent at a stage when their convictions and sentences are being considered by the Advisory Committee on the Prerogative of Mercy in terms of articles 59 and 60 of the Constitution. As the law stands now, this court has no jurisdiction to stay its own final judgment. The point must also be made that at the time of writing this judgment, there was no appeal before this court in relation to the applicants' petition before the High Court. Thus, there was nothing before this court that it could stay. After very anxious moments, we are satisfied that in law, the applicants' application is incompetent. It is therefore dismissed. We make no order as to costs.

*Appeal dismissed.*