

**IN THE HIGH COURT OF ZAMBIA
AT THE ECONOMIC & FINANCIAL
CRIMES DIVISION REGISTRY
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

2023/HPEF/23



IN THE MATTER OF:

**SECTIONS 29, 30 & 31 OF THE
FOREFEITURE OF PROCEEDS OF
CRIME ACT NUMBER 19 OF 2010.**

IN THE MATTER OF:

**SECTION 71 OF THE FOREFEITURE
OF PROCEEDS OF CRIME ACT
NUMBER 19 OF 2010.**

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

**IN RE PROPERTY: PROPERTY NO. 9334/1, 9334/1, 9334/2,
9334/3 AND 9334/4 CONTAINING 15 DOUBLE STOREY
FLATS IN STATE LODGE**

ESTHER NYAWA TEMBO LUNGU INTERESTED PARTY

***BEFORE THE HONOURABLE JUSTICES P. K. YANGAILO, I. M.
MABBOLOBOLO AND S. V. SILOKA, IN CHAMBERS, ON THE 11TH
DAY OF MARCH, 2024.***

For the Applicant:

*Mrs. M. Kapambwe-Chitundu, Deputy
Chief State Advocate; Mrs. R. Malibata-*

Jackson, Senior State Advocate; & Mrs.
C. Alisande-Bauleni, State Advocate –
National Prosecution Authority.

For the Interested Party:

Mrs. D. Findlay & Mr. B. Chipopo –
Mesdames D. Findlay & Associates.

COMPOSITE RULING

P. K. YANGAILO J. DELIVERED THE RULING OF THE COURT.

CASES REFERRED TO:

1. *The Director of Public Prosecution, in Re Property: L/ 9390 & Chiyeso Lungu as an Interested Party – 2023/HPEF/26;*
2. *Fidelitas Shipping Co. Ltd v V/O Exportchelb (1965) Volume 4, 2 ALL E.R. 10;*
3. *Finsbury Investments Limited and Another v Antonio Manuela Ventriglia (2018) ZMCA 362;*
4. *Wilson v Church (No. 2) (1879) 12 Ch. D. 454 at 459;*
5. *The Attorney General v Law Association of Zambia (2008) Volume 1, Z.R. 21;*
6. *Sata v Chanda Chimba III and Others – 2010/HP/1282;*
7. *Bowman Lusambo v Attorney General – 2023/CCZ/001;*
8. *Monk v Bartram (1891) 1 QB 346;*
9. *Director of Public Prosecutions in Re Property & Milingo Lungu & KCM as Interested Parties – 2023/HPEF/10;*
10. *Commonwealth Development Corporation v Central African Corporation (1968) Z.R. 70;*
11. *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000);*
12. *Walhaus & Others v Additional Magistrate, Johannesburg & Another, 1959 (3) SA 113(A) at 120D;*
13. *S. v Western Areas Ltd & Others 2005 (5) SA 214 (SCA) at 224D; and*
14. *Sonny Paul Mulenga & Others vs. Investrust Bank Limited (1999) Z.R. 101.*

LEGISLATION REFERRED TO:

1. *The Evidence (Bankers Books) Act, Chapter 44, Volume 4 of the Laws of Zambia;*
2. *The High Court Act, Chapter 27, Volume 3 of the Laws of Zambia;*

3. *The Rules of the Supreme Court of England 1965 (White Book) 1999 Edition, London Sweet & Maxwell;*
4. *The Electronic Communications and Transactions Act No. 4 of 2021; and*
5. *The Constitution (Amendment) Act No. 2 of 2016.*

OTHER WORKS REFERRED TO:

1. *Halsbury's Laws of England, 4th Edition, Vol. 17; and*
2. *Halsbury's Laws of England, 4th Edition, Vol. 37.*

1 INTRODUCTION

1.1 On 14th February, 2024, the Applicant, Director of Public Prosecution (“DPP”), filed herein an Application for Leave of the Court to add evidence to or in lieu of Affidavit in Support of the Originating Notice of Motion. This was followed up by an Application by Esther Nyawa Tembo Lungu, the Interested Party herein, for an Order to Stay Proceeding pending determination of the Interested Party’s appeal against an earlier Ruling of this Court.

2.2 We found it convenient to hear these applications simultaneously and now render a composite Ruling in respect of both motions, which were heard by this Court on 26th February, 2024.

2 BACKGROUND

2.1 The background to these applications is that on 11th December, 2023, we rendered a Ruling in which we expunged from the Record some exhibits attached to the Applicant’s Affidavit in Support of Originating Notice of Motion, due to failure to comply with the provisions of **The**

Evidence (Bankers' Books) Act¹, which has necessitated the Applicant's present Application before us.

2.2 In the same Ruling of 11th December, 2023, we dismissed the Interested Party's Application for an Order for Constitutional Reference; and other preliminary issues that she raised, *inter alia*, with respect to the jurisdiction of this Court and the mode of commencement of this suit. Being dissatisfied with the said Ruling, the Interested Party has appealed against the said Ruling and has now applied for an Order to Stay the Proceedings herein pending the determination of the appeal.

3 APPLICATION FOR LEAVE OF THE COURT TO ADD EVIDENCE TO OR IN LIEU OF AFFIDAVIT IN SUPPORT

3.1 As earlier stated, this Application is made by the Applicant, pursuant to ***Order XXX, Rules 20 and 21*** and ***Order III, Rule 2 of The High Court Rules***². It is supported by Affidavit deposed to by Emmanuel Khondowe, a Senior Investigations Officer, in the employ of Drug Enforcement Commission ("DEC") working under the Anti-Money Laundering Investigations Unit ("AMLIU").

3.2 The Application is opposed by the Interested Party, who filed herein an Affidavit in Opposition, to which she deposed to.

3.3 AFFIDAVIT IN SUPPORT

- 3.3.1 It is averred in the Affidavit in Support, *inter alia*, that the Deponent perused the Ruling delivered by the Court, in which the Court expunged from the Affidavit in Support exhibits marked “EK7”, “EK8” and “EK9”. The Deponent avers that he had interviewed and recorded a statement produced in the said Affidavit as exhibit marked “EK6” from a Mr. Brian Muleya Mutakwa, the Branch Manager of ZANACO Bank, Cairo Branch, before he printed and gave him the now expunged “EK7”.
- 3.3.2 The Deponent further avers that he had interviewed and recorded by means of typing a statement now expunged from the Affidavit in Support marked “EK8” from Mr. Choolwe Chiyala, a Relationship Manager at First National Bank. The Deponent obtained from Mr. Choolwe Chiyala, a Bank Statement containing copies of Public Sector Cheque Account Statements for the Esther Lungu Foundation Trust, which is exhibit “EK9”, now expunged from the Affidavit in Support.
- 3.3.3 The Deponent also avers that exhibits “EK7” and “EK9” were expunged from the Affidavit in Support due to failure to comply with the provisions of ***The Evidence (Banker’s Books) Act***¹, while exhibit “EK8” was expunged as a result of failure to certify

it as a true copy of the original handwritten statement to prove authenticity.

3.3.4 Additionally, it is averred that the said Mr. Brian Muleya Mutakwa and Mr. Choolwe Chiyala have shown willingness to attend in person herein, if it be found expedient in the mind of the Court, to testify and produce the Bank Statements that are relevant to the just and proper conclusion of this matter.

3.4 **AFFIDAVIT IN OPPOSITION**

3.4.1 The Deponent of the Affidavit in Opposition averred, *inter alia*, that the Application by the Applicant seeks to overcome matters already dealt with by this Court by attempting to adduce *viva voce* evidence of witnesses who are to testify so as to overcome the irregularity of the Applicant's exhibits, which were already expunged by the Court in its Ruling. It is asserted that the Applicant opposed the Interested Party's Notice to Raise Preliminary issue and stated therein that there is no need for *viva voce* evidence, thus he cannot be permitted to subsequently apply to this Court for the same relief.

3.4.2 It is further averred that the Court already dealt with the issue of adducing *viva voce* evidence and thus it is not in the interests of justice to allow *viva voce* evidence of only one of the parties as this will

seriously prejudice the Interested Party in the conduct of this matter.

3.4.3 It is also averred that if the Applicant is granted Leave to adduce *viva voce* evidence and additional exhibits, this will confirm the fact that the matter then ought to have been commenced by way of Writ of Summons and Statement of Claim and not Originating Notice of Motion.

3.5 Both the Applicant and Interested Party filed herein Skeleton Arguments to augment their respective Affidavits.

3.6 **APPLICANT'S SKELETON ARGUMENTS**

3.6.1 It is submitted by the Applicant, *inter alia*, that the Affidavit in Support of the substantive Application reveals that there is need for the Court to summon before it the two named Bank Officials to testify and be examined in person by the Court and the Interested Party, in order to prove authenticity of "EK7" and "EK9" before production.

3.6.2 It is further submitted that the Applicant is aware of the general rule regarding procedure on matters that are commenced by Originating Notice of Motion that they must be determined by Affidavit evidence, however, the provisions of **Order XXX, Rule 20** and **21 of The High Court Rules²** provides an exception to the general rule. It is contended that the cited

provisions of law clothe the Court with discretionary power, if the Court considers it expedient and/or in circumstances considered reasonable by the Court, to grant Leave to have a witness examined *viva voce* or receive documents in evidence.

3.6.3 In fortifying her submissions, Counsel placed reliance on the case of ***The Director of Public Prosecution In re Property: L/9390 and Chiyeso Lungu as an Interested Person***¹, wherein we guided that for such an application to be granted, the Applicant must demonstrate as follows: -

- “(i) The Affidavit evidence before the Court is not sufficient;***
- (ii) There is an existence of factual issues in contention which necessitate the testing of the veracity of the Affidavit evidence; and***
- (iii) Lastly, there should be good and convincing reasons upon which to exercise the discretion to subpoena the Deponent for purpose of cross examination and subpoena witnesses.”***

3.6.4 It is additionally submitted that the Deponent of the Affidavit in Support of the substantive matter, deposed that he received from two Bank Officials, whose names and particulars he disclosed, the Bank Statements marked “EK7” and “EK9”, which have

been expunged. The Deponent contends that these Bank Statements are critical in assisting this Court to come to a just resolution of the matter as they touch on matters that are central to this cause to prove the value or capacity of the Interested Party through her known income and that these two Bank Officials are the right persons to speak to these Bank Statements, and produce them as they are held at their respective Banks. It is argued that this is a fit and proper application upon which this Court may exercise its discretion and order the attendance of the two Bank Officials to appear before it to give *viva voce* evidence and produce the two subject Bank Statements.

3.6.5 The Applicant further relied on **Order 39, Rule 1 (1)** and **(2)** of **The Rules of the Supreme Court**³, which empowers the Court to exercise its discretion and Order the examination on oath of an officer or some other person, and produce any document, where the Court deems it necessary for the purposes of justice.

3.6.6 The Applicant also argued that the summoning of the two Bank Officials to appear before the Court herein will promote the cause of justice upon which this Court is established and is in line with the provisions of **Section 5 (1)** and **(2)** of **The Evidence (Bankers' Books) Act**¹.

3.6.7 The Applicant implores the Court to take this circumstance as a special cause that may require an Order for Leave, as it shall help the Court and the Parties to prove that the two Bank Statements are authentic and to be produced in evidence.

3.7 **THE INTERESTED PARTY'S SKELETON ARGUMENTS**

3.7.1 In Skeleton Arguments filed on behalf of the Interested Party, her Counsel submitted, *inter alia*, that while **Order XXX, Rule 20 of The High Court Rules²**, pursuant to which the Applicant made this Application, allows a party to seek Leave of the Court to adduce oral evidence, the said provision only relates to and is restricted to oral evidence. She argued that in the present circumstances, the Applicant seeks to adduce both oral and documentary evidence, therefore, the provisions of the said **Order XXX, Rule 20 of The High Court Rules²** are not applicable.

3.7.2 Counsel further argued that the Applicant has also placed reliance on **Order XXX, Rule 21 of The High Court Rules²**, which provision does not support his Application as it does not permit a party to move the Court, but instead provides for the Court to determine the necessity and expediency of additional evidence on its own motion.

3.7.3 Counsel contends that the Applicant seeks to move the Court to allow him to rectify his shortcomings following the Ruling of 11th December, 2023, which expunged certain exhibits from the Applicant's Affidavit in Support of the substantive matter. Accordingly, Counsel submits that this issue was already dealt with, particularly the expunged exhibits marked "EK7", "EK8" and "EK9", which the Court declared to be contrary to the provisions of **The Evidence (Bankers) Book Act¹** and **The Electronic Communications and Transactions Act⁴**.

3.7.4 Counsel further submitted that by seeking to raise another determination of the expunged exhibits, the Applicant wants to have a second bite at the cherry, which is tantamount to re-litigating issues and an abuse of Court process. She also submitted that the Applicant ought to have addressed its shortcomings at the time of the hearing of the matter where the issue in determination was the very exhibits that are expunged. In fortifying her submissions, Counsel invited the Court to the case of **Fidelitas Shipping Co. Ltd v V/O Exportchelb²** where Lord Diplock LJ stated as follows: -

"...Three things are necessary for issue estoppel; past litigation, determination of the issue by the

Court of competent jurisdiction and subsequent litigation in a different cause of action... the substance of the matter and not the words must be looked at: the crucial thing is to determine whether there has been final determination.”

3.7.5 Counsel contends that the Applicant has not laid before this Court any special or exceptional circumstances, thus, there is nothing in the Applicant’s Application which establishes any facts to warrant the Court’s use of its discretionary power to disregard the principle of finality on matters upon which the Court already pronounced itself. The case of ***Finsbury Investments Limited and Another v Antonio Manuela Ventriglia***³ was cited in support of this submission. In the said case, the Court of Appeal guided that a Court can only invoke its unfettered inherent jurisdiction where the interests of justice demand that to be done and where the interest of justice outweigh the equally essential principles of finality and *functus officio*.

3.7.6 Counsel went on to argue that the Applicant also seeks to re-litigate the issue that the Interested Party brought before the Court, that there are contentious issues and the matter ought to proceed by way of adducing *viva voce* evidence, which the Applicant had opposed by stating that there were no contentious issues and that the matter did not

require *viva voce* evidence as it could be settled by way of Affidavit evidence. Counsel implored the Court to dismiss the Applicant's Application with costs.

4. APPLICATION TO STAY PROCEEDINGS PENDING DETERMINATION OF THE INTERESTED PARTY'S APPEAL

4.1 This Application was made by the Interested Party, pursuant to **Order XLVII, Rule 5** of **The High Court Rules**². By this Application, the Interested Party seeks to Stay the Proceedings herein pending the determination of her appeal against this Court's Ruling of 11th December, 2023. The Application is supported by Affidavit deposed to by Esther Nyawa Tembo Lungu and Skeleton Arguments.

4.2 The Applicant has vehemently opposed this Application and filed herein his Affidavit in Opposition deposed to by Emmanuel Khondowe and Skeleton Arguments.

4.3 INTERESTED PARTY'S AFFIDAVIT IN SUPPORT

4.3.1 The Deponent averred, *inter alia*, that being dissatisfied with this Court's Ruling of 11th December, 2023, she has appealed to the Court of Appeal and therefore, she seeks to Stay these Proceedings pending the determination of the appeal. She further avers that her appeal raises important questions of law and if this matter

proceeds before her appeal is determined, she will be prejudiced in the enjoyment of her rights to a fair trial, and the appeal will be rendered academic and nugatory.

4.3.2 The Deponent asserts that the fact that this Court's jurisdiction is being challenged on appeal is a circumstance that is likely to influence any decision that this Court may make in the Proceedings herein and as such, it would be in the interest of justice to Stay the Proceedings pending determination of her appeal.

4.3.3 The Deponent further asserts that her appeal also relates to certain exhibits contained in the Applicant's Affidavit in Support of the substantive matter, thus allowing this matter to proceed before her appeal is determined will render the appeal nugatory and an academic exercise.

4.3.4 The Deponent also asserts that her appeal seeks to challenge this Court's decision on the issue of commencement of the proceedings, which is likely to impact the main matter and proceeding in the absence of conclusive determination of this issue on appeal will also likely render the appeal nugatory and an academic exercise.

4.3.5 Additionally, it is asserted that the Proceedings herein are likely to impact her constitutional rights as the Applicant seeks an Order of Forfeiture of her property with allegations of it being tainted without criminal convictions or any prior criminal proceedings, thus she will not be afforded a fair trial by an independent and impartial tribunal, which she believes will entail the right to prosecute the appeal without hindrance.

4.4 **APPLICANT'S AFFIDAVIT IN OPPOSITION**

4.4.1 The Deponent avers, *inter alia*, that no prejudice will be occasioned to the Interested Party if this matter is not stayed as her appeal raises questions of law that have already been settled by superior Courts and that she has not laid before this Court any exceptional circumstances to warrant the Court exercising its discretion to grant of Stay of Proceedings.

4.4.2 The Deponent further avers that proceeding with the substantive matter herein will not render the Interested Party's appeal nugatory and an academic exercise and will not take away her right to prosecute her appeal. It is asserted that the Interested Party's appeal has no prospects of success.

4.4.3 In response to the Interested Party's assertion that proceeding with this matter will deprive her constitutional right to property as she has not been charged with a criminal offence, the Deponent averred that Non-Conviction Based Forfeiture do not require criminal proceedings or a conviction and that the constitutional right to property does not extend to tainted property.

4.4.4 It is also averred that the Applicant will be prejudiced by the delay in prosecuting the substantive matter should the Stay of Proceedings be granted on an application such as this, which has not shown any special circumstances justifying the grant of Stay of Proceedings.

4.5 **INTERESTED PARTY'S SKELETON ARGUMENTS**

4.5.1 Counsel for the Interested Party submitted that this Court is empowered to Stay Proceedings pending determination of an appeal where an Applicant has shown that there are prospects of success on appeal and that there are special circumstances that justify the Stay. In showing that there are special circumstances to warrant the grant of Stay of Proceedings, Counsel submitted that the very nature of the matter herein and the likelihood of constitutional rights being infringed are special

circumstances that may render the appeal nugatory if the Stay is not granted. Counsel called in aid the case of ***Wilson v Church***⁴, wherein the Court stated as follows: -

“...it has also been said that when a party in appealing, exercising his undoubted right of appeal, the Court ought to see that the appeal, if successful is not nugatory.” (Counsel’s emphasis)

4.5.2 Counsel submitted that the Supreme Court has emphasised the undesirability of determining appeals where the orders sought will serve no useful purpose for being academic after issues have been overtaken by events. She referred to the case of ***The Attorney General v LAZ***⁵, where the Chief Justice expressed as follows: -

“It is a notorious fact that the elections are since gone. Even if the Petitioner was to be successful on the cross-appeal, it is quite clear that the order would serve no purpose apart from being an unnecessary academic exercise. This Court frowns upon making academic orders.”

4.5.3 Counsel argued that the fact that the Interested Party has in her appeal challenged issues relating to certain exhibits proposed to be relied upon by the Applicant in the substantive matter, shows that her appeal would be rendered nugatory and an

academic exercise, thus her right to a fair hearing would be impaired. Counsel submits that this further demonstrates special circumstances to justify the grant of Stay of Proceedings. In fortifying this submission, Counsel cited the case of **Sata v Chanda Chimba III and Others**⁶, for the following proposition: -

“It must be shown that special circumstances exist to warrant the grant of the stay or that without the stay a defendant would be ruined or suffer injury. Whatever the case special ground or reason must be shown to exist.”

4.5.4 In establishing that the Interested Party’s appeal has prospects of success, Counsel submitted that the issues raised in the appeal are cardinal and further proceedings herein in the absence of clear determination of the issues will render the Interested Party’s appeal a nugatory and an academic exercise.

4.6 **APPLICANT’S SKELETON ARGUMENTS**

4.6.1 Counsel for the Applicant submitted, *inter alia*, that the Interested Party’s Application to Stay Proceedings is vehemently opposed on the ground that the Interested Party has not shown any special circumstances to warrant the Stay of Proceedings pending Appeal and that the Grounds of Appeal

raised have no prospects of success as these have been settled by Superior Courts.

4.6.2 In establishing that there are no prospects of success in the question raised on appeal by the Interested Party, relating to the allegation that this Court interpreted the provisions of **Article 133 of The Constitution**⁵ in the Ruling being impugned, which is a preserve of the Constitutional Court, Counsel invited the Court to the case of **Bowman Lusambo v Attorney General**⁷, wherein the Constitutional Court stated as follows: -

“We have perused the ruling of the Magistrate and find that the resident Magistrate Honourable Fides Hamaundu made reference to Constitutional provisions and applied the same to the facts. This in our view does not amount to interpreting the Constitution as envisaged by Article 128 of the Constitution. Whereas the interpretation of the Constitution is a preserve of this Court, other Courts are at liberty to make reference to and apply obvious Constitutional provisions.”

4.6.3 Counsel further submitted that the granting of Stay of Proceedings pending appeal is not as a matter of right but at the discretion of the Court and only where special circumstances have been established. To fortify this submission, Counsel cited the case of

*Monk v Bartram*⁸ for its proposition that a stay should only be granted where special circumstances are known to exist.

4.6.4 Counsel also cited the case of *Director of Public Prosecution in Re Property & Milingo Lungu as an Interested Party*⁹, where in dismissing an application for Stay of Proceedings, we stated as follows: -

“...for the Court to grant a stay of proceedings, there must exist special and exceptional circumstances. A special or exceptional circumstance is a peculiar or unique circumstance which is additional to the ordinary state of affairs. The application is not granted as a matter of routine as it is not a mechanical relict following the filing of an application. It is a matter of law and facts and a very hard one in their combined content. It is our considered view that the appeal will not succeed and only serves to protract the judicial proceedings herein. Further, we have combed through the affidavit, skeleton arguments and submissions and have found no exceptional circumstances or something more that would warrant or bring this case within the ambit of the requirements set out in the plethora of authorities for grant of stay of proceedings pending the appeal.”

4.6.5 Counsel reiterated that the Interested Party has failed to demonstrate the special and exceptional circumstances to justify the grant of the Stay of Proceedings, which she invites this Court to make a determination on and that there are no special circumstances shown which take the case out of the ordinary. She prayed that the Interested Party's Application be dismissed for lack of prospects of the appeal succeeding.

5. THE HEARING

5.1 At the hearing of both Applications, on 26th February, 2024, the Parties' Counsel reiterated for emphasis, the contents of their Skeleton Arguments, and as such, there is no need to restate the same as they are on record.

6. CONSIDERATION AND DECISION OF THE COURT

6.1 We have considered the issues raised in both Applications, the Affidavit evidence of both Parties and Submissions by learned Counsel. We have also considered the authorities cited, for which we are grateful to Counsel.

6.2 Before we address the Applications herein, we shall first consider the Interested Party's Application to expunge the Applicant's Affidavit in Reply to the Interested Party's Application to Stay Proceedings herein pending Appeal. The Interested Party took issue with the Applicant's Reply,

which was filed herein on 26th February, 2024, on the basis that no Leave of Court was obtained to file a Reply.

- 6.3 Counsel for the Interested Party argued that a Party does not have, as a matter of right, the liberty to file an Affidavit in Reply. She contends that since there was no Leave of Court obtained to file a Reply, the same ought to be expunged from the Record.
- 6.4 On the other hand, Counsel for the Applicant submitted that Forfeiture Applications, world over, are a unique form of prosecution which seek to ensure that they take unique methods and remedies in ensuring that crime does not pay, hence the Application it takes is a prosecution through an Originating Notice of Motion. Counsel further submitted that the procedure to pleadings for these Applications and is not unique to Zambia, is that the Applicant makes the Application relating to interlocutory matters to which an Interested Party will respond. Thereafter, the Party who made the Application has a right to Reply before the pleadings are closed. On this basis, she prayed that the Court does not expunge the Reply.
- 6.5 Both Counsel for the Interested Party and the Applicant did not cite any authorities for their proposition either from the practice rules or in the decided cases. We have had an opportunity to peruse **Order 28, Rule 1A (5)** of

The Rules of the Supreme Court³, which states as follows: -

“A plaintiff on whom a copy of a defendant's affidavit evidence has been served under paragraph (4) may within 14 days of such service file in Court further affidavit evidence in reply and shall in that event serve copies thereof on that defendant.” (Court's emphasis)

6.6 Although the above provision deals with Affidavits in Originating Summons Procedure, in our view, the above *dicta* of law give guidance to interlocutory matters determined by Affidavit evidence, such as the one before us, as much as they do to ordinary motion matters.

6.7 We opine that where an Application is to be supported by an Affidavit in Support, the Respondent is at liberty to issue an Affidavit in Opposition and thereafter the Applicant is at liberty to issue an Affidavit in Reply. These are the least statutory Affidavits allowed under **Order 28 Rule 1A** of **The Rules of the Supreme Court**³. **Order 28 Rule 1A (6)** of **The Rules of the Supreme Court**³ goes on further to state that: -

“No other affidavit shall be received in evidence without the leave of the Court.” (Court's emphasis)

6.8 It is clear from the cited provision that the Applicant was entitled to put in, at least, the statutory Affidavit in Support of the Application and Affidavit in Reply to the Interested Party's Affidavit in Opposition. However,

thereafter, a Party has to apply for leave to file a Further Affidavit. The rationale for this is simply that an Applicant putting in the Affidavit in Support of the Originating Summons ought to frame it in such a way that it takes into account and covers all the facts relevant to his case. Further, the Affidavit in Reply ought to address the facts raised in the Affidavit in Opposition and not to advance the case further. Equally, a Respondent ought to do likewise to his Affidavit in Opposition.

6.9 We also opine that Affidavits in excess of the number normally submitted under the High Court Rules and Practice may be admitted into evidence in the discretion of the Judge, especially when neither side objects to their inclusion. Accordingly, it is further our firm view that it is only after the Affidavit in Reply has been filed that Leave should be sought for any further Affidavit.

6.10 The application before us is an interlocutory application and in our view, it was to be supported by at least one statutory Affidavit. Further, and as of right, the Interested Party was entitled to put in at least the one statutory Affidavit in Opposition that she is entitled to. Thereafter, the Applicant was at liberty to file a statutory Affidavit in Reply.

6.11 For the foregoing reasons, we decline to expunge the Affidavit in Reply as the Applicant was at liberty to file the Affidavit in Reply.

6.12 We shall now address the first Application that was made herein.

6.13 APPLICATION FOR LEAVE OF THE COURT TO ADD EVIDENCE TO OR IN LIEU OF AFFIDAVIT IN SUPPORT.

6.13.1 Having analysed the documents before us and the respective arguments for and against, the main issue for determination is whether or not the Applicant has demonstrated good cause to justify the grant of Leave to add evidence to or in lieu of Affidavit in Support of the substantive Application.

6.13.2 The instant Application is basically grounded on **Order XXX, Rules 20** and **21**; and **Order III, Rule 2** of **The High Court Rules²**. **Order XXX, Rules 20** and **21** clothes this Court with the discretionary power to summon a witness and have him examined *viva voce*, where this Court considers it expedient and reasonable. The said rules are couched as follows: -

“20. Oral evidence shall not be heard in support of any motion unless by leave of the Court or a Judge.

21. In addition to or in lieu of affidavits, the Court or a Judge may, if it or he thinks expedient, examine any witness viva voce, or receive documents in evidence, and may summon any person to attend to produce documents, or to be examined or cross-examined, in like manner as at the hearing of a suit.”

6.13.3 Further, **Order III, Rule 2**, gives this Court wide discretionary powers to grant an interlocutory Order that justice of the case deserves and is couched as follows: -

“Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not.”

6.13.4 The Applicant contends that the two Bank Officials that provided information, in the form of exhibits “EK 7” and “EK 9”, to the Deponent of the Affidavit in Support of the substantive Application, which exhibits now stand expunged from the Record, should be summoned to produce the said exhibits and speak to them, as these are critical in assisting this Court to come to a just resolution of the matter as they touch on matters

that are central to this Cause to prove the value or capacity of the Interested Party through her known income.

6.13.5 On the other hand, the Interested Party has argued that this Court already made a decision on the said exhibits “EK 7” and “EK 9” and expunged them from the Record in its Ruling of 11th December, 2023, thus the Applicant cannot make such an Application as the one under consideration as doing so amounts to the Applicant having a second bite of the cherry, which amounts to re-litigating the matter and an abuse of Court process.

6.13.6 For ease of reference, we shall reproduce what we stated in our Ruling of 11th December, 2023, wherein we expunged exhibits “EK 7”, “EK 8” and “EK 9” from the Record. We stated as follows: -

“...On our analysis of the subject exhibits, we find that the exhibits marked “EK7” contains the Interested Party’s ZANACO Bank Account Statement from 1st January, 2012 to 16th August, 2022. Further, exhibit “EK8” is a Statement taken by Emmanuel Khondowe from Choolwe Chiyala, a Relationship Manager at First National Bank, where the Interested Party’s Foundation Trust Kwacha Account is held. In that statement, Choolwe Chiyala

highlighted a summary of entries which he stated were as per Bank Statements availed. Finally, exhibit “EK9” contains copies of Public Sector Cheque Account Statements for the Esther Lungu Foundation Trust, dated 3rd December, 2015, 30th November, 2016 and 31st August, 2022.

Based on our analysis of the foregoing, we find that the exhibits marked “EK7” and “EK9” form part of the Bankers Book within the definition of “banker book” in The Evidence (Bankers) Book Act in that they form a record used in the ordinary business of the Bank. However, exhibit “EK8” does not amount to a banker’s book within the meaning of “banker book” as it is a deposition and not a record used in the ordinary business of a bank.

As stated in Section 4 of The Evidence (Bankers) Book Act, for exhibit “EK7” and “EK9” to be admitted into evidence, there was need for the Applicant to show proof that the said exhibits were part of the ordinary books of the Bank, that the entries indicated in the Statement were made in the ordinary course of business and that the books were in the custody of the Bank. In this case, the Applicant did not provide such proof. Further, according to Section 5 of the Act, there was need for the Applicant to show that the copy of an entry in a banker book had been examined

with the original entry and is correct, which has not been done in this case. Accordingly, exhibits “EK7” and “EK9” are expunged from the record.

We now turn to consider the issue of whether exhibit “EK7”, “EK8” and “EK9” being alleged print outs from the bank system met the requirements of The Electronic Communications and Transactions Act.

Section 2 of The Electronic Communications and Transactions Act provides as follows: -

““data message” means data generated, sent, received or stored by electronic, optical or similar means and includes, but is not limited to electronic data interchange (EDI), voice, stored record, electronic mail, mobile communications audio and video recordings.”

In our view, as exhibits “EK7” and “EK9” were allegedly generated from the bank system and that exhibit “EK8” is a computer-generated typed statement, they meet the description of a data message and therefore, were required to be certified in accordance with Section 9 (4) of The Electronic Communications and Transaction Act in order to be admitted into evidence. The said subsection provides as follows: -

***“A data message made by a person in the ordinary course of business, or a copy or printout of, or an extract from, the data message certified to be correct by an officer in the service of that person, shall on its mere production in any civil, criminal, administrative or disciplinary proceedings under a written law, be admissible in evidence against a person and rebuttable proof of the facts contained in a record, copy, printout or extract.”
(Our emphasis)***

Based on the foregoing, as exhibits “EK7”, “EK8” and “EK9” produced by the Applicant were not certified in accordance with the foregoing provision, they are inadmissible evidence and accordingly, they are expunged from the record.”

6.13.7 As can be seen, we expunged the said exhibits as they were inadmissible evidence on the basis that they were not certified in accordance with the provisions of the relevant law. At no time did we consider an application such as the present one nor state that the information sought from the said documents could not be obtained by some other means. Therefore, we disagree with the Interested Party’s assertion that the present application amounts to re-litigating the matter.

6.13.8 Having said that, we shall now proceed to consider whether the Applicant has advanced sufficient cause to justify the grant of his Application. The provision of law pursuant to which this Application was made, which is highlighted in paragraph 6.11.2 above, creates a right to examine any person under oath in support of a Motion or Application. Courts have controlled the use of this Rule somewhat by requiring that the evidence elicited must be relevant to the issue on the Motion or Application. This rule can be used to obtain the evidence of a witness who is not a party to the proceeding but is in a position to provide evidence relevant to the issues on the Motion or Application, which the Parties wish to have before the Court.

6.13.9 In our view, the examining Party does not require Leave to conduct the examination but simply needs to serve a Summons on the party it wishes to examine. The witness in receipt of the Summons must attend to produce documents, or to be examined or cross examined, in like manner as at the hearing of a suit. The said Summons can be attacked on the basis that the individual sought to be examined would not give relevant evidence or, theoretically, that it is evident from

some other circumstances that the examination would be conducted for an improper purpose.

6.13.10 It is clear that Courts are inclined to admit relevant evidence that can aid the prosecution of a matter. In order to justify the grant of his Application, in our view, the Applicant must show that the additional evidence is directly relevant to the matter before the Court and is in the interest of justice; the additional evidence, if given, would influence or impact upon the result of the verdict, although it need not be decisive; the additional evidence sought to be adduced will remove any vagueness or doubt over the case and has a direct bearing on the main issue in the suit; the additional evidence is needful; and that there are good and convincing reasons upon which the Court can exercise its discretion to summon the witness to produce documents or to be examined and cross examined. We are fortified by the learned authors of ***Halsbury's Laws of England***¹, who at **paragraph 5** on 'Evidence' state as follows: -

"The prime requirement of anything sought to be admitted in evidence is that it is of sufficient relevance. What is relevant (namely what goes to the proof or disproof of a matter in issue) will be decided by logic and human

experience, and facts may be proved directly or circumstantially. But while no matter should be proved which is not relevant, some things which are relevant by the normal tests of logic may not be proved because of exclusionary rules of evidence.”

6.13.11 The learned authors of *Halsbury’s Laws of England*¹, further state in *paragraph 27* that the weight to be given to a particular item of evidence is a matter of fact which will be decided, largely on the basis of common sense, in the light of the circumstances of the case and of the view formed by the Court on the reliability and credibility of the witnesses and exhibits.

6.13.12 It is clear from the above that the Court is provided with direction on the issues that it ought to consider when entertaining an Application such as the present one. The principles enunciated above are subject to the Court’s general discretionary power to control the evidence. Therefore, in pursuit of determining the relevance of summoning the two Bank Officials to produce documents or to be examined and cross examined, it is imperative for this Court to interrogate whether the Applicant has satisfied the conditions set out above, so as to justify the summoning of the said Bank Officials. We are fortified by **Order**

38, Rule 13 (1) of The Rules of the Supreme Court³, which provides as follows: -

“At any stage in a cause or matter the Court may order any person to attend any proceeding in the cause or matter and produce any document, to be specified or described in the order, the production of which appears to the Court to be necessary for the purpose of that proceeding.”

6.13.13 The effect of this rule is that it enables the Court to *subpoena* any persons, including persons not parties to the action, requiring them to attend any proceedings in the cause or matter and produce any document considered by the Court to be necessary for the proceeding in question. There is of course no general right of discovery against a non-party, and, since all that an order under this rule requires is for the witness to attend and produce documents, such an order creates no obligation to give inspection of such documents.

6.13.14 We are mindful that even with the said guidelines being the basis for grant of Leave sought by the Applicant, this Court would still determine each application on a case by case basis, and even so, act with restraint and abundance of caution in allowing evidence such as what is being sought.

6.13.15 Accordingly, we have contrasted the guidelines set out above against the Applicant's application and in our view, it is manifest that the Application does meet the threshold set out above. We say so because the Applicant has shown that the source of the information contained in the Affidavit in Support of the substantive application and who are in possession of the Bank Statements are the two Bank Officials. Further, the Applicant has shown that the information in the documents to be produced by the two Bank Officials is relevant to the matter before the Court and is critical in assisting this Court to come to a just resolution of the matter. In addition, the evidence of the two Bank Officials will remove any vagueness or doubt over the matter in issue. We have no doubt that the evidence of the two Bank Officials will be credible in the sense that it is capable of belief and is therefore needful.

6.13.16 We have considered the proportionality and prejudice of allowing the additional evidence and in this case, we have assessed the balance between the significance of the evidence sought to be added, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from such evidence on

the other. We opine that none of the Parties herein will be prejudiced if the Court summons the two Bank Official to produce documents or to be examined and cross examined, as all the Parties herein will have an opportunity to challenge the evidence of the two Bank Officials.

6.13.17 For the foregoing reasons, we hereby grant the Application by the Applicant and hereby move ourselves to summon the two Bank Officials, namely, Mr. Brian Muleya Mutakwa, the Branch Manager of ZANACO Bank, Cairo Branch; and Mr. Choolwe Chiyala, the Relationship Manager of First National Bank Zambia Plc, to produce Bank Statements in respect of the Interested Party and Esther Lungu Foundation Trust.

6.14 We will now move on to consider the Interested Party's Application to Stay Proceedings herein pending determination of her appeal against the Ruling of 11th December, 2023.

6.15 INTERESTED PARTY'S APPLICATION TO STAY PROCEEDINGS PENDING APPEAL

6.15.1 Having analysed the Application, the rival Affidavits and submissions by the Parties, the only issue for determination is whether the Interested

Party has met the conditions for Stay of Proceedings pending appeal.

6.15.2 The Interested Party cited **Order XLVII, Rule 5 of The High Court Rules²**, which rule mentions both the Stay of Execution or of Proceedings under the Judgment or decision appealed from. The said rule is couched as follows: -

“An appeal shall not operate as a stay of execution, or proceedings under the judgment, or a decision appealed from, except so far as the Court below or the Court may order, and no immediate act or proceeding shall be invalidated, except so far as the Court below may direct.” (Court's emphasis)

6.15.3 There is a plethora of decided cases where the superior Courts have laid out the principles that the Courts have established for the grant of Stay of Proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. Some of the principles laid down are as follows: -

1. There must be an appeal pending before the higher Court;
2. The Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;

3. The Applicant must demonstrate that the Appeal would be rendered nugatory if the Stay of Proceedings is not granted;
4. The Applicant must demonstrate that there are exceptional circumstances which make the Stay of Proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
5. The Applicant must demonstrate that the application for stay was filed expeditiously and without delay.

6.15.4 The rationale for these stringent conditions, or criteria in exercising the discretion to grant a stay, is that a successful party should not be denied immediate enjoyment of the fruits of the Judgment, or Ruling, and that there should not be undue delay in prosecuting a matter, unless good, and sufficient grounds are advanced, or shown. The learned author of *Halsbury's Laws of England*², state at *page 330*, that all these factors must be considered, in a given case.

6.15.5 The Stay of Proceedings is a serious, grave and fundamental interruption in the right that a Party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and

therefore, the Court's general practice is that a Stay of Proceedings should not be imposed lightly unless one is satisfied to a high degree that that should indeed be the case and suspend the matter from continuing. This is a power which, it has been emphasised, ought to be exercised sparingly, and only in exceptional cases. It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. Accordingly, the Interested Party, who has applied for a Stay of Proceedings pending appeal, must show not merely that the Applicant might not, or probably would not, succeed but that he could not possibly succeed on the basis of the evidence and the facts of this case.

6.15.6 In brief, a Stay of Proceedings is a drastic remedy which is only granted in very exceptional circumstances. In the case cited by the Applicant, of ***Monk vs. Bartram***⁸, the Court of Appeal expressed sentiments on what might not be considered to constitute "*special circumstances*". In delivering the Judgment of the Court of Appeal, Lord Esher, M.R., observed at **page 346**, as follows: -

“It has never been the practice in either case to stay execution after the judge at the trial has refused to grant it, unless special circumstances are shown to exist. It is impossible to enumerate all the matters that might be considered to constitute special circumstances; but it may certainly be said that the allegations that there has been a misdirection, that the verdict was against the weight of evidence, or that there was no evidence to support it, are not special circumstances on which the Court will grant a stay of execution.” (Court's emphasis)

6.15.7 In the Kenyan case of **Global Tours & Travels Limited**¹¹, the Court stated as follows: -

*“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice. The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the *prima facie* merits of the intended appeal, in the sense of not whether it will probably*

succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...” (Court’s emphasis)

6.15.8 What can be seen from the above is that the grant of a Stay of Proceedings pending the hearing of an interlocutory appeal in civil matters is a rare and exceptional remedy. Accordingly, granting a Stay of Proceedings pending an appeal over interlocutory matters is decided on the facts of each case and with ***“due regard to the salutary general rule that appeals are not entertained piecemeal”***. See the cases of ***Walhaus & Others v Additional Magistrate, Johannesburg & Another***¹²; and ***S. v Western Areas Ltd & Others***¹³.

6.15.9 In the case of ***Sonny Paul Mulenga & Others vs. Investrust Bank Limited***¹⁴, the Supreme Court of Zambia held as follows: -

“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. In exercising its discretion whether to grant a stay or not, the Court is entitled to preview the prospects of the proposed appeal.”

The successful party should not be denied immediate enjoyment of a Judgment unless there are good and sufficient grounds. (Court's emphasis)

6.15.10 Accordingly, in the present case, we have perused the Affidavit evidence, the Notice and Memorandum of Appeal, in assessing whether or not the Interested Party's appeal is arguable. As numerous decisions have held, an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court and is not frivolous. The Appeal in the instant case relates, *inter alia*, to the question of the jurisdiction and establishment of this Court, which questions were settled in the recent case of ***Bowman Lusambo v Attorney General*** and is in line with our Ruling which is being impugned. The intended Appeal also relates to our giving directions in instances where a matter raised relate to the preserve of the Constitutional Court, which issue was also considered and determined in the said case of ***Bowman Lusambo v Attorney General***. With respect to the other questions, the Interested Party has not demonstrated that they are arguable. Additionally, this Application was brought over two months after our Ruling of 11th December, 2023, which we consider undue delay.

This clearly shows, in our view, that the intended Appeal has failed to pass the arguable test.

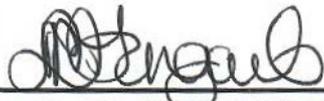
6.15.11 Further, we are not persuaded, that the Appeal will be rendered nugatory by the mere fact that the Proceedings herein will proceed and a Judgment on merits given. We say so because a Judgment given is capable of being stayed. We therefore do not agree with the Interested Party's assertion that proceeding herein will prejudice the Interested Party as the Court might consider what the Interested Party considers to be erroneous conclusions in its Judgment. If Courts were to consider such an argument, it would seriously impede Proceedings in the trial Courts. This is because a party who is keen on obstructing a case from proceeding would simply prefer multiple appeals against interlocutory rulings by the Trial Court and then seek Stay of Proceedings in the Trial Court.

6.15.12 As guided by the superior Courts, the conditions that a party requesting for a Stay of Proceedings ought to meet, are very clear. In particular, an Applicant must demonstrate that there are exceptional circumstances, which make the Stay of Proceedings justified as opposed to having the case concluded and all arising grievances taken

up on a single appeal. We opine that the Interested Party has not met this high threshold in this case.

6.15.13 Consequently, we find that the Application by the Interested Party, dated 16th February, 2024, lacks merit and is hereby dismissed with costs to the Applicant, to be taxed in default of agreement.

**SIGNED, SEALED AND DELIVERED AT LUSAKA, ON THE 11TH
DAY OF MARCH, 2024.**



**P. K. YANGAILO
HIGH COURT JUDGE**



**I. M. MABBOLOBOLO
HIGH COURT JUDGE**



**S. V. SILOKA
HIGH COURT JUDGE**

