



IN THE MALAWI SUPREME COURT OF APPEAL

PRINCIPAL REGISTRY

MISCELLANEOUS CAUSE NO. 70 OF 2021

**(Being High Court of Malawi Commercial Division, Lilongwe Registry,
Commercial Cause No.001 of 2020)**

BETWEEN:

ATTORNEY GENERAL

(MINISTRY OF HEALTH AND POPULATION)-----APPELLANT

AND

SAVENDA MANAGEMENT SERVICES-----RESPONDENT

CORAM: HON. JUSTICE M.C.C. MKANDAWIRE

T.Chakaka, Attorney General, Counsel for the Appellant

P.Nkhata, Counsel for the Respondent

Minikwa, Recording Officer

RULING

1. This is an application brought by the appellant pursuant to Order 1 rule 18 of the Supreme Court rules and Order 1 rule 18 as read with Order 111 rule 5 of the

Supreme Court Rules. The application is supported by an affidavit made by Neverson Chisiza, Principal State Advocate at the Ministry of Justice. There are also skeleton arguments in support of the same.

2. In a nutshell, there are two applications in this matter. The first application relates to a stay of enforcement of judgments. The second application is for an order to amend notice of appeal.

3. The respondent filed an affidavit in opposition to the notice to amend the notice of appeal and in opposition to the application for stay of execution. The said affidavit was filed by Mr Paweme Nkhata a legal practitioner in the firm of Messers Kita and Company. The respondent also filed skeleton arguments in opposition to the application to amend notice of appeal and stay of execution.

4. The appellant in their detailed affidavit have unpacked their story which is detailed hereunder.

5. In or about October 2018, the respondent participated in a procurement process for the procurement of ambulances at the Ministry of Health. Before the process was over, the Ministry of Health cancelled the procurement proceedings by writing the word cancelled across the very advertisement they used in inviting for the same. Before the cancellation bidders including the respondent participated in their technical evaluation to assess their capacity as per the requirement of the procurement process. This exercise made the bidders including the respondent to incur expenses. However, it was express in the bidding documents that such expenses would be borne by the bidders.

6. After learning about the cancellation, the respondent commenced this proceeding in the High Court, Commercial Division Lilongwe challenging the cancellation arguing that the cancellation was not done in the public interest as required under section 46(b) of the Public Procurement and Disposal of Public Assets Act (PPDPA).

7. The respondent claimed damages for loss incurred by reason of such alleged illegal cancellation, legitimate expectation, and that he should be compensated.

8. The appellant challenged the mode of commencement of the proceedings and by consent of the parties, the application was converted to summons. The appellant filed defence denying liability.

9. On 29th July 2020, the matter proceeded for mediation before Justice Mtalimanja. It was resolved that the matter bordered on the interpretation or application of section 46(b) of the Public Procurement and Disposal of Public Assets Act.

10. The High Court made several directions which were four in number. The appellant failed to file its submissions by the ordered date due to the sudden sickness of the concerned counsel who was handling the matter.

11. On 14th September 2020 the respondent made an ex-parte application striking out the defence and entering judgment without hearing under Order 2 rule 3(c) and Order 12 rule 4(1) of the Courts (High Court) (Civil Procedure) Rules, 2017(CPR) for failure on the part of the defendant to file submissions as directed by the court below.

12. The appellant made an application to set aside the judgment under Order 10 rule 1 and 2 as read with Order 12 rule 21 and Order 1 rule 5 of the CPR. On 3rd November 2020, the court below dismissed the application.

13. The appellant made an application for leave to appeal against the finding of the court below dated 3rd of November 2020 and 14th September 2020 which leave was granted.

14. On 8th February 2021 the Assistant Registrar assessed damages.

15. The appellant filed notice of appeal in respect of the interlocutory judgment dated 14th September 2020 and 3rd November 2020. The said notice of appeal is exhibited as NC1 and the order for leave to appeal is exhibit NC2. However, the ruling of the court below dated 9th November 2021 suggest that there is need for leave to appeal against the order on assessment regardless of the fact that leave for appeal against judgment was already obtained.

16. On the 13th of October 2021, the appellant filed applications for stay of enforcement as well as an order amending the notice of appeal. The court below declined to grant the applications hence this application to the court. The ruling of the court is exhibit NC#.

17. From the respondent's side, the story is as below.

18. The respondent says that an appeal is yet to be entered in this court, in that the court record of the appeal itself has not been settled in the High Court. That it is only after the court record has been settled in the High Court and the file is transmitted to this court that this court has jurisdiction to entertain an application as clearly provided for under Order 1 rule 19 of the Supreme Court of Appeal Rules. Therefore, this application is premature.

19. That the leave to appeal that was granted by Justice Mtalimanja on 16th November 2021 was only in respect of her order of the 3rd November 2020 and no other judgment, order or ruling of the court. The appellant's own notice of appeal bears testimony to this fact as can be seen in exhibit PN1.

20. That there has never been any application for leave to appeal against the judgment of the 14th September 2020 and the ruling on assessment of damages of 8th February 2021 both of which were made in chambers and required specific leave of their own to be appealed against.

21. The appellant cannot use the leave that was granted in the order of 3rd November 2020 to bring an appeal against orders which were not part of the order in respect of which leave was granted and cannot by way of application for leave to amend notice of appeal introduce into the notice of Appeal, appeals against orders require their own leave to appeal.

22. The appellant is trying to file appeals through the backdoor knowing very well that time expired. Therefore, as there is no leave to appeal out of time against the judgment, order and ruling of the 14th September 2020, 3rd November 2020 and 8th February 2021 respectively, the appellant's application to amend the notice of appeal cannot be granted.

23. On the issue of stay of execution, as there is no appeal pending against the decision of the court below, this application is baseless. In the instant case, there is no enforcement order that has been issued against the appellant. The application is therefore premature.

24. The critical question that I have to address in this application is whether I am properly seized of this matter. This matter was brought under Order 1 rule 18 as read with Order 111 rule 5 of the Supreme Court of Appeal Rules. I therefore take it that the Appellant is entitled to engage this Court which has powers to hear an

application of this nature to amend the Notice of Appeal. It is however very clear from the wording of Order 1 rule 18 of the Supreme Court of Appeal Rules that an application to amend a Notice of Appeal is nowhere provided by law that it could be made in the Court below. Such powers are only with this Court that has the power to amend the Notice of Appeal.

25. I have looked at Order 111, rule 19 of the Supreme Court of Appeal Rules which provides:

“After an appeal has been entered and until it has been finally disposed of; the Court shall be seized of the whole of the proceedings as between the parties thereto, and except as may be otherwise provided in this Order, every application therein shall be made to the Court and not to the Court below.”

26. In order to satisfy Order 111 rule 19 of the Supreme Court of Appeal Rules, this application can only be made after an appeal has been entered. The million question here is whether such an appeal has been entered. In the case of **Lackson Chimangeni Khamalatha and 26 Others vs The Secretary general of The Malawi Congress Party, The Director of Elections of the Malawi Congress Party and the Malawi Congress Party** MSCA Civil Appeal No 6 of 2016, Justice Anaclet Chipeta SC held as follows:

“Actually that is why my setting down of this Summons was conditional on my first being addressed, and being convinced that I undoubtedly have jurisdiction over the Summons herein before I could accept any substantive arguments in it. In so trading with care, it becomes necessary that I quote Order 111 rule 19, which the respondents also had occasion to refer to in their arguments on the subject of jurisdiction. It deals with the control of proceedings during pendency of appeal and is therefore directly relevant for purposes of my gauging whether I can hear the Summons of the Applicants/Appellants at the stage they have brought it up pending the hearing of their appeal. It reads:

“After an appeal has been entered, and until it has been finally disposed of the court shall be seized of the whole of the proceedings as between the parties thereto, and except as may be otherwise provided in this/every Application therein shall be made to the Court and not the Court below.”

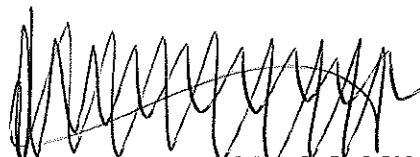
27. It is my considered view that entry of an appeal in the Supreme Court must be understood from Order 111 rules 10 and 11 of the Supreme Court of Appeal Rules. This Order requires the Registrar of the Court below to file the record in the Court when ready, together with-

- a) a certificate of service of the notice of appeal;
- b) four copies of the record for the use of the Court;
- c) the docket or file of the case in the court below containing papers or documents filed by the parties in connection therewith. The Registrar is required to serve the above documents on all the parties mentioned in the Notice of Appeal who have filed an address for service and enter the appeal in the cause list and give notice to the parties of the date of hearing.

28. I am satisfied that the Record of Appeal in this matter was not yet settled at the time I was hearing this application. It is only after the Record of Appeal is settled in the High Court and filed with the Supreme Court and served on the parties that I can safely say that this appeal has been entered.

29. From the totality of the facts before me, I find that this application is pre-mature as the court is not yet seized with the Appeal. However, taking into account the nature of the dispute and the economic repercussions on the State, I order that the record of appeal be ready within 21 days from the date of this ruling. I further order that pending this exercise, the Respondent should not proceed to enforce the default judgment that they obtained. Each party to meet its own costs.

Dated this 15th Day of February 2022



HONOURABLE JUSTICE M.C.C. MKANDAWIRE

JUSTICE OF APPEAL