



IN THE MALAWI SUPREME COURT OF APPEAL
MISCELLANEOUS CRIMINAL APPLICATION No. 1 OF 2023

(being Miscellaneous Criminal Review no.8 of 2022,
High Court, Lilongwe District Registry)

Between:

FRIGHTON PHOMPHO

APPLICANT

and

MARTHA CHIZUMA
THE REPUBLIC

1st RESPONDENT
2nd RESPONDENT

RULING

(*nyaKaunda Kamanga, JA, 12th January 2023*)

1. On 10th January 2023, the Applicant, Frighton Phompho, through Messrs. Gobz & Rechtswissenschaft filed before a single member of this Court an *ex parte* application for stay pending appeal pursuant to Order 1, rule 18 of the Supreme Court of Appeal Rules and the inherent jurisdiction of the Court. The application was issued by the Registrar on 11th January 2023. Documents filed in support of the application which the Applicant relies on are a certificate of extreme urgency, an affidavit of Michael Goba Chipeta, the legal practitioner who has conduct of this matter on behalf of the Applicant which contains facts relied upon in support of the application and skeleton arguments.

2. From the abovementioned documents and the decisions of the High Court that are attached as exhibits to the affidavit, the brief facts of this matter are that on 22nd April 2022 the First Respondent Martha Chizuma, the Director of the Anti-Corruption Bureau applied to the High Court to review of proceedings in the Senior Resident Magistrate's Court sitting at Mzuzu, pursuant to section 26(1) of the Courts as read with sections 360 and 362(1) of the Criminal Procedure and Evidence Code. The First Respondent was challenging the regularity and propriety of the criminal proceedings that were commenced against her by Mr. Frighton Phompho, the Applicant herein. On 6th April 2022 the Applicant had filed a complaint under s. 83 of the Criminal Procedure and Evidence Code to facilitate the prosecution of the First Respondent. The allegations of the Applicant were that the First Respondent had committed offences under the Corrupt Practices Act and the Penal Code following an alleged audio recording of a private telephone conversation. On 7th April 2022 the Senior Resident Magistrate made an order to the effect that the Director of Criminal Investigation in the Malawi Police Service had to carry out further investigations on the complaint and proceeded to summon the First Respondent for interrogation.
3. The outcome of the review proceedings was that on 30th September 2022 the High Court ruled in favour of the First Respondent and ordered the striking out of the criminal proceedings that the Applicant had commenced at Mzuzu Magistrate's Court and set aside the order that the Senior Resident Magistrate had made. The Applicant being dissatisfied with the ruling of the High Court he has appealed against the whole decision to this Supreme Court of Appeal and sets out several grounds of appeal which appear in the Notice of Appeal that was filed in the High Court on 28th October 2022. On 9th December 2022 the High Court declined to grant an order for stay of execution pending determination of appeal of the said ruling of 30th September 2022. The Applicant then decided to exercise his entitlement to have the application determined by this Court.
4. In this Court, the Applicant seeks an order that the execution of the High Court's ruling on review dated 30th September 2022 in Miscellaneous Criminal Review no.8 of 2022 be stayed pending determination of the Applicant's appeal to this apex Court. The main factual issues pertaining to

the matter which are contained in the affidavit of Counsel Chipeta in support of the extreme urgency of the present application and which he states justifies it being made *ex parte* are contained in paragraphs 7 and 8 and are as follows:

7. *“In execution of the High Court’s Ruling being appealed against, the Malawi Law Society Disciplinary Committee has since issued me with a Summons to a Conduct Meeting set down to take place this Friday, the 13th day of January 2023. Copy of the said MLS Summons to me is attached hereto as Exhibit “MGC 4.”*
8. *Whether such inquiry into my conduct by the Malawi Law Society as ordered by the High Court is appropriate, in fact, is an issue raised in the Applicant’s ground 6 of the appeal, an issue yet to be determined by the Supreme Court.”*

5. The legal practitioner for the Applicant contends that until the Supreme Court of Appeal has determined the issues raised in the grounds of Applicant’s appeal, there is real risk of injustice if the ruling appealed against is not stayed. It is the view of the Applicant’s lawyer that it is only just and proper that the execution of the ruling being appealed against be stayed pending determination of the Appeal. The Applicant rely on the case of *The State v The Inspector General of Police and others, ex parte Stanford Siliro Shaba on behalf of T S (minor)*, MSCA Miscellaneous Civil Appeal No. 5 of 2022, to contend that the Supreme Court of Appeal has inherent jurisdiction to stay the order of the court below where the justice of the case requires otherwise. The legal practitioner for Applicant refers to the Notice from the Malawi Law Society Disciplinary Committee and relying on the case of *Chisale v Republic*, Miscellaneous Appeal No. 5 of 2021, he argues “that where review proceedings have been escalated from the High Court to the Supreme Court, stay of the High Court Ruling or proceedings must necessarily be stayed just like the Magistrate Court’s proceedings are stayed pending the review by the High Court.” The Applicant submits that the facts and circumstances of the present case warrant this Court to grant the stay orders sought because, until the Supreme Court of Appeal has determined the issues raised in the grounds

of the Applicant's appeal, there is a real risk of injustice if the ruling appealed against is not stayed.

6. The cases of *Aboo v Republic*, MSCA Miscellaneous Criminal Application no. 3 of 2021, and *Chisale v Republic*, Miscellaneous Appeal No. 5 of 2021, establishes the principle that where proceedings in subordinate court have been stayed pending criminal review before the High Court and where the ruling on review has been appealed upon to this Court then the order staying the subordinate court proceedings must subsist until the final determination of the appeal.
7. Apart from the above legal principle, this Court is also reminded by the case of *Woodworth v Chitakale Plantations Company Limited* [2008] MLR 159 (SCA) to bear in mind the principles that the Court will not grant a stay unless it is satisfied that there is a good reason for doing so and that the Court does not "make a practice of depriving a successful litigant of the fruits of his litigation... pending an appeal": *Monk v Bartram* (1891) 1 QB 346. In addition, the question of whether or not to grant a stay is a discretionary one for the Court and must be exercised judicially depending on the circumstances of each case: *Chichiri Shopping Centre Ltd v Ridgeview Investments* [2013] MLR 38 (SCA). The application for stay of execution involves this Court exercising discretionary powers and the Court considers whether there are special circumstances or factors which warrant a stay order before making an order that would be in the best interests of justice. One of the factors that guides the Court's discretion is whether or not there are special circumstances which speak in favour of a stay. This court finds that the Applicant has failed to clearly explain the form and nature of injustice that will be caused to him. All we have is a general argument that injustice will be caused without explaining by whom and against whom. How can this court be persuaded to grant the relief sought when the nature of the alleged injustice on the parties has not been properly explained?
8. This court finds the factors raised in the affidavit which makes this application also urgent do not concern the Applicant or any of the parties to the proceedings in the court below or those on the notice of appeal. The contents of paragraphs 7 and 8, which have been reproduced above, relate to the legal practitioner of the Applicant, who was not a party to these proceedings in the

court below or the appeal in this Court. It is the considered view of this Court that the Applicant has not shown any facts or special circumstances establishing that injustice will be occasioned on the Applicant if the relief sought is not granted. It is therefore unreasonable for Counsel to expect this court to be persuaded by his arguments which are merely aimed at serving his interests and not those of the parties to the proceedings. This Court also notes the finding of High Court that it would be unjust to the First Respondent and not in the interests of justice to grant an order that “would effectively revive the proceedings in the Mzuzu Court.” Further, it is unethical for the legal practitioner to take out an *ex parte* application for stay of execution of the ruling of the High Court on the pretext that it is on behalf of the Applicant when the facts revealed in his affidavit and the skeleton arguments show that it is the legal practitioner himself who is aggrieved with the execution of the ruling of the High Court. To grant the relief sought would in a way be allowing this Court to entertain the desires and wishes of a non-party to the proceedings which is not allowed in law.

9. The case of *State v Attorney General and others, ex parte Banda*, [2011] MLR 351 (SCA), while emphasising that a stay should only be granted where there are good reasons for departing from the starting principle that the successful party should not be deprived of the fruits of the judgment in his favour also makes it is very clear that this Appeal Court will not entertain a person who was not a party in the proceedings in the court below which resulted in the ruling forming the subject of the appeal.
10. This Court has considered the issues raised by the legal practitioner for the Applicant very carefully and finds that the relief sought cannot be granted in law on the authority of *State v Attorney General and others, ex parte Banda* as the alleged injustice seems to concern the legal practitioner for the Applicant, who himself was neither a party to the proceedings in the High Court nor to the Appeal that has been initiated by the Applicant. The long and short of it is that Counsel Chipeta cannot seek this type of relief in the name of the Applicant when the alleged injustice concerns himself and when he is not a party to the proceedings. On that score alone the application must be dismissed. Further, the application is declined on the ground that granting the relief would not uphold the principle of stay pending appeal in criminal review

proceedings which has been established in the cases of *Aboo v Republic* and *Chisale v Republic*.

Dated this 12th day of January 2023 at Chichiri, Blantyre.



Dorothy nyaKaunda Kamanga
JUSTICE OF APPEAL

Mr. Chipeta	:	Legal practitioner for the Applicant.
1 st & 2 nd Respondent	:	Not served/absent.
Mrs Mthunzi	:	Law Clerk.