



IN THE SUPREME COURT OF MALAWI
MSCA CRIMINAL APPEAL NO. 05 OF 2018

(Being High Court of Malawi, Principal Registry, Criminal Appeal No.28 of 2015)

BETWEEN:

THE REPUBLIC-----APPELLANT

AND

MUHAMMED JAWAD-----RESPONDENT

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

Majamanda, Counsel for the Appellant

Maele, Counsel for the Respondent

C. Fundani, Recording Officer

RULING

1. This matter came before me by way of a motion for an order discharging stay of execution of an order reversing the forfeiture order. The matter was brought pursuant to section 7(a) of the Supreme Court of Appeal Act, Order IV Rule 2 of the Supreme Court of Appeal Rules and inherent jurisdiction of the Court. The application is supported by an affidavit.

2. This application is anchored on the affidavit of Muhammad Jawad the Respondent. There are also skeleton arguments filed in support of the application. In a nutshell, the respondent was charged in the Senior Resident Magistrate Court sitting at Blantyre with two criminal offences namely:

(i) Illegal possession of foreign currency contrary to Regulation 3 of the Exchange Control Regulation, and

(ii) Attempting to illegally transfer foreign currency out of Malawi contrary to Regulation 11(1) of the Exchange Control Regulations.

3. On 24th September 2015, the lower court convicted the Respondent on his own plea of guilt and sentenced him to options of fines in default to custodial sentences. Copy of the sentence is tendered and marked as MJ1. The lower court also forfeited the sum of US\$269, 970.00 to the State.

4. The Respondent appealed against the forfeiture order to the High Court. The appeal succeeded and the forfeiture was set aside. A copy of the judgment from the Court below is tendered as MJ2.

5. Being dissatisfied with the decision of the Court below, the appellant filed a notice of appeal on 29th April 2016. A copy of the notice of appeal is MJ3. The Appellant also sought a stay of execution of the judgment of the Court below. The Court below declined to grant the said stay.

6. The Appellant applied for stay of execution pending appeal in this Court. A copy of the application is tendered as MJ4. The stay was granted.

7. The Respondent says that since 2016, almost 8 years ago, the Appellant has hardly prosecuted the matter. In 2018, the court could not proceed with the hearing because preparation of the record by the Appellant left a lot to be desired. The Respondent tendered exhibit MJ5 which is a copy of the letter which he received from his lawyers indicating the reason for failure of the appeal to be heard. Since the failed appeal, the Respondent says that the Appellant has not taken any steps to prosecute the appeal, and for now it is close to 6 years. The Respondent says that there is inordinate and inexcusable delay. Further, the Respondent says that the delay has occasioned serious, unwarranted business prejudice as the Respondent has been kept out of his money in the sum of US\$269, 970.00

8. The Respondent believes that the balance of justice and convenience tilts in favour of the discharging the stay of execution pending appeal. The Respondent therefore prays for an order discharging the stay of execution of the order of the court below.

9. On 7th March 2024, the Appellant filed an affidavit in opposition made by Zumbe Kumwenda who is Legal Services Manager with the Reserve Bank of Malawi.

10. The Appellant confirmed that what the Respondent had said in the affidavit was materially true and right.

11. The Appellant commented that with regards to the issue of want of prosecution of the appeal herein, the Appellant is aware that the record of the appeal was prepared by the court and that both parties filed skeleton arguments.

12. That it is not correct to say that the Appellant prepared the record of appeal. The record of appeal was prepared by the Registry at the court by court reporters amongst others as it is usually the norm.

13. That both parties were informed that the record of appeal was found wanting but were informed by the Registry that they could resolve the issue. In April 2021, their lawyers informed them through a letter exhibit ZK1. That in the premises, the Appellant is not guilty of failure to timely prosecute this matter as it is being stated in the affidavit in support or at all.

14. That the Appellant is also aware that the Respondent was also charged with the offence of money laundering of the sum of US\$269, 970.00 contrary to section 35(1) (c) of the Money Laundering Proceeds of Serious Crime Terrorist Financing Act. On 13th June 2019, the respondent was accordingly convicted in absentia. Copy of the judgment is tendered as exhibit ZK2.

15. That sentence has not yet been made in this case. Given the fact that the court is yet to pass the sentence in the said criminal case, it is not appropriate that the order for stay should be discharged to enable the Respondent access the forfeited money.

16. The Appellant therefore prays to this court for a dismissal of the application.

17. On the 15th of April 2024, the Appellant filed a notice of intention to cross examine the Respondent on his affidavit at the hearing of the matter. When the Court convened for hearing on the 24th of April 2024, both parties were present. After briefly hearing them, I was of the view that there was no need for cross examination of the Respondent by the Appellant and that I found no merit in this application by the Respondent.

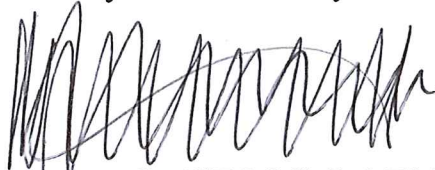
18. It is very clear from the affidavit in support of this application that the Respondent had relied on the ground that since 2016 (almost 8 years ago), the Appellant has hardly prosecuted the appeal. Having perused through the court record, I however respectfully disagree with the Respondent. I find that in 2018 the court below could not proceed with hearing because preparation of the record left a

lot to be desired. As per Order 1V Rule 8 of the Supreme Court of Appeal Rules, the Registrar of the Court below is responsible for preparation of the record of appeal and shall file the record in this court. The duty is not on the Appellant. Therefore, if the record left a lot to be desired as the Respondent has stated in this case, the fault was with the Registrar and not the Appellant. This can therefore not be used as a basis for discharging the stay.

19. I have also taken into account that in pursuing this application, the Respondent had concealed a lot of vital information. For instance, the Respondent did not at all disclose that the same US\$269,970.00 was also an exhibit in a case of Money Laundering in which the Respondent was convicted and just waiting for sentencing. It would therefore be a mockery to justice for this court to grant the Respondent the prayer sought.

20. I therefore dismiss this application with costs.

Made at Blantyre this 19th Day of June 2024



HONOURABLE JUSTICE M.C.C. MKANDAWIRE

JUSTICE OF APPEAL