



REPUBLIC OF MALAWI

IN THE SUPREME COURT OF APPEAL

SITTING AT LILONGWE

MISCELLENEOUS CIVIL APPLICATION NO. 09 OF 2022

(Being High Court, Mzuzu District Registry, Probate Cause No. 144 of 2007)

BETWEEN

BENTRY CHITAYA-----1ST APPELLANT
CHOSANI CHITAYA-----2ND APPELLANT
SOPHIE CARLO CHITAYA (MRS MWASE)-----3RD APPELLANT
LINDA CHITAYA-----4TH APPELLANT

-AND-

CHIUKEPO CHITAYA-----1ST INTERESTED PARTY
CHUMA CHITAYA-----2ND INTERESTED PARTY
EMILY CHITAYA-----3RD INTERESTED PARTY
MWAYI CHITAYA-----4TH INTERESTED PARTY
TIYANJANE CHITAYA-----5TH INTERESTED PARTY
PAWEMI CHITAYA-----6TH INTERESTED PARTY

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

Chibwe, Counsel for the Appellants

Ghambi, Counsel for the Respondents

Mrs. Chimtande, Recording Officer

RULING

1. This is the Respondents' application to dismiss appeal for want of prosecution. The application is brought under Order 111 Rule 17(3) of the Supreme Court of Appeal Rules. The application is supported by an affidavit made by Chuma Chitaya. The Respondents also filed skeleton arguments in support of this application.
2. The Appellants filed an affidavit by Vitumbiko Chitaya opposing the application.
3. This case has a very long history which has been ably narrated by the Respondents through the affidavit of Chuma Chitaya. I shall however not delve into this history. My focus will be on the issue whether the Appellants have failed to prosecute the appeal warranting a dismissal of the appeal.
4. Relevant to this application therefore is paragraph 38 of the affidavit of Chuma Chitaya. In the said paragraph, it is stated that on the 8th of February 2023, the court lifted the stay order it granted on 8th March 2022, and among other directives, ordered the Appellants to do and complete settlement of the record within 30 days from the day the Registrar of the Mzuzu High Court issued the records.
5. The Respondents say that the Appellants failed to comply with the order as the record was completed and served recently on the 8th of August 2024. Since then, skeleton arguments have not been filed or served.
6. The Respondents conclude by saying that the Appellants have clearly shown that they are not willing to prosecute the matter even at the appeal stage, as up to now they have refused to file and serve the required documents for the appeal to be trial ready.
7. The Respondents therefore humbly pray that the appeal should be dismissed for want of prosecution with costs in this court and the court below.
8. The Appellants first submitted that this application is grounded on a wrong provision of the law. The application is based on Order 111 Rule 17(3) of the Supreme Court of Appeal Rules. This Rule is in the following words:

(3) If the respondent alleges that the appellant has failed to comply with part of the requirements of rule 2 or 12 of this order, the court if satisfied that the appellant has so failed, may dismiss the appeal for want of prosecution or make such other order as the justice of the matter may require. A look at rule 2 shows that it deals with the notice and grounds of appeal and rule 12 deals with an order for the Appellant to pay security for costs. The Appellants counsel therefore poses the question of whether

the Appellants herein have failed to comply with the said orders meriting this application. The Appellants' counsel concludes that from the affidavit made by the Respondents, there is no allegation of breach of rule 2 and even rule 12.

9. The Appellants say that the record of appeal was settled by the parties through a consent order issued by the Registrar on 30th March 2023 as shown in exhibit 'BC1'. Thereafter the Appellants proceeded to prepare the record of appeal which was later certified by the Registrar. The Registrar served the records of appeal to both parties on 12th of August 2024. As the Appellants are not responsible for the service of the record they can not be blamed for the delay.

10. The Appellants say that they prepared skeleton arguments, a list of authorities and authorities themselves in support of the appeal as shown in exhibit 'BCX2'.

11. Due to resource constraints, the Appellants say that they have been unable to print the large documents for the full bench. As it stands, the Appellants say that they are in dire need of funds to clear tax obligations for the Estate and have even reached out, though unsuccessfully, to the Respondents to access the funds that were deposited in court.

12. The Appellants say that since the record of appeal is ready and all the necessary documents including the skeleton arguments are already prepared and ready for filing, it will be in the interest of justice that the appeal should be heard on its merits.

13. The Appellants therefore pray to this court to dismiss the application for lacking any legal basis and that the court should enlarge the time within which skeleton arguments and all attendant documents be filed.

14. I have carefully looked at the application that is before the court. It is very clear that this application is grounded on Order 111 Rule 17(3) of the Supreme Court of Appeal Rules which deals with specific issues which are well elaborated in rules 2 and 12 of the Supreme Court of Appeal Rules. On the other hand, the sworn statement in support of this application relates to my ruling of 8th February 2023 in particular my orders giving timelines within which to perform specific activities. The orders emanating from the said ruling do not fall under the ambit of Order 111 Rule 17(3) of the Supreme Court of Appeal Rules.

15. It is important to put it on record here that a party who moves the court should always cite the correct provisions of the law that embrace the court with mandate and jurisdiction. The court will not allow a fishing expedition as was the case in this

application. Therefore, the court will not engage itself in any judicial adventurism. This application therefore falls apart.

16. I have however taken into account the checkered history of this matter. I noted that following my ruling of 8th February 2023, a lot has already been accomplished by the parties to ensure that the appeal is heard. I therefore feel compelled to engage stricter case management techniques here.

17. Accordingly, it is my order that the Respondents should complete the printing of the documents and all other remaining processes within 21 days from the date of this ruling. Otherwise, the appeal herein shall automatically stand dismissed without further action from the Respondents and this court.

18. I order that each party should meet their own costs.

**MADE IN CHAMBERS THIS 6th DAY OF NOVEMBER 2024 AT
BLANTYRE**

A handwritten signature in black ink, appearing to read 'M.C.C. MKANDAWIRE SC', written in a cursive, somewhat stylized script.

M.C.C. MKANDAWIRE SC

JUSTICE OF APPEAL