



**IN THE SUPREME COURT OF APPEAL**

**MISCELLANEOUS CIVIL APPLICATION NO. 50 OF 2022**

*(Being High Court Commercial Case NO. 242 of 2022, Lilongwe District Registry)*

**BETWEEN:**

**CASSIDY CHALIMBA**

**t/a KRISKEN GENERAL SUPPLIERS-----APPLICANT**

**AND**

**STANDARD BANK PLC-----RESPONDENT**

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

Kadzipatike, Counsel for the Appellant

Njovu/Soko/Misanjo/Masamba, Counsel for the Respondent

C. Fundani, Recording Officer

**RULING**

1. On the 9<sup>th</sup> of November 2023, the Applicant Cassidy Chalimba t/a Krisken General Suppliers filed an inter partes notice of motion to set aside the Respondent's fresh application to set aside a default judgment. The application was brought under Section 7 of the Supreme Court of Appeal Act and Order 1 Rule 18 of the Supreme Court of Appeal Rules and the Inherent Jurisdiction of the Court.
2. On 24<sup>th</sup> November 2023 the Applicant filed supplementary affidavits and skeleton arguments in support of the application.
3. On 29<sup>th</sup> November 2023, the Respondent filed a notice of preliminary objections to notice of motion to set aside application. The notice of preliminary objections was made under section 7 and 21 of the Supreme Court of Appeal Act, Order 1 Rule 18,

Order 111 Rule 14 of the Supreme Court of Appeal Rules and Inherent Jurisdiction of the court. The Respondent also filed skeleton arguments in support of the preliminary objections and in opposition to Applicant's application.

4. On 4<sup>th</sup> December 2023, the Applicant filed skeleton arguments in opposition to the Respondent's preliminary objections.

5. When the matter came for hearing before the court on 5<sup>th</sup> December 2023, I ordered that we should first dispose of the preliminary objections that had been lodged by the Respondent. In order to appreciate the basis of this preliminary objection, I found it imperative to go back to the inter parte notice of motion filed by the Applicant on 9<sup>th</sup> November 2023.

6. The Applicant commenced an action against the Respondent in the court below on 29<sup>th</sup> June 2022. On 12<sup>th</sup> of July 2022, the court below entered a default judgment. On 21<sup>st</sup> July 2022, the Respondent filed for stay of execution which was granted by the Assistant Registrar in the court below pending the filing of an application to set aside the default judgment. On the 9<sup>th</sup> of September 2022, the Assistant Registrar dismissed the Respondent's application.

7. On 30<sup>th</sup> September 2022, the Respondent filed for a notice of referral intended to move the judge of the court below to review the decision of the Assistant Registrar. In between the Applicant through the Sheriff of Malawi collected MK24, 976, 277.79 pending assessment of damages and interest. The referral has not been prosecuted by the Respondent.

8. On 12<sup>th</sup> October 2022 the respondent filed an application before the Registrar for stay of execution of the Registrar's decision pending hearing of the referral.

9. On 3<sup>rd</sup> of November 2022, the Respondent filed an appeal to the Supreme Court against the ruling of the Assistant Registrar dated 9<sup>th</sup> September 2022.

10. On 3<sup>rd</sup> November 2022, the Respondent filed in this court inter-parte notice of motion for leave to appeal and extension of time within which to appeal. The court dismissed the applications on the grounds that the Respondent had first made the application in the court below before approaching the Supreme Court. The court further guided the Respondent to seek leave in the court below and to wait for assessment of damages and interest to be concluded.

**11.** The Assistant Registrar of the court below assessed damages and awarded MK65,000,000.00 but the issue of interest was referred to the Judge in the court below as the Applicant was claiming MK5 billion as interest.

**12.** Following the award of damages, the Respondent filed a second notice of appeal against the order of the Assistant Registrar dated 9<sup>th</sup> September 2022 again and the order of assessment of damages. The notice was filed on 24<sup>th</sup> March 2023.

**13.** After filing the second notice of appeal on 24<sup>th</sup> March 2023, the Respondent simultaneously filed a without notice application for suspension of the enforcement of the order of assessment pending the hearing and determination of the appeal. The application was granted ex-parte on condition that inter-partes application should be made within 7 days. This order is still in force.

**14.** On 21<sup>st</sup> April 2023, the Respondent filed a fresh notice to set aside the default judgment in the court below. The Applicant filed a preliminary objection to this fresh application to set aside the default judgment of the Registrar in the Court below. The basis for the preliminary objection is that there were already multiple applications which are not even prosecuted and also that the Judge in the Court below has got no jurisdiction.

**15.** On 12<sup>th</sup> October 2023, the Registrar below set down the matter for hearing on the 25<sup>th</sup> of October 2023. On the 25<sup>th</sup> of October 2023, the Judge in Chambers heard the matter. The Applicant objected to the hearing of the Respondent's fresh application. The Judge dismissed the Applicant's objections and proceeded to hear the matter. The court below adjourned the matter for judgment to the 2<sup>nd</sup> of November 2023.

**16.** The Respondent's preliminary objection is anchored on the following:

i) That the Applicant's application is not supported by any of the Sections or Rules under which it is said to have been brought.

ii) That the notice of motion does not have any factual basis as there is no application to set aside default judgment pending in the High Court which this Court can set aside.

iii) That even if such an application was pending before the High Court, this application would have been incompetent as a similar application, in the first instance, would have been required to be prosecuted before the High Court.

iv) That this application is a disguised appeal against the decision of Hon. Justice Dr Chifundo Kachale made on the 2<sup>nd</sup> of November 2023, contrary to section 21 of the Supreme Court of Appeal Act. That this appeal is inchoate and that this court has no jurisdiction to consider the application.

v) That section 7 of the Supreme Court of Appeal Act, Order 1 Rule 18 of the Supreme Court of Appeal Rules and this court's jurisdiction cannot found an application of the kind that the Applicant has placed before the Court.

vi) Considering that the Respondent's application to set aside default judgment was heard and disposed by Hon. Justice Dr Chifundo Kachale on 2<sup>nd</sup> of November 2023, there is in fact no application to set aside default judgment which this court can set aside.

vii) That this court can only be seized of an application if the same was being pursued in the context of an appeal or in furtherance of an appeal.

viii) That relief against the order of Hon. Justice Dr Chifundo Kachale setting aside the default judgment can only be obtained through appeal to the full court under section 21 of the Supreme Court of Appeal Act.

17. Both parties addressed the court at some considerable length. The parties referred me to several case authorities such as **Elida Liphava and Others vs Michael Mbaula and Another MSCA CIVIL APPEAL Number 40 of 2019 (unreported), The State (On The Application of Getrude Hiwa) and Office of the President and Cabinet and Secretary to The President and Cabinet MSCA Case Number 1 of 2021 and Malawi Communication Regulatory Authority and Daniel Datch and Others MSCA Miscellaneous Application Number 61 of 2012** just to mention a few. I shall not delve into most of the issues that the Applicant had raised in their skeleton arguments. But what I did note was that Counsel for the Applicant was raising substantive issues relating to the jurisdiction and the decision of Hon. Justice Dr Chifundo Kachale. The impression I had was that the Applicant was deliberately dragging the court to approach this application as if it was an appeal against the decision of the court below. Fortunately, I did not get trapped. I was left convinced that Counsel for the Applicant was strategically disguising this application as if it was an appeal.

18. My simple understanding of the preliminary objection by the Respondent is that the Applicant is not properly before the Court. The Applicant's application is coded: 'Inter-Partes Notice of Motion to Set Aside the Respondent's Fresh Application to

set Aside a Default Judgment.’ This application is based on section 7 of the Supreme Court of Appeal Act and Order 1 Rule 18 of the Supreme Court Rules.

**19.** Section 7 of the Supreme Court of Appeal Act provides:

“A single Member of the Court may exercise any power vested in the Court not involving the hearing or determination of an appeal.”

**20.** This section confers jurisdiction on a single Member of the Court but expressly outs the single Member’s jurisdiction in any matter involving hearing or determination of an appeal.

**21.** Order 1 Rule 18 of the Supreme Court of Appeal Rules provides as follows:

“Whenever an application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below but, if the Court below refuses the application, the Applicant shall be entitled to have the application determined by the Court.”

**22.** I note that this Rule is extremely clear and one wonders why it is being deliberately misunderstood or misapplied. Order 1 Rule 18 of the Supreme Court of Appeal Rules confers on the High Court (Court below) and the Supreme Court of Appeal (the Court) concurrent jurisdiction. This concurrent jurisdiction is however only triggered when the High Court (Court below) refuses to grant an application.

**23.** I have gone through the Court record before me. I find that the present application was not made in the first instance to the Court below. I also find that the Court below did not refuse any application by the applicant. It is also established as a fact that there is no pending application in the Court below after the ruling of Justice Dr Chifundo Kachale. I am aware that the Applicant had entered a preliminary objection to the application by the Respondent in the Court below. That preliminary objection is not the application that is envisaged in Order 1 Rule 18 of the Supreme Court of Appeal Rules.

**24.** It is therefore very clear from my evaluation of the material before me that, the Applicant's application herein has got no legs on which to stand. The Court can not even delve into the legal philosophy of inherent jurisdiction where it is very clear that the application itself is misconceived. This application is completely misguided. The Preliminary objection by the Respondent therefore succeeds. This application is therefore dismissed with costs but only for two Counsels.

Made at Blantyre this 22<sup>nd</sup> day of December 2023.

A handwritten signature in black ink, appearing to read 'M.C.C. Mkandawire', written in a cursive style.

**HONOURABLE JUSTICE M.C.C. MKANDAWIRE**

**JUSTICE OF APPEAL**