IN THE SUPREME COURT OF APPEAL

PRINCIPAL REGISTRY

MISCELLANEOUS CRIMINAL APPEAL NO. 7 0F 2021

BETWEEN:

FAIZAL GAFFAR LATIF.....1ST APPLICANT

ZARINA LATIF.....2ND APPLICANT

MAPETO (DWSM)..... .....3RD APPLICANT

AND

THE REPUBLIC .....RESPONDENT

CORAM: HONOURABLE JUSTICE H.S.B. POTANI JA

Chione, Counsel for the Applicants

Msisha SC, Counsel for the Respondent

Chungu, Counsel for the Respondent

C Masiyano, Court Clerk

RULING

Before this Court is a Notice of Motion on an Application for Release of Goods seized by the Commissioner General of Malawi Revenue Authority. As indicated

in the notice of motion itself, the application is made pursuant to sections 42(2) (f) (iii), 28 ,29 and 41(3) of the Constitution of Malawi read together with section 149(1) of the Criminal Procedure and Evidence Code, sections 146, 147 and 149 of the Customs and Excise Act and section 7 of the Supreme Court of Appeal Act and inherent jurisdiction of the Court.

Initially the Applicants approached the Court *ex parte* but the court directed that the application should be heard *inter partes* and gave attendant directions on the filing and service of the necessary processes. The matter was set down for hearing on December 15, 2021 at 2.30 PM. On the appointed day, the hearing could not proceed as it was reported by Counsel Chione acting on a brief that Counsel Wame siesed of the matter was in isolation due to suspected Covid 19 infection. The matter was adjourned to January 6, 2022 at 2.00 PM unfortunately the hearing also failed, this time is was now the Court that was in isolation on account of a similar infection. Another date of January 19 was set but again the hearing failed due to the unavailability of the Court. The matter was eventually heard on January 26.

In support of the application, there is the affidavit of the 1st Applicant. There are also skeleton arguments filed on November 30, 2021 and subsequent ones filed on February 1, 2022, following a direction by the Court. On the part of the Respondent, initial skeleton arguments in response were filed on December 13, 2021 and after the Applicants filed served the skeleton arguments as ordered by the Court, the Respondent filed and served skeleton arguments in response thereto on February 7, 2022.

The brief facts of the matter which are not in contention are that the 1st and 2nd Applicants, in their capacity as officers of the 3rd Applicant, Mapeto (DWSM) Limited, alongside others are answering criminal charges in relation to alleged offences under the Customs and Excise Act, the Value Added Tax Act, the Penal Code and the Financial Crimes Act. The case is before the Blantyre Chief Resident Magistrate's Court. In connection with the alleged offences, the Commissioner General of the Malawi Revenue Authority seised and placed under embargo some goods belonging the Mapeto (DWSM) Limited Company pending the disposal of the case.

It is the contention of the Applicants that the seizure of the goods in an infringement of their constitutional right to be presumed innocent and to economic activity hence it is tantamount to pretrial punishment and arbitrary deprivation of property. They aver that the seised goods being trading stock, the seisure has resulted in the business of the 3rd Applicant being chocked thereby threatening its own survival and putting at risk close to 1,000 jobs. It is also the Applicants' assertion that goods are perishable in nature and prone to deteriorate and lose value with passage of time. According to the Applicants, a similar application was made before the trial court but it was adjourned *sine die* pending the disposal of some Review Proceedings before the High Court and it is not know when those proceedings will be heard and disposed of.

When the matter was called for the hearing on January 26, 2022, Counsel Chione, acting on a brief from Counsel Wame seised of the matter told the Court that Counsel Wame had instructed him to inform the Court that it should proceed to determine the matter solely on the basis of the material that he had filed and served without him orally addressing the Court. When asked by the Court to disclose what exactly was preventing Counsel Wame from appearing before the Court, Counsel Chione indicated that he was not told the reason but previously on January 19, Counsel Wame again gave him a brief to appear before the Court saying he had to attend a funeral. The Court then directed that it would proceed to hear the Respondent.

In his address to the Court, Senior Counsel Msisha appearing for the Respondent wondered why Counsel Wame who moved the Court on behalf of the Applicants was shying away from the Court. He proceed to bring to the attention of the Court that in the skeleton arguments in response, the Respondent raised a jurisdictional issue which the Applicants needed to respond to and that he mentioned this to Mr Wame as way back as January 6 when the hearing failed for reasons stated earlier herein but no such response came forth. Such being the case, Senior Counsel argued and submitted that the failure by the Applicants to respond to jurisdictional issue meant that they were in agreement with the position as presented by the Respondent that this Court does not have the jurisdiction to entertain the matter before it. He implored the Court to dismiss the matter on that account.

Bearing in mind that the issue of jurisdiction of the Court is a very fundamental one in the administration of justice, the onsidered it desirable to give the Applicants the last opportunity and window to make representations on the issue of jurisdiction and directed the Applicants to file and serve a response by 4 .00 PM on Monday, January 31 failing which the Court would proceed with the determination of the matter without hearing the Applicants on the issue of jurisdiction. It was not until February 1 that the Applicants did the needful. Then on February 7, the Respondent filed and served a reply which ought to have been done on February 2 as directed by the Court.

In the main, the Respondent relies on section 104 of the Constitution on the argument and submission that this Court does not have the jurisdiction to deal with the matter before it. The section is as follows:

(1) There shall be a Supreme Court of Appeal for Malawi, which shall be a superior court of record and shall have such jurisdiction and powers as may be conferred on it by this Constitution or by any other law.

(2) The Supreme Court of Appeal shall be the highest appellate court and shall have jurisdiction to hear appeals from the High Court and such other courts and tribunals as an Act of Parliament may prescribe.

[Emphasis supplied]

According to the Respondent, the reading of section 104(1) is clear that this jurisdiction of this Court is 2) the jurisdiction conferred to the Court by the Constitution is appellate jurisdiction.

The position of the Applicants is that in addition to section 104 of the Constitution, this Court as the highest court in the jurisdiction has inherent powers to review proceedings in the lower courts and that an application in that respect may be made directly to this Court from any subordinate court and reliance for that proposition is placed on the case of **Malawi Communication Regulatory Authority v Daniel Datch, Godfrey Itaye & Others** MSCA Misc Application No. 39 of 2012.

In the estimation of the Court, section 104 of the Constitution does not need any magical interpretation. It means what it plainly says. As provided for is subsection1,

the jurisdiction of this Court is that conferred by the Constitution or any ther law. By virtue of subsection 2 such jurisdiction is appellate and specifically to hear appeals from the High Court and such other courts and tribunals as an Act of Parliament may prescribe. What this means is that ordinarily, the jurisdiction of this Court is to hear appeals from the High Court and in some instances from other courts and tribunals as prescribed by an Act of Parliament. This is in sharp contrast with the jurisdiction of the High Court as provided for under section 108 of the Constitution as follows:

(1) There shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.

(2) The High Court shall have original jurisdiction to review any law, and any action or decision of the Government, for conformity with this Constitution, save as otherwise provided by this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.

It is very evident from sections 104 and 108 of the Constitution that the jurisdiction of the High Court is unlimited original jurisdiction while that of this Court is essentially limited to appeals. As observed by the Respondent in the initial skeleton arguments, in the case of the High Court, section 11(b) of the Courts Act gives in additional jurisdiction and relevant to the present case section 11b gives it all jurisdiction and powers, civil and criminal which belong to and are exercisable by any subordinate court. There is no similar power given to this Court is under the Courts Act which as rightly pointed out by the Respondent does not apply to this Court or under the Supreme Court of Appeal Act. At this juncture, the Court would wish to observe that the present case is distinguishable form the case of **Malawi Communication Regulatory Authority v Daniel Datch, Godfrey Itaye & Others** the Applicants seek to rely on as bestowing upon this Court the jurisdiction to entertain the application before it. What is evident from that case is that the High Court had refused to grant a stay order to the Applicant and that was when the

Applicant knocked on the doors of a single member of this Court. In the present case, the Applicants have not sought from and refused any reprieve by the High Court.

What the facts show is they made the application before the subordinate court before whom they are charged but they court could not consider the application as its hands were tied by a High Court order of stay of the proceedings before it which order was obtained at the behest of the Applicants themselves.

The Court has had occasion to consider section 149 of the Criminal Procedure and Evidence Code and sections 146,147, and 149 of the Customs and Excise Act which the Applicants cited in the header to their application. These provisions show that the application ought to have been made before the trial court and if refused move on to the High Court and if again refused then approach this Court, if need be. As it is, the application is prematurely before this Court. As matter of recollection, when the Applicants first approached the Court *ex parte,* as the Court was directing an *inter partes* hearing, it put it on record that the Applicants need to reflect if the application was competently brought before this Court.

In the light of the foregoing, this Court cannot at this stage entertain the Applicants' application. The avenue open to the Applicants is either to have the stay they obtained against their trial discharged if that has not yet been done in order to untie the trial court's hands so that it can deal with the application or approach the court that granted the stay to consider the application. Whichever of the two avenues the applicants would opted for, considering that the goods the subject of the application are prone to deteriorate, it is directed and ordered that the application should be heard and determined with 30 days from the court would get seised of it.

Made in Chambers day of March 11, 2022 at Blantyre.

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H.S.B POTANI JA