REPUBLIC OF MALAWI

IN THE MALAWI SUPREME COURT OF APPEAL

MSCA MISC. CIVIL APPLICATION NO. 29 OF 2023

(Being High Court, Commercial Division, Lilongwe Registry, Commercial Case No. 78C of 2020)

BETWEEN:

GEORGE JIVASON KADZIPATIKE……….……………………1ST APPLICANT
MACDONALD KAMWERA t/a KAM
BUILDING CONTRACTORS………..…………………………..2ND APPLICANT
AND
ZHEJIANG COMMUNICATIONS CONSTRUCTION
GROUP COMPANY LIMITED…………………. ………..………..RESPONDENT

Coram.

Hon Mr. Justice D. Madise JA

Mr. Chancy Gondwe for the Applicants

Mr. P. Likongwe for the Respondent.

Mr. K. Chimkono Clerk

RULING

Madise JA

Background.

1. This matter came before me as a single member of the Court pursuant to section 7 of the Supreme Court of Appeal Act hereinafter referred as the Act as read with Order I Rule 18 of the Supreme Court of Appeal Rules, and under the Inherent jurisdiction of the Court. The brief facts of the case are that the 1st Appellant represented the 2nd Appellant in the Court below as his Counsel in a Commercial Matter registered as Commercial Case No. 78C of 2020 at Lilongwe Registry of the Commercial Division of the High Court. The matter had been transferred from Mzuzu General Division of

the High Court. The matter was settled at mediation stage before Honorable Justice Malonda and there was a Settlement Agreement is exhibited herein and marked **GJK4**.

2. That the Assistant Registrar of the Court below handled the assessment of interest and delivered his ruling awarding the 2nd Applicant the sum of MK48, 541, 831. 27. The Order on assessment is now exhibited herein and marked GJK5. The Respondent did not pay the judgment sum as contained in the Order of assessment on time. As a result, the 2nd Applicant obtained a Seizure and Sale Order dated 31st January, 2022, exhibited herein and marked GJK6. That the Sheriff of Malawi executed the Seizure and Sale Order around 2nd February, 2022 and seized the Respondent's four tippers and a Ford Ranger, and waited for 10 days as provided in the Sheriffs Act for the Respondent to pay the judgment sum but the Respondent never paid until the Sheriff of Malawi sold the vehicles on 17th to 18th February, 2022 and settled the claim. The report from the Sheriff of Malawi is now shown to me, exhibited herein and marked GJK7.

3. That after the claim had been settled, the Respondent started approaching the Sheriff's office, offering to pay the judgment sum in order to redeem the vehicles. This proved to be impossible and the Respondent's lawyers Nankhuni and Partners, who had been reminding the Respondent to pay the judgment sum, did nothing about the situation, which forced the Respondent to look for another legal house, and engaged Likongwe and Company. That upon being engaged, Likongwe and Company stumbled upon an Order for Sale of property by private treaty which the Court in Lilongwe had granted on 17th February, 2022 but which had not been served on the Sheriff of Malawi. The order is now shown and exhibited herein and marked GJK8.

4. That the Respondent filed an application to set aside the Order for sale by private treaty which the 2nd Applicants heavily opposed on the grounds that the goods in question had been sold by the Sheriff of Malawi and the order exhibited as GJK7 had not been served on the Sheriff of Malawi by the time the property was being sold. On 16th May, 2023, however, the Court, ruled in favour of the Respondent and set aside the Order for sale by private treaty and ordered the Applicants to pay for the purported value of the vehicles in the sum of MK192, 603, 397.62 within 30 days from 16th May, 2023.

5. The Court has further made the following orders: that the relevant authorities including the Police and the Anti-Corruption Bureau should urgently investigate the conduct of

Mr. Kadzipatike, in this case, and Mr. Nyirenda Assistant Sheriff in the handling of the warrant of execution in this case; and that the Malawi Law Society should take disciplinary measures against their member, Counsel Kadzipatike, on his conduct, which, according to the Court below, borders on perjury and dishonesty in the execution processes related to this case. The Appellant stated that the Respondent herein is a foreign company that is working on construction projects in Malawi and almost all its Directors and senior personnel including those who appeared before the Court are foreign nationals without assurance of permanent residence in Malawi. That if the money is paid to the Respondent and they no longer have any business in Malawi and they thus leave the jurisdiction, it will be difficult to recover the money in the event that the Applicants succeed in their appeal in the Supreme Court. That on the other hand, if the Respondent succeeds on appeal, the Applicants will still be in Malawi. Leave to appeal was denied by the trial court and the application for an order of stay was withdrawn by the Applicants purportedly on the basis that leave to appeal was denied and they allegedly saw no merit in pursuing the application..

6. Being unsatisfied with the decision of the court below the Applicants have appealed to this Court and have applied for a stay of execution of the decision of the High Court. When the application came before this Court without notice the Court granted the same on condition that the Applicants should bring the same application this time with notice. The application is supported by a sworn statement of the Applicants, a reply and skeleton arguments. We now give our views on whether we should grant a continuation of the stay or vacate it.

The issue

7. The main issue to be determined by this Court is whether an order staying execution of the ruling of the Court below dated the 16th day of May 2023, which was granted exparte be continued or not pending the determination of the appeal.

The Applicants' arguments in support of the application.

8. *The law*

Section 7 of the Supreme Court of Appeal Act provides as follows:

"A single member of the Court may exercise any power vested in the Court not involving the hearing or determination of an appeal:

Provided that –

(a) *in criminal matters, if a single member refuses an application for the exercise of any such powers, the applicant shall be entitled to have his application determined by the Court;*

(b) *in civil matters, any order, direction or decision made or given in pursuance of the powers conferred by this section may be varied, discharged or reversed by the Court.*

Order 1 Rule 18 of the Supreme Court of Appeal Rules also provides as below:

'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.'

9. In the Canadian Case of ***Golden Forest Holding Limited v Bank of Nova Scotia (1991) N.S.R 429 (1990 NSCA)*** Justice Hallet observed that:

"The term inherent jurisdiction is not used in contradistinction to the jurisdiction of the court exercisable at common law or conferred on it by statute or rules of court for the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or rules of court. The jurisdiction of the court which is comprised within the term inherent is that which enables it to fulfill itself properly and effectively as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is a part of procedural law, both civil and criminal, and not a part of substantive law; it is exercisable by summary process without a plenary trial; it may be invoked not only in relation to parties in pending proceedings, but in relation to matters not raised in the litigation between the parties, it must be distinguished from the exercise of discretion and it may be exercised even in circumstances governed by rules of court.

10. The Applicants have submitted that the Court will notice from the Order dated 16th May, 2023 that there is no proof that the vehicles in issue had a value of MK192, 603, 397. 62 as these vehicles have been in use in Malawi for a long period and some of

them were non-runners and in bad shape when they got seized by the Sheriff of Malawi. The Respondent never exhibited any valuation report for these vehicles. That the Court will also notice that the Order dated 16th May, 2023 amounts to an order setting aside the Seizure and Sale Order, as the Court is essentially giving back the vehicles to the Respondent, without regard to the fact that the vehicles were seized under a valid warrant which has never been stayed or set aside. Further the Court has not ordered the Respondent to pay any Sheriff fees and expenses in its ruling, meaning that the Court has in essence set aside the execution yet the only application the Court was handling involved the validity of sale of the property, and not the seizure thereof.

11. That the Court will also notice that the Respondent did not complain about the use of any Third Party Debt Order in this case simply because, like the Order to sell property by private treaty, the Third Party Debt Order was obtained but never used to recover money from the Respondent, although the Court has included it as one of the issues in its ruling. That the Court will also notice that the time-frame within which the Respondent was required to pay the judgment sum expired in January, 2022 and the Respondent did not apply for extension of time within which to honor the Order on Assessment dated 13th January, 2022, yet the Court below had allowed the Respondent to make the payment now, thus unfairly exempting the Respondent from execution, yet the application before the Court was one of the validity of the sale of the property only.

12. That the other major concern is that the Court below had made orders which were never pleaded by the Respondent. The issues relating to the criminal investigations of Counsel Kadzipatike and the Assistant Sheriff, and professional discipline of Counsel and the issue of the payment of the value of the vehicles were issues which were never pleaded by the Respondent but the Court raised those issues on its own and resolved them in favour of the Respondent, without inviting the Applicants for a hearing, to allow the parties to address the Court on those issues.

13. That the 1st Appellant is particularly concerned that the Court has made orders condemning him unheard when he was a not a party to these proceedings and thus did not expect any order against him personally. That the Court will notice that the Order dated 16th May, 2023 is contentious and it will be very unfair for this Court to allow such an order to continue in force and the Court will notice further that the appeal

lodged by the Applicants in this Court will be rendered nugatory if the Order dated 16th May, 2023 will continue in force. That the 1st Appellant had approached the Court below for an urgent relief in form of suspension of ruling but the Court ordered that the application should be brought with Notice to the Respondent, yet the application for leave too was denied and a re-application for leave for the 1st Appellant to be added as a party has been adjourned to 2nd June, 2023 meaning that he had keep waiting for the Court to assist him with an urgent relief. As such, he had no option but to rush to this Court. The 1st Appellant wanted a relief urgently when he made his application but the court ordeed that the application should come *inter-partes*.

14. That Applicants agreed that the general principle of law is that an appeal does not automatically operate as a stay of the judgment being appealed against. See ***Chimwemwe Segula v Pastor Chisi Civil Appeal No. 61 of 2015 (unreported)***. If the appellant wishes to stay the execution of the judgment, an express application of the same must be made to the court. This is so because a judgment of a court of law remains valid and enforceable until set aside. That when the 1st Appellant presented his application for stay of execution of a judgment pending appeal, the court had discretion to either grant the same or not. However, such discretion ought to be exercised judiciously and in line with the settled principles of law. From the decided cases, the main factors that a court attending to an application for stay of execution of a judgment pending appeal ought to consider are whether the appeal has merits (on prima facie), whether the appeal will be rendered nugatory if stay order is not granted and who will be most or least prejudiced if the stay order is granted or not. See the cases of ***City of Blantyre v Manda and Others Civil Cause No. 1131 of 1990; Nyasulu v Malawi Railways Ltd [1993] 16(1) MLR 394*** and ***Manly Msuku and Others v Timothy Chigwere MSCA Civil Appeal No. 39 of 2015.***

15. That it must be stated however that courts are discouraged from looking at the merits and demerits of the appeal in determining an application for stay. In the case of ***Sunico A/S and Others v Revenue and Customs [2014] EWCA Civ 1108*** it was held such assessment has the propensity of generating satellite litigation. Similarly in ***Manly Msuku and Others v Timothy Chigwere (supra)*** it was held that will involve the court hearing the stay application effectively hearing the appeal. It is only in exceptional circumstances that the merits and demerits of the appeal ought to be looked at. That in

the case of ***Malawi Revenue Authority v Nadeem Munshi Civil Appeal Cause No. 67 of 2013***, the High Court cited the case of ***Wilson v Church (No 2) (1879) 12 Ch D 454*** where it was held at 458:

"When a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory"

16. The above is in line with the proposition of the law as stated in the case of ***Ian Kanyuka v Thom Chiumia and Others Civil Cause No. 58 of 2003*** where it was held that *it is usually wiser to delay new activity rather than risk damaging one that is already established.* (Emphasis theirs). The Applicants filed their application in the Court below on or about 18th day of May, 2023. There was a similar certificate of extreme urgency to the one filed herein. The Judge below exercised her jurisdiction over it, went through it and noticed that she could not grant the application. She thus refused the application and instead ordered that the application be heard *inter-partes.* Circumstances of this case would see the Applicants were going to be ruined if they waited a minute longer without a stay order. From the foregoing, it is clear that this Court has jurisdiction to entertain the present application.

17. That the Court below denied the Applicants leave to appeal on 22nd May, 2023. On the same day, the 1st Appellant withdrew his application for stay in the Court below because he knew that the Court below could not grant him an order for stay pending appeal when it had refused to grant him leave to lodge the appeal in question. Pending which appeal would the Court below grant him stay of execution yet it did not want him to appeal? This confirmed the decision of the Judge below declining to grant him a stay ex-parte on 18th May, 2023. The Court below was sure that it was not going to grant him an order for stay pending appeal. The Applicants intend to appeal to the Supreme Court of Appeal. This Court has to see that if the appeal is successful, the same should not be rendered nugatory. In the present case, the decision of the Court below cannot be allowed to stand. That if the decision is not stayed then the same will be prejudicial to the Applicants.

18. That justice will demand that the Applicants be allowed to prosecute their appeal before the Respondent goes ahead to enforce the judgement of the Court dated the 16th

day of May 2023. As indicated above, granting the stay order will do justice to all parties, whilst denying the same will prejudice the Applicants as apart from the Order for the 1st Appellant and the 2nd Appellant to pay around MK192 million within 30 days to the Respondent, all other orders were enforceable immediately from 16th May, 2023 and the Applicants were under the danger of being arrested by the police or the Anti-Corruption Bureau, and he had actually been summoned by the Malawi Law Society for disciplinary measures pursuant to the ruling of the Court below. It was therefore necessary that the Applicants had to come to this Court for stay of execution pending hearing and determination of the appeal.

Respondent's skeleton arguments in opposition to the application for stay of execution of the ruling of the court below pending appeal

19. That the affidavit of Chikumbutso Nichodemus Sitima used in opposition to this application provides the factual background to this application and the same was adopted. That the Applicants applies to this Court for an order of stay pending the determination of their appeal against the Ruling of the Court below dated 16th May 2023. The Respondent opposes the application and urges this Court not to grant the stay on four grounds which are that;

    (a) The Application for stay pending appeal is prematurely before this Court as the Court below has never determined the said application;

    (b) There is no valid appeal by the Applicants hence no stay ought to be granted in respect of an invalid appeal'

    (c) Mr. Kadzipatike is not a party to these proceedings and he cannot validly apply for a stay of execution pending appeal; and

    (d) The balance of justice militates against the granting of the order of stay.

20. The Honorable Court is being called upon to determine whether an order staying the Ruling of the Court below dated 16th May 2023 in this matter should be granted in the present circumstances.

<u>The present application is premature and this court lacks jurisdiction to hear it</u>

21. The Respondent has stated that the application by the Applicants for stay pending appeal is taken out under section 7 of the Supreme Court of Appeal Act as read together with Order 1 Rule 18 of the Supreme Court of Appeal Rules and under the inherent jurisdiction of the Court. Section 7 of the Supreme Court of Appeal Act grants to a single member of this Court powers to exercise any power vested in the Court except the determination of an appeal. Of particular relevance to the present case, however, is Order 1 Rule 18 of the Supreme Court of Appeal Rules which provides that;

"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. That the jurisdiction of this Court therefore to entertain an application like the present one can only be invoked after the Court below has dealt with the application. It was held so in ***<u>The State v The Inspector General of Police and another v A.J. (a minor) ex parte Standford Shaba on behalf of T.S. (a minor)</u>*** Misc. Civil Appeal Number 5 of 2022 and numerous other cases and in ***<u>Director of Public Prosecutions and Attorney General v Paulos Norman Chisale and 5 others</u>***, Misc. Civil Application Number 56 of 2022, this Court per Mkandawire J.A. held that;

"Order 1 Rule 18 of the Supreme Court of Appeal Rules refers to a situation where there is concurrent jurisdiction between the Court and the Court below. There has been a lot of jurisprudence in this area and it is now settled that the applicant only comes to the Court after the Court below has declined to grant the relief sought- see the cases of ***<u>Malawi Communication Regulatory Authority vs Daniel Datch, Godfrey Itaye and others</u>*** MSCA Misc. Application 39 of 2021 and the case of ***<u>Fumu Mdolo v Bonifacio Mdolo and Muzipasi Moyo</u>*;** MSCA Civil Appeal No 41 of 2016."

23. That where, like in the present case, the Court below has not dealt with the application, this Court cannot assume jurisdiction over that application. The present case is on all fours with what happened in ***<u>Gelson Mkweza and Gam Fuels Ltd v Master Borehole Drilling Ltd</u>*** Misc Civil Application Number 35 of 2022. In that case the Respondent

obtained judgement against the Applicants and attempted to enforce it. The Applicants then applied, *ex parte*, to the Court below for a stay of execution. The Court below ordered that the application comes inter partes whereupon the Applicants rushed to this Court and obtained a stay *ex parte.* During the hearing of the inter partes application, the Applicants maintained, as the Applicants are doing herein, that the Court below technically refused their application by ordering that the application comes inter partes. This Court threw out the appellant's application for being an abuse of the court process. This Court, as per Chikopa SC JA, in vacating the stay said,

"The truth however is that an application must never simultaneously be in two courts. In the present circumstances, the stay application should have only come to this Court once the Court below had dealt with it to finality."

24. That in the matter herein, the Applicants filed his application for stay in the court below on 18th May 2023, two days after the ruling complained of. The Court below ordered that the application should come inter partes on 25th May 2023. On 22nd May 2023, the Applicant voluntarily withdrew the said application. On 25th May 2023, the Appellant filed another application for stay, which was also removed from the court file and never to be returned. On 26th May 2023 the Applicants applied in this Court for an interim stay which was granted. The above clearly indicates that the Court below never dealt with the Applicants' application for stay because they voluntarily withdrew it. The Applicants's contention that the Court below refused his application because it ordered the application to come inter-partes does not hold at all. The fact remains that the court below never dealt with the application as the Applicants voluntarily withdrew it.

25. That the long and short of it all is that the application for stay is improperly before this Court and the Applicants are guilty of abuse of the court process and judicial tourism. To illustrate; the Ruling complained of gave the Applicants 30 days to pay the money to the Respondent. The order could not be enforced until after the expiry of those 30 days, which was until after 16th June 2023. That the said order is still unenforceable as the time for paying has not yet expired and yet the 1st Appellant could not wait for his application to be heard on the 25th May 2023 alleging that he was under threat of being ruined by an impending execution. Which execution could that be? That there was no

and there could be no impending execution on the Applicant any time before the 25th of May 2023 or, for that matter, any time before the expiry of those 30 days. The only reason why the Appellant rushed to this Court is that he is convinced that somehow this Court will grant him favorable outcomes. This is a classic case of judicial tourism and abuse of the court process which must be frowned upon. The Respondent submitted that that this Court cannot assume jurisdiction over this application until after the Court below has refused it. Ordering an application to come inter partes does not amount to refusing it.

There is no valid appeal before this court

26. That without prejudice to the foregoing, the Respondent argues that a stay cannot be granted in this matter as there is no valid appeal before this Court. The granting of an order of stay presupposes that there is in existence a valid appeal. The Respondent refers the Court to paragraphs 40 to 41 of the affidavit in opposition which shows that there is no leave to appeal with respect to the fresh Notice of Appeal that was filed by the Applicants on 25th May 2023. In the absence of the leave to appeal, there is no valid appeal before this Court in respect of which an order for stay could be granted. Further, Mr. Kadzipatike is a stranger to these proceedings and he cannot validly apply for a stay in proceedings in which he is not a party. The Court below refused to add Mr. Kadzipatike to these proceedings on the basis that he had no sufficient interest in the case and that his only interest was to evade being disciplined over his conduct. That without prejudice to the above, the Respondent further argues that even if the Applicants's application were to be considered on its merits, justice and equity militate against granting the Applicants the order of stay.

The applicable law on applications for stay pending appeal

27. That the old position: fruits of litigation vs appeal being rendered nugatory. The old cases state that the general rule is that the court does not make a practice of depriving a successful litigant of the fruits of litigation, and locking up funds to which prima facie he is "entitled" pending an appeal. This principle has been repeated by the courts in Malawi with approval on several occasions without number. The principle first appears in the ***Annot Lyle*** (1886) 11p.114, p.116.

As an exception to this rule, the courts have held that they will grant a stay pending an appeal where a refusal of the stay would render the appeal nugatory, or where the appellant would suffer such loss as cannot be compensated in damages. See also ***Wilson v Church*** *(No. 2) 12 Ch D. 454*

28. That in ***Mhango .v. Blantyre Land and Estate Agency Limited*** 10 MLR 55, it was stated that the major consideration in deciding whether to grant a stay of execution pending appeal is whether or not, if the appeal is successful, it will be rendered nugatory. In ***Leelasena .v. Tarmahomed and Company*** 10 MLR 139 it was said that:

"The lodging of an appeal does not operate as a stay of execution. It is in the discretion of the court whether or not to order a stay of execution. The general rule for the exercise of the discretion is that where the right of appeal exists the court ought to exercise its best discretion in a way so as not to prevent the appeal if successful from being nugatory. At the same time, the courts should not make a practice of depriving successful litigants of the fruits of their litigation. These two principles appear to be irreconcilable but the crux of the matter seems to be whether special circumstances exist in any particular case necessitating a stay of execution. The only ground for a stay of execution is an affidavit showing that if the damages and costs were paid, there is no reasonable probability of getting them back if the appeal succeeds. Execution might be stayed, for example, where the judgment is in favour of a person resident out of or about to leave the jurisdiction."

29. In ***The Anti- Corruption Bureau v Atupele Properties Limited***, MSCA Civil Appeal Number 27 of 2005, Justice Tambala SC, JA, sitting as a single judge of the Court put it this way:

I must now revert to the law relating to stay of execution of Court's judgements. There are clearly four principles. The first is that it lies within the broad discretion of the court to grant or refuse an application for stay of execution. The second principle is that as a general rule the court must not interfere with the successful party's right to enjoy the fruits of litigation. The third principle is an exception to the general rule and states that where the losing party has appealed and is able to demonstrate that the successful litigant would be unable to pay back the damages, in the event that the Appeal succeeds, execution of the court's judgement may be stayed. The fourth principle is that even where the party

appealing is able to show that the successful party would be unable to pay back the damages if the appeal succeeds, the court may still refuse an application for stay of execution of a judgement if upon examination of the facts of the case, an order of stay of execution would be utterly unjust."

Applicant must show special circumstances

30. That the courts have this far been united in requiring the applicant to show that there are special circumstances necessitating the granting of the stay. In ***National Bank of Malawi v Donnie Nkhoma t/a Nyala Investments***, MSCA Civil Appeal No. 6 of 2005 it was stated that the burden is on the applicant to satisfy the court that there are special circumstances in favour of granting a stay. Evidence of facts must be presented to the court for it to properly assess the position. See also ***City of Blantyre v Manda and others*** Civil Cause Number 1131 of 1990, and ***Chichiri Shopping Centre v Ridgeview Investments***, MSCA Civil Appeal Number 30 of 2012, one of the progressive judgements in this area (as will be seen below), proceeds on the understanding that the applicant must show special circumstances as Twea SC, JA, said;

"what comes out though is that the court, when exercising its discretion in favour of a stay, must show that there are special circumstances that would justify this……The category of what constitutes special circumstance is not yet settled, neither would one say it is exhausted"

Whether the requirement for special circumstances exist?

31. That in ***Malawi Revenue Authority v Nadeem Munshi***, Civil Appeal NO. 67 of 2013, Mwaungulu J, as he was then, held that the granting of a stay pending appeal is discretionary and to premise it upon the proof of special circumstances is to fetter such discretion. The court need not emphasise on special circumstances but must consider all the relevant circumstances. The judge put it this way;

"In my judgement, when the stay is sought pending appeal, a factor, to warrant inclusion, need not be special. If the circumstances are relevant, their exclusion, without reason, may be a wrong exercise of discretion. For the discretion must be exercised judicially, comporting that the power exercising jurisdiction must regard all relevant factors. Moreover, the power exercising discretion must give proper weight or consideration to a

factor. Underrating, exaggerating or overlooking a material factor is a wrong exercise of discretion. In a sense, requiring special circumstances is tantamount to fettering the discretion. Undoubtedly, proof of special circumstances is critical where stay of execution is necessary where there is no appeal (Order 47, rule (1) (1) (a) and (b) of the Civil Procedure Rules 1998; Rules of the Supreme Court 1965). Consequently, there is no reason why an appeal is not a special circumstance, if proof of special circumstances be necessary. In my judgment proof of special circumstances is unnecessary because primarily it fetters discretion and proliferates litigation. Courts have from time to time to determine whether a factor is special and whether in a particular case any such circumstance exists. The list of circumstances may be very long and, at best, endless and at times with a real risk that some may be unreasonably excluded and others inadvertently included."

The new position: both successful litigant and unsuccessful litigant to be treated equally in considering an application for stay

32. In the ***City of Blantyre v Manda*** and ***The Anti- Corruption Bureau v Atupele Properties Limited*** cases, the courts held that even where the party appealing is able to show that the successful party would be unable to pay back the damages if the appeal succeeds, the court may still refuse an application for stay of execution of a judgement if upon examination of the facts of the case, an order of stay of execution would be utterly unjust."

33. In ***Chichiri Shopping Centre v Ridgeview Investments***, the Supreme Court held that when deciding whether to grant or refuse a stay application, no matter what factors the court considers, the court must not lose sight of what is just and equitable in the circumstances. This case, therefore, implores the court to equally consider the circumstances of both the Applicant and the Respondent and strive to arrive at what is just and equitable in the circumstances. Thus the "utterly unjust" test must apply equally to both parties.

34. In ***Malawi Revenue Authority v Nadeem Munshi***, Mwaungulu J, as he was then, put it in these words;

"As the Supreme Court repeatedly states, stay of execution is, indeed, in a court's discretion. It is in the nature of discretion that it must be unfettered and, consequently, meet

the ends of justice. It is, in my judgment, to fetter discretion to start from the premise that a litigant, in matters of justice and fairness, has a headway against an unsuccessful litigant, based on the initial success. It is salutary that even the full Supreme Court, even on the extended premises of "utterly unjust" or "unconscionable" or "inexpedient", looked at it only in terms of "utterly unjust" or "unconscionable" or "inexpedient" to the successful litigant. There are bound to be cases where refusal to stay execution would be "utterly unjust" or "unconscionable" or inexpedient" to an unsuccessful litigant and justice militate towards refusing stay of execution. Equally, appeal nugatory considerations should be even handed in that they are a two-edged sword, working for stay of execution where the successful litigant is affected and working for refusal of stay where the unsuccessful litigant is affected".

"justice, equity and expediency" are the paramount consideration

35. That the ***Chichiri Shopping Centre v Ridgeview Investments*** introduces the "just and equitable" test as the paramount consideration when dealing with applications for stay. In *Contract Facilities Limited v Estates of Rees (Deceased) & others* [2003] EWCA Civ 465, Waller LJ considers the evidence and circumstances for granting stay of execution.

"The normal rule is neatly summarised in paragraph 21 of the judgment in ***Hammond Suddards' Solicitors v Agrichem International Holdings Ltd*** *[2001] EWCA Civ 1915: "By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"*

36. And in deducing what the interests of justice dictate in any particular case, the principles for the granting of interim injunctions as enunciated in ***American Cynamid***

are applicable. In ***Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*** [1987] 1 S.C.R. 110, Beetz J., said

"A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions."

37. In ***Malawi Revenue Authority v Nadeem Munshi***, Mwaungulu J then summarised the position as follows;

"A court considering stay of proceedings must realize that it is exercising discretion which, like other discretions, must be exercised judicially, comporting that the court must account for all material factors on all circumstances of the case. Failure to consider material factors and placing undue emphasis on a factor or circumstance is wrong exercise of jurisdiction. The prospects of success of appeal, that a litigant was successful, that the appeal may be rendered nugatory are some of the factors, not exhaustive, that a court considers. The critical consideration is "whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay." There are other considerations based on the nature of the remedy sought.

38. That the court must consider the prospect or risk of stifling the appeal. Once proceedings commence the wheels of justice are in motion with both parties seeking justice from the courts. Parties could be satisfied with justice at the end of a trial. Where one of the parties is dissatisfied the wheels of justice will not have stopped until the matter is disposed by appeal. In this continuum, a court, where it is necessary, must ensure that ultimately justice prevails at the end of the process. That ultimate justice may be illusory where at any point in the continuum, at the aegis of one party, actions were taken that failed to ameliorate the risk of injustice at the end of the process. Consequently, the court must assess the risk to the successful litigant in enforcing judgment should the appeal fail. Conversely, the court must evaluate the risk to the losing party in enforcing the judgment against a successful party should the appeal succeed.

39. That for monetary judgments, the court must regard not only the immediate resources of the successful and unsuccessful litigant. For judgments where money cannot compensate

the court must proceed on balance of convenience. To both aspects delay, deliberately by the unsuccessful party or by the exigencies of litigation may be critical. For monetary judgments losses may be ameliorated by ordering payment of interest. Alternatively, the court may, in its discretion order payment into court."

40. That in ***Mike Appel and Gatto Limited v Saulos Chilima***, MSCA Civil Appeal No 20 of 2013, the full bench of the Supreme Court endorsed the new position that justice and expediency are the paramount considerations in determining applications for stay pending appeal. The Court said that;

"We are thus inclined to agree that we should move on and allow ourselves wider discretion in granting or refusing stay of execution. A passage that is often lost in our jurisprudence is that of Unyolo JA in **Nyasulu v Malawi Railways Ltd** *1993 16(1) MLR 394 at 399 where he said;*
'In **Barker v Lavery** *1885 4 QBD 769 it was held that evidence showing that there was no probability of getting back the money awarded under the judgement would constitute special circumstances which would influence a court to grant a stay of execution. But again, that is not a closed rule. All the facts must be considered, for even such a situation the court would, in its discretion still refuse to grant a stay if on the total facts of the particular case it would be utterly unjust or unconscionable to make such an order. Equally, the fact that a successful litigant would be able to pay back the damages awarded him would constitute special circumstances. But here again, even in such a situation, the court would properly grant a stay if it was of the view it was expedient to do so, regard being had to all the facts.in other words, the mere fact that a successful litigant would be able to pay back the damages cannot operate in all cases operate as a "stay of execution"'*

41. That clearly, from this authority, the approach should be to look at all the facts of the case and base the court's decision on what is "just and expedient" in all the circumstances of the case. This is in line with what is advocated by the Hammond case and we do not find any reason why we should shy away and continue to cage ourselves and resist adopt what is propounded in the Hammond case. A consideration of "risk of injustice" and "prejudice" would even encompass the consideration of currently and conventionally considered; but it also allows other considerations relevant in the case. Liberal in that way, a court has a wider premise upon which to exercise its discretion in granting or refusing to grant stay of execution."

Our analysis of the law and the facts

what do justice and equity dictate in this matter?

42. That a litigant does not have a right to stay of execution because he has filed an appeal. An order staying execution is an equitable remedy. As with all equitable remedies, he who comes to equity must come with clean hands. In this regard, the Respondent refers the Court to paragraphs 44 to 55 of the Affidavit in opposition which clearly shows that the 2nd Applicant's lawyer, Mr. Kadzipatike has resorted to perjury, forgery and falsification of documents to get his way. The Applicants approaches this Court with very dirty hands. The 1st Applicant's blatant breach of ethics is well documented in the Court below's Ruling dated 7th June 2023 in which the 2nd Applicant's lawyer does not shy away from demeaning and belittling a Judge of the High Court and fellow counsel at the bar. Counsel even removed documents from the court file.

43. That the 1st Applicant has shown that he has no regard to respecting the law and his duty of courtesy to the bench and the bar and will not shy away to breach those duties to get his way. Does such a person deserve the Court's equitable remedies? We do not think so. Further, as indicated in the affidavit in opposition to this application, and as lamented by the Court below, the 1st Applicant is using the court machinery to abuse the Respondent. The Court will perpetrate such abuse if it grants the Applicanst the stay being sought. Over a debt of **MK48, 541, 831. 27**, the Respondent has lost property worth **over MK192, 603, 397. 62** at the hands of the Applicants since February 2022. If the Applicants succeeds in the appeal, the Respondent is perfectly capable of paying back the sum of **MK 144, 061, 566.35** which the 2nd Applicant and his lawyer are supposed to pay to the Respondent.

44. On the other hand if the stay is granted, the Respondent continues to suffer the oppression he has suffered at the hands of the Applicants for the past year. The court's machinery is aimed at producing justice, not oppression. If it is true that the vehicles were sold by public auction and that there were no criminal elements in the conduct of Mr. Kadzipatike, then he need not fear any investigation by the Anti-Corruption Bureau or the Malawi Law Society in the manner in which he conducted himself as these organs will exonerate him. If the Court considers the matter in its totality, it will

be apparent that the justice of this matter tilts in favour of refusing the order of stay pending the appeal.

Conclusion

45. That in the final analysis, if all the relevant circumstances of this matter are considered, the Respondent submitted that it will be just and equitable in the circumstances to refuse the order of stay pending the determination of the appeal herein on the following grounds;

(a) The Application for stay pending appeal is prematurely before this Court as the Court below has never determined the said application;

(b) There is no valid appeal by the Applicants hence no stay ought to be granted in respect of an invalid appeal.

(c) Mr. Kadzipatike is not a party to these proceedings and he cannot validly apply for a stay of execution pending appeal; and

(d) The balance of justice militates against the granting of the order of stay.

We thus pray that the Applicant's application for stay be dismissed with costs on the indemnity scale as it amounts to abuse of the court's process.

Finding

46. As stated earlier on the cardinal principle which is well settled is that an appeal does not operate as a stay of execution of the judgment of the court below. However a superior court may stay execution when certain conditions are meant. The most important is the damage and risk to the parties and the balance of justice. That the applicant must demonstrate is that if the judgment is allowed to be implemented the appeal will be rendered meaningless and nugatory. I'm guided by the case of ***Leelasena .v. Tarmahomed and Company*** 10 MLR 139 it was said that:

"The lodging of an appeal does not operate as a stay of execution. It is in the discretion of the court whether or not to order a stay of execution. The general rule for the exercise of the discretion is that where the right of appeal exists the court ought to exercise its best

discretion in a way so as not to prevent the appeal if successful from being nugatory. At the same time, the courts should not make a practice of depriving successful litigants of the fruits of their litigation.

47. The primary consideration in the court's determination will be whether an applicant for the stay has discharged the onus of demonstrating that there is a proper basis for the stay. That the three tests (similar to the test for interlocutory injunction), viz: a serious issue to be tried; *irreparable harm;* and a balance of convenience/justice must be met. Although the test for a stay may be equated to a test for an interlocutory injunction, there may be circumstances when the two may be said to be different. In those circumstances, the question before Court, however, remains one of a balance of convenience/Justice. I'm guided by ***Mike Appel and Gatto Ltd v Saulos K Chilima*** MSCA Civil Appeal Case No. 20 of 2013, the Supreme Court of Appeal, while accepting that the principle above as a good starting point for the exercise of the court's discretion in stay applications, observed that there was no reason why the court's discretion should be fettered strict application of 'special circumstances' test. That Justice AKC Nyirenda JA, then stated:

"…the approach should be to look at all the facts of the case and base the decision on what is 'just' and 'expedient' in all circumstances of the case. This approach is in line with what is advocated by the Hammond case. We do not find any reason why we should shy away and continue to cage ourselves and resist adopt[ing] what is propounded in the Hammond case. A consideration of risk of injustice and prejudice would encompass the considerations currently and conventionally considered; but it also allows for other considerations relevant in the case. Liberal in that way, a court has got a wider premise upon which to exercise its discretion in granting or refusing to grant s

48. That it must be stated however that courts are discouraged from looking at the merits and demerits of the appeal in determining an application for stay. That in ***Malawi Revenue Authority v Nadeem Munshi***, Civil Appeal NO. 67 of 2013, Mwaungulu J, as he was then, held that the granting of a stay pending appeal is discretionary and to premise it upon the proof of special circumstances is to fetter such discretion. The court need not emphasise on special circumstances but must consider all the relevant circumstances. I'm mindful of the decision in ***Director of Public Prosecutions and***

Attorney General v Paulos Norman Chisale and 5 others, Misc Civil Application Number 56 of 2022, this Court per Mkandawire J.A. held that;

"Order 1 Rule 18 of the Supreme Court of Appeal Rules refers to a situation where there is concurrent jurisdiction between the Court and the Court below. There has been a lot of jurisprudence in this area and it is now settled that the applicant only comes to the Court after the Court below has declined to grant the relief sought.

49. This to me is a general rule which must have exceptions depending on the circumstances of each particular case in order to achieve justice as between the parties. This rule was not cast in stone. Having looked at the facts before this Court and the arguments advanced by the parties, I find that there is no justification whatsoever to discharge the order of stay. I'm in agreement with my elders before me that issues of whether to order an application to come with notice is grounded on the judge's discretion and case management and that appellate courts should be slow to tamper with exercise of discretion unless it can be shown that there was an abuse of the same or that the discretion was exercised using wrong principles of law. I'm in agreement that an order to file an application with notice doesn't not amount to a denial of the application. However the rule cannot apply in all cases religiously. I'm of the considered view once an application has been differed to a later distant date, the application ceases to be urgent and that in my view triggers the current jurisdiction of this Court in order to achieve the justice of the case.

50. A good example is the present case. The court below ordered the police and the ACB to investigate the 1st Appellant and for the Malawi Law Society to discipline him effective the date of the order and that the judgment sum of K192 million be paid to the Respondent within 30 days. The 1st Appellant tells this Court that he withdrew his application for a stay before the court below because it had denied him leave to appeal. Surely common sense dictates that once leave to appeal is denied any application for a stay is purely moot, academic and in futility. I cannot fault the 1st Appellant on this one.

51. I do not agree that Mr. Kadzipatike is a stranger to these proceedings and he cannot validly apply for a stay in proceedings in which he is not a party. If this were true why was he mentioned in the judgment and punished in the court below? Furthermore the

Court below refused to add Mr. Kadzipatike to these proceedings on the basis that he has no sufficient interest in the case and that his only interest was to evade being disciplined over his conduct. This for all intents and purposes puts the 1st Appellant as a party to the case. The application he made before court below was a very urgent application which the court below could have made a decision on there and then without calling for an interpartes application in view of the punitive orders the court made.

52. The Respondent submitted that that this Court cannot assume jurisdiction over this application until after the Court below has refused it. Ordering an application to come inter partes does not amount to refusing it. The question is how will this matter be dealt with? Because even if this Court were to send the matter back to the court below to determine whether to grant a stay or not pending appeal, we wonder how the same will be dealt with regard being had to the fact that leave to appeal was denied. This is a proper case where if the stay is discharged it will create a great injustice to the Applicants. Using my discretion I hereby sustain the order of stay pending appeal. I order the Applicants to file summons for settlement of the record of appeal in the court below within 21 days and that an appeal be entered in this Court 14 days thereafter. Once the appeal is entered in this Court, the Registrar will set a date for the hearing of the appeal.

Order 3 rule 1 of the Supreme Court of Appeal rules provides that;
(1) Where an appeal lies only by leave of the Court or the Court below any application to the Court for such leave shall be made ex-parte by notice of motion.
(2) If leave to appeal is granted by the Court or the Court below the appellant shall file a notice of appeal:
provided that nothing in this sub-rule shall be deemed to prohibit an appellant from filing a notice of appeal prior to the hearing of the application for leave to appeal

Since leave was denied in the court below and there is an application on the same, I proceed to grant leave to appeal. I further order that the record of appeal should exclude

the further orders that were made on 7 June 2023 after the judgment had been delivered as the Applicants were not heard on the allegations that were levered against them and the Court below was *factus official*. When a party is appealing, thus exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not rendered nugatory. One of the grounds for a stay of execution is an affidavit showing that if the judgment is satisfied and paid, there is no reasonable probability of getting the money back if the appeal succeeds. Execution might be stayed, for example, where the judgment is in favour of a person resident out of or about to leave the jurisdiction."

I so order

Cost will be in the cause.

Made at the Supreme Court of Appeal at Blantyre on 14th July 2023

Dingiswayo Madise

Justice of Appeal