



IN THE SUPREME COURT OF APPEAL
MSCA MISCELLANEOUS CIVIL APPLICATION NO. 45 OF 2023
(Being High Court, Civil Division, Mzuzu Registry, Miscellaneous Civil Cause No. 07 of 2023
Being IRC Matter No. 115 and 116 of 2016 Mzuzu Registry)

BETWEEN:

HARLOD CHIPHWANYA AND 116 OTHERS-----APPLICANTS

AND

OPPORTUNITY BANK OF MALAWI LIMITED-----RESPONDENTS

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

Kadzipatike, Counsel for the Applicants

Likongwe/Kita/Sitima, Counsel for the Respondents

C. Fundani, Recording Officer

RULING

1. This is an inter-partes application for an order vacating stay order pending hearing and determination of the appeal before the court below. The application is made under section 7 of the Supreme Court of Appeal Act as read with Order 1 Rule 18 of the Supreme Court of Appeal Rules, and under the inherent jurisdiction of the Court.
2. The application is supported by an affidavit sworn by George Jivason Kadzipatike, a legal practitioner in the firm of Messers Jivason and Company. There are also supplementary affidavits filed by George Jivason Kadzipatike and Mr Aaron Kayira.
3. The application is opposed by the Respondent. There is an affidavit in support of the opposition sworn by Pempho Likongwe, legal practitioner of Likongwe and Company.
4. This matter has a long history. I shall however only concentrate on the most relevant parts to the case before me. After the Appellant were unsuccessful in the Industrial Relations Court (Lower Court), they applied for a stay of execution in the

Court below which was granted on 1st September 2023. The Judge further directed the Respondent to pay the judgment sum and sheriff fees into court within 7 days from 1st September 2023. The Respondent did not pay the said money as ordered by the Court below.

5. Following the default the Appellant filed a certificate of non-compliance and an ex-parte application for the Court to vacate the order of stay. The Court below directed that the application to vacate the stay order should come inter-partes.

6. On 13th September 2023, the Applicant filed a 'Without Notice Application for an Order Vacating Order of Stay of Execution.' The application was made under Order 10 Rule 1 of the Courts (High Court) (Civil Procedure) Rules 2017 and High Court Inherent Jurisdiction.

7. On 14th September 2023 the Respondent filed an application for variation of one of the conditions of stay. The Applicants vehemently opposed the application. On 15th December 2023, the Court below gave the Respondent 5 days from 15th December 2023 within which to pay the judgment sum into court.

8. The Applicants therefore pray for an order vacating the stay order dated 1st September 2023 pending the hearing and determination of the appeal before the Court below.

9. The Respondent in its affidavit in opposition says that the Applicant has not appealed against the ruling of the High Court dated 15th December 2023 refusing to vary one of the conditions of stay and refusing to vacate the stay order.

10. The Respondent state that since there is no appeal pending before this Court with respect to the ruling of the High Court dated 1st September 2023 granting Order of stay and dated 15th December 2023 refusing to vacate the order of stay, the jurisdiction of this Court has not been triggered and it lacks the jurisdiction to hear this application.

11. The Respondent argued that the question of jurisdiction is so important and that it can be raised at any stage in the litigation by the Court on its own or on the application of a party. As there is no appeal or contemplated appeal in this matter, the Respondent emphasized that this Court is not properly seized of this matter.

12. The Court has taken note of the fact that this matter is brought under section 7 of the Supreme Court of Appeal Act. This section provides for the general jurisdiction of a single Member of a Court. That power has to be specifically vested in the Court. The Applicant has relied on Order 1 Rule 18 of the Supreme Court of Appeal Rules which provides:

“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.”

13. It is imperative that this being an appellate Court as provided for under section 104 of the constitution, an application being referred to under Order 18 of the Supreme Court of Appeal Rules presupposes that there is an appeal in motion or there is a contemplated appeal. A look at the court record here however shows that there is no such appeal or contemplated appeal before this court. The Applicant seems to be confused between the appeal filed in the court below which is an appeal focusing on liability whilst the issue herein relates to assessment of compensation by the Assistant Registrar of the Industrial Relations Court. It therefore means that the appeal the Applicants are relying on is inchoate. This Court has made it very clear in the cases of **Dalitso General dealers Ltd v. MyBucks Corporation Ltd**, MSCA Misc. Application No. 2 of 2023 and **Ted Sparks Jumbe vs Christopher Kasema and Attorney General** MSCA Miscellaneous Civil Application No. 46 of 2023 that where the Applicant is improperly before the Court, there is no reason to entertain the application. It is unfortunate to note that the Applicant heavily relied on precedents which were all anchored on judicial review. What the Applicant forgot was that Judicial Review procedures are governed by the Civil Procedure Rules 2017 and therefore there was a disconnect.

14. The Court therefore finds that since there is no appeal, this Court lacks the jurisdiction to hear the present application see the case of **Grezelder Jeffrey, Kondwani Nankhumwa and Cecilia Chazama v. Arthur Peter Mutharika, Clement Mwale and Democratic Progressive Party**, MSCA Miscellaneous Civil Application No. 65 of 2023.

15. The application is therefore dismissed with costs.

Made at Blantyre this 29th day of February 2024.



HONOURABLE JUSTICE M.C.C. MKANDAWIRE

JUSTICE OF APPEAL