

**IN THE SUPREME COURT OF APPEAL  
SITTING AT BLANTYRE**

**MSCA MISC CIVIL APPLICATION NUMBER 33 OF 2024**

*(Being High Court, Mzuzu District Registry, Misc Civil Case No.07 of 2024)*

**BETWEEN:**

**ISAAC CHAPASUKA-----APPELLANT**

**-AND-**

**AIRTEL MALAWI LIMITED-----RESPONDENT**

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

G. Kadzipatike/C. Kambalame, Counsel for the Applicant

D. Njobvu/Kalunga, Counsel for the Respondent

C. Fundani, Recording Officer.

**RULING**

**1.** This is an inter parte application for an order vacating stay order pending appeal. The application is brought under section 7 of the Supreme Court of Appeal Act and 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 made by Christopher Kambalame and skeleton arguments filed by the Applicant. All these were filed on 28<sup>th</sup> June 2024. On 5<sup>th</sup> of July 2024, the Applicant filed a supplementary affidavit made by George Jivason Kadzipatike as well as supplementary skeleton arguments.

- 3.** The Applicant's story is that the Industrial Relations Court (IRC) in its judgment dated 5<sup>th</sup> of February 2024 found that the Respondent had unfairly dismissed the Applicant. The IRC awarded the Applicant the sum of MK105,239,025.00 as damages and severance allowance. The Judgment is marked as exhibit CK1.
- 4.** The Respondent applied for stay which was readily granted by the IRC on condition that the Respondent pays to the Applicant half of the judgment sum within two days of the order. The order is marked as exhibit CK2.
- 5.** The Respondent breached the order of stay. The Applicant vacated the order of stay as per exhibit CK3. Through an ex-parte application, the Respondent applied to the High Court for an order for stay pending appeal. The without notice application was granted by the Court below on 19<sup>th</sup> March, 2024 and it is exhibit CK5 and the application is exhibit CK4.
- 6.** The Applicant filed a with notice application to vacate the order granted by the Court below. The application is exhibit CK6. The Respondent opposed the application. According to the affidavit of Mr Kambalame, the Judge in the Court below raised a lot of issues on the irregularities of the opposing affidavit which irregularity was confirmed by Stella Rose Mapemba. Eventually the Court below struck out the affidavit by the Respondent's Counsel. The matter therefore proceeded without any opposition from the Respondent.
- 7.** In the supplementary affidavit, Mr George Kadzipatike says that the Respondent's application for order of stay of execution pending appeal was made under a wrong provision of the law. This irregularity therefore rendered the entire application untenable before the Court below. That the Respondent's application was also not signed by the Respondent or its legal practitioner as required by the rules of procedure. This also rendered the Applicant's application in the issue defective and invalid.
- 8.** On 22<sup>nd</sup> July 2024 the Respondent through Francis Kalonga filed an affidavit in opposition to the application for an order vacating stay of execution order pending appeal.
- 9.** In a nutshell, the Respondent repeated the history of this matter as narrated by the Applicant.
- 10.** Aggrieved with the order vacating an order of execution of judgment, on 14<sup>th</sup> March 2024, the Respondent made a without notice application before the Court

below for an order of stay of execution of judgment pending appeal. The same was granted on 19<sup>th</sup> March 2024.

**11.** The Applicant aggrieved with this order, subsequently made an inter-partes application for an order vacating an order of stay of execution granted by the Court below. The Court below refused to vacate the stay.

**12.** Dissatisfied with the order of the Court below, the Applicant has approached this Court with a fresh application to vacate the stay.

**13.** The Applicant has also filed an appeal challenging the same order of stay granted by the Court below.

**14.** The Respondent says that the Applicant's application is incompetently before this Court as it was brought based on the wrong provisions of the law. The Court should therefore dismiss it with costs.

**15.** Going to merits, the Respondent says that the application filed by the respondent in the Court below complied with the provisions of the law. As for the irregularity of the sworn statement filed in opposition to the with notice application for stay pending hearing of appeal, the Respondent says that they are not fatal. That the Judge exercised his discretion to deal with the merits of the application that was before him and the Applicant can not fault the Judge through this application. The Respondent also said that even if the application was to be treated as unopposed due to the irregularity, which is denied, it is however not automatic that where an application is unopposed then the Court has to grant the application without exercising its discretion.

**16.** Commenting on the supplementary affidavit of George Jivason Kadzipatike, the Respondent said that the application which brought about the stay of execution of judgment was made using the correct provisions of the law.

**17.** On the issue of the Applicant being denied fruits of litigation, the Respondent said that this does not arise here considering that when the Respondent obtained a stay of execution of the judgment at the IRC, the IRC ordered the Respondent to pay the Applicant the sum of MK56, 619, 512.50, which is half the judgment sum. The said money was paid to the Applicant.

**18.** The Respondent filed an appeal against the whole judgment of the IRC and to allow the Applicant to collect the other half of the judgment sum would lender the appeal a nugatory and would prejudice the Respondent.

**19.** The Respondent said that the application herein is an abuse of the court process in that the Applicant has lodged an appeal challenging the order of stay of the judgment by the High Court. The said notice of appeal is exhibit FKK2. The grounds advanced by the Applicant in the Notice of Appeal filed with the Court are the same as the ones they are advancing in this application before the Court. In essence, the Respondent says that the Applicant intends to argue his appeal disguised as an application to vacate order of stay of execution of judgment.

**20.** The Respondent therefore verily believes that the application herein is incompetently before this Court and ought to be dismissed.

**21.** Having gone through all the documents filed in this matter and having listened to the submissions made by both sides, I would firstly like to address the preliminary point that has been raised by the Respondent. In a nutshell, the Respondent said that this application is incompetently before this Court as it was brought based on wrong provisions of the law.

**22.** This application is anchored on section 7 of the Supreme Court of appeal Act as read with Order 1 Rule 18 of the Supreme Court Rules, and under the Inherent Jurisdiction of the Court. It is therefore imperative to refer to these statutory provisions in order to avoid a deliberate misunderstanding. 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 determination of an appeal:

Provided that-

- a) in criminal matters-----
- 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 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.”

**23.** On 20<sup>th</sup> May 2024, the Applicant filed a Notice of Appeal under Order 111 Rule 2 of the Supreme Court of Appeal Rules. There are four grounds of appeal couched as follows:

1. The Learned Judge below erred in law in granting a stay Order of the IRC dated 11<sup>th</sup> March 2024 when there was no appeal in relation to that order before the High Court.

2. The Learned Judge erred in law in allowing the Respondent to raise factual issues from the bar opposing the application to vacate the order for stay when the Respondent sworn statement had been struck out by the Court.

3. The learned Judge erred in law in not dismissing the application for stay when:

a) The application was not signed by the Respondent or its legal practitioner as mandatorily required by the Rules of practice.

b) The application had been brought under wrong provisions of the law.

c) The sworn statement in support thereof was invalid as it bore electronic signature, contrary to the requirements of the Oaths, Affirmation and Declarations Act of the laws of Malawi.

d) The Respondent had not brought any or any sufficient evidence supporting the application for stay.

4. The Ruling of the Court below was against the weight of the evidence that was before the Court.

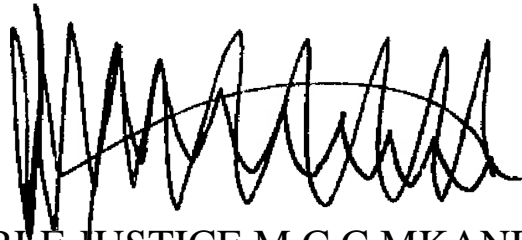
**24.** On the 28<sup>th</sup> of June 2024, a month after filing the appeal, the Applicant filed this application to vacate the order of stay pending appeal.

**25.** I have closely looked at the Notice of Appeal dated 20<sup>th</sup> May 2024. The Notice of Appeal shows that the contents of the grounds of appeal are similar to the contents of the affidavit of Christopher Kambalame. For example, the facts raised in paragraph 8 of this affidavit are exactly the same issues being referred to in grounds 3(2) (3) of the Notice of Appeal.

**26.** Listening to the Applicant's Counsel submissions, I am of the view that Counsel has brought this application with a view to trick the Court. If I proceed to make a determination in this application, then I shall have actually determined the issues raised in the appeal. That I can not do.

27. I therefore find that what the Applicant has done is total abuse of the Court process. The Applicant is on a fishing expedition and any unsuspecting Court would easily fall into the trap set. The Applicant should proceed to prosecute the appeal filed with the Court. This application is dismissed with costs.

Made on the 5<sup>th</sup> of September 2024 at Blantyre

A handwritten signature in black ink, appearing to be 'M.C.C. Mkandawire', written over a horizontal line.

HONOURABLE JUSTICE M.C.C MKANDAWIRE SC, JA

**JUSTICE OF APPEAL**