



**IN THE MALAWI SUPREME COURT OF APPEAL
MSCA CIVIL APPLICATION No. 7 OF 2024
(Being Commercial Case No. 7 of 2022, Lilongwe District Registry)**

BETWEEN

KAMPHINDA NYASULU APPLICANT

AND

REGISTERED TRUSTEES

OF MPATSA TRUST 1ST RESPONDENT

CHRISTINA MAJAVINA 2ND RESPONDENT

MALAWI HOUSING CORPORATION 1ST INTERESTED PARTY

ATTORNEY GENERAL

(MINISTRY OF LANDS, HOUSING

AND URBAN DEVELOPMENT) 2ND INTERESTED PARTY

CORAM: HON. JUSTICE R. MBVUNDULA, J.A.

Tsabola, Counsel for the Applicant

Tambulasi, Counsel for the 1st Respondent

2nd Respondent, 1st and 2nd Interested Parties not represented

Mnthunzi, Recording Officer

RULING

Before this Court is an application for a stay of execution of a default judgment entered by the Assistant Registrar of the Commercial Division of the High Court at Lilongwe, who thereafter declined an application for a stay of the said default judgment. Following the refusal by the Assistant Registrar to order the stay, the applicant made a similar application before a Judge of the High Court, who also

declined to grant the order. The applicant has thus brought another such application now before this Court.

The application is purportedly brought under section 7 of the Supreme Court of Appeal Act as read with Order I rule 18 of the Supreme Court of Appeal Rules. The application is supported by an affidavit sworn by Peter Tsabola, counsel for the applicant, who also filed skeleton arguments which are relied upon. The application is opposed and there is an affidavit in that regard sworn by Felix Tambulasi, counsel for the 1st respondent, who also filed skeleton arguments. The underlying relevant facts are undisputed, and are as stated below.

There subsists a dispute concerning the ownership of a property title number Alimaunde 43/383/55 in the city of Lilongwe. Initially the applicant was not a party to the proceedings but was later added by an order of the High Court. According to the contents of a ruling of the Assistant Registrar in the Court below, dated 9th February 2024, after the applicant was served with the necessary court documents, he did not enter an appearance and a default judgment was entered against him. The Assistant Registrar found the applicant's application for the stay without merit and dismissed it. So did the Judge upon a fresh application. It is the self-same application that is now before this Court.

The 1st respondent challenges the application on several grounds, one of which is that this Court lacks jurisdiction to entertain the application. This Court will first address that ground for the reason that should that ground be sustained, the rest of the other grounds will fall away as courts do not exercise jurisdiction not conferred upon them by law.

It is the 1st respondent's submission on this ground that except where the Registrar acts on delegated power from a Judge, such as where the Registrar is assigned to assess damages against a party the Judge will have found liable, no application that came before the Registrar may be brought afresh in the Supreme Court of Appeal. The legal position, it is submitted, is that the Registrar's decision on such an application must be appealed to a Judge of the High Court. Counsel cited the following case authorities for the proposition: *Liphava and others v Mbaula and another* MSCA Civil Appeal No. 40 of 2019 [2021] MWSC 9; *Nasiyaya v Attorney*

General MSCA Civil Appeal No. 7 of 2021 and General Alliance Limited v Jumbe and Kanthalo Civil Appeal No. 24 of 2023 [2023] MWSC 17.

Counsel then cited several case authorities for the position, as I understand counsel, that an application of the nature that was before the Registrar ought to have been appealed against before a Judge of the High Court, and if declined, further appealed to this Court, hence, so it is submitted, the application herein is irregular, such that this Court lacks jurisdiction to entertain it.

In his counter-argument regarding the issue of jurisdiction, counsel for the applicant made reference to section 7 of the Supreme Court of Appeal Act emphasizing that the provision allows a single member of this Court to sit alone. That is correct. Counsel then made reference to Order I rule 18 of the Supreme Court of Appeal Rules stating that if an application is refused in the Court below then the same may be brought afresh in this Court. In this regard he referred to the case of *DPP and the Attorney General v Norman Chisale and others* MSCA Misc. Application Number 56 of 2022 in which this Court affirmed the position that the jurisdiction of this Court is exercisable only after the application has been refused in the High Court. Counsel proceeded to argue that since the Assistant Registrar in the Court below had refused to grant the relief sought by the applicant, to set aside the default judgment, then this application was properly before this Court, as this Court now assumes jurisdiction since, so he submitted, both section 7 of the Act and Order I rule 18 have been complied with.

Section 7 of the Supreme Court of Appeal Act provides, in so far as the application before this Court is concerned, that a single member of this Court may exercise any power vested in the Court not involving the hearing or determination of an appeal. All things being in order, therefore, the present application would be properly before this Court.

Order I rule 18 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.

As noted, counsel for the applicant took the position that merely because an application was heard “in the High Court”, including that which was before an

Assistant Registrar, then this court automatically assumes jurisdiction under Order I rule 18. A reading of rule 3 of the High Court (Exercise of Jurisdiction of Registrar) Rules does not, however, support this contention. It reads as follows:

3. Any person affected by any decision, order or direction of the Registrar may appeal therefrom to a Judge in Chambers. Such appeal shall be by notice in writing to attend before the Judge without a fresh summons ...

Had the applicant complied with this provision and duly brought an appeal to the Judge in the Court below, there would be no argument about the applicability or otherwise of Order I rule 18 of the Supreme Court of Appeal Rules with regards to the facts and circumstances of this case. The only application that would and should have taken place in the High Court would only be the one that was before the Assistant Registrar, under rule 3 of the High Court (Exercise of Jurisdiction of Registrar) Rules, whereafter the applicant would be entitled to appeal to a Judge of the High Court, in Chambers, in which case this Court's jurisdiction under Order I rule 18 of the Rules of the Supreme Court could not be triggered. Counsel for the 1st respondent was therefore correct in stating that where a Judge has not delegated his or her authority to a Registrar, but the power is yielded by the Registrar, the appeal lies to a Judge of the High Court.

The application herein falls foul of the relevant rules of procedure and must fail. It is accordingly dismissed with costs.

Made in chambers at Blantyre this 22nd day of August 2024.



R. Mbvundula

JUSTICE OF APPEAL