

IN THE SUPREME COURT OF APPEAL

CIVIL APPEAL NUMBER 26 OF 2022

(Being Commercial Case Number 63 of 2021 – High Court of Malawi,
Commercial Division, Lilongwe Registry)

Between

MALAWI HOUSING CORPORATION.....INTENDED APPELLANT

And

EDWIN NYIRENDA.....INTENDED RESPONDENT

CORAM: HON. JUSTICE J. KATSALA, JA

N. Chisiza, Principal State Advocate for the Intended Appellant

C. Masiyano, Court Clerk

RULING

The intended appellant, Malawi Housing Corporation (hereinafter “the applicant”), comes to this Court *ex parte* seeking an order enlarging the time within which it can appeal against the judgment of Lady Justice Mesikano Malonda sitting in the Commercial Division at Lilongwe Registry delivered on 16 March, 2022 in favour of the intended respondent (hereinafter “the respondent”) following his application for summary judgment. The present application is supported by an affidavit made by Mr Neverson Chisiza, a Principal State Advocate in the Attorney General’s Chambers, who is appearing for the applicant.

The brief facts of the matter are that on 1 June 2016, the applicant offered to the respondent a piece of land, being a residential plot in Area 47 in the

City of Lilongwe for the respondent to develop. As consideration therefor, the respondent was required to pay development charges in the sum of K7,848,680. The following were some of the pertinent conditions of the offer: -

- “3. Any refund for non-compliance of terms will attract an administrative fee of 5% of the development charges after the production of original receipts.
4. After full payment of development charges, you shall be granted 12 months to commence the development of the plot.
5. A title deed will be issued on payment of development charges and related fees.

Please note that if the deposit is not received within 30 days thus by 16th July 2016 this offer shall automatically lapse and the plot will be withdrawn from you and reallocated to another applicant without any reference to you.”

The respondent accepted the offer and paid the development charges in full. However, the respondent failed to commence the development of the plot allegedly because there was no access road to the plot such that he could not even manage to view the plot. He alleged that he pushed the applicant for the access road but to nothing. He exhibited to his affidavit in support of his application for summary judgment a letter written in 2020 to the applicant wherein he was following up on the issue of lack of access road. Despite this, the applicant re-entered the plot and allocated it to a third party allegedly on the basis that the respondent had failed to develop the plot within the period prescribed in the offer letter. However, the applicant did not pay back the development charges to the respondent who then commenced an action in the court below claiming the development charges, compound interest thereon at 4% above bank lending rate and damages for inconvenience.

In their defence to the claim, the applicant did not dispute that indeed there were no access roads to the plot in 2016. However, they said they had no paper trail of the respondent pushing for access to the plot in 2016. Thus, the respondent applied for summary judgment on the ground that the applicant did not have a defence to the claim. The Judge agreed with the respondent and entered judgment for the respondent for the sum of K7,848,680, compound interest thereon as claimed, damages for inconvenience (to be assessed) and costs of the action. The applicant is dissatisfied with the judgment and wants to appeal to this Court. However, the six weeks prescribed by law for one to appeal against a judgment has since expired. Hence, the present application in which it seeks an order of

this Court enlarging the time within which to file its Notice of Appeal. As already stated, the application is made *ex parte*.

Section 23(2) of the Supreme Court of Appeal Act gives this Court the power to extend the time within which a party may lodge an appeal where such time has expired. And Order III, rule 4 of the Rules of the Supreme Court of Appeal (hereinafter "the Rules") provides as follows: -

"Every application for an enlargement of time in which to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal within the prescribed period, and by grounds of appeal which *prima facie* show a good cause why the appeal should be heard. When time is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal".

Clearly, this rule introduces two factors which must be satisfied by an applicant for enlargement of time within which to appeal. These are (a) he must show that he has good and substantial reasons for the failure to appeal within time; and (b) his grounds of appeal must *prima facie* show a good cause why the appeal should be heard. For the application to be successful both factors must be satisfied in the supporting affidavit. See *NBS Bank Ltd v Hamdani* [2010] MLR 257. This means that where an applicant satisfies one limb but fails to satisfy the other, the application must fail.

The six weeks an aggrieved litigant is allowed to appeal against a judgment is by all standards a very long time in as far as the successful litigant is concerned. The uncertainty as to whether there will be an appeal or not can be mean. Therefore, in the absence of any justification, it is unfair and unjust to keep a successful litigant in such suspense beyond the six weeks prescribed for filing a notice of appeal. And that is why the law demands that it should only be done if there are good and substantial reasons.

What would constitute good and substantial reasons for purposes of Order III, rule 4 of the Rules is a question of fact. It will vary from case to case depending on the circumstances. There is no catalogue of circumstances that would suffice. It is up to the Court hearing the application to determine whether in the circumstances of that particular case, the explanation given for the delay in filing the notice of appeal within the prescribed period is good and substantial.

In explaining the delay in the filing of the notice of appeal, counsel depones in his affidavit in support of this application as follows: -

- (10) THAT the delay to file an appeal was a result of formalities that are there between the office of the Attorney General and Malawi Housing Corporation in respect of communications which are in

written form. The instruction to appeal from the clients reached the office of the attorney General late hence the delay.

- (11) THAT by that time, the only lawyer for Malawi Housing Corporation, Counsel Mzanda was not feeling well and was not working and the Attorney General was handling court matters awaiting the recovery of Counsel Mzanda and further engagement of external counsel for the Corporation.
- (12) THAT notwithstanding the fact that the Defendant delayed to appeal the matter within the prescribed time limit, I verily believe that the delay is not inordinate as this application is still within 3 months since the Court below delivered the impugned Judgment." (sic)

What is being alleged here as the cause of the delay is the bureaucracy between the office of the Attorney General and the applicant. In my considered view, this cannot be a good and substantial reason to excuse the failure to appeal within time. In my judgment, it would be wrong to allow any bureaucracies to affect a successful litigant's right to enjoy the fruits of his litigation. As a reminder, it is imperative that litigants must always be vigilant in the protection of their rights. If a litigant, out of his own choice, fault or lapse allows internal bureaucracy to impede the protection of his rights as a litigant, he should own up to it and face the consequences head on. I find that it would be an error of law and an injustice if this Court were to accept that such choice, fault, lapse or bureaucracy would be a good and substantial reason to warrant an enlargement of time within which to appeal against a judgment.

Coming to the second reason given for the delay, namely, that "the only lawyer for Malawi Housing Corporation, Counsel Mzanda was not feeling well and was not working and the Attorney General was handling court matters awaiting the recovery of Counsel Mzanda and further engagement of external counsel for the Corporation", I must say that I find it absurd. The fact that the internal counsel was not available in the office does not mean that the applicant was not functioning. I do not think the whole organization's operations could hinge on the absence or availability of one person. If that is the case, then I would say that this Court is not prepared to accept that manner of doing things as a good and substantial reason for extending the time within which to appeal.

In my view, this second reason only speaks to the first reason – the bureaucracy. And it does not hold water since it is deposed that the Attorney General was handling the matter in the absence of the internal counsel. In other words, in the first place, the matter could not be allowed to stall or go undefended because of the absence of the internal counsel.

Now, one wonders why, after the judgment, it was not the same Attorney General to advise the applicant on the issue of the appeal. Why did the applicant have to wait for the internal counsel in order to decide whether to appeal or not? Surely, this does not make sense when the Attorney General was already handling the matter and available for consultation on the issue of appeal. Further, even the present application is being handled by counsel from the Attorney General's Chambers. I therefore, find that this second reason for the delay is not good or substantial to justify the delay. It only reflects applicant's tardiness and simplicity in dealing with important issues. This Court cannot condone it.

Further, the applicant alleges that the delay is not inordinate since this application has been brought within three months since the date of the judgment the applicant intends to appeal against. There is not much that I can say on this except that any delay if not for a good and substantial reason is not acceptable. The law prescribes a period of six weeks within which to file a notice of appeal. And to say a fact, six weeks is a long period for a successful litigant to be in limbo not knowing whether the other party will appeal or not. To extend that period of waiting is unfair and unjust to the successful party. There has to be finality to litigation. Hence, under our law, the successful party is entitled to believe that the case has come to an end at the expiry of six weeks from the date of the judgment. This is a legitimate expectation which should only be interfered with only when there are good and substantial reasons. That is what the law demands.

Consequently, an application for extension of time within which to file a notice of appeal should never be treated as a matter of course. It is a serious application and must be accorded the seriousness that it deserves. The fact that the law allows such application to be made *ex parte* does not subtract anything from its significance.

Further, as earlier stated, the law requires that in an application for extension of time within which to appeal, the applicant must present grounds of appeal which *prima facie* show a good cause why the appeal should be heard. In my judgment, this entails two factors. First, the Notice of Appeal (including the grounds of appeal) must comply with the applicable law governing appeals in this Court, and secondly, the grounds of appeal must be meritorious.

On the first limb, Order III, rule 2(1) of the Rules prescribes, *inter alia*, that an appellant must state in the Notice of Appeal whether he is complaining against the whole or only a part of the judgment. This is necessary because it puts both the respondent and the Court on alert on the centre of the appellant's grievance and also puts the entire appeal in focus.

In the present matter, the Notice of Appeal exhibited to the affidavit in support of the application does not state whether it is the whole or only a part of the judgment that the complaint is about. Instead of being specific on this point, the applicant refers to the grounds of appeal which state as follows: -

- "1. The learned Judge erred in law by granting an application for summary Judgment when the matter raises several contentious factual and legal issues including but not limited to the following:
 - a. Whether or not there was an access road to the Claimant's plot, *vis as vis* paragraph 3(a) of the Defendant's Defence?
 - b. Whether or not the Claimant was under contractual obligation to develop the land within 12 months from the prescribed date of completion of payment of development charges *vis as vis* paragraph 3(b) of the Defendant's Defence?
 - c. Whether or not the Claimant breached the sale of land Contract and whether or not the Landlord *vis as vis* paragraph (c) of the Defendant's Defence?
 - d. Paragraph 3(d) of the Defendant's Defence also raises issues that should have gone for trial.
2. The Court below erred at law in granting compound interest on the purchase price at 4% above the commercial bank lending rate as pleaded by the Claimant.
3. The Court below erred at law in granting the Claimant damages for inconvenience notwithstanding the fact that the same were too remote in the circumstances." (sic)

Looking at these grounds of appeal, I do not see where they state whether the appeal is against the whole judgment or just a part of the judgment. This means that the Notice of Appeal is not complying with the prescription in Order III, rule 2(1) of the Rules.

Further, even the grounds of appeal themselves do not fully comply with Order III, rule 2(1) of the Rules. In *Mutharika and Electoral Commission v Chilima and Chakwera* MSCA Constitutional Appeal No. 1 of 2020 (unreported) this Court commenting on the need for grounds of appeal to comply with the Rules stated as follows: -

"In *Dzinyemba t/a Tirza Enterprise v Total (Mw) Ltd* MSCA Civil Appeal No. 6 of 2013 (unreported), this Court emphasized that grounds of appeal must conform to the requirements of Order III rule 2 of the Supreme Court of Appeal Rules. The Rules require that the grounds of appeal must be precise and concise; they must not be argumentative; and that the grounds of appeal must state clearly whether they are based on law or fact, so that this Court and the other party (or parties) to the proceedings are able to appreciate precisely what the appellant is appealing against. This Court also emphasised that the grounds of appeal that do not comply with Order III rule 2 of the Supreme Court of Appeal Rules may be struck out by the Court on its own motion or on application by a respondent in the proceedings."

In my judgment, the grounds of appeal do not pass the test laid down in this dictum. Just to point out a few observations, the first ground of appeal refers to paragraphs in the applicant's defence filed in the court below and yet that defence has not been attached to the Notice of Appeal. As it is, this Court does not know what was stated in those paragraphs and is unable to appreciate the gist of the ground of appeal. Thus, the ground of appeal fails to speak on its own. And it cannot be said that it is precise and concise as required by the Rules.

The second ground of appeal, in my judgment, lacks legal merit. The applicant kept the respondent's money for over seven years. Having decided to terminate the contract, there was no justification, legally or otherwise, for the applicant to hold on to the money. The position at law in such circumstances is clear – where a person wrongfully withholds another person's money and that other person is forced to take legal action to recover it, justice demands that the party who wrongfully withholds the money ought not to benefit from his wrongful act. See *Gwembere v Malawi Railways Ltd* 9 MLR 369 where this Court cited with approval the dictum of Lord Herschell, L.C. in *London, Chatham & Dover Ry. Co. v South E. Ry. Co.* (4) [1893] A.C. 429 (at 437) on justification for award of interest.

The courts have gone further and have held that in such circumstances, an award of compound interest is appropriate in order to compensate the wronged party for being wrongfully deprived of the use of his money. The compound interest must be at the rates that were applicable on the money market for the entire period the money was wrongfully withheld. See *National Bank of Malawi Ltd v Central Africana Produce Ltd* Commercial Case No. 74 of 2014 (HC) (unreported) and the cases cited therein.

On the foregoing, and without in any way deciding the intended appeal, I am fortified in my view that the applicant's chances of succeeding on the second ground of appeal are almost nonexistent.

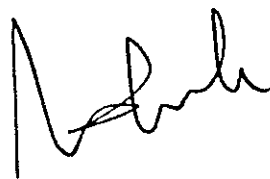
Likewise, the third ground of appeal is difficult to appreciate why the applicant thinks is a good ground. Having found that the applicant breached the contract with the respondent, it was only proper for the court below to award damages for the breach. I do not see how that can be faulted.

In the end, I find that the application before me must fail. The applicant has failed to demonstrate before this Court that there were good and substantial reasons for the failure to appeal within the prescribed period. Further, I find that the applicant's grounds of appeal prima facie do not show a good cause why the appeal should be heard. Therefore, it will only be a waste of this Court's time if the applicant were allowed to file the appeal. Surely, this Court will not allow anyone to waste its time through appeals that are prima facie legally flawed or otherwise. As was recently stated by this Court in *Falifoti Mkwaila & others v Malbro Investment Ltd* MSCA Civil Appeal Number 5 OF 2020 (unreported): -

"No one has the right to waste a court's time and resources. The court's time is a public resource which must be utilized prudently at all times. Any attempts at wasting the court's time must be resisted and dealt with firmly".

I will not give the applicant the opportunity to waste the Court's time. I refuse to grant an enlargement of time within which to appeal. I dismiss the application.

Made at Blantyre this 14th day of June, 2022.



J N Katsala
JUSTICE OF APPEAL