



**IN THE MALAWI SUPREME COURT OF APPEAL
MSCA MISCELLANEOUS CAUSE NO. 09 OF 2024
(Being High Court, Civil Division, Mzuzu Registry, Civil Cause
No. 17 of 2023)**

BETWEEN:

MATTHIAS KHWIMA DHLAMINI.....APPLICANT

AND

FIRST CAPITAL BANK PLC.....1ST RESPONDENT

WILLIAM PHALURA.....2ND RESPONDENT

CORAM: THE HON. JUSTICE MR S.A. KALEMBERA SC, JA

: Mr Kadzipatike, of Counsel for the Applicant

: Mr Ndau, of Counsel for the Respondents

: Mr Zimphonje, of Counsel for the Respondents

: Mr Chinkono, Recording Officer

: Mr Fundani, Recording Officer

RULING

Kalembera J

1. This is an order on the Applicant's inter-partes Application for an Order Setting Aside Order of Stay of Execution. The Application is supported by an affidavit sworn by George Jivason Kadzipatike, of Counsel for the Applicant, an affidavit in reply, as well as Skeletal Arguments. The Respondents have filed an affidavit in opposition sworn by Given Phiri, Legal Manager for the 1st Respondent, as well as skeletal arguments. The Respondents oppose the Application.

2. The background of this matter is such that the Applicant commenced an action in the Senior Resident Magistrate's Court at Mzuzu, claiming damages for conversion, defamation, inconvenience, trespass to land, indemnity against payment of legal fees and costs of the action. After a full trial the Court found for the Applicant and awarded him the sum of K37, 000,000.00 in damages for conversion, trespass to land and inconvenience in a judgment dated the 5th day of December 2023.

3. The Court further awarded the Applicant the sum of MK14, 024,500.00 in costs of the action which it ordered the 1st Respondent to pay within 7 days from 16th January 2024, the day of the Order. In its ruling dated the 2nd of February 2024, the High Court stayed the judgment of the Senior Resident Magistrate dated 5th December 2023, that had awarded damages and costs of the action to the Applicant. At the time the Order of Assessment of costs was being made, the 1st Respondent had already moved the High Court to stay the enforcement of the Magistrate Court's decision of 5th December 2023, and also paid the judgment sum of MK37, 000, 000.00.

4. That application for the continuation of the interim order of stay of execution against the order of assessment was overtaken by events, since Justice Ligowe stayed the judgment (being both the judgment and costs order), which means the Applicant stops the execution of the order on assessment of costs.

5. The Respondents contend that the Applicant's application is misplaced in law and without merit, in that there is no appeal before this Court to anchor the present application and to invoke this Court's jurisdiction. That the present application is not a fresh application since it is essentially an appeal against the High Court's decision and completely different application, one that seeks to set aside the interlocutory order of stay of 2nd February 2024 as made by the High Court.

6. In the affidavit in reply sworn by George Jivason Kadzipatike, it is deponed that the Applicant already filed a Notice of Appeal before this Court against the decisions of the Court below regarding proceedings surrounding the matter herein. Further, that the Applicant already filed an application without Notice, for leave to appeal against a decision delivered in Chambers which is yet to be determined by Hon. Justice Ligowe.

7. It is further deponed that there is an appeal or contemplated appeal regarding the matter before this Court.

8. Main issues for the court's determination are whether the application be granted or not?

9. In terms of section 21 of the Supreme Court of Appeal Act, as read with section 23 of the Supreme Court of Appeal Act; it provides for what judgments are appealable to this Court. Strictly, in terms of the law all judgments are appealable except for those provided in the first proviso under section 21 as follows:

10. 21. Civil appeals

24 of 1968 An appeal shall lie to the Court from any judgment of the High Court or any judge thereof in any civil cause or matter:

Provided that no appeal shall lie where the judgment (not being a judgment to which section 68 (1) of the Constitution applies) is—

(a) an order allowing an extension of time for appealing from a judgment;

(b) an order giving unconditional leave to defend an action;

(c) a judgment which is stated by any written law to be final;

(d) an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree nisi on which the order was founded has not appealed from that decree:

And provided further that no appeal shall lie without the leave of a member of the Court or of the High Court or of the judge who made or gave the judgment in question where the judgment (not being a judgment to which section 68 (1) of the Constitution applies) is—

(a) a judgment given by the High Court in exercise of its appellate jurisdiction or on review;

(b) *an order of the High Court or any judge thereof made with the consent of the parties or an order as to costs only which by law is left to the discretion of the High Court;*

(c) *an order made in chambers by a judge of the High Court;*

(d) *an interlocutory order or an interlocutory judgment made or given by a judge of the High Court, except in the following cases—*

(i) *where the liberty of the subject or the custody of infants is concerned;*

(ii) *where an injunction or the appointment of a receiver is granted or refused;*

(iii) *in the case of a decision determining the claim of any creditor or the liability of any contributor or the liability of any director, or other officer, under the Companies Act in respect of misfeasance or otherwise;*

(iv) *in the case of a decree nisi in a matrimonial cause;*

(v) *in the case of an order on a special case stated under any law relating to arbitration;*

(e) *an order refusing unconditional leave to defend or granting such leave conditionally.*

11. And the said section 23 provides time for appealing as follows:

“s. 23 (1) If a person desires to appeal under this Part from the High Court to the Court, he shall, in such manner as may be prescribed by the rules of court, give notice to the Registrar of the High Court of his intention to appeal –

(a) Within 14 days of the judgment from which he wishes to appeal if such judgment is an interlocutory order;

(b) Within six weeks of the judgment from which he wishes to appeal in any other case.

(2) the Court may extend time for giving notice of intention to appeal under this Part, notwithstanding that the time for giving such notice has expired.”

12. The provisions under sections 21 and 23 of the Supreme Court of Appeal Act are very clear and straight forward. This is a matter which under the said section 21 required leave of the Court in order for the Applicant to properly bring an appeal before this Court. The Applicant did not. And the Applicant further concedes that he never obtained leave, but had an application for leave to appeal before Ligowe J. Having an application for leave to appeal does not mean you have leave to appeal. In the absence of leave, there is no appeal pending before this court.

13. In the case of **Linda Limbe vs Development Aid of the People to People, MSCA Civil Appeal No. 70 of 2017**, the Court made the following observation:-

“8.1.1 In accordance with paragraph (c) of the second proviso to section 21 of the Supreme Court of Appeal Act, the Appellant requires leave of the court below or this Court to appeal against the order of mandatory injunction of the court below.

*8.1.2 In this matter, the Appellant has filed a notice of appeal. While ordinarily, a notice of appeal should be filed after the grant of leave, the proviso to Order III r 3 (2) of the Supreme Court of Appeal Rules does not prohibit the filing of a notice of appeal before the granting of leave to appeal (See: **The Registered Trustees of Thandizane Carpenters Shop v Foletsani Tchawango MSCA Civil Appeal No 2 of 2012.**). It is, therefore, permissible to file a notice of appeal before obtaining leave to appeal; the proviso to Order III r 3 (2) of the Supreme Court of Appeal Rules expressly provides that “... nothing in this subrule shall be deemed to prohibit an appellant from filing a notice of appeal prior to the hearing of the application for leave to appeal.”’.*

8.1.2 However, it is pertinent to observe that not only is there nothing in documents filed by the Appellant to indicate that leave to appeal has been sought and obtained;

*and there is no indication whatsoever that there is pending any such application either before the court below or this Court. **The application herein for a stay of the order of mandatory injunction of the court below is premised on the fact that an appeal has been filed against the order of the court below, and presumably also, based on the grounds of appeal that have been filed by the Appellant, the good prospects of success of the appeal. If, as it must, this Court is required to inquire into the prospects of the success of the appeal for purposes of determining whether to judiciously exercise its discretion to grant or to refuse to grant the sought stay of the order of mandatory injunction, then whether there is in fact a valid appeal filed in the Supreme Court of Appeal is material. If there is no valid appeal filed because leave to appeal has not been sought and obtained, then it cannot seriously be contended that there is before this Court a proper application for a stay of the order of mandatory injunction pending the hearing and determination of an appeal.***

8.1.3. After carefully considering the issue whether this is a proper case to grant a stay of the order of mandatory injunction of the court below, pending the hearing and determination of the appeal, I am not inclined to grant the application for the reasons set out under paragraphs 8.1.1 and 8.1.2, namely, the Appellant's failure to seek and obtain, from the court below or this Court, leave to appeal against the order the court below, as required by and in accordance with paragraph (c) of the second proviso to section 21 of the Supreme Court of Appeal Act" [Emphasis supplied]

14. Justice of Appeal Mbvundula in **First Capital Bank Limited vs Fumbani Kanyika and others**, MSCA Civil Application No. 64 of 2023 on the issue of jurisdiction of the Supreme Court in applications of stay had this to say on applications such as the present:-

"This Court appears to have no jurisdiction to entertain and grant the application. In addition to Order I rule 18 of the Supreme Court of Appeal Rules, section 65, in particular, subsection (3) of the Labour Relations Act is pertinent...

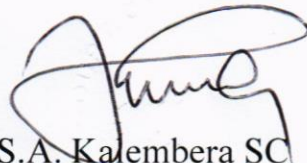
... The determinant question with relation to Order I rule 18 of the Supreme Court of Appeal Rules, and in so far as the issue of jurisdiction is concerned, is whether the application herein may have been made either to the High Court, at first

instance, or to this Court, in terms of the Order, and the answer should be in the negative because the application for stay that was refused below could only be made under section 65 (3) of the Labour Relations Act to the IRC and/or to the High Court, and not to this Court. It is also pertinent to point out that the application that was considered by the High Court was not at first instance, which automatically removes it from the scope of Order I rule 18. To suggest that just because the application found itself before the High Court then the provisions of Order I rule 18 were thereby triggered is an attempt to confer upon this Court jurisdiction which it otherwise does not have. Save where a court exercises its inherent jurisdiction, a court is not entitled to exercise jurisdiction not conferred upon it by statute. I find myself to be in agreement with the submission of counsel for the respondents that the application herein is irregular for want of jurisdiction on the part of this Court.” [Emphasis supplied]

15. I cannot agree more with the above authorities. And as earlier observed herein, the Applicant did not obtain leave to appeal to this court. And the Applicant through Counsel, has conceded that he never obtained leave, rather that he applied for leave before Ligowe J, and that that application is pending. Thus, with no leave, the jurisdiction of this court has not been triggered as can be seen from the authorities cited. In other words, there being no appeal pending, and there being no leave to appeal, this court has no jurisdiction to entertain this application. The application is thus, premature.

16. Consequently on the reasons and observations herein. This application is hereby dismissed with costs for the Respondents.

MADE this 17th day of January 2025 at the Principal Registry, Blantyre.



S.A. Kalembera SC
JUSTICE OF APPEAL