REPUBLIC OF MALAWI

IN THE MALAWI SUPREME COURT OF APPEAL

MSCA MISC CIVIL APPLICATION No. 28 OF 2024

(Being Civil Cause No. 97 of 2023, Before the High Court of Malawi, Lilongwe Registry)

In the matter between:

PACIFIC LIMITED	APPELLANT
-AND-	
ZAIFE INVESTMENTS	1ST RESPONDENT
MALAWI HOUSING CORPORATION	2ND RESPONDENT
PERSONS UNKNOWN	3RD RESPONDENT

RULING

1. The issue currently under consideration is an application filed by the appellant, Pacific Limited, hereinafter referred to as 'the applicant', which seeks a stay of execution pending the hearing and determination of an appeal. The application is filed under Sections 7 and 8 (b) of the Supreme Court of Appeal Act as read with Part 52.16 of the Civil Procedure Rules of England. The application is substantiated by an affidavit sworn by Mr. Phokoso, Counsel representing the applicant, along with accompanying skeleton arguments. The application is opposed. Counsel representing Zaife Investments, hereinafter referred to as 'the first Respondent', has filed an affidavit contesting the application, and corresponding skeleton arguments. Similarly, Malawi Housing Corporation, hereinafter referred to as 'the first Respondent', also opposes the application and has filed skeleton arguments in opposition thereto.

Factual background

2. The factual circumstances surrounding this matter indicate that the applicant made an *ex-parte* application for an interlocutory injunction, seeking to restrain the respondents, their servants, agents, or any other associated individuals from entering and conducting construction activities on Plot Numbers 6/282 and 6/290 until the matter's final resolution or until a subsequent order is issued by the High Court. The High Court duly granted the *ex-parte* application and directed that the applicant should file an *inter-parte* application for the continuation of the interlocutory order within 14 days. On 26 May 2023, the first respondent filed an application requesting the discharge of the aforementioned *ex-parte* order of interlocutory injunction and sought for the High Court to strike out the claim on the grounds of being frivolous, vexatious, and unsustainable. On 20 February 2024, the High Court presided over the two applications: one concerning the applicant's request for the continuation of the interlocutory injunction, and the other pertaining to the first respondent's motion to discharge the interlocutory injunction and strike out the claim on the basis of frivolity and vexation. On 22 April 2024, the High Court discharged the *ex-parte* order of interlocutory injunction that had been granted on 9 May 2023 in favour of the applicant and subsequently struck out the claim as being frivolous, vexatious, and unsustainable. This Court will refrain from elaborating on the rationale behind this decision at this juncture; however, the applicant, feeling aggrieved by the ruling of the High Court, filed a notice of appeal against the decision discharging the order for interlocutory injunction. After the applicant lodged a notice of appeal they also filed in this Court an *ex-parte* application for a stay of execution pending appeal, accompanied by an affidavit in support of the application. The Court rejected the *ex-parte* application and instead mandated that the application proceed by way of *inter-parte* hearing. The first respondent filed an affidavit opposing the application for a stay of execution pending appeal.

The Applicant's submissions

3. In the skeleton arguments submitted in support of the application, the applicant commenced by referring to section 7 of the Supreme Court of Appeal Act, which articulates that:

> "A single member of the Court may exercise any power vested in the Court not involving the hearing or determination of an appeal."

Furthermore, the applicant referred to Order 1 Rule 18 of the Supreme Court of Appeal Rules, which stipulates that:

> "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 previously indicated, the applicant brings this application under Part 52.16 of the Civil Procedure Rules of England, which are incorporated into our procedural rules by virtue of section 8 (b) of the Supreme Court of Appeal Act. Counsel additionally contended that Order III rule 34 of the Supreme Court of Appeal Rules provides that:

> "Unless the Appeal Court or the lower court orders otherwise, an appeal shall not operate as a stay of any order or decision of the lower court."

However, Order III rule 34 does not encompass the provision quoted by Counsel. Instead, the rule addresses matters not explicitly articulated as follows:

> "Where no other provision is made by these Rules the procedure and practice for the time being in force in the Court of Appeal in England shall apply in so far as it is not inconsistent with these Rules, and the forms in use therein may be used with such adaptations as are necessary."

The applicant posits that an appeal consequently does not function as a stay of the judgment being appealed unless the Court explicitly orders and grants a separate stay. Therefore, Courts possess such jurisdiction. The applicant maintains that the principles governing the granting of a stay pending the determination of an appeal have been established by both the High Court and the Supreme Court of Appeal in Malawi on numerous prior occasions. The case of *Mike Appel & Gatto Limited v Saulos Chilima* [2014] MLR 231 (SCA) represents the seminal case regarding the decision to grant a stay of execution

pending the resolution of the appeal. In that case, as well as in subsequent cases, the Court has articulated that the decision to grant or deny a stay of execution is a matter of judicial discretion, and when exercising such discretion, the Court must consider several factors, including:

i. whether any special circumstances are justifying the grant of stay;
ii. whether the appeal would be rendered nugatory if the appeal succeeds if the stay is refused; and
iii. whether looking at the case in totality, it is in the interest of justice that a stay be granted. In this regard, the court went further and observed that if the principle is that the Applicant must show that he would be prejudiced, the court's discretion would revolve around whether indeed the Applicant would be prejudiced if the judgment is executed.

4. The applicant refers to *Hammond Suddard Solicitors vs Agrichem International Holdings Limited* [2001] ECWA Civ. 2065 which was cited with approval in *Mike Appel and Gatto Limited*, the Lord Justice articulated the following observations:

> *"Unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the order of the lower court. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a 'risk of injustice' to one or both parties if it grants or refuses a stay.*

The applicant contends that this Court ought to grant a stay of execution pending appeal on the grounds that there exists a reasonable prospect of success for the appeal, as the High Court committed multiple legal and factual errors, which are contained in the grounds of appeal articulated within the Notice of Appeal filed by the applicant. The applicant further posits that should the ruling of the High Court rendered on 22 April 2024 not be stayed, any judgment on appeal, if favourable, may be rendered nugatory, as the first respondent is likely to proceed unabated with the construction of permanent structures on the property, selling it, subdividing it into multiple plots, making irreversible alterations, and permanently obstructing access and frontage to the respondent's

four hectares of land under title Bwaila 6/290, where they plan to establish an international standard shopping mall and hotel, thus rendering it devoid of utility. The applicant asserts that there exist special circumstances that necessitate the granting of a stay, aimed at serving the interests of justice by preserving the very subject matter of the appeal from potential loss during the pendency of the appeal, thereby avoiding the risk of rendering the appeal academic, nugatory, and moot. Consequently, the execution of the ruling from the High Court should be stayed. The applicant further articulates that, in the absence of a stay regarding the ruling of the court below dated 22nd April 2024, the first Respondent will continue unabated with the construction of permanent structures on the land, subdividing it into multiple plots, selling the plots, permanently altering it, and obstructing access and frontage to the respondent's four hectares of land under title Bwaila 6/282, where they intend to develop an international standard shopping mall and hotel, ultimately rendering it useless and resulting in the loss of a unique parcel of land that cannot be replicated. This situation would be prejudicial to the Applicant, as the appeal would be rendered academic should the Supreme Court of Appeal rule contrary to this position. Therefore, allowing the ruling of the court to remain unstayed and permitting enforcement would not serve the interests of justice.

The first respondent's submissions

5. The first respondent cites the case of *National Bank of Malawi v D. Nkhoma t/a Nyala Investments* MSCA Civil Appeal Number 6 of 2005 (unreported), wherein the Court considered the principles that underpin the granting of an order for a stay of execution pending appeal. On page 3 of the transcript of the ruling, the learned Justice of Appeal remarked that:

> *..case authorities, from both within and outside the jurisdiction, abound for the principles that: (a) the court will not grant stay unless it is satisfied that there is a good reason for doing so; (b) the court does not "make a practice of depriving a successful litigant of the fruits of its litigation, and locking up funds to which he is prima facie entitled", pending appeal and (c) the practice is that a stay will normally be granted only where the applicant satisfies the court that if the damages are paid then there will be no*

reasonable prospect of recovering them in the event of the appeal succeeding.

6. The first respondent further submits the case of *Mike Appel & Gatto Limited v Saulos Chilima*, the full bench of the Supreme Court stated that there are cardinal considerations which have remained primary even on a reading of the *Moat Housing* and the *Hammond* cases, which are that;

(i) Neither the commencement of an appeal nor the grant of permission to appeal affect the enforceability of the judgment below. A court will not dwell on the prospects of success of the impending appeal to grant or refuse to grant a stay of execution: *Ulalo Capital Investments Ltd and another v Southern Africa Enterprise Developing Funding* [2009] MLR 479, *Nyirenda v Osman* [1993] 16(1) MLR 400

(ii) A successful litigant should not generally be deprived of the fruits of his litigation pending appeal: *Auction Holdings Limited v Fasta Civil Engineering* [2011] MLR 6 (SCA); *Leicester Circuits Ltd v Coates Brothers PLC* [2002] EWCA Civ 474; *City of Blantyre v Manda and Others* [1992] MLR 114.

(iii) where it is evident that if a stay is not granted the appeal will be rendered nugatory stay is likely to be granted: *In re: Citizen Insurance Company Limited and The Registrar of Financial Services Act, 2010; Ex Parte the Registrar of Financial Institutions* [2012] MLR 138 (SCA).

7. The first respondent argues that the application be declined for the following reasons;

i. That the land being ordinary commercial land, in the likelihood that the appeal succeeds the applicant will be compensated by way of damages should the land no longer be capable of being overturned to its current state

ii. That the applicant's claim lies principally against the second Respondent, Malawi Housing Corporation, which is responsible for owning and allocating land hence the compensation on land matter is not an issue

iii. That in the Court below the first Respondent testified that a grader, JCB and other machinery were parked on site for weeks at hire charges of K700,000 per day hence with the injunction he suffered a loss so it would be unfair and unjust for the first Respondent to continue incurring these losses if the stay is granted in favour of the Applicant. Therefore, the first Respondent should enjoy the fruits of their judgment because they are the leasehold owner of the land

iv. That the first Respondent's land is plot No. 6/290 while the Applicant's grounds of appeal are focused on the High Court's determination regarding plot No. 2/282. Therefore, the Applicant has no issues with the first Respondent's land and there is no reason for denying the first Respondent the fruits of their judgment.

The second respondent's submissions

8. The second respondent submits that the granting of a stay by a court is not an automatic procedure. The applicant bears the burden of presenting credible evidence to the court that substantiates a favourable disposition towards granting such an application. Refer to *Mike Appel and Gatto Limited v Saulosi Chilima*. Consequently, the party seeking such relief is obligated to demonstrate to the Court in which direction the scales of justice are inclined. Therefore, the applicant's affidavit, along with the replying affidavit, fails to meet the requisite evidential threshold.
9. Moreover, the second respondent contends that the applicant has based its case on the purported uniqueness of the contested land. The suggestion that the mere involvement of land as the subject matter of an application for injunctive relief compels the Court to grant such relief was explicitly repudiated by this Court in *Standard Bank Limited v Dr. Chaponda* (MSCA Civil Appeal 58 of 2013) [2018] MWSC 11 (20 March 2018), wherein it was determined that damages would suffice as an adequate remedy in such circumstances. In this instance, even if the appeal were to succeed, which is highly questionable, the applicant should be confined to seeking damages as its remedy.

10. Furthermore, the second respondent posits that, in the context of determining stay applications, an appellate court must be convinced that the Appellant is presenting substantial questions worthy of the Court's consideration. Refer to *Chitawira Shopping Centre v HMS Foods & Grain Ltd* MSCA Civil Appeal No. 30 of 2015. As such, the materials presented to the Court do not adequately address the following pivotal concerns: That the claim in the court below was predicated on factual inaccuracies; and that the order of injunction was procured based on blatant lies. The second respondent further asserts that concerning the latter point, the Court has not been apprised of the rationale behind permitting the applicant to retain the benefit of an order obtained through dubious means, particularly after having previously misled the Judge in the *ex parte* application. Therefore, the appeal does not pose serious questions, so the application should be dismissed.

The Issues

11. In the Court's considered view, the following legal issues emerge for determination:
    a. Whether the application is properly before the Court; and
    b. Whether the applicant has demonstrated that the orders of stay of execution pending appeal are merited.

The decision

Whether the application is properly before the Court

i. As previously indicated, the matter before me involves an application for a stay of execution pending an appeal against a ruling from the High Court, which denied the request for the continuation of an interlocutory injunction initially granted *ex parte* and subsequently discharged that *ex parte* order of interlocutory injunction. In essence, the applicant was denied interim relief, specifically, the continuation of the injunction it had secured *ex parte,* pending the resolution of the primary action.

ii. The current position of the Court is that when an applicant has been denied interim relief in the High Court, he or she is entitled to petition this Court for the same order, as Order I rule 18 and Order II rule 1 permit this Court to consider and grant interim reliefs following their

denial by the High Court. In the case of *Dalitso General Suppliers Limited v National Bank of Malawi* (MSCA Misc. Application 19 of 2023) [2023] MWSC 42 (7 August 2023), a single member of the Court articulated the following:

> *"This Court finds and concludes that in terms of the law this application is erroneous as well as misconceived and must therefore fail. Why do we say so? It is well to note that the Applicant was denied an interim relief, namely, continuation of the injunction which it obtained ex parte, pending determination of the main action. As this Court understands it, the right approach should have been for the Applicant to make a fresh application before this Court for an injunction pending determination of the main action in the High Court. This approach is consistent with this Court's earlier decisions and Order 1 Rule 18 and Order 2 Rule 1 of the Supreme Court of Appeal Rules. It is further in conformity with this Court's stance on "inchoate decisions" of the High Court which this Court has on numerous occasions held that they are incapable of being appealed to this Court. The Applicant has appealed the decision of the High Court refusing continuation of the injunction. This intended appeal on the ruling vacating the injunction is thus erroneous and misconceived. The High Court's ruling vacating the injunction is incapable of being appealed to this Court."* [Emphasis supplied]

12. In this Court's well-considered assessment, the sole distinction between the present matter and the case of *Dalitso General Suppliers Limited v National Bank of Malawi* lies in the fact that the High Court, in this instance, addressed an application to strike out the claim. The High Court articulated its position as follows:

> *"Thus, the ex parte order of interlocutory injunction that was granted on 9th May 2023 in favour of the Claimant is hereby discharged and the action accordingly struck out for reasons contained herein. Costs are for the Defendants."*

13. Indeed, the legal framework permits an appeal against orders concerning interlocutory injunctions as delineated in section 21 of the Supreme Court of

Appeal Act. Thus, it was held in *Dalitso General Suppliers Limited v Mybucks Banking Corporation Limited*, MSCA Civil Application No. 2 of 2023:

> *"This is an appellate court. Matters come here invariably by way of appeal or in the context of appeal. Except in a few instances which this case is not. Parties therefore either get relief i.e. judgment/order/ruling at the conclusion of the appeal or interim relief in the context of an existing or contemplated appeal. It explains the use of the words 'pending appeal' where interim relief is sought.*
> *In the instant case the matter is still before the Court below. There is no appeal in relation thereto in this Court. There is no appeal against the vacation of the injunctive relief or the order of the Court below dated January 24, 2023. The Applicant is clearly improperly before this Court."* [Emphasis supplied]

14. It is the determination that the application is appropriate before this Court. The applicant has duly filed a notice of appeal against a final judgment rendered by the High Court, which dismissed the application for the continuation of the interlocutory injunction and the entirety of the claim. No substantive claim remains pending before the court below. The applicant has correctly adhered to the proper procedure for seeking a stay of execution in this instance.

Whether the applicant has demonstrated that the orders of stay of execution pending appeal are merited

15. The question remains whether the applicant has substantiated that the orders for a stay of execution pending appeal are justified. The current position of the Court regarding applications for stay of execution pending appeal adopts the 'nugatoriness' approach in its deliberations. In *Chitawira Shopping Centre v HMS Foods & Grain Ltd* MSCA Civil Appeal No. 30 of 2015, it was articulated as follows:

> *The normal rule is neatly summarised in paragraph 21 of the judgment in* ***Hammond Suddards Solicitors v Agrichem International Holdings Ltd*** *[2001] EWCA Civ 1915:*
> *"By CPR rule 52.7, unless the appeal court or the court below orders otherwise, an appeal does not operate as a stay of execution of the orders of the court below. It follows that the court has a discretion whether or not to grant a stay. Whether*

the court should exercise its discretion to grant a stay will depend on all circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any money paid from the respondent?" [Emphasis supplied]

16. The overarching principle posits that a court of law should refrain from establishing a practice that deprives a successful litigant of the fruits of their litigation in anticipation of an appeal's outcome, as established in *Mulli Brothers Ltd v Malawi Savings Bank* MSCA Civil Appeal No. 48 of 2014. Furthermore, in *Speaker of the National Assembly ex parte v Hon. John Z. U. Tembo* [2010] MLR 358 (SCA), the following principles were enunciated:

"Stay of execution of judgment pending appeal has become common place in our courts and over the years clear principles for consideration have emerged. The guiding principles, however, are in Order 59 rule 13/1 of the Rules of the Supreme Court. That Order cites a number of cases specifically dealing with stay of execution of judgments. Some of the cases have been referred to by Counsel in this matter from which the following cardinal principles resonate:

i. *The Court does not make the practice of depriving a successful litigant fruits of his judgment.*
ii. *The Court should then consider whether there are special circumstances which militate in favour of granting the order for stay and the onus will be on the applicant to prove or show such special circumstances.*
iii. *The Court is likely to grant stay where the appeal would otherwise be rendered nugatory or the appellant would suffer loss which would not be compensated in damages.*

iv. Where the appeal is against an award of damages the established practice is that stay will normally be granted where the appellant satisfies the court that if the damages were paid, then there will be no reasonable prospect of recovering them in the event of the appeal succeeding."

17. In *Mike Appel & Gatto Limited v Saulos Chilima* [2014] MLR 231 (SCA) the Supreme Court of Appeal elucidated the established legal principles as follows:

> *"Once an applicant has brought forward solid grounds for seeking stay, the court is then called upon to weigh the risks inherent in granting a stay and the risks inherent in refusing stay. This balancing process is what is here referred to as the court's discretion. Much as the court will start from the premise that courts will not make the practice of depriving successful litigants fruits of their judgment and much as the mere filing of an appeal and probability of success will not qualify as stay of execution; while a court will be concerned about the appeal not being rendered nugatory, ultimately it is about how the court weighs these considerations and what they translate to in the particular case."*

18. Consequently, had the High Court refrained from striking out the claim, the appropriate procedural avenue for advancing the application would have entailed filing a new application rather than lodging a notice of appeal. Nonetheless, it is imperative to highlight that the issue presently before this Court pertains to an application for a stay pending appeal and is not the appeal itself. It is noteworthy to consider that there exist serious questions regarding whether the esteemed Judge in the High Court may have committed legal errors; firstly, concerning the way he addressed the application to strike out the claim, and secondly, regarding whether he provided justifications for his decision to strike out the claim. The esteemed Judge concurred that the claim was indeed frivolous, vexatious, and unsustainable, the characterization of the claim as frivolous, vexatious, and unsustainable warrants a thorough examination by the full bench.

19. Furthermore, an additional question arises concerning how the esteemed Judge approached the application for interlocutory injunction, seemingly treating it as if he were hearing the substantive claim itself. It is pertinent to be reminded that

the application under consideration pertains to the continuation or discharge of interim relief. There exists a question as to whether the High Court ought to have exclusively entertained this application and subsequently allowed the parties to present their arguments regarding whether the matter should have been struck out on the grounds of being frivolous, vexatious, and unsustainable during or before the trial. It can be argued that the applications made by the first respondent seeking the vacating of the *ex parte* interlocutory injunction and the striking out of the matter were convoluted.

20. This Court, in the precedent set by *Mtemadanga Farm Ltd v Agricultural Development and Marketing Corporation* MSCA Civil Appeal No. 25 of 1988, employed the characterization of the term 'frivolous and vexatious' as articulated by Lush J in the case of *Norman v Mathews* (1916) 85 L.J.K.B., 857 at p. 859. The judge observed that:

> *"There is an inherent power in every court to stay and dismiss actions or applications which are frivolous and vexatious and abusive of the process of the court… in order to bring the case within the description it is not sufficient merely to say that the plaintiff has no cause of action. It must appear that his alleged cause of action is one, which on the face of it is clearly one which no reasonable person could properly treat as bona fide, and contend that he had a grievance which he was entitled to bring before the court."* [Emphasis supplied]

21. In *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* Civil Appeal No. 35 of 2000 the Court of Appeal articulated the following position:

> *"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and*

one, which was difficult to believe, could be proved...If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits...

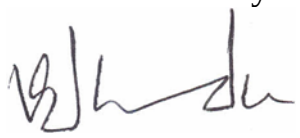
...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment." [Emphasis supplied]

22. From the analysis of the precedents, the opinion of this Court is that although the court wields discretionary authority in the striking out of pleadings, due to the extensive ramifications of such actions, there must exist well-defined and established principles that govern the court in the exercise of this authority. A matter is deemed frivolous if (i) it lacks substantive merit, or (ii) it is merely fanciful in nature; or (iii) when a litigant is engaging in trifling conduct with the Court; or (iv) when the provision of a defence would constitute a waste of the court's time; or (v) when it is incapable of being supported by a reasoned argument. Refer to *Dawkins v Prince Edward of Save Weimber* (1976) 1 QBD 499; *Chaffers v Golds Mid* (1894) 1 QBD 186 for further elucidation.
23. Further, in *Bullen & Leake and Jacobs Precedents of Pleading* (12th Edn.) at 145, it is posited that a pleading or an action is considered frivolous when it is devoid of substance, groundless, or fanciful, and it is categorized as vexatious when it is devoid of bona fides, is hopeless, or is offensive, ultimately causing the opposing party unnecessary anxiety, trouble, and financial burden. In addition, a matter is classified as vexatious when (i) it is bereft of any foundation, (ii) it possesses no chance of success, or (iii) the defence (pleading) is instituted merely for the purpose of causing annoyance; or (iv) it is advanced such that the party's pleading can attain some fanciful advantage, or (v) when it can lead to no beneficial outcome whatsoever: refer to *Consult Willis v Earl Beauchamp* (1886) 11 PD 59 for further reference.
24. Reverting to the issue of the stay, the preceding analysis has only served to demonstrate that in this matter, there exist plausible grounds for appeal regarding the manner in which the main action or the originating process was struck out by the High Court. In this Court's considered opinion, the execution of the order might undermine the fundamental basis or substance of the appeal.

Conversely, the granting of the application for a stay would not result in injustice to the respondents involved.

25. In conclusion, the motion for a stay of execution pending appeal is hereby granted, with costs awarded to the applicant. The processing of the appeal should be expedited. Any aggrieved party can appeal to the full bench of this Court.

Delivered and dated this 19th day of September 2024.



Dorothy nyaKaunda Kamanga
JUSTICE OF APPEAL

Mr. Phokoso	:	Legal practitioner for the Appellant.
Mr. Mulemba	:	Legal practitioner for the First Respondent.
Mr. Y. Soko	:	Legal practitioner for the Second Respondent.
Mr. Shaibu	:	Principal Judicial Research Officer.
Mrs. Mthunzi / Mr. Maluwa:		Law Clerks