



**IN THE MALAWI SUPREME COURT OF APPEAL**

**PRINCIPAL REGISTRY**

**MISCELLANEOUS CIVIL APPLICATION NO. 63 OF 2023**

**(Being High Court Miscellaneous Application No. 13 of 2023, Mzuzu Registry)**

**BETWEEN:**

**SAMSON MALIPA GONDWE.....APPLICANT**

**AND**

**WLWCTRICITY SUPPLY CORPORATION**

**OF MALAWI.....RESPONDENT**

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

: Mr Kadzipatike, of Counsel for the Applicant

: Mr Chibwe, of Counsel for the Respondent

: Mr Kalua, of Counsel for the Respondent

: Mr Chinkono, Recording Officer

**RULING**

***Kalembera SC, JA***

This is an Order on the Applicant's application for an Order setting aside the Order of the High Court staying execution of the judgment of the Subordinate Court. The application is supported by an affidavit sworn by George Jivason Kadzipatike, of Counsel for the Applicant, as well as skeletal arguments. The Respondent is opposing the application and has filed an affidavit in opposition filed by Aaron Gausi, of Counsel for the Respondent as well as skeletal arguments. The Respondent has further filed a Notice of Preliminary Objection.

The Applicant commenced this action against the Respondent in the Senior Resident Magistrate Court sitting at Mzuzu, around 24<sup>th</sup> November 2022 seeking several reliefs namely an Order that the Respondent pay damages for the replacement of the house in question; damages for negligence; damages for inconvenience; reimbursement of the sum of MK 700,000.00 being costs of the production of the damage valuation report; MK 350,000.00 being costs of hiring the estate valuers; and costs of the action. The delivered its judgment on 17 October 2023 in favour of the Applicant, and awarded the Applicant a total sum of MK 26,000,000.00.

Being dissatisfied with the lower court's decision, the Respondent lodged an appeal against the said decision on the following grounds:

- a. The Court erred in fact by holding the Defendant vicariously liable for acts of unknown people with no authority from the Defendant.
- b. The Court erred in law and in fact in awarding a total sum of MK 26,000,000.00 as replacement costs for the entire house when the damage was only on one wall.
- c. The Court erred in law in basing its decision on the quantum for the replacement of the damaged house based on the valuation report of an unlicensed valuer.
- d. The Court erred in law by basing its decision on a valuation report that was only admitted in evidence only to the effect that it was made.
- e. The Court erred in law and in fact by awarding the Plaintiff a sum of MK 8,000,000.00 as damages for inconvenience when the Plaintiff was already compensated for the entire house and the rentals lost.
- f. The Court erred in law in awarding MK 2,100,000.00 being rentals when the same was not pleaded by the Applicant.

On 24<sup>th</sup> October 2023, the lower court dismissed the application for stay, but on its own volition went on to vary its own judgment by removing the amount of MK 2,100,000.00 awarded for rentals. The Respondent applied before the High Court for suspension of the execution of the judgment. On 21<sup>st</sup> November 2023, the application was heard, and the court proceeded to grant the order. No appeal was ever lodged against the High Court decision, nor did the Applicant apply for its setting aside.

As earlier alluded to herein, the Respondent filed a Notice of Preliminary Objections as follows:

1. The Court herein does not have jurisdiction to hear the application as there is no appeal that has been lodged against the decision of the court below.
2. The Application to set aside the Order of the lower court herein is improperly brought before the Court as the same has not been brought before the Court below.

It is clear, and it is confirmed by the Applicant's skeletal arguments in support of the application herein, that the Applicant's application is grounded or based on Section 7 of the Supreme Court of Appeal Act as read with Order I r. 18 of the Supreme Court of Appeal Rules.

Section 7 of the Supreme Court of Appeal Act provides that:

*"A single member of the Court may exercise any power vested in the Court not involving the hearing or determination of an appeal: Provided that—*

*(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".*

Looking at this provision, the Appellant's application herein, cannot be made under section 7 of the Supreme Court of Appeal Act. This is so because in my view, and it has been held by the Full Bench of this Court, this section merely gives general jurisdiction to the single member of this Court to hear applications that do not dispose of the appeal. Thus an applicant must always point to some law that affords the right to apply to this Court for a stay.

As regards Order I rule 18 of the Supreme Court of Appeal Rules, which provides 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*", again this rule cannot be used as a basis for the Appellant to lodge its application herein in this Court.

Order I, rule 18 of the Supreme Court of Appeal Rules does not provide for the making of an application to set aside an order for stay before this Court; but it is a general provision which guides the Court when to entertain an application that has been refused before the court below; that all the provision says is that this Court will

only assume jurisdiction to hear an application which is provided for under the appropriate rules that may be heard by this Court after the court below has heard the application and declined to grant it -see **Ted Sparks Jumbe vs Christopher Kasema, Attorney General (Land Registrar) & the Sheriff of Malawi, MSCA Miscellaneous Civil Application No. 46 of 2023**. The Applicant, therefore, must have filed the application under a rule or provision which provides that one may apply for setting aside of a stay order in this Court.

As earlier alluded to herein the first preliminary objection is that the Court herein does not have jurisdiction to hear the application as there is no appeal that has been lodged against the decision of the court below. The second preliminary objection is that the Application to set aside the Order of the lower court herein is improperly brought before the Court as the same has not been brought before the Court below. Furthermore, the Respondent argues and submits that contrary to the provisions of Order 1 r.18 of the Supreme Court of Appeal Rules, the Applicant did not first make this application before the court below, hence this Court lacks jurisdiction to hear and determine this application. The Applicant's argument as to why this Court should proceed to hear and determine this application is premised on flawed reasoning. It is deposed thus in paragraph 21 of the Applicant's affidavit in support of his application:

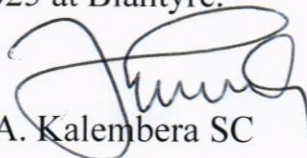
*“**THAT** by allowing and deciding the Respondent's application for stay of execution, the Court below refused the Applicant's application to dismiss the Respondent's application on all the issues raised in the Court below, so that this Court should vacate the Order for suspension of judgment that was granted by the Court below contrary to the arguments advanced by the Applicant.”*

It is very clear that it was the Respondent who brought an application for the suspension of the enforcement of the lower court's judgment. The Applicant objected to that application. Nevertheless the lower court granted the Respondent's application. Now the Applicant wants this court to take his objections in the court below as his first application to have the stay set aside. That is definitely not what was envisioned by Order 1r.18 of the Supreme Court of Appeal Rules. The Appellant ought to have brought this application before the Court below first. In the event that it was denied, then he should have brought the same application afresh, before this Court. Clearly, the Applicant did not do that.

Thus, it is clear, firstly, that there is no appeal pending before this Court; and secondly, that this Application was brought prematurely as it was brought straight

to this Court before first, being made in the Court below, which is contrary to Order 1 rule 18 of the Supreme Court of Appeal Rules. Therefore, the preliminary objections succeed and are upheld. Consequently, the Applicant's application to set aside the Order of the High Court staying execution of the judgment of the Subordinate Court is dismissed with costs to the Respondent.

**MADE** this 25<sup>th</sup> day of February, 2025 at Blantyre.



S.A. Kalembera SC

**JUSTICE OF APPEAL**