



IN THE MALAWI SUPREME COURT OF APPEAL
CIVIL CAUSE No. 18 OF 2023
(being Civil Cause No. 78 of 2021, High Court, Mzuzu District Registry)

BETWEEN:

REGISTERED TRUSTEES OF KHUSI TRUST

APPELLANT

AND

FORCE NGWIRA

RESPONDENT

RULING

(nyaKaunda Kamanga, JA, 19th May 2023)

1. On 25th June 2021, the Respondent, represented by Messrs. Jivason and Company, commenced this legal action at the High Court, Mzuzu District Registry against the Appellant (Applicant in this matter), claiming damages for trespass, damages for diminution in the value of land, a declaratory order affirming that the disputed land belongs to the Respondent, a permanent injunction restraining the Appellant from encroaching upon, occupying, selling, or possessing the land owned by the Respondent and legal costs associated with the action.
2. The summons was appropriately served upon the Appellant. On 6th April 2021, the Appellant filed its defence which was duly served on the Respondent's counsel on that same day. The Appellant denied the designated name of "Registered Trustees of Khuzi Trust" as stated in the summons and indicated that their proper name is "Registered Trustees of Khuzi Trust". On 15th June 2021, the Respondent made an application to the court below seeking to amend

the summons by changing the Applicant's name from “Registered Trustees of Khuzi Trust” to “Registered Trustees of Khuzi Trust”. The aforementioned application was granted, and the Respondent was directed to serve the amended summons upon the Appellant. Furthermore, the Appellant was directed to serve their defence within seven days from the amended summons' service date. The Appellant was duly served with the summons; however, they failed to serve a defence for an extended duration of almost six months. Consequently, on 10th December 2021, the court below entered a default judgment against the Appellant.

3. On 17th December 2021, the Appellant filed a motion to set aside the default judgment, on the ground that they failed to serve the defence because the trustees required additional time to furnish their lawyers with relevant information regarding the matter. The High Court dismissed the application on the ground that the failure of communication between a lawyer and the litigant is not a sufficient reason to set aside the default judgment. On 22nd February 2022, the Appellant challenged the Registrar’s ruling in an appeal to the High Court Judge in chambers. The court below dismissed the appeal, on the basis that it lacked jurisdiction to consider an appeal from the Registrar based on the decision in *Liphava and Others v Mbaula and Prime Insurance Company Limited* (Civil Appeal 40 of 2019; Personal Injury Cause 848 of 2013) [2021] MWSC 9 (2 December 2021).
4. The Appellant filed an *ex parte* motion with this Court on 25th April 2023, seeking an order of extension of time to file an appeal, as well as a stay of execution pending the hearing and determination of the appeal. This Court ordered that the applications be addressed in an *inter partes* hearing on 12th May 2023. This ruling was made after the legal practitioners for both parties had addressed the Court.

The Applicant’s Arguments

5. Regarding the application for a stay, the Appellant (hereinafter referred to as the Applicant) posits that the grant of a stay of execution resided within the discretion of the Court. In the circumstances where matters of legality, regularity, and potential excess of judgment arise, these factors inherently necessitate the staying of the court’s order of execution. Consequently, when prejudice or the risk of injustice to either party is at stake, the determination of

a stay transcends the mere application of a special circumstances test and is instead based on judicial discretion as discussed in the case of *Mike Appel and Gatto Limited v Saulos Chilima* [2014] MLR 231. The counsel representing the Applicant articulated that no application for a stay of execution was made in the High Court because of the judgment from the Court below, which stated that it lacked jurisdiction over the matter based on the precedent established in the *Liphava* decision.

6. The Applicant contends that this Court possesses the jurisdiction to extend the timeframe within which an appeal must be lodged, as provided under section 23(2) of the Supreme Court of Appeal Act. Furthermore, the Applicant argues that the failure to file an appeal within the prescribed time was due to their prior appeal to the High Court against the District Registrar's decision, a process that experienced considerable delays in resolving. After the appeal hearing, the High Court judge in chambers determined that the Supreme Court of Appeal retains jurisdiction over the matter, while the High Court does not. Considering these circumstances, the Applicant should not be blamed for failing to appeal within the legally prescribed timeframe.
7. Regarding the appealability of the High Court's decision at this stage, the Applicant contends that the amount claimed by the Respondent was explicitly specified in the statement of the case, thus eliminating the necessity for further assessment. The Court directed counsel for the Applicant to the summons attached to the application, to which counsel conceded that the summons did state the precise amount claimed by the Respondent. However, he asserted that the amended summons, which were not attached to the application, did specify the exact amount being claimed.

The Respondent's Arguments

8. The Respondent opposes the two applications as articulated in their affidavit and skeleton arguments. They present the following arguments: first, the application for a stay has been brought under the wrong legal provisions. The application has been instituted under Order 10 rule 1 of the Courts (High Court) (Civil Procedure) Rules. As delineated in section 29 of the Courts Act, the Courts (High Court) (Civil Procedure) Rules were primarily established to govern the procedural framework of the High Court. There exists no provision

within the Supreme Court of Appeal Act or its corresponding rules that permits the application of the Courts (High Court) (Civil Procedure) Rules.

9. Secondly, the Respondent contended that the application for an extension of time to file an appeal is premature. At this stage, the decision of the Court below is not subject to appeal as the requisite assessment has yet to be conducted. To substantiate his argument, counsel for the Respondent relied on the cases of *Standard Bank Plc v Cassidy Chalimba t/a Krisken General Dealers* Misc Civil Cause Number 50 of 2022, *Premium Tama and others v Kanengo Tobacco Processors Ltd and another*, Civil Appeal Number 72 of 2016.
10. Counsel for the Respondent further asserted that prior leave to appeal is requisite before applying for an extension of time. He argued that the decision being appealed against was rendered in chambers, thus the Applicant lacks the right to appeal until such time as they obtain leave to appeal under section 21 of the Supreme Court of Appeal Act. To advance his argument, counsel for the Respondent relied on the cases of *Raiply Malawi Limited v Mike Dzombe* Misc Civil Application No. 2 of 2022, *Chifundo Kamwana and Others v Illovo Sugar (Malawi) Limited* MSCA Civil Appeal No, 9 of 2022 and *Parliamentary Service Commission v SJR Catering Services* MSCA Civil Appeal No. 09 of 2018.
11. He additionally stated that according to Order I rule 18 of the Supreme Court of Appeal Rules, in instances where both this Court and the High Court possess concurrent jurisdiction, recourse shall first be made to the Court below before filing an application in this Court. Counsel for the Respondent also referred to the cases of *Raiply Malawi Limited v Mike Dzombe* Misc. Application No. 2 of 2020, and *Standard Bank Plc v Cassidy Chalimba t/a Krisken* Misc. Civil Case No. 50 of 2022. Counsel for the Respondent therefore submitted that the applications in issue are misplaced and should be dismissed.

The issues for determination

12. This court has been called upon to determine whether to allow an extension of time to file an appeal and grant a stay of execution pending the hearing and determination of the appeal. Upon scrutinising the two applications, the initial issue that this Court must determine is whether the applications are competent and properly brought before this Court.

The Applicable Law and Rules

Whether there is a case for a stay

13. A stay of execution is a court order that prevents further steps from being taken to enforce an order or judgment in the litigation to which it relates, pending further court orders or the satisfaction of conditions: *Mulli Brothers Limited v Malawi Savings Bank Limited* MSCA Civil Appeal No. 48 of 2014. In the case of *Press Corporation Limited and another v Rolf Patel and others* [2014] MLR 272 (SCA), the Court established the conditions for granting a stay order where it held as follows:

“It is an exceptional step that must be taken on the basis of valid reasons, such as risk of rendering the up-coming appeal nugatory, or risk that if payment is made or loss incurred there will be no reasonable prospects of recovery, or the fact that the appeal raises what appear to be substantial issues.” [*emphasis supplied*]

14. In *Mike Appel and Gatto Limited v Saulos Chilima* [2014] MLR 231 (SCA), the court cited *Nyasulu v Malawi Railways Ltd* [1993] 16(1) MLR 394 at 399 as a precedent, stating that:

“evidence showing that there was no probability of getting back the money awarded under the judgment would constitute special circumstances which would influence a court to grant a stay of execution. But again, that is not a closed rule. All the facts must be considered, for even in such a situation the court would, in its discretion, still refuse to grant a stay if, on the total facts of the particular case, it would be utterly unjust or unconscionable to make such an order. Equally, the fact that a successful litigant would be able to pay back the damages awarded him, would constitute special circumstances. But here again, even in such a situation, the court would properly grant a stay if it was of the view it was expedient to do so, regard being had to all the facts. In other words, the mere fact that a successful litigant would be able to pay back the damages, cannot in all cases operate as a ‘stay of execution.’” [*emphasis supplied*].

The procedure for applying for a stay of execution

15. Order I rule 18 of the Supreme Court of Appeal Rules 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.”

16. Under Order 28 rule 48 of the Courts (High Court) (Civil Procedure) Rules, 2017, the High Court has the power to suspend any enforcement orders made under Order 28. In exercising the powers given to the court by Order 28, the court below can suspend the enforcement order altogether or in part, and it can make any orders it considers appropriate: refer to Order 28 rule 50 of the Courts (High Court) (Civil Procedure) Rules, 2017.

17. In the case of *Violet Phiri v Amos Phiri* (Matrimonial Cause 45 of 2015) [2021] MWHC 354 (30 March 2021) (unreported) at p.6-7, the High Court held as follows:

“The understanding by this Court is that, and as rightly observed by both the appellant and respondent, Order 1 rule 18 of the Supreme Court of Appeal Rules confers on the High Court and the Supreme Court concurrent jurisdiction. This concurrent jurisdiction is triggered when the High Court refuses to grant an application. In the consideration of this Court that for the High Court to exercise such concurrent jurisdiction the basis of the application should invariably be in accordance with practice and procedure governed by the rules of procedure in this case the Courts (High Court) (Civil Procedure) Rules, 2017. In circumstances where the High Court refuses application, the applicant is entitled to have recourse to the Supreme Court of Appeal, he shall have regard to practice and procedure in the court as regulated and governed by the Supreme Court of Appeal Rules.

In the present application, this Court is of the firm view that not all applications are subject to concurrent jurisdiction. There are selected few applications, and these selected applications have corresponding rules of procedure in both superior courts. Examples of applications in which the two would be said to have concurrent jurisdiction and, by no means exhaustive,

are those applications which involve suspension or stay of execution; and leave to appeal. If such applications are refused by the High Court (Court below) then the applicant can still call in aid the Supreme Court of Appeal (the Court) by lodging a fresh application in that Court for its determination.” [*emphasis supplied*]

18. According to the preceding case authority, the starting point for determining the applicability of Order I and rule 18 of the Supreme Court of Appeal Rules necessitates an examination of the Courts (High Court) (Civil Procedure) Rules, 2017 to identify any provisions pertinent to a particular application, subsequently followed by a review of the Supreme Court of Appeal Act or rules made thereunder. Should the determination yield an affirmative response, the appropriate procedural course is to file an application in the High Court before filing a new application in the Supreme Court of Appeal for Malawi, should the initial application be denied. Furthermore, the court elucidated instances wherein both the High Court and Supreme Court of Appeal for Malawi have concurrent jurisdiction, which includes applications concerning the stay or suspension of judgment.

The law on extension of time

19. Section 21 of the Supreme Court of Appeal Act provides as follows:

“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) 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.....”
[*emphasis supplied*]

20. In the case of the *Administrator General v Khoji* [2000-2001] MLR 1 (SCA), the Court held as follows:

“Paragraph (c) of the further proviso of section 21 of the Supreme Court of Appeal Act requires that leave must be obtained from this Court before an appeal can be commenced where the Order of the High Court was made in chambers.”

In the case of *Raiply Malawi Limited vs Mike Dzombe* Misc. Civil Application No.2 of 2020, Hon. Justice Chipeta, SC JA held as follows:

“However, for a party that by law must seek the leave of the court to appeal before securing the right to appeal if such litigant happens also to have gone past the legally acceptable time frame for appealing, it can only make sense for him to seek enlargement of time either after first obtaining leave to appeal or by filing such an application for leave to appeal. To my mind this irregularity is far more serious than the ones I have earlier on pointed out and brushed aside. It being an irregularity that contravenes provision in the Supreme Court of Appeal Act, it cannot be cured under guise of resort to rule of Order of the Supreme Court of Appeal Rules. Rules in subsidiary law cannot be used to heal shortfalls in compliance with statutory requirements.”
[emphasis supplied]

Prematurity of appeal

21. In the case of *Toyota Malawi Limited v Jacque Mariette* MSCA Civil Appeal No. 62 of 2016 (unreported), the Court held as follows:

“The maxim *interest reipublicae ut sit finis litium*, in our view does not advocate an idle principle. It is, as the maxim espouses, in the interests of public that litigation should come to an end. Why handle two more appeals in one and the same matter when one appeal can easily conclude the said matter with finality and within a reasonable time? Why spend so many years on the suit before the parties find closure to their issues in such matter. Why allow a case to go on and on without any end coming within site due to permitting a practice of splitting what could be one wholesome and complete appeal into several appeals. It is for these reasons that we believe we should stop entertaining appeals on inchoate judgments. Henceforth, we think it is best to only entertain appeals on complete and enforceable judgments. A judgment pending

assessment of damages only becomes a complete and enforceable judgment once the assessment has been done and there is an enforceable quantum of damages that can be recovered or otherwise enforced”. [*emphasis supplied*].

In the case of *Standard Bank Plc v Cassidy t/a Krisken General Dealers* Misc Civil Cause Number 50 of 2022, the intended appellant filed an application challenging the ruling of the Assistant Registrar in the court below, which application was subsequently dismissed due to a lack of jurisdiction. The intended appellant later realised that the appeal was indeed misconceived, and by the time they sought to apply to the Supreme Court of Appeal, the statutory time had expired. The intended appellant proceeded to apply for leave to appeal along with a request for an extension of time within which to appeal. The court dismissed both applications and rendered the following determination:

“the honourable route for the intended appellant is to go back to the Court below and apply for leave to appeal. As the ruling for assessment of damages and interest is not yet out, the intended appellants have the opportunity to make their application for enlargement of time once the whole process in the court below is finalised. It would be premature at this point in time to entertain such applications.” [*emphasis supplied*]

Disposal of the matter

Evaluating the necessity for a stay

22. This Court has the discretion to grant an order for the stay of execution pending the hearing and determination of the appeal. It must be emphasised that this power ought to be exercised judiciously and, in a manner that appears equitable, to temporarily preserve the *status quo*. In deliberating upon the decision to grant a stay of execution, several guiding principles, among others, should be considered: the likelihood of success of an appeal or application, the danger of suffering substantial loss or irreparable injury, the timeliness of the application without unreasonable delay, and the balance of convenience. In the present case, the Applicant, in their skeleton arguments, asserts that the District Commissioner has issued a demolition order concerning the Applicant’s infrastructure, and it is highly unlikely that such infrastructure could be easily and timely replaced by the Applicant if the appeal is successful. On the date of hearing, the legal practitioner indicated that the structure had already been demolished; nevertheless, he still desired for the matter to be tried on its merits.

Consequently, this Court is of the considered opinion that since the *status quo* has been changed, the intended purpose for the issuance of the order for a stay of execution has been superseded by subsequent developments.

The procedure for applying for a stay and the determination of whether this court possesses the requisite jurisdiction to hear the application

23. It is evident that both the Supreme Court of Appeal and the High Court possess concurrent jurisdiction to grant the order of stay sought by the Applicant. Considering these circumstances, the Applicant should initially make an application for a stay in the court below; should the court below deny this application, the Applicant would then be entitled to make a fresh application in this Court. The legal authority for this assertion is articulated in Order I rule 18 of the Supreme Court of Appeal Rules, alongside the precedent established in *Phiri v Phiri*, previously referred to; the decision in *Malawi Communications Regulatory v Joy Radio* [2009] MLR 328 (SCA) distinctly clarifies that the jurisdiction of the Supreme Court of Appeal is invoked solely when the High Court has “refused” to grant stay. Furthermore, *Mike Appel and Gatto Ltd v Saulosi K Chilima and another* [2013] MLR 231 (SCA) underscores that Order 1 rule 18 of the Supreme Court of Appeal Rules stipulates that an application for a stay should be presented to this Court only after its refusal in the court of first instance. In consideration of the above, and the admission by the Applicant of their failure to make an application in the court below, which they are aware consists of the High Court and its District Registrar, the application for stay of execution is rendered incompetent and improperly positioned before this Court. Consequently, this Court is devoid of jurisdiction to hear the application, which is hereby dismissed.

The application for an extension of time

24. In instances where the Court has established or fixed a specific timeframe for the execution of any act prescribed or allowed by the Act or related rules, the Court retains discretionary to enlarge the said period, irrespective of the expiration of the originally fixed timeframe. In the present case, it is undisputed that the decision the Applicant seeks to challenge was rendered in chambers and that the assessment of damages is pending. Such decisions are subject to appeal only upon reaching finality and obtaining leave from either the High Court or the Supreme Court of Appeal, as delineated in section 21 of the

Supreme Court of Appeal Act. Consequently, the Applicant is supposed to first obtain leave or permission to appeal before making an application for enlargement of time, as illustrated in the case of *Raiply Malawi Limited v Mike Dzombe*. The applicant having failed to obtain leave in the court below this court cannot handle the application for want of jurisdiction.

Whether there is an appeal in this matter

25. As established in the cases of *JTI Leaf (Malawi) Limited and Kad Kapachika* MSCA Appeal no. 52 of 2016; *Toyota Malawi Ltd v Mariette* MSCA Civil Appeal 61 of 2017 and *Premium Tama v Mambala and others*, Civil appeal no. 72 of 2016- if damages have not been quantified, the judgment against the appellants remains inchoate and unenforceable. This court will not entertain multiple appeals. Moreover, following the assessment, the Applicant, if aggrieved, would retain the right to lodge an appeal. In addition, it has been demonstrated in practice that issues of liability are somehow reopened and contested even when parties appeal against judgments on assessment: refer to *Easy Loans Ltd v Maxwell Rex Mkusah*, MSCA Civil Appeal No. 13 of 2021. It is clear from the case law that an aggrieved party can only lodge an appeal if both issues of liability and damages have been resolved definitively, which is not the case in the present matter.

The applicable provisions of the law

26. The Court disagrees with counsel for the Respondent that no provision in the Supreme Court of Appeal Act or its rules allows the application of the Courts (High Court) (Civil Procedure) Rules. Order II rule 1 of the Supreme Court of Appeal Rules provides as follows:

“In the exercise of the original jurisdiction of the Court, the practice and procedure of the Court shall be conducted in conformity with the practice and procedure for the time being observed in the High Court.”

The Courts (High Court) (Civil Procedure) Rules are applicable in this Court based on the above provision. However, in the present circumstances, Order 10 rule 1 of the Courts (High Court) (Civil Procedure) Rules is not applicable. The Applicant having brought the application for a stay under the wrong provision

of the law, the application for stay is incompetent and improperly before this Court because the Applicant filed it under the wrong legal provision.

Case management

27. The above findings, also demonstrate that, in terms of case management, this matter should have been registered as a miscellaneous civil application rather than a civil cause. As a result, the party bringing the applications would have been properly identified as the Applicant rather than being wrongly named the Appellant.

Conclusion

28. In conclusion, the two applications brought by the Applicant, are incompetent and improperly presented before this Court for the above-outlined reasons. Therefore, the applications for an extension of time and a stay of execution are dismissed because they are premature and this Court lacks jurisdiction. The Respondent is awarded the costs. Any aggrieved party can appeal to the full bench of this Court.

Dated this 19th day of May 2023.



Dorothy nyaKaunda Kamanga
JUDGE

Mr. Mhone : Legal practitioner for the Appellant/Applicant.
Mr. Kadzipatike : Legal practitioner for the Respondent.
Mrs. Mthunzi & Mr. Maluwa: Senior Court Clerk & Court Clerk.