IN THE MALAWI SUPREME COURT OF APPEAL

MISCELLANEOUS CIVIL APPLICATION NO. 54 OF 2023

(Being High Court, Revenue Division, Blantyre Registry, Civil Cause No. 11 of 2023)

BETWEEN:

THE STATE (on application of ALLIANCE ONE TOBACCO (MALAWI) LIMITED.....APPELLANT

AND

THE COMMISSIONER GENERAL OF MALAWI REVENUE AUTHORITY.....RESPONDENT

CORAM: THE HON. JUSTICE MR S.A. KALEMBERA

Mr Njobvu, of Counsel for the Respondent

Mr Chungu, of Counsel for the Respondent

Mr Chinkono, Recording Officer

RULING

Kalembera JA

This is the Appellant's application for stay pending appeal. The Appellant's application is as a result of the decision of Chigona J delivered on 19th May 2023 in which he declined a prayer for leave to commence judicial review and subsequently declined an application for stay. This was in Judicial Review Case Number 11 of 2022. The application is brought under section 7 of the Supreme Court of Appeal Act as read with Order I rule 18 of the Supreme Court of Appeal Rules. There is an

affidavit in support sworn by Chiza Jere, the Appellant's Financial Director plus skeletal arguments. The Respondent has also filed affidavuts in opposition sworn by Anthony Chungu of Counsel for the Respondent and Godfrey Magaleta, the Respondent's Audit Manager=Planning and Monitoring, plus skeletal arguments.

A brief background of this matter is such that the Appellant firstly lodged the application for permission for judicial review under Judicial Review Case No. 11 of 2022. The Appellant was seeking amongst other things declarations that the decision of the Respondent demanding payment in the amount of MK 14,071,685,866.80 (which was obtained by disallowing foreign exchange losses and interest expenses and subjecting the same to income tax) was unreasonable and made in bad faith, a declaration that the said decision was contrary to Section 41 of the Constitution of the Republic of Malawi to access justice and further to have an effective remedy.

On 19 May 2023, the court below upon hearing both parties delivered its ruling and declined the permission to commence judicial review. In June 2023, the Appellant filed a Notice of Appeal in the court below against the ruling of the court below refusing permission to apply for judicial review.

Then again the Appellant applied before the same High Court for an order of stay pending appeal of the order of the court below declining permission to apply for judicial review.

On 31 October 2023, the court below delivered the ruling on the stay application where the stay was declined on ground that the court did not have jurisdiction as the proper mode of procedure was to have the application refiled before a single member of the Supreme Court of Appeal and not through an appeal to the full bench.

The Appellant now brings the application for stay of an enforcement of the order of Justice Chigona dated 19 May 2023 and/or for an order restraining the Respondent from proceeding with enforcement of the sums assessed in the amended notice dated 22 June 2022 pending the determination of the appeal.

Having gone through the notice of motion, the affidavits in support and opposition to the application, it becomes clear that, the following issues arise for determination:

1. Whether section 7 of the Supreme Court of Appeal Act as read with Order I rule 18 can be used as the basis or the enabling provision for the present application; and

2. Whether an appeal lies against refusal of permission to apply for judicial review by the High Court; and if in the negative whether the Court should entertain the application for stay pending appeal;

Can these two provisions cited by the Appellant as the basis of making its application before this Court, namely, section 7 of the Supreme Court of Appeal Act and Order I rule 18 of the Supreme Court of Appeal Rules, indeed be a basis for this application? Counsel for the Appellant has strongly argued that this application is properly before this court, whereas Counsel for the Respondent has strongly argued against that .

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—*
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> *(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 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 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; and that the Appellant, therefore, must file the application under a rule or provision which provides that one may apply for stay in this Court.

Just as in an application for leave to appeal, a party intending to appeal in terms of Order I rule 18 may be required to make an application before the court below, and if the court below refuses the application, that is when he should bring an application before this Court. Nonetheless, the party intending to appeal cannot rely on Order I rule 18 as the enabling provision, he or she is required to bring such an application for leave to appeal under Order III rule 3 of the Supreme Court of Appeal Rules.

In accordance with proviso (b) to section 8 of the Supreme Court of Appeal Act, the Appellant's application herein ought to have been made under Part 52.16 of the Civil Procedure Rules of England, and not under section 7 of the Supreme Court of Appeal Act as read with Order I, rule 18 of the Supreme Court of Appeal Rules. See ***Prof. Arthur Peter Mutharika and The Electoral Commission v Dr. Saulosi Klaus Chilima and Dr. Lazarus McCarthy Chakwera***, MSCA Civil Appeal No. 7 of 2020.

As to what should be the consequence of citing the wrong the provision; there are two schools of thought; the first looks at whether the party defending the motion has been vehemently prejudiced by the clerical mistake in specifying the law under which the Defendant's application was made. In ***NBS Bank PLC v Dean Lungu t/a Deans Engineering co Ltd*** (Commercial Cause 14 of 2015; MSCA Civil Appeal 83 of 2019) [2019] MWSC 11 (7 November 2019), the single member of the Court held:

> "With respect to the Respondent's preliminary objection that the Appellant's application herein was wrongly made pursuant to Order I rule 18 of the Supreme Court of Appeal Rules, it is pertinent to observe that Order 1 rule 18 merely provides that "*whenever an application may be made either to the court below or this 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 this Court*". In accordance with proviso (b) to section 8 of the Supreme Court of Appeal Act, the Appellant's application herein

should have been made under Part 52.16 of the Civil Procedure Rules, and not under Order I, rule 18 of the Supreme Court of Appeal Rules. While this Court sustains the Respondent's preliminary objection, this Court is, nevertheless, not inclined to dismiss the Appellant's application herein on the basis of the anomaly correctly identified by the Respondent because the Respondent does not appear to have been misled or prejudiced in any material respect, and the anomaly is easily rectifiable." [Emphasis supplied]

To the contrary, another school of thought is of the view that, an application that does not cite the law under which it has been brought is as good as an application grounded on a wrong legal provision. Both are bound to fail, that is, the applications will be dismissed in limine: see ***Chande v. Indefund Ltd*** 2010 MLR 229 and the Kenyan case of ***Aviation & Allied Workers Union Kenya v. Kenya Airways Limited & 3 others*** [2015] eKLR. In the latter case, the Kenyan Supreme Court of Appeal had this to say on the need of moving the court under proper law:

"We have noted that the applicant has cited Sections of the Supreme Court Act and Rules which are applicable when one seeks leave, and grant of certification. In *Hermanus Phillipus Steyn v. Giovanni Gnecchi Ruscone*, Sup. Ct. Application 2 of 2012, this Court stated [paragraph 23]:

... It is trite law that a Court of law has to be moved under the correct provisions of the law.

A party who moves the Court, has to cite the specific provision(s) of the law that clothes the Court with the jurisdiction invoked. It is improper for a party in its pleadings, to make 'omnibus' applications, with ambiguous prayers, hoping that the Court will grant at least some. [Emphasis supplied]

> The second issue for determination is whether an appeal lies against refusal of permission to apply for judicial review by the High Court; and if in the negative whether the Court can entertain an application for stay pending appeal. At this juncture, it is important to remind myself that although the matter relates specifically to the issue of stay pending appeal, there is now a preliminary objection with respect to the Appellant's application herein, thus, some of the issues raised in the arguments and submissions of the parties go beyond the Appellant's application herein and raise the issue whether there is a valid appeal lodged by the Appellant.

In this regard, this Court has to remind itself that, in accordance with section 7 of the Supreme Court of Appeal Act the general jurisdiction of the single member of this Court is to hear applications that do not dispose of the appeal so that this Court does not end up actually determining the appeal filed by the Appellant. However, section 7 must be understood in its context that the single member of the Court ought not to determine an appeal in its merit. Thus, it is unsurprising that the law allows a single member to dismiss appeals for want of prosecution. The same is not determining an appeal in its merits as envisaged by section 7 of the Supreme Court of Appeal Act. Thus, and without in any way wishing to be understood or seen to be determining the appeal, this Court is only considering and determining the several pertinent issues that have arisen in the arguments and submissions in this matter, but the Court is not considering and/or determining the merits of the appeal as set out in several grounds of appeal in the notice of appeal.

Furthermore, as seen above and decided elsewhere the application of stay of execution pending appeal invokes the discretionary powers of the court and by nature discretionary powers must be exercised fairly and judiciously see ***Airtel Malawi Limited v SS Rent a Car***, MSCA Civil Appeal No. 24 of 2016 (unreported). The enabling provision under Part 52.16 of the Civil Procedure Rules, 1998 empowers this Court to stay execution, of a judgment being appealed against pending appeal. I must emphasize that the very first condition why the stay would be granted is that there must be an appeal pending which is in my view the legal basis for the application. Further, the conditions for granting a stay are provided

through several case laws both locally and internationally. In ***Chitawira Shopping Centre v HMS foods & Grain Ltd,*** MSCA Civil Appeal No. 30 of 2015, it was stated 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**:
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> "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)

In determining whether or not to grant stay application this Court must determine whether the purported appeal will be stifled. Meanwhile, indeed the position of the Court as at the moment is that an appeal does not lie against refusal of permission to apply for judicial review by the High Court but the aggrieved party should file a fresh application to a single member of the Court. In ***The State on the Application of Flatland Timbers Ltd v Department of Forestry (Director of Forestry)*** MSCA Civil Case No. 25 of 2021 Chikopa JA had this to say:

> "Coming to the substance of this matter first we must emphasize that where leave for judicial review is denied the remedy is not to appeal against the denial. It is to resubmit the request for leave in the Supreme Court of Appeal. To that extent therefore any references to an appeal in cases where leave has been denied are with respect most likely misplaced."

> As can clearly be seen, even if the Court were to give the Appellant the benefit of doubt by assuming that the application for stay has been brought by invoking the so called inherent jurisdiction, the said application has no legal basis. The Appellant should have brought a fresh application for judicial review, in it the Court would have considered the issue of whether to stay the order restraining the Respondent from proceeding with enforcement of the sums assessed in the amended notice dated 22 June 2022 pending the determination of the appeal.

Most importantly, staying the decision of Chigona J has no impact at all to the Respondent because staying the decision of the honourable judge of refusing permission to apply for judicial review, either way the parties will revert to the earlier position of the Appellant being in a position of requiring to apply and obtain the same permission. The honourable judge only dismissed an application for permission of judicial review. He did not give any enforcement order which ought to be stayed. In other words, staying the decision of the court below, will not result in the application for permission for judicial review being allowed. Arguably, it is on this basis that the Appellant should make a fresh application before a single member of the Court and at the same time make the stay application.

The only stay which ought to have been applied for, was the stay against the Respondent from proceeding with enforcement of the sums assessed in the amended notice dated 22 June 2022 pending the determination of the appeal. This application would only be supported by a fresh application under Part 54.12 of the Civil Procedure Rules as read with Order 19 rule 20 of the Courts (High Court) (Civil Procedure) Rules. This application would not be supported by filing a notice of appeal. Thus, the stay pending appeal as envisaged under Part 52.16 only applies to matters where there is a competent appeal before the Court.

On the facts and evidence before the Court, and on the observations and findings herein, I find no reason to depart from the reasoning, findings and decision of Chigona J . Consequently I dismiss the Appellant's application for stay pending appeal with costs to the Respondent.

MADE this 12th day of December 2023 at Blantyre.

S.A. Kalembera

JUSTICE OF APPEAL