



**REPUBLIC OF MALAWI**

**IN THE SUPREME COURT OF APPEAL**

**MISC. CIVIL APPLICATION NUMBER 62 OF 2024**

*(Being High Court, Commercial Division, Lilongwe Registry, Commercial Cause No 259 of 2019)*

BETWEEN:

**TOTAL MALAWI LIMITED.....APPELLANT**

**AND**

**PRIMA FUELS LIMITED.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL (MINISTER OF  
FINANCE AND ECONOMIC AFFAIRS).....2<sup>ND</sup> RESPONDENT**

**CORAM: HON. JUSTICE M.C.C. MKANDAWIRE SC, JA**

Msiska SC/Chalamanda, Counsel for the Appellant

Kita, Counsel for the 1<sup>st</sup> Respondent

C. Masiyano, recording Officer

**RULING**

1. On 3<sup>rd</sup> December 2024, the 1<sup>st</sup> Respondent (Applicant) filed an application to vacate the order of stay of proceedings. The application was made under section 7 of the Supreme Court of Appeal Act as read with Order 1, Rule 18 of the Supreme Court of Appeal Rules and part 23.3 of the Civil Procedure Rules, 1998 and under the inherent jurisdiction of the Court. In its application, the Applicant relied on the affidavit made by Mr Wapona Kita. There were also filed skeleton arguments in support of the same.

2. On 31<sup>st</sup> December 2024, the Appellant filed a notice of preliminary objection and issue under Order 111 Rule 14 of the Supreme Court of Appeal Rules. The Appellant also filed skeleton arguments in support of motion to strike out the

1<sup>st</sup> Respondent's application to vacate the stay of proceedings. On 13<sup>th</sup> January 2025, the Applicant filed a sworn statement in opposition to preliminary objection. The Applicant also filed skeleton arguments in opposition to preliminary objection.

3. This matter came for hearing on 22<sup>nd</sup> of January 2025. On this day, both parties addressed me on the preliminary objection. I thereafter reserved my ruling hence this delivery today.

4. In order to avoid a deliberate misunderstanding, it is imperative to narrate all the events from commencement of this application to where we are today.

5. On the 5<sup>th</sup> of November 2024, the Court below set aside an order for stay of proceedings pending arbitration on account of the arbitration proceedings having been terminated and the Arbitration Agreement providing that in such circumstances, either party was at liberty to refer the matter back to the High Court for trial. A copy of the ruling is tendered as exhibit WK1.

6. The Appellant was dissatisfied with the ruling and filed an appeal. The Notice of Appeal is exhibit WK2. The Appellant filed an application in the Court below for leave to appeal and also applied for a stay of the proceedings pending the determination of the appeal.

7. The application was vehemently opposed on the ground that it was an inchoate appeal.

8. On 26<sup>th</sup> November 2024, the Court below granted both orders. The ruling is tendered as exhibit WK3.

9. The 1<sup>st</sup> Respondent does maintain the position that the Appellant's right of appeal has not yet crystallized as the Court below is yet to fully determine the matter before it and that the ruling of 5<sup>th</sup> November 2024 was an interlocutory ruling that did not determine the matter before the Court below.

10. The 1<sup>st</sup> Respondent therefore says that there can be no stay of proceedings since for the appeal to be had, the matter must be allowed to go for full trial to judgment.

11. The 1<sup>st</sup> respondent therefore prays to the Court to vacate the order of stay of proceedings granted by the Court below on 26<sup>th</sup> of November 2024.

12. The Appellant says that the argument put by the 1<sup>st</sup> Respondent is incorrect as the Appellant is not appealing an inchoate ruling.

13. The set aside ruling while not a final judgment on the merits of the Respondent's claims against the Appellant, is a final and enforceable judgment that completely and finally disposes of the dispute between the parties as to the proper forum for the Respondent's claims.

14. That the Court's jurisprudence on inchoate decisions, must be understood in context. That the Court was not invalidating section 21 of the Supreme Court of Appeal Act. Whilst the Supreme Court has discouraged appeals of inchoate judgment, it has not invalidated section 21 of the Act and has cautioned parties to understand its jurisprudence on inchoate decisions in context.

15. The Appellant respectfully requests the Court to dismiss the application in any event.

16. Having gone through the history of this matter, let me now look at the preliminary objection.

17. The Appellant seeks to strike out the application based on a preliminary objection on the following grounds:

i. Section 7 of the Supreme Court Act does not provide for the submission of any application to a single Justice of the Court where no power exercisable by the full court exists, or where a single Justice would be required to hear or determine an appeal.

ii. No application has been submitted by the 1<sup>st</sup> Respondent to a Judge of the High Court which the High Court refused to grant and there is therefore no legal basis under Order 1, Rule 18 of the Supreme Court of Appeal Rules for moving the Court through the Application.

iii. Part 23.3 of the English Procedure Rules (1998) does not override the procedural Rules of the Court and provides no basis for the application.

iv. There is no inherent jurisdiction in the Court to receive and adjudicate upon an application which is incompetent.

v. There is no other provision of the Supreme Court of Appeal Act or the Supreme Court of Appeal Rules supporting the application by the 1<sup>st</sup> Respondent.

18. The Applicant opposed the preliminary objection. It is the Applicant's position that the Appellant's preliminary objection is not supported by the rule under which it is said to have been brought as outlined below:

- i. The Appellant has misinterpreted the scope and intent of the provision; and
- ii. the cited rule does not provide for objections raised in this context.

19. That the Appellant's preliminary objection has no basis as there is no preliminary objection to strike out the 1<sup>st</sup> Respondent's application to vacate the stay of proceedings before this Court to deal with.

20. That the objections raised by the Appellant have failed to satisfy the requirements as stipulated under Order 111 Rule 14 of the Supreme Court of Appeal Rules.

21. That the objections being unsupported and improperly raised, serve to only delay the proceedings and prejudice the substantive determination to the 1<sup>st</sup> Respondent's application.

22. The 1<sup>st</sup> Respondent's prayer is that this Court dismisses the preliminary objections in their entirety and allow the application to proceed on its merits.

23. The application for preliminary objection is made under Order 111 Rule 14 of the Supreme Court of Appeal Rules. For the avoidance of doubt, this Order and Rule provides as follows:

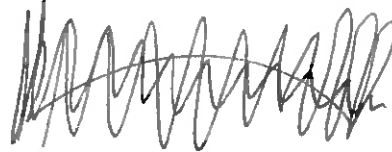
***"14-(1) A Respondent intending to rely on a preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before the hearing, setting out the grounds of objection, and shall file such notice together with four copies thereof with the Registrar within the same time.***

***(2)-If the respondent fails to comply with this rule the court may refuse to entertain the objection or may adjourn the hearing thereof at the cost of the respondent or make such other order as it thinks fit."***

24. The above rule is very clear. The preliminary objection that is before me does not comply with the said rule. I find that it is misconceived and I dismiss the notice of objection with costs.

25. I order that we proceed to hear the initial application to vacate the order of stay of proceedings. The matter shall come for hearing on a date to be set by the Court within 7 days from the date of this ruling.

Made in Chambers at Blantyre this 7<sup>th</sup> day of February 2025

A handwritten signature in black ink, appearing to read 'M.C.C. Mkandawire SC', written in a cursive style.

**M.C.C. MKANDAWIRE SC**

**JUSTICE OF APPEAL**