



REPUBLIC OF MALAWI

IN THE SUPREME COURT OF APPEAL

MSCA MISCELLANEOUS APPLICATION NO 11 of 2025

(Being High Court Principal Registry Civil Division Civil cause 95 of 2021)

(Before Honourable Justice D. Madise SC, JA)

BETWEEN

DYSON MKWAPATIRA.....APPELLANT

-AND-

MR MALUNGA.....1ST RESPONDENT

MR MANYEKA.....2ND RESPONDENT

MR KHONYOLA.....3RD RESPONDENT

RULING

1. This is an interpartes application for continuation of the order of stay which I had granted ex parte on 26th February 2025. This application is brought under Section 7 of the Supreme Court of Appeal Act which grants jurisdiction to a single member of the court to exercise any powers vested in the Court not involving the hearing or determination of an appeal. I'm mindful that an appeal does not operate as a stay of execution of the judgment of the court below. Courts do not make it the practice to stay execution of court orders unless special circumstances exist. An applicant seeking a stay must make a specific application in the Court below or this Court. Where there is clear evidence that failure to grant a stay will cause great injustice and render the appeal nugatory the Court will readily grant the

stay of execution pending appeal. See *Nyasulu vs Malawi Railways Limited*. 16 (1) MLR. 394

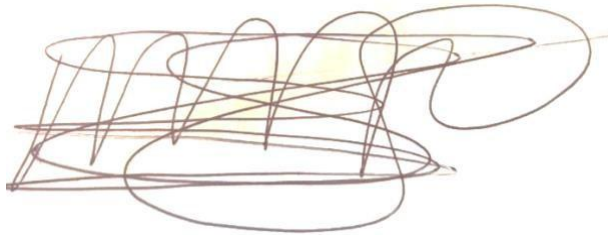
2. On 25th June I was called upon to determine this matter where I heard from both parties. The application has been supported by an affidavit and skeleton arguments filed by the appellant. The respondents have opposed the application for continuation of the order of stay. Counsel Thembako Banda filed an affidavit and skeleton arguments in opposition. The case emanates from the decision of the Court below to deny the applicant herein an order of injunction in a land dispute involving the applicant and the respondents.
3. The Court below further struck out and dismissed the applicant's case. The applicant being unhappy applied for an order of stay before the Court below but the same was denied. The denial by the Court below has triggered the concurrent jurisdiction of the Malawi Supreme Court of Appeal. Order 1 Rule 18 of the Supreme Court of Appeal rules provide as follows: *'whenever an application may be made to the court below or to the court it shall be made in the first instances to the court below but if the court below refuses the application the applicant shall be intitled to have the application determined by the court'*.
4. The applicant filed a notice of appeal before this Court. The respondent has raised issue with the notice of appeal on the basis that the same was filed before leave to appeal was granted from the Court below or this Court since this was a chamber matter. The respondent stated that the appeal is incompetent as it was irregularly brought before this Court. However, at the hearing of the interpartes application the applicant had obtained leave from the Court below.
5. The question before me is whether the preliminary objection can be sustained. Unfortunately, it cannot. Order 3 rule 3 of the Supreme Court of Appeal Rules states.
 - (1) Where an appeal lies only by leave of the court, or the Court below and application to the Court for such leave shall be made exparte by notice of motion.
 - (2) If leave to appeal is granted by the Court or by the Court bellow the appellant shall file a notice of appeal:
Provided that that nothing in this sub rule shall be deemed to prohibit an appellant from filing s notice of appeal prior to the hearing of the application for leave to appeal.

6. The rule therefore allows the appellant to file an application (motion) for leave before or after filing a notice of appeal. In this matter leave was obtained after the notice of appeal had already been filed. In these premises the preliminary objection does not hold water and it is over ruled. In this matter the applicant told the Court during the interpartes hearing that third parties at the invitation of the respondents are erecting structures on the disputed piece of land. This was not disputed by the respondents. That if this stay is not sustained the appeal will be rendered nugatory which will case a great injustice to the appellant/applicant. I'm in agreement with the applicant. I therefore sustain the order of stay on the following conditions:

- 1) The applicant to settle the record of appeal within 14 days.
- 2) The applicant to enter the appeal with the Registrar of the Court within 7 days thereafter.

Costs are in the cause.

Made at the Supreme Court of Appeal in Blantyre on 5th August 2025

A handwritten signature in brown ink, consisting of several overlapping loops and lines, positioned above the name of the justice.

Dingiswayo Madise SC JA

JUSTICE OF APPEAL