



**IN THE MALAWI SUPREME COURT OF APPEAL
AT BLANTYRE**

MISCELLANEOUS CIVIL APPLICATION NO. 05 OF 2024

(Being Judicial Review No. 23 of 2025, High Court, Lilongwe Registry)

BETWEEN:

THE STATE (On the Application of

THAWALE MINING LIMITED).....APPLICANT

AND

THE DIRECTOR GENERAL OF MINING AND

MINERALS REGULATORY AUTHORITY.....1ST RESPONDENT

MINING AND MINERALS REGULATORY

AUTHORITY.....2ND RESPONDENT

KHATHO CIVILS (PVT) LIMITED.....INTERESTED PARTY

CORAM: THE HON. JUSTICE MR S.S. KALEMBERA SC JA

: Mr J. Luwa, of Counsel for the Appellant

: Messrs Chisiza/Banda. Of Counsel for the Respondent

: Mr Kadzipatike, of Counsel for the Interested Party

: Mr Chinkono, Recording Officer

RULING

Kalembera J

1. Introduction

This is the Court’s Ruling on the applicant’s inter-partes application for stay of enforcement or suspension of the High Court's Order dated 4 June 2025 pending appeal and/or intended cross-appeal. The application follows the decision of the

High Court, Lilongwe District Registry (Judicial Review Case No. 23 of 2025) who, on 11 June 2025, dismissed the applicant's request for stay pending appeal.

The present application has been brought pursuant to section 7 of the Supreme Court of Appeal Act and Order I rule 18 of the Supreme Court of Appeal Rules. It is supported by the affidavits of Peter Thawale, Managing Director of the applicant, and Jefferson Luwa, counsel for the applicant, together with skeleton arguments on behalf of the applicant.

The application is opposed. The 1st respondent (The Director General of Mining and Minerals Regulatory Authority) and the 2nd respondent (The Mining and Minerals Regulatory Authority, or "the respondents") have filed an affidavit in opposition sworn by Neverson Chisiza, Deputy Director of Civil Litigation in the Ministry of Justice, supported by skeleton arguments. The Interested Party (Khato Civils (Pty) Ltd) has similarly opposed the application and filed an affidavit in opposition sworn by George Jivason Kadzipatike, supported by skeleton arguments.

2. Factual Background

The case originates from a dispute over mining rights at Kanyenyeva Hill in Salima District. The factual backdrop, according to applicant is that the applicant held an exploration license for the site and had completed all necessary steps, including the Environmental & Social Impact Assessment (ESIA), to be granted a mining license. They were in the process of applying for this mining license when the regulatory authority made a decision in favour of another company.

The 1st and 2nd respondents granted permission to the interested party, Khato Civils (Pty) Limited, to carry out mining operations at the same site via a letter dated 17 March 2025. The applicant contends this decision was unlawful because Khato Civils does not possess a valid mining license. Further, the applicant contends the decision was made by the respondents before the names of their Board of Directors were officially published in the gazette, rendering the decision *ultra vires* and *void ab initio*.

The High Court initially granted the applicant permission for judicial review and an interlocutory injunction on 12 May 2025, restraining the respondents from allowing Khato Civils to mine at the site. However, on 4 June 2025, the High Court, upon

application by Khato Civils, discharged the injunction. Crucially, the Court below found that the applicant had not suppressed material facts and that there were serious, triable issues for the judicial review. However, it discharged the injunction on the basis that the applicant could be adequately compensated in damages and that the balance of convenience favoured Khato Civils due to its involvement in the critical Salima-Lilongwe Water Project.

The applicant then applied for a stay of this discharge order on 11 June 2025, which the same High Court judge refused. Shockingly, on 19 June 2025, the same judge granted an application for stay filed by Khato Civils, which is seeking to appeal the part of the 4 June ruling that found the applicant had sufficient interest. This sequence of events has led the applicant to file the current application in the Supreme Court of Appeal, seeking to level the playing field.

3. Summary of Affidavit Evidence

Jefferson Luwa's Affidavit

He avers that the judge's "surprising and shocking" inconsistency in refusing the applicant's stay application but granting the interested party's identical application days later, suggesting favourable treatment. He further states that Khato Civils has never filed a response to the substantive judicial review and is "flooding the court" with interlocutory applications solely to frustrate and delay the expeditious resolution of the case.

He believes the only logical and fair solution is to suspend the enforcement of the 4 June ruling, putting all parties on an equal footing by preventing any mining until the appeals or the substantive judicial review are determined.

Peter Thawale's Affidavit

He points out the confusion in the High Court's 4 June ruling: while the Court below found the Applicant had a strong case and that Khato Civils had no license, it still discharged the injunction, effectively allowing unlicensed mining to continue. He emphasizes that during cross-examination, both the 1st respondent and Khato Civils' witness (Mr. Gama) conceded that the document held by Khato Civils was a "mere

letter” of provisional approval, not a mining license as required by the Mines and Minerals Act, 2023.

He argues that damages are not an adequate remedy in this case, as quantifying the loss of a multi-year mining license is exceptionally difficult, if not impossible. He lists several serious legal questions forming the basis of his intended cross-appeal, including:

- a. Whether an interested party (a non-public body) has the locus standi to apply to discharge an injunction issued against a public body;
- b. Whether the court erred by discharging the injunction on a ground (adequacy of damages) that was not pleaded by any party.
- c. Whether the court erred by effectively allowing a party to mine without a license.

He further states that if a stay is not granted and the interested party proceeds to mine, the applicant will suffer irreparable harm that cannot be undone, rendering its cross-appeal meaningless (nugatory).

The 1st and 2nd Respondents

In his affidavit in opposition to the present application, Counsel Neverson Chisiza says he is Deputy Director of Civil Litigation at the Ministry of Justice, Attorney General's Chambers, who are representing the respondents in this matter. Counsel Chisiza avers that the applicant's entire application is premature and defective because no valid cross-appeal exists. The applicant failed to obtain the mandatory leave to appeal against a judgment made in chambers, rendering the purported cross-appeal “irredeemably defective.”

Counsel Chisiza then defends the High Court's action of considering the adequacy of damages even if it was not pleaded, arguing that a court can apply relevant law *suo motu* (on its own motion) to achieve justice. The respondents' Counsel further characterizes the applicant's allegations of judicial bias as unethical. He states that the proper channel for such a complaint was an application for recusal in the High Court. By remaining silent there and launching an attack in the appellate court, the applicant's counsel has acted unprofessionally, and these allegations should not be entertained.

Counsel Chisiza also asserts that the applicant has failed to substantiate its claim of suffering irreparable harm if the stay is not granted, a key requirement for such an application.

The Interested Party

Counsel George Jivason Kadzipatike representing the interested party deposits that a single member of the Court has no jurisdiction to hear the application. He argues that varying a High Court judgment involves the determination of an appeal, which is beyond the powers of a single judge under Section 7 of the Supreme Court of Appeal Act. He further further avers that the cross-appeal is non-existent. Counsel Kadzipatike states that as a key fact that the applicant has not filed any notice of cross-appeal in the registry of the Court below. Consequently, the application for a stay pending a cross-appeal is based on a “legally non-existent” appeal and is speculative.

He submits that the records shows that the applicant has not obtained the required leave to appeal from either the High Court or the Supreme Court of Appeal, as mandated for chamber orders in section 21 of the Supreme Court of Appeal Act.

Without prejudice to the procedural arguments, he also contends that the applicant has failed to demonstrate irreparable harm or prove that the interested party is impecunious and unable to pay potential damages.

4. The Partys' Submissions

The Applicant

The applicant's Counsel submits the Supreme Court of Appeal has the jurisdiction to hear this application after it was refused by the High Court, pursuant to Order 1 rule 18 of the Supreme Court Rules and Section 7 of the Supreme Court of Appeal Act. He argues that the grant of a stay pending appeal is a discretionary power of the Court. The key principle is that a stay should be granted where the appeal would be rendered nugatory if the stay were refused. Counsel for the applicant refers the Court to the case of *Wilson vs Church* (No 2) (1879) f2 Ch.D. 455, *Becker vs Earl's Court Ltd* (1911) 56 SJ 206, *The Ratata* (1897) p 118.

Counsel further submits the modern approach requires the Court to consider all circumstances and base its decision on what is just and expedient, with a primary consideration being the risk of injustice and prejudice to the parties. Counsel relies on *Africa Prime Investment Ltd vs NBS Bank Ltd*, MSCA Civil Appeal Number 17 of 201

It is the applicant's contention that the appeal has high prospects of success. The applicant argues its cross-appeal is strong because the High Court made clear errors, such as allowing mining without a license and deciding on point not pleaded on adequacy of damages.

On whether the appeal will be nugatory, Counsel argues that if Khato Civils mines the site, the physical and commercial reality of the site will be permanently altered. Even if the applicant wins its appeal, the victory would be hollow as the resource would be depleted.

Thus, it is the applicant's Counsel submission that the applicant will suffer grave injustice if the stay is refused. The investments and steps taken to secure the mining rights will be lost, and this loss cannot be compensated in damages, especially from a public body using taxpayers' money. Counsel therefore argues that this is an irreparable injustice.

Finally, Counsel submits that balance of justice favours a stay. He argues that the "balance of convenience" test should be replaced with a "balance of justice" test. Here, justice demands a stay to preserve the subject matter of the dispute and ensure a fair outcome. The interested party has other quarry sites for its water project, whereas the applicant's rights are specific to this site.

Arguments in the Alternative for Variation of the Order

Counsel for the applicant further argues and submits that the Court has the inherent jurisdiction to vary its own orders to achieve justice and ensure a fair trial. Citing the case of *Ali and Another vs Robin Yadi and another* Civil Cause number 17 of 2021 (HC) Lilongwe Registry), the applicant argues that varying the order to prevent both parties from mining is a fair and common-sense solution that would expedite the resolution of the substantive judicial review.

In conclusion the applicant prays for an order either (1) staying the enforcement of the High Court's 4 June 2025 Ruling, or (2) in the alternative, varying the ruling to

state that neither party shall carry out mining operations until the final determination of the substantive judicial review.

The 1st and 2nd Respondents

The respondents stand by their decision to grant provisional approval to Khato Civils for the quarry project at Kanyenyeva Hill. This decision was made in the public interest to facilitate the critical Salima-Lilongwe Water Project. Supporting the High Court's rationale, they fully endorse the High Court's Ruling of 4 June 2025, which discharged the injunction. They agree with the judge's finding that the applicant could be adequately compensated in damages, a legal principle they believe the court was entitled to raise on its own to serve the interests of justice.

The respondents further contend that the applicant's entire case, including the current application, is built on a flawed foundation due to multiple procedural failures, primarily the failure to obtain the necessary leave to appeal.

The respondents' arguments are focused on procedural bars and the applicant's failure to meet the legal test for a stay. They anchor their case on Section 21 of the Supreme Court of Appeal Act, which mandates that leave must be obtained to appeal an order made in chambers. Citing *Buluma v Electoral Commission and another* (Misc Civil Appeal No. 22 of 2014), 2014 MWSC, they argue that without this leave, the Supreme Court cannot assume jurisdiction, and the application must be dismissed.

The respondents further contend that allegations of judicial impartiality cannot be raised for the first time on appeal. Citing *Kumwembe & another v R*, (Criminal No.05 of 2017) 2017 MWSC they state the objective and subjective test for bias requires a formal recusal application in the Court below. The failure to do so renders the allegations inadmissible.

As to the issue of stay order itself, the respondents submit that the applicant has failed to discharge its burden of proof, particularly the need to demonstrate irreparable harm. They pledge to rely on established jurisprudence in *CFAO Motors Limited v NBS Bank Plc* Misc Civil App No. 21 of 2023 and *Mulli Brothers Limited v Malawi Savings Bank Limited* Misc Civil Appeal No. 48 of 2014 to argue that the balance does not justify a stay. The respondents pray for the dismissal of the applicant's application with costs.

Khato Civils (Pty) Limited

Khato Civils, the interested party, presents itself as a legitimate contractor for a vital national project, wrongly impeded by a competitor with no valid legal claim. The interested party asserts it holds a valid provisional approval from the Regulatory Authority to conduct quarrying at Kanyenyeva. This is for the Salima-Lilongwe Water Project, a critical government infrastructure initiative. The interested party maintains that the applicant has no locus standi. At the time of filing the judicial review, the applicant's exploration license had expired, and it never held a mining license. Therefore, it has no rights to enforce and no sufficient interest in the matter.

The interested party frames the applicant's current application as a speculative and procedurally improper attempt to suspend a lawful ruling without having taken the necessary legal steps to challenge it properly. The interested party's submissions are a three-pronged procedural assault designed to have the application struck out. First is on lack of jurisdiction and relying on *Ted Sparks Jumbe v. Christopher Kasema anil Another*, MSCA Miscellaneous Civil Application No. 46 of 2023 (unreported), the interested party submits that a single member of the Court powers under Section 7 of the Supreme Court of Appeal Act are explicitly limited and exclude the power to vary a High Court judgment. Therefore, the application is fatally flawed from the outset.

Second, citing the Supreme Court of Appeal Rules and the precedent in *The Registered Trustees of Youth and Society (YAS) v Greizedar Jeffrey and others*, MSCA Civil Appeal No. 70 of 2018, the interested party argues that an appeal is only "deemed brought" when a notice of appeal is filed. Since none has been filed by the applicant, the application for a stay has no legs to stand on.

The interested party thus reinforces the respondents' argument by invoking Section 21 of the Supreme Court of Appeal Act and the authority of *Administrator General v Khofi*, [2000-20011] MLR I (SCA), which clearly states that leave is a mandatory prerequisite for appealing a chambers order. The absence of leave is a complete bar to the application. The interested party therefore prays for the dismissal of the applicant's application with costs.

5. Issues for Determination

- i. Whether the application is incompetent due to the applicant's failure to obtain the required leave to appeal.
- ii. Whether a single member of the Court has the jurisdiction to vary the order of the High Court.
- iii. Whether the applicant has satisfied the legal test for the grant of a stay of execution pending appeal.

6. Law and Analysis

Whether the application is incompetent due to the applicant's failure to obtain the required leave to appeal

The respondents and the interested party have taken the position that this application is incompetent for want of leave to appeal, relying on section 21 of the Supreme Court of Appeal Act, which provides in its second *proviso* that no appeal shall lie without leave where the impugned judgment or order of the High Court is, *inter alia*, an order made in chambers. There is no dispute that the High Court's Ruling of 4 June 2025, which discharged an interlocutory injunction, was made in chambers. The dispute, however, concerns the procedural timing and effect of leave at this preliminary stage, namely, whether an applicant for stay pending appeal must have already obtained leave before the Supreme Court of Appeal may entertain such an application.

Interpretation of Section 21 and the Procedural Timing of Leave

Section 21 indeed makes leave to appeal a prerequisite for a valid appeal in the categories of decisions specified. However, the section is silent as to when such leave must be obtained and whether its absence bars an intending appellant from seeking interlocutory relief pending appeal.

The governing procedural rule is Order III rule 3 of the Supreme Court of Appeal Rules, which provides:

“3. *Application for leave to appeal*

(1) Where an appeal lies only by leave of the Court or of the Court below any application to the Court for such leave shall be made ex parte by notice of motion.

(2) If leave to appeal is granted by the Court or by the Court below the appellant shall file a notice of appeal:

Provided that nothing in this subrule shall be deemed to prohibit an appellant from filing a notice of appeal prior to the hearing of the application for leave to appeal.”

This *proviso* is instructive. It explicitly allows an intending appellant to file a notice of appeal before having obtained leave. The rationale is practical to prevent an appellant from being time-barred from filing their notice while the separate (and potentially protracted) application for leave is being litigated.

The Nature of the Present Proceeding

The current application is not the appeal itself; it is an interlocutory application for a stay of execution pending a potential appeal. The requirement for leave attaches to the substantive appeal, not to every incidental application made prior to its perfection.

As held in *Roads Authority and Another v. AL-Abdulhadi Engineering Consultancy*, Civil Appeal No. 22 of 2023, the Supreme Court of Appeal’s engagement with a matter, for the purpose of interlocutory applications, is not contingent on the full record of appeal being before it. Raising the issue of leave at this nascent stage is, therefore, procedurally inappropriate. The focus of this application is on the balance of justice and the risk of the appeal being rendered nugatory, not on the technical perfection of the appeal process.

Therefore, while leave to appeal is indeed a mandatory requirement for the prosecution and hearing of a substantive appeal against a chambers order, the failure to have obtained such leave at this stage does not bar the present application. Just as the Rules expressly permit a party to file a notice of appeal prior to obtaining leave where leave is required, so too may a party seek interlocutory relief such as a stay pending appeal before formal leave is granted. Circumstances may arise where the preservation of the subject matter demands urgent recourse to this Court before the leave question is finalised.

To hold otherwise would defeat the protective function of a stay pending appeal and elevate form over substance. Moreover, pursuant to Order I rule 18 of the Supreme Court of Appeal Rules, where the High Court refuses leave, a party may properly renew the leave application before this Court. It would be illogical if, in such a situation, access to necessary preservatory relief were procedurally foreclosed merely because the leave process is ongoing. The Rules do not impose such a restriction.

In the Court's view, to insist that leave be obtained prior to seeking a stay would impose a procedural hurdle not contemplated by the Act or the Rules and could result in irreparable injustice by denying an appellant interim protection while regularising the appeal. Accordingly, the preliminary objection based on the alleged absence of leave to appeal is without merit and is dismissed. The application is properly before this Court.

Whether a single member of the Court has the jurisdiction to vary the order of the High Court

Nature of Relief Sought

The present motion is framed as an inter-partes application for stay and/or variation of the High Court's ruling of 4 June 2025. While part of the prayer seeks suspension or stay, another limb expressly asks this Court to "vary" the order of the High Court. In substance, that prayer invites this Court to re-examine the correctness of the High Court's findings and substitute them with a new order that neither party should conduct mining operations.

Scope of a Single Member of the Court Jurisdiction

Under section 7 of the Supreme Court of Appeal Act, a single member “may exercise any power vested in the Court not involving the hearing or determination of an appeal.” This limitation is crucial. The statutory language draws a bright procedural line between interlocutory or procedural powers, such as stay of execution, enlargement of time, or directions and appellate powers, which involve reviewing or overturning the merits of a High Court’s order. To “vary” a High Court order, in the sense of altering its substance, necessarily entails an appellate determination of that order’s correctness in law or fact. It therefore falls squarely within the prohibited class of matters that “involve the hearing or determination of an appeal.”

The applicant attempts to justify the variation request as an alternative to a stay i.e., to level the playing field. However, the practical effect of such an order would be to replace the High Court’s determination with a new regime of rights and obligations. That is not preservation of the status quo; it is a modification of the judgment itself, which amounts to appellate interference with the decision of the Court below.

Application of Section 7 and Order I Rule 18

The stay application satisfies the two cumulative requirements under Order I rule 18. It was first made before the High Court, and the High Court refused it on 11 June 2025 (Exhibit PT 2). Consequently, this Court now has concurrent jurisdiction to consider the same relief afresh, not by way of appeal but by original exercise of its interlocutory power to preserve the subject matter. The Court’s task is not to review the correctness of the High Court’s refusal, but to determine afresh whether, on the materials presented, a stay is warranted.

The “variation” prayer, however, plainly exceeds the remit of a single member of the Court, as it would entail substituting the High Court’s order with a different substantive outcome. That portion of the motion must therefore be struck out for want of jurisdiction, leaving intact the prayer for stay pending cross- appeal.

The Court accordingly strikes out the alternative prayer for variation of the High Court’s order for want of jurisdiction under section 7 of the Supreme Court of Appeal Act. The Court will therefore proceed to consider only the application for stay or suspension of enforcement on its merits.

Whether the Applicant has satisfied the requirements for the grant of a stay or suspension of enforcement of the High Court’s order pending appeal

The law governing stay or suspension pending appeal is well-settled, see *Mulli Brother Ltd v Malawi Savings Bank Ltd* (MSCA Civil Appeal No. 48 of 2014) [2015] MWSC 466 (8 July 2015). The power is discretionary and must be exercised judiciously, guided by three inter-related criteria repeatedly affirmed by this Court.

First, there must be an arguable appeal with reasonable prospects of success. In other words, the applicant must show that the intended appeal is not frivolous or vexatious.

As for risk of the appeal being rendered nugatory, the applicant must demonstrate that, absent of a stay, the success of the appeal would be futile or cause irreparable harm not compensable in damages. Finally on balance of justice the Court must weigh the respective prejudice to each party and determine where justice lies, see *Mike Appel & Gatto Ltd v Saulos Chilima*, MSCA Civil Appeal No. 20 of 2013; *Africa Prime Investments Ltd v NBS Bank Ltd*, MSCA Civil Appeal No. 17 of 2015

It is equally recognised that the Court does not lightly deprive a successful litigant of the fruits of its judgment, see *Wilson v Church* (No 2) (1879) 12 Ch D 454). The discretion turns ultimately on the balance of justice, not rigid formulae.

Existence of an arguable appeal

The applicant has lodged a notice of intention to cross-appeal against the High Court's ruling of 4 June 2025, principally contending that:

- i. the learned Judge erred in law in discharging an injunction when the interested party admittedly had no mining licence under the Mines and Minerals Act, 2023;
- ii. the Judge erred by grounding the discharge on adequacy of damages, a point never pleaded or argued by any party; and
- iii. the Judge erred in entertaining and granting relief sought by an interested party rather than by the public authority against whom the injunction lay.

These grounds are not frivolous. On the face of the record, the High Court acknowledged that the applicant had sufficient interest and that there were serious

triable issues yet went on to discharge the injunction on adequacy of damages. Which I form a different view as we shall see below. Further, whether such reasoning properly applies to judicial review proceedings whose focus is on legality and process, not compensatory damages is at least debatable.

Furthermore, the applicant's substantive judicial review challenges the very validity of the respondents' decision, arguing it was made by a Board whose members were not gazetted as required by law, rendering the decision *ultra vires* and *void ab initio*. If this underlying challenge has merit, the injunction should not have been discharged to allow actions based on a potentially null and void administrative decision. The cross-appeal can compellingly argue that the High Court failed to give sufficient weight to the gravity of this jurisdictional challenge when assessing the serious triable issues. The proposed appeal therefore raises bona fide and arguable questions of law. The Court is satisfied that the intended cross-appeal discloses triable issues and has a reasonable prospect of success.

Whether the appeal will be rendered nugatory

The applicant contends that if a stay is refused, the interested party will proceed with mining operations at Kanyenyeva Hill, thereby depleting the finite rock aggregate resource which forms the very subject matter of the dispute. Once extracted, the material cannot be restored; even a successful appeal could not undo the physical depletion. Quantifying such loss in damages would be speculative, given the multi-year tenure of mining licences and fluctuating commodity values. By contrast, the interested party has not shown that a temporary restraint would cripple the Salima-Lilongwe Water Project, still less that this particular site is indispensable. The project could continue sourcing materials from its other authorised quarries.

These circumstances demonstrate a real risk of the appeal being rendered nugatory if mining proceeds unchecked. The potential harm to the applicant is irreversible, whereas the potential delay to the interested party and the respondents is temporary and compensable in cost or scheduling adjustments. The applicant has established that refusal of a stay would likely render its appeal nugatory and cause irreparable prejudice.

Balance of justice

The Court must now weigh the competing equities. On the applicant's side, the resource in dispute is unique and non-renewable; its loss would nullify the appeal. The applicant has shown diligence by pursuing both judicial review and appellate remedies. On the respondents' and interested party's side, their interest lies in avoiding interruption to a public infrastructure project. Yet the evidence discloses no immediate project paralysis; the interested party has alternative sources of quarry materials, and the public interest equally lies in ensuring lawful administrative decision-making under the Mines and Minerals Act.

The public interest in legality and environmental stewardship therefore outweighs the administrative convenience of continuous extraction pending appeal. Justice is best served by preserving the status quo ante, the condition that existed before the High Court's discharge of the injunction. The balance of justice clearly favours granting a stay to maintain the integrity of the appellate process and the subject matter of the dispute.

7. Conclusion

Having considered all the circumstances, the Court finds that the intended cross-appeal raises serious and arguable issues; refusal of a stay would render that appeal nugatory; and the balance of justice favours preserving the status quo.

Accordingly, the Court hereby grants the application for stay. The alternative prayer for variation of the High Court's Ruling of 4 June 2025 is struck out for want of jurisdiction. Enforcement of the High Court's order of 4 June 2025 is stayed pending determination of the Applicant's intended cross-appeal or until further order of this Court. Costs for this inter-partes application be borne by the Respondents and interested party.

MADE this 6th day of November, 2025 at Blantyre.



S.A. Kalembera SC

JUSTICE OF APPEAL