



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

MSCA MISCELLANEOUS CIVIL APPEAL NO. 2 OF 2012

(Being High Court Lilongwe District Registry Civil Cause No. 530 Of 2010

Before Hon. Justice Chombo)

BETWEEN:

THE REGISTERED TRUSTEES OF TITHANDIZANE

BWAILA CAROENTERS SHOP.....APPELLANTS

AND

FOLETSANI TCHAWANGO.....RESPONDENT

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

: Mr Kadzakumanja, of Counsel for the Respondent

: Mr Salima, of Counsel for the Appellants

: Mr Chinkono, Recording Officer

RULING

Kalembera, SC JA

This is an application to dismiss the appeal herein for want of prosecution. It is brought under section 7 (b) of the Supreme Court of Appeal Act and under the Inherent Jurisdiction of the Court. It is supported by an affidavit sworn by Henry George Kadzakumanja, of counsel for the Respondent, and skeletal arguments. The Appellants oppose the application, and have filed an affidavit in opposition sworn by Eric Dickson Salima, of counsel for the Appellants, as well as skeletal arguments.

The Appellants in the main contend that they are not wholly to blame for the delay in prosecuting the appeal; and that the Respondent and the Court are equally to blame.

The Respondent commenced this action in October 2010, against the Appellants under Order 113 of the Rules of the Supreme Court claiming summary possession of the Plot on Title Number Bwaila 2/242 . the City of Lilongwe. The Appellants did oppose the application. Upon hearing the Summons, the Registrar found that there were serious issues to be tried, and ruled in favour of the Appellants on 9th June 2011. He further directed that the matter do proceed to trial as if commenced by writ. On appeal by the Respondent, the High Court, on 18th July 2011 reversed the Registrar's ruling and granted the Respondent Summary Judgment.

The Appellants being dissatisfied with that decision file and served a Notice of Appeal in February 2011. The Appellant never sought leave to appeal as required by the Rules. The Appellants further filed and served summons to settle record of the appeal. They also obtained an order of stay of execution of the decision of the Judge, which order was subsequently set aside on the grounds of irregularity on 12th December 2011. The Appellants then file fresh summons for leave to appeal out of time which the court dismissed and set aside the appeal irregularly filed with costs on 18th January 2012.

The Appellants then filed fresh summons to appeal out of time and stay of execution before a Single Member of the Court, who granted both leave to appeal out of time and a stay order on 27th April 2012. On review, the full bench of the Court upheld the decision of the Single Member on 11th September 2015, on condition that the appeal be prosecuted expeditiously. Further, the Court specifically ordered and directed that the record of appeal be settled within 14 days and the appeal set down by no later than 60 days from 11th September 2015.

Thus it is the contention by the Respondent as argued and submitted by counsel, that since the decision of the full bench of the Court, and despite clear directions given by the Court, the appeal has still not been prosecuted, and that it is to the detriment and prejudice of the Respondent. The Respondent blames the Appellants for this inordinate delay in prosecuting the appeal, and the blatant breach of the directions given by the full bench. On the other hand, the Appellants, through counsel contend that they have tried all they could to have the record of appeal settled, and the appeal heard but all their efforts have been in vain, and exacerbated by the missing of the

court file. They further contend that the responsibility to have the record settled if at all, is for all those involved, that is, the Appellants, the Respondent and the Court.

The Appellant contends further, that since the judgment of the full bench delivered on 11th September 2015, counsel for the Appellants wrote his counterpart representing the Respondent, suggesting that they settle the record by consent, and counsel for the Respondent never responded. Then the Appellants filed a notice of adjournment of the hearing of the settlement of record. Finally they were given the 16th day of April 2016, whereby an order settling record was made, and that the Registrar of the High Court was tasked with the preparation of the record. That they have been checking with the court since then but were being told that the record was missing. The Appellants further contend that there are officers in the civil registry who can ably attest to the fact that the Appellants have always been trying to remind the court to finalize the preparation of the record, and that one of them is Mr Kumwenda.

The Respondent then, in June 2023, having noted that the appeal had still not been entered, the record having not been settled, filed an application before the High Court to have the appeal dismissed. The Presiding Judge in the Court below directed that the Supreme Court should hear the application since the order for stay of execution of the judgment herein and leave to appeal out of time was granted by the Supreme Court.

The main issues for determination are:

- a. Whether the application herein is properly before a Single Member of the Court.
- b. Whether the application be granted or not.

Section 7 of the Supreme Court of Appeal Act provides as follows:

“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 –

- (a) In criminal matters, if a single member refuses an application for the exercise of any such power, the applicant shall be entitled to have his application determined by the Court;*
- (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."*

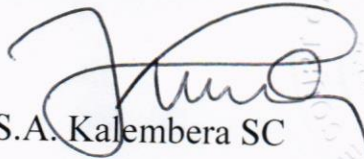
It thus follows that, in accordance with section 7 of the Supreme Court of Appeal Act the general jurisdiction of the single member of this Court is to hear applications that do not dispose of the appeal so that this Court does not end up actually determining the appeal filed by the Appellant. However, 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.

In this matter though, I am also mindful that, although as a Single Member of the Court I can, in normal circumstances, hear and determine this application, I must not lose sight of the fact that the full bench of this Court, at one point was seized with this matter and made a determination, as well as gave directions as to the further conduct of the appeal. It is clear from the submissions and arguments of the parties herein, that those directions, for diverse reasons have not been adhered to. Was it not incumbent on the Respondent, having noticed the breach of the directions given by the full bench of this Court, to approach the full bench of this Court and make this application before the said full bench? I feel greatly constrained, to entertain this application, knowing fully well that the full bench made pronouncements on this matter. I am inclined to agree with the Judge in the Court below, that this application be heard, by the Court that made pronouncements on this matter, that is the full bench of this Court.

Having made the above observations and findings, it is my considered view that I am not in a position to entertain this application, and as a Single Member of the Court I can neither grant or deny this application. Thus, the Respondent must approach the full bench of the Court.

Consequently, I order and direct that the Respondent must take the necessary steps to bring this application before the full bench of the Court for proper determination and directions if any. Costs be in the cause.

MADE this 11th day of February 2026 at Blantyre.


S.A. Kalembera SC

JUSTICE OF APPEAL

