



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 197 OF 1994

BETWEEN:

MOHAMMED RAFIK HAJAT 1ST PLAINTIFF

-and-

RUBINA HAJAT 2ND PLAINTIFF

AND

DAVID MOSES DOMINGO 1ST DEFENDANT

-and-

ABDUL RASHID SULEMAN t/a Siku Transport..... 2ND DEFENDANT

-and-

PEARL ASSURANCE PUBLIC CO. LTD 3RD DEFENDANT

CORAM: Hon. Justice M.L. Kamwambe
Mr. E. Banda of counsel for the Applicant
Mr. Ching'ande of Counsel for the Respondent
Mr. Mdala, Official Interpreter

RULING

Kamwambe J

This is an application taken out by the Plaintiffs (Applicants) herein to strike out the notice of appeal and to vacate the order of stay of execution. The notice of appeal was purportedly filed on the 13th September 2007 whereas the ex-parte stay of execution by the Respondents (Defendants) was granted on the 20th September, 2007. Thus this application is two pronged.

It is the argument of the Applicants that the judgment of the court awarding damages to the Applicants was delivered on 3rd August, 2007 and that time for filing the appeal expired on or about the 3rd day of September 2007. The appeal having been filed on the 18th September, 2007 was so filed out of time and without leave. He further argues that the notice of appeal has to date not been served on the Applicant and that the notice was simply used to obtain a stay of execution.

The Applicants continue to argue that after a warrant of execution was issued on behalf of the Applicants the Respondents caused an application for stay of execution and the warrant was accordingly stayed. The order for stay was not served on the Applicants.

It is further argued by the Applicants that it is not clear whether what was stayed was the whole judgment which came after a full hearing or just the warrant of execution. They submit that whereas an application for stay of warrant of execution or default judgement can be obtained ex-parte; the stay of the whole judgment after full hearing must be obtained inter partes.

Later the Applicants conceded that the notice of appeal, if it was duly filed, it was so filed on the last day but that it was not served. They doubt nevertheless if it was filed as it had no appeal number although it was merely stamped.

The Respondents on the other hand contend that the application for stay was duly made under Order 47 rule 1 which combines the judgment (ie after a writ) and the writ of fieri ficias. In essence Applicants say these should not be distinguished at all, and that in fact this is why there is the notice of appeal against the whole judgment of the lower court. They further contends that service of notice of appeal is a matter for the Registrar according to Order 3 rule 5 Rules of Supreme Court (1999). They concede however that he

served the notice of appeal just yesterday the 18th February, 2008.

Let us not undermine mistakes made. To me it is unfathomable that a document can be said to have been properly filed if it fails to show the cause or appeal number. Such should not be taken for granted. Just because the Civil Registry has stamped the document does not cure the irregularity. The mechanical way of stamping on its own is not enough if the document is meaningless. It is just the same as filing a document without indicating the parties thereto. Just to say I nevertheless filed it because it bears that stamp of the Civil Registry is to allow inadequate completion of documents and shifting unnecessary blame on the Civil Registry. I would have loved it if counsel for the Respondents admitted fault on his part rather than saying the document was nevertheless filed. This is the more reason that Order 2 rule 1 comes into play in respect of non-compliance of the form or content of a document. Of course such irregularity cannot lead to nullity of proceedings. But some remedy of such irregularity must be found. Counsel was not vigilant enough to check the content of the document. As such, in accordance with Order 2 rule 1 (2). I set aside the notice of appeal by way of striking it out so that a fresh one is obtained within 7 days with leave of the court and to be duly served on the Applicants.

Coming to the second aspect of vacating the stay all I can say is that Applicants counsel has failed to mention authority which says to stay the judgment it must be by the way of an inter-partes application. The stay herein is taken under Order 47/1 which allows stays to be obtained ex-parte. Under order 32 rule 6 the court may set aside an order made ex-parte. The question is whether it would be proper to set aside the stay in the circumstances at this time. In accordance with Order 47/1/4 a stay of execution (of writ of *fieri ficias*) ought to be served on the other party and if execution was levied or threatened, the sheriff must be notified by the Respondents. Not to notify the Applicants' solicitors is to play hide and seek. Transparency of each step

of the proceedings is of utmost importance, this is why I do not condone the non-service of the notice of appeal on the Applicants.

The basis of the judgment is the award of damages in this case. If the execution of the whole judgment is stayed it means the execution of the warrant too is stayed and vice versa except that which falls outside the warrant or an order independent of the warrant of execution. In this case, what will one achieve by saying it is only the execution of the warrant that is stayed and not the judgment if there is nothing material to gain from the judgment once the execution of the warrant is stayed. It merely becomes academic and I am not prepared to enter in that realm.

I fail to see any good reason why I should set aside the stay since there is no apparent abuse of the court process as the Applicants thought at first. Whereas the order for stay of execution was served on the sheriff it ought to have also been served on the applicants' lawyers as well. But this is not a serious evil warranting the vacation of the stay order.

Since I have ordered that a proper notice of appeal be filed with the Supreme Court Registry within 7 days from the date of this ruling I will allow the order for stay of execution to continue unless the Respondents fail to file the appeal within the specified time.

I would wish that the hearing of the appeal in this matter was expedited due to the fact that this is an old matter and that the Applicants are desirous to benefit from their successful litigation. It is so decided.

Made in Chambers this 20th day of August 2008 at Chichiri, Blantyre.

M.L. Kamwambe
JUDGE