Duplicate

Republic of Malawi

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 158 OF 2010

BETWEEN

EDGAR NAMAKHWA — **PLAINTIFF**

AND

AGASON MOTORS — **DEFENDANT**

Coram	**:**	**Matapa Kacheche**	**Assistant Registrar**
		Masanje	**For the Plaintiff**
		Kauka	**for the Respondent**

ORDER

1. Let me start by apologising for the delay in delivering this order. When the parties came in the morning I still had a few issues to clarify in the order and I had to ask them to come back at 3 p.m. thereby really inconveniencing them.

2. This is the summons on the part of the plaintiff to have the order of stay of execution and leave to appeal out of time be set aside on the grounds that the same was obtained through misrepresentation of facts, that there were no proper grounds for granting it and that there is inordinate delay in having the appeal prosecuted.

3. On 9th July, 2015 my brother Assistant Registrar Mdeza issued an order on assessment of damages following a judgment by Potani J on liability dated 17th February, 2015. On 13th July 2015 the order was served on the defendant.

4. There is dispute as to whether the defendant was present or not when the order on assessment of damages was being delivered. I must point out that this dispute came out only after the plaintiff attempted to have the affidavit amended.

5. My observation is that in the affidavit in support the plaintiff indicated that it was when his lawyers came to inquire that they were informed that the order was ready but was awaiting

typing. He did not indicate that the inquiry was made in the presence of the defendant's counsel.

6. To come around and start claiming that the defendant's counsel was actually available when the order was being delivered would amount to changing the substance of the affidavit. I will not accept such an amendment.

7. Counsel for the appellant submitted that an affidavit cannot be amended. In my view that is an erroneous view. Information on an affidavit can be defective for many reasons including typo errors and mistakes of fact or mere oversight. In all these occasions a deponent can come back and state that they would like to correct a mistake or introduce a new piece of evidence. The duty of the commissioner would be to recommission the affidavit by allowing the deponent take a fresh oath.

8. The only reason I am not allowing the amendment on the issue of whether the defendant's counsel was available or not at the time the judgment was being delivered is that the change is substantial. It is like he was claiming one thing in the first affidavit and is claiming the opposite in the proposed amendment. I therefore overrule the proposed amendment and proceed on the original content of the affidavit.

9. I therefore find as a fact that the order was delivered in the absence of the defendant and was only brought to its attention by service on 13th July 2015.

10. On 23rd July 2015 the defendant made an application to have the order on assessment of damages stayed. He also prayed for leave to appeal out of time. The order of stay was to be made pending the determination of the appeal. I granted both prayers on certain conditions one of which was that the defendant should pay K5, 000, 000.00 into Court. There is no suggestion that any of the conditions have been breached.

11. In the summons and affidavit in support for stay of execution, it was stated on behalf of the defendant that its counsel was not present at the time the order was being delivered but the affidavit clearly failed to state the day or date when the defendant became aware of the order. Secondly the defendant did not state the reasons for the delay in filing the notice of appeal although it was explained on its behalf that the application for stay could not be made immediately by reason of its absence during the delivery of the order.

12. The plaintiff therefore attacks the order primarily on the ground that, by reason of not disclosing to the Court the date when the defendant became aware of the order, the defendant misrepresented the facts to the Court. Secondly the plaintiff also argues that, as a matter of law, the defendant was supposed to provide the grounds for the stay as it was a

suspension of the plaintiff's enjoyment of the fruit of litigation. According to the plaintiff there were no grounds provided at all.

13. I think it is prudent that I begin with the issue of the granting of the leave to appeal out of time. Rule 3 of the High Court (Exercise of Jurisdiction of Registrar) Rules provides that a person affected by any decision, order or direction of the Registrar may appeal to a Judge in chambers. The appeal is required to be lodged within seven days.

14. In the present case the order was made on 9th July, 2015, the appellant came to seek leave to appeal out of time on 22nd July, 2015. The appeal is to the Judge in Chambers so it was supposed to be lodged within 7 days.

15. The parties argued what seven days means in the context of the rule in question. Counsel for the plaintiff submitted that the seven days should not exclude Saturday. He justified this by relying on Section 45 of the General Interpretation Act. Subsection 1(d) states that where an act is directed to be done within a period of 6 days excluded days (Meaning Sundays and public holidays) shall not be reckoned. Under the said provision Saturdays are not excluded days therefore are reckoned as forming part of the days within which an act or proceeding may be done.

16. On his part the appellant says we should follow Order 3 rule 5 of the Rules of the Supreme Court, 1965. That rule does exclude both Saturdays and Sundays from reckoned days.

17. I agree with the appellant. Section 29 of the Courts Act clearly requires us to follow the Rules of the Supreme Court as far as matters of procedure are concerned "so far as local circumstances permit". Further the rules of interpretation demand, where there are two provisions, one relating to the general while the other to the specific, that we must follow the specific. In this case the Courts Act as read with the Rules of the Supreme Court relate to the specific. We therefore must follow them as opposed to the General Interpretation Act.

18. The other question is as to when we should start computing the time. This is a straight forward question. In my view the answer is that we should start the computation as from 13th July, 2015. Although the rule refers to the day the decision, order e.t.c was made, it does not really require a person who has no knowledge of the order to act until he comes to the knowledge of the same.

19. Further professional etiquette requires that the party who gets the copy of the order before the other should serve the other party so that that other party shall be given an opportunity to comply with the order. It is in light of this that I find that time began running only after service of the order.

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20. On the basis of the foregoing, therefore, the appellant had up to 22nd July, 2015. It was on this day that the plaintiff filed the application to extend time within which to appeal. The decision to extend time or not is discretionary. Although it is required that the party seeking an extension of time do provide reasons for the delay, and in this case the appellant did not provide the said reasons, in my view the order ought to be upheld still.

21. I take judicial notice that the appellant had just appointed a new legal practitioner to act on its behalf and the said legal practitioner promptly filed that application while giving himself time to file the notice. In my view the appellant acted reasonably and must not be condemned because of a small procedural delay.

22. Although I have decided the question on the basis that the appellant ought to have appealed within seven days, let me also state in passing that I have done this only because none of the parties took issue with the forum of the appeal itself.

23. It is my considered view that an assessment of damages is an extension to the Judgment and the same ought to be appealed to the Supreme Court of Appeal and not to a Judge in Chambers. Although assessment of damages proceedings take place in chambers and the orders are said to be delivered in chambers, the truth of the matter is that these are open court proceedings and the order on assessment of damages is in fact an ancillary order to a judgment in open court and ought to be treated as such.

24. In my view, the appeal therefore ought to be done within six weeks as is the case with all appeals to the Supreme Court and not within seven days as is the practice now. So even if I had found that the appellant was way out of the seven day period within which to appeal I would still have exercised my discretion in its favour in view of this observation.

25. The plaintiff attacked the appellant's non-disclosure as to the day he came to the knowledge of the order herein. He submitted that such disclosure was material and ought to weigh in his favour in discharging the leave to appeal out of time herein. In view of what I have expressed above I do not think the non-disclosure was material either. So I stick to my order granting leave to appeal out of time.

26. Let me come to the issue of the order of stay pending appeal. The law on stay pending appeal has been well researched by both parties and I will have to scrutinize it in detail before I can make my order.

27. The starting point is the general principle: that the Court does not make a practice of depriving a successful litigant of the fruits of litigation. *Monk v Batram* **[1891] 1 QB 346** applied in *Nkhonjera v Concrete Pipe and Precast (PVT) Ltd and another* **[1998] MLR 274 (HC)**.

28. As a result the Court is very reluctant to suspend the enforcement of its orders unless the party applying for the stay shows special circumstances justifying the granting of the stay. In short the Court looks at the balance of convenience. The special circumstances only go to show where the balance of convenience tilts. In my view such special circumstances can come in many forms but the Court must exercise its discretion in such a way that it does not lead to injustice to one party or the other.

29. Some of the special circumstances may be the likelihood of a successful appeal and failure on the part of the plaintiff to pay back the damages. It is said that the Court will grant a stay order pending appeal where there is a likelihood that the appeal will be rendered nugatory if the stay is not granted (*Nkhonjera v Concrete Pipe and Precast (PVT) Ltd and another*). Sometimes it will be the cost of enforcing a judgment.

30. The categories are not closed but the most important consideration is the justice of the case. In *Nyasulu v Malawi Railways Ltd [1993] 16(1) MLR 394 (SCA)* the Court held that the facts that: the terminal benefits awarded to the appellant would only have been due in 2000; the appellant would not suffer undue hardship; and the respondent would encounter difficulties when the appellant was to repay the money after a successful appeal; all constituted special circumstances to justify ordering a stay of execution and the learned judge had been correct and justified to consider them all.

31. In most cases it is the duty of the party seeking stay to adduce the evidence to justify the order – i.e. to show the special circumstances justifying the stay.

32. In the present case the appellant, in his affidavit attacked the basis of the award and is of the view that my learned brother clearly used a wrong basis in the assessment of damages. Though he did not expressly say it, clearly he implied that the likelihood of the appeal being successful was high. He did not allude to the fact that the plaintiff might not be able to return the damages if the decision is overturned but that is just one of the factors considered.

33. The consideration that really weighed my mind before I made my order of stay of execution was the likelihood of success on appeal and possibility that the same might have been rendered nugatory considering the amount of damages involved. I still consider that this weighs in favour of the appellant.

34. The plaintiff also asked this Court to set aside the order on the basis that the appellant is failing to prosecute the appeal in good time. I must state that I have no jurisdiction to deal with the issue as in is an issue in the appeal itself and can only be dealt with by a judge as such a decision will amount to striking out the appeal altogether.

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35. Having said that I have observed that the appellant really is aggrieved with the loss of profit part of the order. He seems to have no problems with the rest of the order. Therefore it would be inequitable to freeze the whole sum when the appellant is only aggrieved with a part.

36. In the circumstances I exercise my discretion to order that the plaintiff should access the K5, 000, 000.00 which I ordered to be paid into Court, if the same has already been paid. If it has not been already paid the amount is subject to immediate execution. In short I order that the stay of execution be vacated in respect to this sum.

37. Costs are in the cause.

Made in chambers this 30th Day of May 2016

CC Matapa Kacheche

Assistant Registrar