REPUBLIC OF MALAWI

IN THE SUPREME COURT OF APPEAL
SITTING AT BLANTYRE

MSCA CIVIL APPEAL NO. 70 OF 2016

BETWEEN

MINISTER OF NATURAL RESOURCES AND ENVIRONMENTAL AFFAIRS — **APPELLANT**

-AND-

MICHAEL SANER — **RESPONDENT**

Coram: **HON. JUSTICE MZIKAMANDA SC, JA**

Miss A. Itimu	Counsel for the Appellant
Mr. Theu	Counsel for the Respondent
Mr. Minikwa	Recording Officer

RULING

I have before me a summons to strike out notice of appeal under the inherent jurisdiction of the Court and section 7 of the Supreme Court of Appeal Act. The respondent applies to this Court for an order that the notice of appeal herein be struck out with costs on the ground that the appeal is frivolous, vexatious or an abuse of the process of the Court. According to the respondent, the grounds of appeal raise issues which were not before the Court below and are not the subject of any matter or order or ruling or judgment of the Court below. The application is opposed.

The material presented to this Court shows that the matter has had some troubled history, it having been commenced in 2003 in the High Court through judicial review process. The judgment of the Court was rendered in 2006 and it was in favour of respondent to the appeal. An assertment of damages was done in 2010 but ruling on the assessment of damages was delivered on 15th March 2016 awarding the respondent US$100,000,000 plus interest to be assessed and costs to be taxed. There had been various other applications in between the assessment of damages and the ruling on the assessment of damages.

On 16th March 2016 the appellant filed a notice of appeal against the assessment and the notice was served on 21st of March 2016. A summons to settle record of appeal was filed on 22nd March 2016 and served on 20th April 2016. It was returnable on 17th May 2016. The record of appeal was settled by consent through an order dated 8th June, 2016.

The present summons was taken out on 4th October 2016. The affidavit in support recounts the troubled history of the matter covering a period of 13 years. The matter concerns the grant and renewal of Exclusive Prospecting Licence to the respondent over Kangankude mining area. The initial grant was effective 15th March 2000. Renewal of the same was rejected on or about 15th May 2003 but there was issuance of Mining Licence to Rare Earth on 18th May 2003 which licence was in 2010 transferred to Lynas upon approval by the appellant. Up to that point, the facts appear a little unclear as to how the respondent is connected with Rare Earth and Lynas. I attribute this lack of clarity to the scantiness of the material placed before me. Be that as it may, what appears to be relevant for the purposes of the present proceedings is the judicial review of 2006 quashing the non-renewal of the Exclusive Prospecting Licence which

then led to assessment of damages. The affidavit in support further shows that since the commencement of the litigation in 2003, the appellant never showed interest to defend the matter until the order of assessment of damages was made to the tune of US$100,000,000.00. The appellant never showed a desire to respect or comply with orders and directions of the Court, particularly under the judgment of 26th May 2006. It is avered that on perusal and assessment of the grounds of appeal and the assessment of damages and resultant order, the appeal is not made bona fide, is abuse of the Court process for being vexatious and frivolous and is only intended to frustrate the respondent. The prayer is for the application to strike out the notice of appeal to be granted. Skeletal arguments in support were adopted and buttressed by oral representation.

I have not seen an affidavit in opposition although there were filed skeletal arguments in opposition which adopted in full and were buttressed by oral presentation. The skeletal arguments identify on the issue for determination, whether or not the respondent's appeal should be dismissed. The arguments list the grounds of appeal, saying that the appeal is premissed on matters of law, and not facts, on the question of admissibility of some of the evidence that was relied upon in the assessment of damages. It was argued that a Court is obliged to take into account matters of law in coming up with an assessment of damages, whether the same is raised by the parties or not, and whether one party attends the hearing or not. It was further argued that it is only in exceptional circumstances that a Court will dismiss a claim on the grounds that it is frivolous, vexatious and an abuse of the court process. It was stated that the respondents' appeal raises triable issues, has substance, is not fanciful or hopeless and it is not for an improper motive. The appeal should not be dismissed on alleged grounds of frivolity, vexatiousness and abuse of Court process, as doing so would violet the respondents' right of access to courts under section 41 of the Constitution.

At the hearing, Counsel for the applicant argued that the appellant who had chosen not to file any opposing process to the notice of assessment of damages and who failed to attend the assessment of damages, even though it had been duly informed of the date of assessment, cannot now appeal against the assessment made in the Court below. Further the appeal is not competent as it purports to bring up

matters that were never raised in the court below for the assessment hearing. It was acknowledged that the appeal is against the quantum of damages. According to Counsel for the respondent, the appellant is attempting to re-litigate a matter when it had squandered its opportunity to present its own case at a hearing. It was argued that in any case the appellant should have first sought a re-hearing before the lower court and would only have come to this Court by way of appeal after the process in the Court below. Counsel argued that action stopped and issue stopped would apply in this case based on public policy.

Counsel for the appellant argued that no affidavit was filed because the appeal is based on matters of law and not facts. It was argued that the common law position is that although a Court has inherent jurisdiction to strike out a matter for being frivolous, vexatious and an abuse of the court process it can only do so in the most exceptional circumstances. The respondent would have to show that the appeal is clearly incompetent incapable of argument and that it would be a foregoing conclusion that it would fail. The grounds of appeal in the present case relate to the issues of burden and standard of proof admissibility of evidence and other evidential matters. There were issues before the Court below whether the appellant was present or not at the hearing of the assessment of damages. Again it was argued that failure to attend the hearing in the lower court does not remove the right of access to court where a judgment is delivered but does not satisfy one of the parties. It cannot be said that a party who appeals cuts in bad faith merely because the party failed to attend a hearing in the lower court.

My attention was drawn to a number of legal provisions and case authorities. I have had recourse to them and I will take them into account in the remainder of this ruling where necessary.

The present application is made pursuant to the inherent jurisdiction of the Court and section 7 of the Supreme Court of Appeal Act. Section 7 of the Supreme Court Appeal Act provides for powers of a single member of the Supreme Court of Appeal and such powers do not involve the hearing or the determination of an appeal. On the other hand the concept of inherent jurisdiction is an English Common law doctrine which is often relied upon by Courts as a fall back position on questions of jurisdiction.

According to the concept, a superior court is said to have the jurisdiction to hear a matter that comes before it, unless a statute or rule limits that authority or indeed grants exclusive jurisdiction to some other court or tribunal. Although the concept is frequently resorted to, it remains nebulous. It is often considered to be jurisdiction derived not from any statute or rule of law but from the very nature of the Court as a superior court of law. For the present purposes there has been no dispute about the inherent jurisdiction of this Court to hear the present application. It will thus be unnecessary to engage in a further discussion on the matter of inherent jurisdiction.

As pointed out before, the application is for an order that the notice of appeal here in be struck out with costs on the ground that the appeal is frivolous, vexatious or an abuse of the process of the Court as the grounds of appeal raise issues which were not issues at any point in the proceedings at in the court below and are not the subject of any matters or order or ruling or judgment in the Court below. There is an affidavit in support of the application and there are skeleton arguments filed along with the summons. I wish to observe that these are the only documents received from the applicant apart from copies of three case authorities relied upon. The grounds of appeal which the applicant described in the summons as being frivolous, vexatious and an abuse of the process of the Court were not stated by the applicant, who is the respondent to the appeal. It is clear that should this Court grant the application to strike out notice of appeal, the appeal that is pending before the Court will abruptly come to an end. Now, the grounds of appeal would not be held to be frivolous, vexatious or an abuse of the process of Court at the mere say so bearing in mind that there is a challenge to the application. It goes without saying that it was for the applicant to demonstrate to this Court and to persuade me that indeed the grounds of appeal are obviously frivolous, vexatious and abuse of the process of Court. While it is correct to say that this Court has inherent jurisdiction to strike out proceedings before it where such proceedings are obviously frivolous, vexatious or an abuse of the Court process (see **Mbele v Lanjesi & Others** MSCA Civil Appeal 8/15, **Burgess v Stafford Hotel Ltd** [1990] 3 ALL ER 222), there is need to show the matters that are considered frivolous, vexatious or an abuse of the process of the Court. The power to strike out a matter on the ground that it is obviously frivolously, vexatious or an abuse of the process of the Court is

discretionary. The exercise of discretionary power must be judicious and this mean that when an application is made on the inherent jurisdiction of the Court, relevant facts can be gone into and affidavits as to the facts examined in order for the Court to appreciate if indeed the grounds of appeal are frivolous, vexatious or an abuse of the process of the Court.

In the present application, general statement were made that the grounds of appeal in the notice of appeal were frivolous, vexations and an abuse of the process of the Court without any specificity. The applicant did not present the grounds of appeal it was attacking. The appellant, who never filed an affidavit in opposition, generously included in its skeleton arguments what it described as the grounds of appeal, probably the ones the applicant was attacking. The applicant made no comment on any of those alleged grounds of appeal, whether the same were accurately presented or whether it challenged any or all those alleged grounds of appeal as being frivolous, vexatious or an abuse of the process of the Court.

I must say that I find excuse by Counsel for the appellant for not filing an affidavit in opposition less than satisfactory. In Chamber matters, a court acts on affidavit evidence. It is even more troubling that the appellant chose not to contest the affidavit in support of the application through an affidavit in opposition but simply by filing skeleton arguments. I would have expected the appellant to have contested the evidence through affidavit in opposition.

Be that as it may, it is pertinent to note that at the time Counsel for the appellant addressed the court she was clear that the appellant did not challenge the judgment or liability, that in fact the appellant conceded liability in the action. What the appellant was challenging was the quantum of damages arrived at following the assessment of damages as ordered in the judgment on liability. It seems to me that it is difficult to see how an appeal that challenges the quantum of damages can be said to be an attempt to re-litigate the matter as Counsel for the applicant would have this Court believe. It does not appear to me correct to suggest that conceding liability must necessarily mean conceding the extent of damages where such damages are to be assessed subsequent to the judgment on liability.

Looking at the alleged grounds of appeal as provided by the appellant in the skeleton arguments, it is clear to me that the grounds relate to a challenge to the manner in which the assessment of damages was conducted and how the quantum of damages was eventually arrived at. The grounds of appeal again as provided by the appellant, relate to issues of admissibility of certain documentary evidence among other matters. The appellant argues that the grounds of appeal are on matters of law regarding the assessment of damages. It is not at this stage that the merits of demerits of the grounds of appeal would be determined with finality. What appears clear to me is that given those grounds of appeal, it cannot be said with any degree of certainty that those grounds are obviously frivolous, vexatious and an abuse of the process of Court.

As to whether the appellant should have a rehearing of the assessment before moving to an appeal, I think that the case of **RE Edward's Witts Trust,Edwards v Edwards** [1981] 2 ALL E.R. 941 was not appropriately called in aid in the circumstances of this case. That case dealt with re-hearing and I do not think that a re-hearing is the same as an appeal. I am not persuaded that the appeal in this case was brought as a disguise of a re-hearing. It seems to me that there was an assessment judgment rendered by Justice Mbvundula in the High Court, if the oral arguments by Counsel for the applicant must be believed. It is that judgment which is being appealed against on errors of law.

It is interesting that this application is coming at this stage after the parties had settled the record of appeal by way of consent order of 8th June 2016. Having consented to what should be included in the record of appeal, it seems to be an after thought that an application to strike out notice of appeal is made. Again there was granted by Court an order of stay of execution of judgment on 6th October 2016 pending appeal.

All in all, there is nothing on the record before me and in the arguments raised before me that makes the notice of appeal obviously frivolous, vexatious and an abuse of the court process. The appellant is entitled to challenge the quantum of damages regardless of the fact that it concedes liability. As to the actual merits of the grounds of appeal, I leave that to the hearing of the appeal. The path to the appeal must be left open in order that the appeal be determined on merits. For these reasons this application cannot be sustained and it fails.

I must say that I sympathise with the applicant herein on the issue of delays that have characterized the present matter, largely due to the fact that the appellant has paid scant attention to it. I thus can understand why the applicant would want an early disposal of the present matter so that it can move on with business. It is incumbent on the appellant to speed up the necessary processes and ensure that it actively gets engaged in speeding up the disposition of the present matter. The matter must be processed with dispatch and be set down in the next session. In the exercise of my discretion on matters of costs, I order that each party bears its own costs.

It is ordered accordingly.

Made this 27th day of October 2016 at Blantyre.

R.R. Mzikamanda SC
JUSTICE OF APPEAL