REPUBLIC OF MALAWI

IN THE SUPREME COURT OF APPEAL

SITTING AT BLANTYRE

MSCA MISCELLANEOUS CIVIL APPLICATION NO. 46 OF 2023

(Being Civil Cause No. 110 of 2023 before the High Court, Principal Registry)

Between:

Ted Sparks Jumbe ……..……...…….Claimant

-and-

Christopher Kasema ……..……..1st Defendant

The Attorney General (Land Registrar) & The Sheriff of Malawi ….....2nd Defendant

CORAM: THE HON. MR JUSTICE FE KAPANDA SC, JA

Cassius Omar Chidothe , Counsel for the Claimant/Applicant

C. Gondwe, Counsel for the 1st Respondent

The Attorney General, Counsel for the 2nd Respondents

E. Minikwa, Court Clerk

Dates of Hearing: 8 September 2023; 15 September 2023; and 26 September 2023

Date of Ruling: 11 January 2024

RULING

Kapanda SC, JA:

Introduction

The Claimant seeks from this Court an order of interlocutory injunction restraining the:

(1) 1st Respondent and the Sheriff of Malawi either by themselves, their servants or agents or howsoever otherwise from enforcing or continuing to enforce or executing or continuing to execute the Warrant of Distress and Possession issued by the 1st Respondent in his capacity as Administrator of the Estate of Jessie Kazinga Mkandawire and the Sheriff of Malawi (which warrant was issued by the Sheriff of Malawi on 6th October, 2022) in respect of Property Title Number Nyambadwe 791 or giving effect or continuing to give effect or taking or continuing with any action based on the Warrant of Distress and Possession herein or doing anything with the like effect until the determination of this matter or a further order of the Court.

(2) 1st Respondent and the Sheriff of Malawi either by themselves, their servants, agents or howsoever otherwise from taking or maintaining possession of property Title Number Nyambadwe 791 or the goods they seized from the Applicant in execution of the Warrant of Distress and Possession herein or from selling or otherwise disposing off the property Title Number Nyambadwe 791 and the Applicant's goods herein or otherwise interfering with the Applicant's possession and use of the property Title Number Nyambadwe 791 and personal property (goods) herein or doing anything with the like effect until the determination of this matter or a further order of the Court.

It is well to note that the goods and chattels that were seized from Applicant were sold by public auction on 2 September, 2023 and MK3,203,000.00 was the amount realized. The Applicant claims that he was all along not aware of this fact. Consequently, the aspect of the injunction that seeks to restrain the Respondents from selling the goods that were levied by way of distress have been overtaken by events. However, the issue in respect of which the application remains relevant relate to the execution of the Warrant of Distress and Possession herein in so far they relate to property Title number Nyambadwe 791.

Thus, the application only proceeds on the issue of an order of interlocutory injunction that pertains to the issues relating to the Warrant of Distress and Possession on issues of possession and potential or risk of sale of the real property herein. As it were, the aspects of an injunction relating to the prevention of sale of the distrained goods are no longer the subject matter of the application and this Court will not make a determination thereon.

The application by the Claimant is supported by the affidavit of the Applicant (Ted Sparks Jumbe). It is opposed by the sworn statement of the 1st Respondent (Charles Kasema) and Aaron Mbeya. The facts in the said affidavit of Mr. Ted Sparks Jumbe were disputed by Mr Massona who stated in his sworn statement that Mr Ted Sparks Jumbe commenced an action in his name without his consent. Further, Mr. Massona has consistently denied receiving any payment from the Applicant for the house. It is in evidence that the said Mr Ted Sparks Jumbe is also facing criminal charges bordering on fraud and forgery pertaining to this very same issue and is currently on bail.

THE PARTIES' ARGUMENTS

Claimant's arguments

One of the questions that arose for determination is whether or not this Court has jurisdiction to hear and determine this application. This issue arose following the argument by the 2nd Respondent; and was also brought up by the Court during the hearing of this application. The gist of the argument by the 2nd Respondent is that this is an appellate court and can only hear Appeals or applications arising in the context of an appeal. They contend that since there is no appeal against the decision of the Court below where it refused to grant an order of interlocutory injunction sought herein on without notice application this Court therefore has no jurisdiction to entertain the within application which basically is a fresh application before this Court. Their view is that the right course for the Applicant was to appeal against the decision of the Court below and apply before this Court for a stay of the decision of the Court below. Based on their argument, once an order of interlocutory injunction or interim relief is refused in the Court below there is no room for a party to make a fresh application before this Court.

It is the submission of the Claimant that the issue of jurisdiction as raised by the 2nd Respondents, and by this Court during the hearing of this application, bring into play the question of the nature of jurisdiction that the Supreme Court of Appeal has. For this, the Claimant drew this Court's attention to Section 104(1) of the Constitution and argued that this section is general while Section 104(2) is specific but that Section 104(2) does not provide that that the hearing of Appeals is the sole jurisdiction of the Supreme Court of Appeal as the other jurisdiction of the Court can be found in "**any other law**". It was further submitted that the term "a**ny other law"** entails all the sources of law which includes legislation and case law. He added that in the context of legislation the jurisdiction of the Supreme Court of Appeal is found in the Supreme Court of Appeal Act and any rules made thereunder which include the Supreme Court of Appeal rules. The Claimant continued to argue that while there is no debate on the appellate jurisdiction of the Court, Order 2 Rule 1 of the Supreme Court of Appeal Rules provides for original jurisdiction of this Court. Further, the Claimant opines that recognition of the original jurisdiction of the Supreme Court of Appeal Rules is also see in the provisions of Order 1(3)(6) 1 read alongside Order 1 rule 5 of the Supreme Court of Appeal Rules.

It is the argument and submission of the Claimant that Order 2 Rule 1, Order 1(3)(6) 1 read alongside Order 1 rule 5 of the Supreme Court of Appeal Rules**,** demonstrate that the Supreme Court of Appeal has original jurisdiction but that the legislation has not specified the situations when the Supreme Court of Appeal can exercise original jurisdiction. The Claimant submitted further that case law has however come up with some of the situations when the Supreme Court can exercise original jurisdiction. He added that one such situation relates to applications for judicial review, interlocutory orders and interim reliefs. Thus, in the further view of the Claimant, where the High Court refuses to grant any of these applications or vacates an order granting permissions to apply for judicial review or an interlocutory order or interim relief the law is that the aggrieved party does not come to this Court by way of appeal but such party is required to make a fresh application before a single number of the Supreme Court of Appeal. In support of this submission the Claimant referred to this Court the case of the ***State (on the application of Flatland Timbers Ltd v. Department of Forestry [Director of Forestry*** [1] and ***The State (on the***

[1] MSCA Civil Case Number 25 of 2021

application of the Malawi Revenue Authority v. Chairperson of the Industrial Relations Court and Roza Mbilizi[2].

The Claimant continued to argue that the position at law is that the High Court decisions on interlocutory reliefs are inchoate and not appealable to the Supreme Court of Appeal as only final Judgements are appealable to the Supreme Court of Appeal. The Court was then referred to the case of ***JTI Leaf (Malawi) Limited v. Kad Kapachika***[3] in support of the argiukent that High Court decisions on interlocutory reliefs are inchoate and not appealable to the Supreme Court of Appeal.

It is the view of the Applicant that, from the authorities above, the position at law is twofold viz. (a) that where the High Court makes a decision on an application for interlocutory order or interim relief and a party is aggrieved therewith, the aggrieved party is not supposed to appeal against the decision but file a fresh application before this Court. The Claimant continued to argue that this is regardless of whether the application for interlocutory order or interim relief in the context of an appeal or not. (b) that inchoate appeals are not allowed as this Court only hears appeals on final judgements and not decisions on applications for interlocutory orders or interim reliefs. As it were, the Claimant contends that this Court exercises original jurisdiction with respect to applications for interlocutory orders or interim reliefs at the instance of a fresh application by a party who is aggrieved with the decision of the High Court on an application of interlocutory order or interim relief. He concludes by submitting that the established position of the law is that this Court has both appellate and original jurisdiction to hear and entertain fresh applications for permission for judicial review, interlocutory orders or interim reliefs.

As regards the reason why the Claimant desires an interlocutory injunction issued, it is submitted that the application for an order of interlocutory injunction was initially, inter *alia,* intended to prevent the sale of the Applicant's goods and prevent the sale of the property Title Number Nyambadwe 791 so as to ensure that the subject matter of the action is preserved until determination of the matter since the subject matter is very likely not to be recovered if it is sold

[2] ; see also Dalitso General Suppliers Limited v. National Bank of Malawi MSCA Misc. Civil Application No. 19 of 2023.

[3] MSCA Civil Appeal No. 52 of 2016

and the Applicant succeeds in this action in the Court below. It is further submitted by the Claimant that if he is to be required to appeal against that decision he would be left with no room for an urgent interim relief in a situation where it is merited as the Appeal process is always long and would not serve any purpose in so far as the urgent interim relief is concerned since such a stay would not prevent its sale. In sum, the Claimant submits that this Court has jurisdiction to hear and determine this application as the matter does not involve determination of an appeal and thus falls within the ambit of Section 7 of the Supreme Court of Appeal Act. He adds that he first made the application in the Court below and has come to this Court after it was declined. Thus, in his view, the application falls within the ambit of Order 1 rule 18 of the Supreme Court of Appeal Rules.

Turning to the substantive matter herein, the Claimant has addressed this Court on the question viz. whether there are serious questions to be tried in this matter. The Claimant argues and submits that the 1st Respondent has purportedly exercised the rights of a Landlord over a tenant who defaults on rental payments by allegedly exercising the right of distress and possession by issuing a Warrant of Distress and Possession. However, the Applicant continued, the Respondents have not provided any evidence of existence of a tenancy or lease relationship between the Applicant and (late Jessie Kazinga Mkandawire) or the 1st Respondent herein. It is the further argument of the Claimant that the 1st Respondent has not offered evidence respecting when the Applicant became the tenant for his late wife or himself, the monthly rental payable overtime and if at all he or his wife ever received rentals from the Applicant. The Applicant further submitted that the 1st Respondent has not even stated how he calculated the rentals to arrive at the amount contained in the Warrant of Distress and Possession.

It is the further contention of the Applicant that the real issue between the Applicant and the 1st Respondent and his late wife has always been with respect to the ownership of the property and not any tenancy relationship. The Applicant claims that the 1st Respondent's arguments in Court largely focused on establishing his and/or her late wife's ownership of the land and demonstrating that the Applicant is not the owner of this property but the evidence herein does not conclusively show that the property was owned by the 1st Respondent or his late wife. He further argued that in ***E.J. Massona v. Anna Nkhoma, Christopher Kasema, Jessie Kazinga Mkandawire and the New Building Society*** Civil Cause No. 1393 of 2001, in a Judgement delivered on 10th September, 2005

the Court found that the sale and transfer of property Title Number 791 to Jessie Kazinga Mkandawire (The 1st Respondent's late wife) was fraudulently done and the sale and transfer documents were not executed by the Claimant, E.J. Massona. He further argued and submitted that although Ernesto Jackson Massona is disowning the proceedings by alleging that he did not institute the proceedings, the Judgement and the findings therein are binding as the disowning of the case herein is not valid and honest.

The Applicant continued to argue that there has never been any tenancy relationship between the him and the 1st Respondent's late wife, Jessie Kazinga Mkandawire but that the dispute between them has always been for the ownership of the property herein. In his view, there is thus a triable issue to be determined, namely, whether the Applicant was a tenant of Jessie Kazinga Mkandawire in respect of the property and if the answer is in the affirmative whether he defaulted in rental payment let alone to the sum specified in the Warrant of Distress and Possession.

On whether damages would be an adequate remedy, it is the submission of the Applicant that the continued possession and the sale of the property herein will lead to the Applicant completely losing it. He further argued that he is at present suffering great inconvenience and loss of use of the property and the same will become permanent once the property is sold. The Applicant continued to submit that the property will not be restored or reinstated as it would have gone to a third party who would be protected by the law. He continued to argue that on the other hand if the injunction is granted and consequently possession of the property is returned to the Applicant, and further it is not disposed of should the Applicant fail to succeed in the action in the Court below, there will be no significant loss to the 1st Respondent since he then will take possession of the property and deal with it as it pleases him. It is the view of the Applicant that on the facts he stands to lose more if the injunction is not granted than the 1st Respondent would lose if it is granted. Thus, he concludes, scales of justice tilt in favour of granting the injunction herein.

The Applicant continued to argue and submit that the Court in deciding whether to grant an interim relief must address its mind to the question whether it is just to do so for the overall purpose of an injunction is to achieve justice. It is the view of the Claimant that in the present case the Warrant of Distress and Possession is irregular and illegal which assertion he claims the Defendants have

not challenged or disputed. He added that the Court below is yet to decide on the issue of ownership of property. The Claimant continued to submit that the assertions by the 1st Respondent that the property was owned by her late wife and recent registration of him as proprietor can not stand as there are fraudulent activities involved. He claims that the fraud issues were left for the Court to decide by the Land Registrar where the Court granted a restriction notice to the property. It is the view of the Claimant that at this stage therefore it cannot be said that the 1st Respondent is the owner of the property although the 1st Respondent has issued an illegal Warrant of Distress and Possession and wants to sell it when there are various cases between the parties in Court which have to determine the issue of ownership of the property.

The Applicant claims that the Court runs the risk of facilitating fraud if it does not grant the injunction prayed for in this matter. It is the further view of the Applicant that the purpose of an injunction is to maintain the status quo which he claims will be achieved if the injunction is granted which will have the effect of the Applicant maintaining possession of the property and the Warrant of Distress and Possession having no effect.

As regards the question whether the Claimant has come to Court with dirty hands, the Applicant has argued and submitted that simply because there are criminal proceedings before the Court against the Applicant arising from the complaint to Police by the 1st Respondent that he forged documents for the property to be transferred to him does not mean that he has come to Court with dirty hands and is not entitled to equitable relief. It was the view of the Claimant that such an argument could hold if he was convicted of the forgery allegations or there was evidence of forgery from the documents filed.

The long and short of it is that the Claimant prays to this Court for an order granting the order of interlocutory injunctions sought. He also prays for costs of this application.

The 1st and 2nd Respondents' position

1st Respondent's

It is submitted and argued by the 1st Respondent that the application for an Injunction before this Court is misconceived as this Court is only mandated to handle appeal matters and has got the powers to grant an interim injunction but it can only be in the context of an appeal or contemplated appeal. He adds that this is not the case with in the case under consideration as there is neither an appeal before this Court nor is one being brought before this Court. In sum, the 1st Respondent is of the view that this Court has no jurisdiction over the matter brought before it.

The 1st Respondent further contends that the Applicant has come to court with a criminal case bordering on fraud hanging on his head. Thus, the Applicant who is praying for an injunctive relief has come to Court with unclean hands. Therefore, in the view of the 1st Respondent no injunctive relief should be granted to the Applicant.

Further, the 1st Respondent believes that the interlocutory order of injunction should be refused on the ground that damages would be adequate remedy should the Claimant succeed at trila and defendant would be able to pay them. It is further argued and submitted by the 1st Respondent that it would be improper to grant to order an interim injunction to him as he is a landlord who is enforcing payment of rent through a warrant of distress.

The 2nd Respondents

The gist of the argument by the 2nd Respondent is that this Court is an appellate court and can only hear appeals or applications arising in the context of an appeal. They contend that since there is no appeal against the decision of the Court below in which it refused to grant an order of interlocutory injunction sought on without notice application this Court has no jurisdiction to entertain the within application which basically is a fresh application before this Court. Their view is that the right course for the Applicant was to appeal against the decision of the Court below and apply before this Court for a stay of the decision of the Court below. The long and short of it is that the 2nd Respondent has argued that once an order of interlocutory injunction or interim relief is refused in the Court below there is no room for a party to make a fresh application before this Court.

Issues for Determination

What are the issues that arise and fall to be decided in the application under consideration by this Court? As this Court understand it, the main issue the Court is invited to decide on is whether in the circumstances this case the Court should grant the order of interlocutory of injunction to the Applicant? This Court will also have to discuss and determine whether this Court has jurisdiction to hear and determine this application? Put differently, this Court has to address its mind as to the following further issues:

a. Is the Applicant's application a nullity for failure to comply with section 4 of the Civil Procedure (Suits by or against Government or Public Officers) Act?

b. Can an injunction lie against Government?

c. is the present application a mere academic exercise given that the subject matter of the application is no longer in existence?

d. Would damages be adequate? Has the Claimant proved that the Respondents are impecunious such that the Respondents would not be capable of paying the said damages?
e. Does this Honourable Court have jurisdiction to entertain the Applicant's application?

LAW AND DISCUSSION (ANALYSIS OF THE LAW AND DETERMINATION)

The Law

At law, and in the opinion of this Court, the jurisdiction of a court plays a significant role in ensuring justice and fairness within the legal system. Jurisdiction refers to the power of a court to hear and rule on a particular case, based on various factors such as the location of the parties involved and the subject matter of the case. This means that a court may have limited or widespread jurisdiction depending on the situation at hand.

The importance of jurisdiction lies in its ability to ensure that cases are dealt with in the right court, which in turn increases the likelihood of a fair outcome. By having a clear jurisdictional framework, judges are able to apply relevant laws and regulations to the case at hand, and are more likely to have expert knowledge in the area being litigated. This can result in a faster resolution and more accurate verdict, which ultimately serves to improve the public's trust in the legal system. In addition, jurisdiction helps to prevent confusion and overlap between different parts of the legal system, which could potentially result in cases being dismissed or ignored entirely. Generally, the jurisdiction of a court is a critical component of the legal system, as it plays a vital role in ensuring justice for all parties involved.

Thus, in ***Mulli Brothers Limited v. Malawi Savings Bank Limited*** [4] the Court instructively stated that the question of jurisdiction, even for the Supreme Court is of paramount consideration. A Court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in the suit[5]. Further, this Court's attention is drawn to what this Court observed in ***Mkandawire v. Council for the University of Malawi*** [6] where it was stated that this Court cherishes its jurisdiction and can and should raise matters of jurisdiction *suo motu* and *suo pante*. Further, this Court subscribes to the view that the objection that a Court lacks subject matter jurisdiction may be raised by a party, or by a Court on its own initiative, at any stage in the litigation[7]. As this Court further understands it, where the Court has no jurisdiction over the subject matter it is enjoined to dismiss the application before it for want of jurisdiction[8].

What does the law say about the jurisdiction of the Supreme Court of Appeal? Section 104(1) of the Constitution provides that:

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[4] MSCA Civil Appeal No. 48 of 2014

[5] See *Sinochem International Company Limited v. Malaysia International Shipping Corporation*, 549 U.S. 422 (2007).

[6] MSCA. Civil Appeal No. 16 of 2015

[7] *Arbaugh v. Y&H Corp*, 546 U.S 500, (2006)

[8] *Mulli Brothers Limited v. Malawi Savings Bank Limited* (Supra). See note 4

"

(1) There shall be a Supreme Court of Appeal for Malawi, which shall be a superior court of record and shall have such jurisdiction and powers as may be conferred on it by this Constitution or by any other law.

(2) The Supreme Court of Appeal shall be the highest appellate court and shall have jurisdiction to hear appeals from the High Court and such other courts and tribunals as an Act of Parliament may prescribe."

This constitutional provision relates to the establishment and powers of the Supreme Court of Appeal in Malawi. It establishes the Supreme Court of Appeal and sets out the nature of the Court i.e. the Supreme Court of Appeal is described as a "superior court of record." As it were, it is a Court that keeps a permanent and detailed record of its proceedings. Further, the court is granted jurisdiction and powers as specified by the Constitution or other laws. This means that the Court's authority and abilities are not arbitrary but are defined by the Constitution and other legal statutes. Furthermore, it is designated as the highest appellate court with the authority to review and decide appeals from lower courts or tribunals. As regards the scope of it appellate jurisdiction, the Court has the authority to hear appeals from the High Court and any other courts and tribunals as prescribed by an Act of Parliament. This means that it can review decisions made by lower courts and other judicial bodies.

In short, this provision establishes the Supreme Court of Appeal in Malawi as a superior court with appellate jurisdiction. It outlines that the Court's powers and jurisdiction as defined by the Constitution and other laws. The Court's primary function is to hear appeals from the High Court and other courts and tribunals as specified by legislation.

Section 21 Supreme Court of Appeal Act also speaks to matters of jurisdiction of this Court. It provides as follows:

"An appeal shall lie to the Court from any judgment of the High Court or any judge thereof in any civil cause or matter:

Provided that no appeal shall lie where the judgment (not being a judgment to which Section 68(1) of the Constitution applies) is –

(a) an order allowing an extension of time for appealing from a judgment;

(b) an order giving unconditional leave to defend an action;

(c) a judgment which is stated by any written law to be final;

(d) an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree nisi on which the order was founded has not appealed from the decree:

And provided further that no appeal shall lie without the leave of a member of the Court or of the High Court or the judge who made or gave the judgment in question where the judgment (not being a judgment to which Section 68(1) of the Constitution applies)

(a) a judgment given by the High Court in exercise of its appellate jurisdiction or on review;

(b) an order of the High Court or any judge thereof made with the consent of the parties or an order as to costs only which by law is left to the discretion of the High Court;

(c) an order made in Chambers by a judge of the High Court;

(d) an interlocutory order or an interlocutory judgment made or given by a judge of the High Court, except in the following cases –

(i) where the liberty of the subject or the custody of infants is concerned;

(ii) where an injunction or the appointment of a receiver is granted or refused;

(iii) in the case of a decision determining the claim of any creditor or the liability of any contributor or the liability of any director, or other officers, under the Companies Act in respect of misfeasance or otherwise; Cap 46:03

(iv) in the case of a decree nisi in a matrimonial cause;

(v) in the case of an order on a special case stated under any law relating to arbitration;

(e) an order refusing unconditional leave to defend or granting such leave conditionally."

It is well to note that this provision outlines the rules regarding appeals to this Court from judgments of the High Court or its judges in civil matters. As it were, inter alia, the provision establishes a general right of appeal to this Court from any judgment of the High Court or any judge in a civil cause or matter. There are exceptions though to the right of appeal viz: certain types of judgments are excluded from the general right of appeal. As it were, no appeal shall lie in the following cases: (a) where there is an Order allowing an extension of time for appealing from a judgment; (b) where there is Order giving unconditional leave to defend an action; (c) in cases of a Judgment stated by any written law to be final; and (d) where there is an Order absolute for the dissolution or nullity of marriage if the party had the opportunity to appeal from the decree nisi but did not do so.

Further, there are additional conditions for appeal. As it were, even for judgments that are generally appealable, further conditions are specified for filing an appeal. For example, leave (permission) of a member of the Court or the High Court or the judge who made the judgment is required in certain cases; leave is required for judgments related to the appellate jurisdiction or review by the High Court, certain orders made with the consent of parties, orders made in Chambers, and interlocutory orders, except in specific cases such as those concerning liberty of the subject, custody of infants, injunctions, receivership, decisions regarding the liability of directors under the Companies Act, decrees nisi in matrimonial causes, and orders on special cases stated under arbitration laws; and leave is required for orders refusing unconditional leave to defend or granting such leave conditionally.

In a nutshell, this provision establishes the general right of appeal from judgments of the High Court or its judges in civil matters but sets out specific exceptions and conditions for certain types of judgments or orders. The goal is to define the scope of appealable judgments and streamline the appeal process.

As regards the powers exercisable by a Single Judge of this Court, Section 7 of the Supreme Court of Appeal Act is instructive. The said section states that:

> *"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."*

This provision addresses the authority of a single member of this Court to exercise certain powers that do not involve the hearing or determination of an appeal. As this Court understands it, the following are the key points from this provision:

First, there is delegation of power to a single member of this Court. The provision allows a single member of this Court to exercise any power vested in the Court as long as it does not involve the hearing or determination of an appeal. Secondly, and as regards criminal matters, if a single member refuses an application for the exercise of any such power, the applicant is entitled to have their application determined by the full Court. This ensures a mechanism for review or reconsideration if the application is initially denied by a single member. Thirdly, in civil matters, any order, direction, or decision made or given by a single member in pursuance of the powers conferred by this section may be varied, discharged, or reversed by the full Court. This means that the decisions made by a single member are subject to review or modification by the full Court in civil matters.

In summary, the provision allows a single member of the Court to handle certain matters that do not involve the hearing or determination of an appeal. However, in criminal matters, if the single member refuses an application, the applicant has the right to have the application reviewed by the full Court. In civil matters, any decision made by a single member can be reviewed, modified, or

overturned by the full Court. This mechanism helps ensure checks and balances within the judicial process.

Another provision that has a bearing on the jurisdiction of this Court is Order 1 Rule 18 of the Supreme Court of Appeal Rules. Indeed, the position at law is that where an applicant desires to make an application after being denied by a Court quo the person will do well to be guided by Order 1 Rule 18 of the Supreme Court of Appeal Rules which provides that:

> "Whenever an application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below but, if the Court below refuses the application, the applicant shall be entitled to have the application determined by the Court".

The above provision outlines a procedure for making applications to this Court when the same application could be made to either the court below or this Court. On the choice of court for an application, the provision states that when an application can be made to either the Court below or this Court, the applicant should initially make the application to the Court below. If the Court below refuses the application, the applicant has a right to have the application determined by this Court. This means that if the applicant is not successful in the Court below, they can seek review or consideration of their application by this Court.

In brief, the provision establishes a sequential process for making applications in situations where the applicant has a choice of whether to apply to the Court below or this Court. The default is to apply to the Court below first, and if the Court below refuses the application, the applicant can then seek redress or review from this Court. This mechanism ensures that there is a process for reconsideration if the initial application is denied by the Court below.

Further, Order 2 Rule 1 of the Supreme Court of Appeal Rules is instructive on the procedure to be followed where a party is not satisfied with the decision of a Court a quo and desires to make a fresh application for the interim relief in this Court. The said Order 2 Rule 1 of the Supreme Court of Appeal Rules provides for the original jurisdiction of this Court. It reads:

> "In the exercise of the original jurisdiction of the Court the practice and procedure of the Court shall be conducted in substantial conformity with the practice and procedure for the time being observed in the High Court".

The provision pertains to the exercise of the original jurisdiction of this Court and specifies that the practice and procedure of the Court should be conducted in substantial conformity with the practice and procedure observed in the High Court. The provision is specifically addressing the original jurisdiction of the Court. As this Court understands it, original jurisdiction refers to the authority of a court to hear a case for the first time, as opposed to appellate jurisdiction, which involves reviewing decisions of lower courts. Further, it is well to note here that the "practice and procedure" of a court refers to the rules and methods followed by the court in handling legal cases. This includes rules about how cases are initiated, how evidence is presented, and how judgments are rendered. Furthermore, the provision mandates that, in the exercise of its original jurisdiction, this Court should conduct its practice and procedure in substantial conformity with the practice and procedure observed in the High Court. In other words, this Court should follow similar rules and procedures as those used by the High Court. Finally, the term "substantial conformity" suggests that while this Court is expected to align its practices with those of the High Court, it may not be required to mirror them precisely. There may be some flexibility or room for adaptation based on the specific needs or nature of this Court's original jurisdiction.

In sum, this provision means that when this Court is exercising its original jurisdiction, it should conduct its practice and procedure in a manner that is substantially similar to the practice and procedure observed in the High Court. This helps establish consistency and coherence in the legal processes across different levels of the judicial system.

We have looked at various statutory provisions that speak to the jurisdiction of this Court. The Court shall now look at decisions rendered on the issue of jurisdiction of the Supreme Court of Appeal on matters to do with applications for injunctions. In ***Dalitso General Dealers Ltd v.***

Mybucks Banking Corporation Ltd [9]Justice Chikopa SC had this to say on an application like the present one:

> "*The Respondent on the other hand firstly contends that the application is improperly before this Court. Matters come to this Court by way of appeal. The matter before us is not an appeal and should not be entertained*
> *The Respondent is correct on both scores. This is an appellate court. Matters come here invariably by way of appeal or in the context of appeal. Except in a few instances which this case is not. Parties therefore either get relief i.e. judgment/order/ruling at the conclusion of the appeal or interim relief in the context of an existing or contemplated appeal. It explains the use of the words 'pending appeal' where interim relief is sought.*
>
> *In the instant case the matter is still before the Court below. There is no appeal in relation thereto in this Court. There is no appeal against the vacation of the injunctive relief or the order of the Court below dated January 24, 2023.The Applicant is clearly improperly before this Court.*

Recently, in ***Dalitso General Suppliers Ltd v. National Bank of Malawi***[10], this Court held that where the Court below had declined to grant an injunction the right approach would have been to make a fresh application before this Court for an injunction pending determination of the main action i.e. the Applicant can present the same application before the Supreme Court of Appeal. This decision by this Court appears to contradict with the decision made by Justice Chikopa SC in the other Dalitso General Suppliers matter. These two positions taken by this Court ought to be reconciled and clarified. As shall be seen below, the position is reconcilable.

An appellate court cannot grant an interlocutory injunction when there is no appeal before it. An appellate court only has jurisdiction to review and decide on appeals from the Court below courts, not to initiate new legal proceedings. If there is no appeal pending before the appellate court, it cannot grant any relief or injunction.

[9] MSCA Misc. Application No. 2 of 2023

[10] MSCA Misc. Civil Application No. 467 of 2022

It is highly unlikely that an appellate court would grant an interlocutory injunction when there is no appeal before it, as it would be outside of the court's jurisdiction.

Further, the case of ***Dr. Bakili Muluzi v. The Director of the Anti-Corruption Bureau*** [11] is for the proposition that courts must protect and enforce section 21 of the Supreme Court of Appeal Act. That can only be done by holding that the applicant was required to appeal against the refusal of the court below to grant him the order of injunction. Further, it is well to put it here that this Court cannot grant an order of interlocutory injunction in the absence of a pending appeal as interlocutory injunctions are parasitic, that is they depend on another action[12]. The Court in ***Dr. Bakili Muluzi v. The Director of the Anti-Corruption Bureau*** [13] instructively put it as follows:

> *"A right to obtain an [interim] injunction is not a cause of action. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the claimant…. The right to obtain an [interim] injunction is merely ancillary and incidental to the pre-existing cause of action".*

It is further well to observe that interlocutory injunction orders are temporary orders made to regulate the position between the parties to an action pending trial. Such orders are intended to maintain the status quo between the parties. Thus, there being no appeal pending before this Court, there cannot be any valid injunction on which the interlocutory can be anchored on the authority[14].

However, there may be exceptional circumstances where an appellate court has the power to grant an interlocutory injunction without an appeal being filed. The following, in this Court's view are situations where exceptional circumstances would require an appellate court to grant an interlocutory injunction:

First, in emergency situations. It is this Court's view that where there is an imminent threat of irreparable harm, such as harm to life or property, an appellate court may have the power to issue

[11] MSCA Civil Appeal No. 17 of 2005 (Unreported)

[12] Ibid.

[13] Ibid.

[14] Ibid.

an injunction in order to prevent such harm. Secondly, in public interest situations. In certain cases, an appellate court may have the power to grant an injunction in the public interest, such as to prevent an environmental disaster or protect public safety. Lastly, in some instances, a statute may provide an appellate court with explicit authority to grant an interlocutory injunction, independent of any appeal pending before the court.

It is important to note that these situations are rare, and will likely depend on specific legal and factual circumstances unique to each case. This Court wants to add that these exceptional circumstances do not exist in the present matter. The application for injunction would be dismissed on that score alone.

However, the above does not dispose of the matter. As shown above, when looking at the provisions dealing with the jurisdiction of this Court, the Supreme Court of Appeal is only mandated to handle Appeal matters, hence being designated as the Court of Appeal. There is no Appeal before this Court. No appeal is being brought before this Court. The application for an Injunction before this Court is therefore misconceived. How is this Court going to assess as to whether there are triable issues or not in the Court below when the matter is yet to be heard and determined?

It is found and concluded that the approach in ***Dalitso General Dealers Ltd v. Mybucks Banking Corporation Ltd*** (*supra*) is a better one. The application before this Court is not properly before it. The Court acknowledges the Respondents' position and agrees with them for the following reasons:

First, the application is improperly before this Court because matters typically come to this particular court through the avenue of appeal. As earlier noted, this Court is an appellate court. Thus, its primary function is to hear appeals or matters related to appeals. Secondly, there is no pending appeal before this Court. As was rightly put in ***Dalitso General Dealers Ltd v. Mybucks Banking Corporation Ltd*** (*supra*), in the normal course, matters are brought before this Court either as part of an ongoing appeal or in anticipation of an appeal. In the case before this Court there is no pending appeal. The Applicant is seeking relief, but the matter is still pending before the Court below, and there is no existing appeal related to it before this Court. Further, it is well to note that the matter is still before the Court below, and there is no appeal related to it in this Court.

Therefore, the Applicant is improperly before this Court, as there is no proper basis for the matter to be entertained at this stage.

The long and short of it is that based on the nature of this Court as an appellate court, and the absence of a pending appeal related to the matter in question, the Applicant is improperly before this Court. This Court should not entertain the application at this point. It is accordingly so found and concluded. As already noted, this Court has got the powers to grant an interim injunction but it should be in the context of an appeal or contemplated appeal or in exceptional circumstances. That is not the case with the present case. Consequently, this Court would and hereby dismisses the present application for being misconceived.

The above finding and conclusion notwithstanding, this Court would like to make further observations. Such observations will be made so as to put it clearly that even if this application was not misconceived or it was one of those few exceptional ones where this Court as an appellate court had jurisdiction to entertain an application for injunction, it would still have failed. It would have failed for the reasons this Court will shortly show below.

This Court is alive to the instructive and persuasive remarks made in the case of ***American Cyanamid Company Limited v. Ethicon Ltd***[15], where Lord Diplock stated as follows :

> "On an application for an interlocutory injunction, the Court must look at the respective situations of the two contending positions. The first question to ask is why the Plaintiff should not be left to fight his action and get his relief by succeeding. The normal rule of English litigation is that a person gets no relief till he has gone to trial and persuaded the Court that he has been infringed. He is not entitled to an interlocutory injunction just because he has a strong case. He is only so entitled if it is shown that there could be injustice if the Defendant is left unfettered and that there is a serious risk of irreparable damage to the Plaintiff."

[15] [1975] AC 396

As it were, this Court agrees with the reasoning above that in the context of an application for an interlocutory injunction, the court is required to assess the positions of the parties involved. The primary consideration is why the Claimant should not be allowed to pursue their case and obtain relief through the regular legal process. The standard practice in litigation is that a person is not granted relief until they have presented their case at trial and convinced the court of the infringement they have suffered. Having a strong case alone does not automatically entitle the Applicant an interlocutory injunction. Such an injunction is only warranted if it can be demonstrated that allowing the Respondent to proceed without restrictions would result in injustice, and there is a significant risk of irreparable harm to the Claimant.

Further, it is settled law that an Applicant who prays for an injunctive relief must come to Court with clean hands. This Court agrees with the 1st Respondent that the matter before it is a peculiar one. The Applicant has come to court with a criminal case bordering on fraud hanging on his head. Further, it is on record that a Mr Massona accused the very same Applicant of impersonating him in the previous High Court matter. The said Mr Massona denied selling the property to the Applicant. It is well to note that an injunction is an equitable remedy and that those who come to equity must come with clean hands[16]. The Applicant does not deserve an equitable remedy as he has not come with clean hands. The Application's prayer for injunction would still have been dismissed on that score.

Furthermore, this Court is alive to the position at law that the grant or refusal of an injunction is a matter in the discretion of the court. The discretion has to be exercised on sound basis and to that end, there are principles and guidelines courts apply in considering whether to grant or refuse an application for interlocutory injunction as authoritatively articulated in the ***American Cynamid*** case. Moreover, the position at law is that where damages would be adequate remedy and defendant would be able to pay them, an interlocutory order of injunction should be refused, irrespective of the strength of the claimant's case[17].

Now, it is well to note that a tenant who does not pay his rent suffers no damage from the landlord's exercise of the right to distrain for rent. It is the landlord who suffers damage instead. The tenant

[16] American Cynamid v. Ethicon Ltd [1975] AC 396

[17] Mkwamba v. Indefund Ltd [1990] 13 MLR 244

would suffer loss if the distress is wrongful and in that event the only action would be to sue for trespass and generally damages would be an adequate remedy. Thus, if the injunction is refused the Claimant would be adequately compensated in damages at the trail so much so that the only question is whether the landlord would be able to pay. If the landlord can compensate the Plaintiff in damages, the court must refuse the injunction, however, strong the Plaintiff's case[18]. As this Court understands it, unless something exceptional exists, the court would find it exceptionally difficult to order an interim injunction on a landlord who, to enforce payment, distress for rent. This is the position at law as it gives the landlord the right, without court action, to distrain for rent when the tenant defaults[19].

DETERMINATION

The main issue that arose to be resolved before this Court was the issue of jurisdiction in relation to the competency of this application. This application is misconceived and is improperly before this Court. Matters come to this Court by way of appeal. The matter before this Court is not an appeal and should not be entertained. It is so found and ordered. Further, in terms of Section 7 of the Supreme Court of Appeal Act a single member of the Court may exercise any power vested in the Court not involving the hearing or determination of an Appeal. And, Order 1 Rule 18 of the Supreme Court of Appeal Rules provides that *whenever an Application may be made either to the Court below or to the Court* (emphasis supplied by this Court), it shall be made in the first instance to the Court below. However, if the Court below refuses the application, the applicant shall be entitled to have the application determined by the Court.

In terms of Order 1 Rule 18 of the Supreme Court of Appeal Rules, an application can only be made to both Courts where the main action is in the Court of Appeal or else there is contemplation of an Appeal to this Court. As this Court understands it, an application cannot be made in the Supreme Court of Appeal when there is no Appeal to anchor that Application. Put differently, this

[18] Fellows & Son v. Fisher 1976]1QB 122, 127; Kasema v. National Bank of Malawi (Civil Cause 2299 of 2001) [2001] MWHC 47 (2 October 2001)

[19] Joubertina Furnishers (Pty) Ltd t/a Carnival Furnitures v. Lilongwe City Mall (None) [2013] MWHC 443 (2 May 2013)

Court's understanding of Order 1 Rule 18 of the Supreme Court of Appeal Rules is that specific circumstances under which an application can be made to both courts, and these circumstances are related to the main action being in the Court of Appeal or the contemplation of an appeal to this Court. As it were, an application can be made to both Courts (presumably a Court below and this Court) when the primary legal matter or main action is currently before the Court of Appeal. This suggests that there may be instances where certain applications or issues are relevant to both the Court below and the Supreme Court of Appeal, and therefore, it is permissible to make applications to both simultaneously. Further, another condition under which an application can be made to both Courts is when there is contemplation of an appeal to this Court. This means that if the party involved is considering appealing a decision from the Court below to this Court, they may be allowed to make certain applications to both courts.

In sum, Order 1 Rule 18 of the Supreme Court of Appeal Rules is establishing a rule or condition regarding the filing of applications. It suggests that, in general, applications should typically be made to the court where the main action is taking place. However, an exception is allowed when the main action is already in this Court or when there is a contemplation of appealing to this Court. In these specific situations, applications can be made to both the Court below and this Court simultaneously although it is advisable to start with the Court below. Thus, where the Court below has declined an injunction the best approach in terms of the rules and the jurisdiction of this Court would have been to appeal and then apply for a stay. This Court is of this view because of the following reasons:

First, the authority of this Court over the application is drawn from Order I rule18 of the Supreme Court of Appeal Rules. With the key words relevant to the present application underlined, Order I rule 18 reads as follows: *Whenever **an application** may be made either to the Court below or to the Court, **it shall** be made in the first instance to the Court below but, if the Court below refuses **the application**, the applicant shall be entitled to have **the application determined by the Court.*** It is the same application that was refused in the Court below that is supposed to be brought before this Court for re-consideration or re-hearing. Same application means the same material

constituting "*the application"* in the Court below[20]. It is not simply the title of the application-it is the facts and evidence, the legal considerations and the material that were presented in the Court below over which the applicant shall be entitled to have the application determined by a Supreme Court Justice of Appeal after a High Court Judge has refused the application. Thus, Interpreting Ord. 1 r. 18 otherwise than that, the Supreme Court will be inundated with fresh applications disguised application made in the Court below and the Judiciary will risk continuously making conflicting pronouncements on case management matters that are supposed to be covered by settled law.

Where an order contrary to that made in the Court below is to be made it would also be unfair and discouraging of the the Court below for the Supreme Court to pronounce itself and perhaps make adverse remarks concerning a High Court Judge on material not presented in or considered by the Court below or over which the Judge has had no opportunity to pronounce himself or herself.

It would be contrary to judicial comity to make the Supreme Court Justices of Appeal appear to be constantly meddling in the management of cases in the Court below when the truth would be that the two tiers of the Court are considering different materials due to non-compliance by an Applicant with the text and intend of Ord. I r.18 of the Rules of this Court in failing to bring "the application" that was before the Court below. The very integrity of the Judiciary as an institution falls to be undermined if, on account of Ord. 1 r. 18, the Supreme Court were to entertain fresh applications and factual or legal material over which the Court below has had no say or no opportunity to say something. All that would be contrary to the principles articulated and settled in ***Bazuka Mhango v. New Building Society Bank Limited*** MSCA Civil Appeal No. 50 of 2015(Kamanga, JA, SC) on the need to have the application dealt with first in the Court below.

Secondly, this Court is a Supreme Court of Appeal. Its constitutional jurisdiction is *"to hear appeals from the High Court and such other courts and tribunals as an Act of Parliament may prescribe"*[21]. Its case management powers relate to managing a case in contemplation of an appeal

[20] Chithila and 3 Others v. Central East African Railways Limited MSCA Civ. App.53 of 2023

[21] See s. 104(1) and (2) Constitution as read with ss. 3(a)-(c), 7, 21, 22 and 23 SCA and Ord. III SCAR

that may fall to be dealt with by the full Court. But for the due application of Ord. I r. 18 this Court does not have control over proceedings in the High Court *"until an appeal is entered"* as provided for under Ord. III r. 19 of the Supreme Court of Appeal Rules.

Therefore, when Ord. I r.18 of the Supreme Court of Appeal Rules talks about concurrency of jurisdiction over an application, it can only be in cases where the Supreme Court jurisdiction has also been ignited by an appeal. An appeal is defined in Rule 2 of the Supreme Court of Appeal Rules. There is no appeal of any kind against the Ruling of the Court below. Therefore, the findings and determination of the Court below are crystallised and binding as between the parties. Further, it is well to put it here that the Supreme Court jurisdiction has not been triggered.

By reason of the foregoing, this application should be dismissed for the reasons and grounds advanced above. It is so found and concluded.

Further, there are other reasons why this application ought to be dismissed. It is well to observe that the sworn statement of the 1st Respondent has been very clear on the status of the property the subject matter of this application. The unchallenged evidence before this Court both from the Land Registrar and the Judgment of Justice Kamwambe is very consistent with the position of the 1st Respondent that he is the owner of the property in issue. The 1st Respondent successfully redeemed the property through his wife Jessie Kazinga Mkandawire from NBS Bank. This is borne out by exhibit CK3 a letter from the bank congratulating the 1st Respondent for redeeming the property in issue. This followed the Applicant's failure to buy the house as a sitting tenant from the bank. Further, The Applicant's case has no legs to stand on when one looks at the allegation of fact in paragraph 43 of the 1st Respondent's Sworn Statement. The 1st Respondent alleges that he bought the property on 12 July, 2005 when the Court ruled that NBS Bank was the one under the law to sell the property and not Mr Erenesto Jackson Massona. There is no credible evidence to dispute this allegation of fact. The Applicant has no meritorious case or raises no triable issues before this Court to warrant an interim injunction under those exceptional cases mentioned above. As put in the Sworn Statement of Mr Erenesto Massona, the Applicant has not acted properly. Thus, the allegations of fraud that still hangs over his head. The Applicant does not deserve an equitable remedy before this Court.

The Court below exercised its discretion to decline the prayer for an interim injunction. As this Court understands it, the position is that the decision whether to grant or not to grant an interlocutory injunction is at the discretion of the Court. This Court, in ***Patrick Ngwira and Another v. Francis Ngwira***[22] said the following which is instructive on the approach of Appellate Courts in instances of exercise of discretion by the Court below:

> *"The role of an Appellate Court is not to rush and replace its own discretion for that the lower court. The Appellate Court will generally be slow in doing that; but it will not abdicate its responsibility to do so when it is appropriate so to do."*

Further, in ***The State (On the Application of Joseph Nsabimana) v. The Minister of Homeland Security & The Chief Immigration Officer***[23] this Court had this to say on similar applications i.e. the approach of Appellate Courts in instances of exercise of discretion by the Court below:

> *"Order 1 rule 5(2) of the CPR enjoins the Court to seek to give effect to the overriding objective whenever it exercises any power conferred on it by the CPR or interprets any written law, rules and regulations. In my view, it is logical and necessary that when dealing with cases where there is concurrent jurisdiction, as in the present instance, this Court must also seek to give effect to the overriding objective of the CPR- more especially bearing in mind that the matter will be heard in the Court below if it is to proceed. In this respect, I would wish to quote the dissenting opinion in the Ngwira v Ngwira case (supra) where it says;*
>
> *Thus in my opinion, it is also necessary and imperative that when dealing with 'appeals against decisions of judges made after the introduction of the CPR, this Court must always endeavour to promote and enhance the overriding objective. We must acknowledge that the judge now has much wider case management powers than previously and that the circumstances in which those powers will be exercised are also much wider. At no point in*

[22] MSCA Civil Appeal No. 16 of 2020

[23] MSCA Misc. Civil Application No. 38 of 2023,

> *time should this court as an Appellate Court, under the guise of promoting access to justice or whatsoever, make statement, decisions or orders whose effect will be to undermine, limit or take away the judge's case management discretion conferred by the CPR. We must allow the judge to have the full discretion to conduct, manage, regulate and control proceedings before him or her because that is the scheme under the CPR. As an Appellate Court, we must be slow in interfering with the exercise of discretion on case management issues. The judge handling the matter in real time is best suited to assess and judge the gravity or lightness of the situation before him than us who see the matter and the issues on review. Therefore we need to resist the temptation of being too judgmental, fault finding, sceptical and critical of the manner in which the judge handled the situation before him. The Court should not frustrate the case management scheme under the CPR but rather promote it."*

The above reflects this Court's view on what should inform it when dealing with an application where an applicant wants this Court to review the exercise of discretion by the Court below. It is accordingly adopted. This Court cannot agree more with Justice of Appeal Katsala on the importance of considering the overriding objective of the Civil Procedure Rules (CPR) when dealing with cases of concurrent jurisdiction. This Court should seek to promote and enhance the overriding objective of the CPR, especially when the matter will be heard in the Court below. There is need for this Court to avoid undermining the case management discretion granted to Judges under the CPR. Judges in the Court below should be allowed to exercise their discretion in managing and regulating proceedings. Besides, this Court is cautioned against interfering with case management decisions unless absolutely necessary, recognizing that the Judge handling the matter in real-time is best suited to assess the situation.

The Judge in the Court below exercised his discretion by declining to grant the prayer for the injunction. The Applicant has not faulted the judge's exercise of discretion in the Application in the Court below. There was no reason advanced to suggest that the Court below improperly exercised its discretion. This Court will not therefore replace its own discretion with the discretion of the Court below. This Court also declines to grant the prayer for an interim injunction. The Applicant's Application ought to be and is hereby dismissed by this Court.

This Court agrees with the 1st Respondent that this matter is all about distress for rent. As noted above, at law a tenant who does not pay his rent suffers no damage from the landlord's exercise of the right to distrain for rent. Thus, where the injunction is refused, as has been the case in this matter, the Applicant would be adequately compensated in damages at the trial so much so that the only question is whether the landlord would be able to pay. This Court is alive to the fact that the Applicant had argued that that in the event that an injunction is not granted, he will be unable to recover the money paid to the 1st Respondent. However,. the Applicant did not bring cogent evidence to support the assertion of inability to pay on the part of the Respondents. Further, the Claimant has not proved that the Respondents are impecunious such that they would not be capable of paying the said damages. The Applicant just made bare assertions without any evidence to support it. It is not for the respondent to demonstrate capacity to pay back. The duty lies on the applicant to establish the respondent's lack of capacity to pay back. It is well to further note that the position at law is that where the landlord can compensate the Claimant in damages, the court must refuse the injunction, however, strong the Claimant's case is[24]. The law is very clear that where damages would be an adequate remedy and defendant would be able to pay them, an interlocutory order of injunction should be refused, irrespective of the strength of the claimant's case[25].

It is the view of this Court, and it so finds and concludes, that damages would be adequate in the present case since it involves the property that was auctioned by the 2nd Respondent in executing a warrant of distress that was properly obtained by the 1st Respondent. The Applicant has failed to demonstrate that the Respondents are impecunious such that if a judgment is rendered in their favour they would be unable to pay the damages.

Further, this Court has not seen exceptional circumstances that warrant a departure from the general principles on the law of distress discussed above. Unless something exceptional exists, this Court would have found it difficult to order an interim injunction on against the 1st Respondent

[24] Fellows & Son v. Fisher 1976]1QB 122, 127; Kasema v. National Bank of Malawi (Civil Cause 2299 of 2001) [2001] MWHC 47 (2 October 2001)

[25] Mkwamba v. Indefund Ltd [1990] 13 MLR 244; see also Standard Bank Limited v. Dr Chaponda (MSCA Civil Appeal 58 of 2013) [2018] MWSC 11 (20 March 2018); and Anti-Corruption Bureau v. Atupele Properties Ltd, MSCA Appeal Case No. 27 of 2005 (1February 2007),

who, in order to enforce payment, distressed for rent as the law gives the landlord the right, without court action, to distrain for rent when the tenant defaults[26]. Further, as earlier noted, the law allows the landlord the right, without going through legal action, to distrain for rent when the tenant defaults[27]. As this Court sees it, it is clear that damages will be enough to compensate the Applicant in the event that it later transpires that the Claimant was genuinely entitled to an injunction.

Pausing here, respecting the 2nd Respondent, this Court would like to make some observations that show that the application as against the 2nd Respondent would have been untenable. First, this Court doubts that an an injunction would have issued against the 2nd Respondent. In observing thus, the Court's attention has been drawn to what is provided for in Section 10 of the Civil Procedure (Suits by or against the Government or Public Officers) Act (Cap. 6:01 of the Laws of Malawi). The said Section 10 provides as follows: is couched in the following terms:

> "(1) Nothing in this Act contained shall be construed as authorizing the grant of relief by way of injunction or specific performance against the Government, but in lieu thereof the court may make an order declaratory of the right of the parties.
> (2) The court shall not in any suit grant any injunction or make any order against a public officer if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in a suit against the Government."

The provision establish limitations on the types of relief that can be granted against the government in certain legal actions. This section does not grant the authority for the court to issue injunctions or specific performance, against the government. Instead, the court may issue a declaratory order, which declares the rights of the parties involved without requiring specific actions or performance. This section further emphasizes the restriction on granting injunctions or orders against public officers if doing so would effectively provide relief against the government. Thus, if the relief sought against a public officer is essentially the same as relief against the government itself, such

[26] Ibid.

[27] Joubertina Furnishers (Pty) Ltd t/a Carnival Furnitures v. Lilongwe City Mall (None) [2013] MWHC 443 (2 May 2013)

relief should be sought in a suit against the government rather than against the individual public officer. As it were, this statutory provision is placing limitations on the types of remedies that can be sought against the government, specifically prohibiting injunctions or specific performance, and directing the court to issue declaratory orders instead. It also prevents the circumvention of these restrictions by seeking similar relief against public officers. In the case under consideration, the application for an injunction against the 2nd Respondent has ignored the clear provisions of section 10 of the Civil Procedure (Suits by or against the Government or Public Officers) Act. The application would have been dismissed on this ground as well.

Secondly, it would appear that the applicant's application as against the 2nd respondent is a nullity as it failed to comply with section 4 of the Civil Procedure (Suits By or Against Government or Public Officers) Act. The said section 4 of the Act states that:

> "No suit **shall** be instituted against the Government, or against any public officer until the expiration of three months next after notice in writing has been, in the case of the Government, delivered to or left at the office of the Attorney General, and in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims." (emphasis supplied).

Thus, it is mandatory that any person desirous of commencing a suit against Government has to comply with section 4 of the Act by giving what has overtime been referred to as the 'Mandatory Notice.' This Court in ***Dr. Bakili Muluzi v. The Director of the Anti-Corruption Bureau***, [28], made the following observations regarding failure to give notice before commencing proceedings against the Malawi Government:

> "According to section 9 of the Constitution, the responsibility of this Court is to interpret, protect and enforce the Constitution and all laws (emphasis supplied by us). This court is mandated to protect and enforce all laws which obviously include section 4 of the Civil

[28] MSCA Civil Appeal No. 17 of 2005 (Unreported)

> Procedure (Suits by or Against Government or public Officers) Act. The appellant was therefore required to comply with Section 4 before commencing his action against the respondent."

This Court sees no reason why it differ with the dictum above. the Court has also found the dictum of Chimasula Phiri J in ***Kamanga v Attorney General*** [1995] 2 MLR 687 very illuminating. He coreectly noted as follows:

> "It is a known fact that Government is a colossal organization operating from Nsanje to Chitipa and Mchinji to Mangochi. The Attorney–General is based in Lilongwe. Notwithstanding that modern technology facilitates transmission of communication there are still vast areas where this modern technology is still underdeveloped. The Attorney–General is not and cannot always be present where a wrong is committed and may not even know of it until upon receipt of notice. In such a case he has to get briefed. If no provision for notice existed, would it be prudent to expect Attorney–General to get briefed and prepare a defence within 14 or 28 days? I think not. Therefore, knowing that ethics require legal practitioners as officers of the court to assist the court and not to mislead it by sham defences, it is my view that in all suits against the Government there must be a prior written notice served on the Attorney–General."[29]

This Court strongly agree with this statement. It is adopted by this Court as its own. There is no choice by a litigant when it comes to commencing a legal action against government. It is mandatory that there must be a prior written notice served on the Attorney General's office before instituting a suit against Government through the office of the Attorney General[30]. The position is

[29] See Rashid Tayub, Transglobe Produce Export Limited v. Attorney General (Director of Public Prosecution) and the Director of Anti-Corruption Bureau Civil Cause Number 209 of 2018

[30] See also Tembo and Another v. Speaker of the National Assembly M.S.C.A. Civil Appeal No. 1 of 2003 (unreported) Where Tambala J.A. made the following statement which is instructive as well:

"Section 4 of Civil Procedure (Suits by or against the Government or Public Officers) Act Cap 6:01 requires at least three months' notice before commencing a court action against Government through the Attorney General. In the present case the National Assembly passed the motion in question on 13th December, 2002. It would seem that the

different where an aggrieved person is seeking a declaratory order from the court[31]. There is no other conclusion than that section 4 of the Civil Procedure (Suits by or Against Government or Public Officers) Act is expressed in mandatory terms since the provision uses the word "shall". This demands that any person who wants to commence an action against the Government through the office of the Attorney General has to comply with the said provision without fail. Additionally, the said provision has no exceptions. In spite of this provision, the Applicant commenced the action in the Court below against the Government without serving the office of the Attorney General with the pre-suit notice described under section 4 of the Civil Procedure (Suits by or Against Government or Public Officers) Act. This was contrary to one of the laws of this country. If this matter had come on appeal Court would not have hesitated to enforce and/or protect the said law and dismidesd the appeal on that ground the action had been commenced in contravention of section 4 of the Civil Procedure (Suits by or Against Government or Public Officers) Act [32].

By reason of the observations above, this Court finds and concludes as follows:

appellants were desperate to obtain an injunction against the National Assembly's decision urgently. They were not prepared to wait for two months before obtaining such injunction. That would explain why they preferred and insisted to sue the Speaker and not the Attorney General. But the law cannot be evaded in that manner."

[31] The Democratic Progressive Party v. The Attorney General (On behalf of The President of Malawi) (Civil Cause 230 of 2021; Constitutional Referral 3 of 2021) [2021] MWSC 11 (26 November 2021) where the Court observed as follows:

"We take cognizance of the court's finding in that case that an aggrieved person can seek from the court a declaratory order without giving notice as required by section 4 of the Act. We find that this decision does not apply to the present proceedings for the reason that in so far as the present matter was commenced by a summons under Order 5 of the CPR, the requirement for the section 4 notice cannot be dispensed with. The case of Dr. Jean Mathanga and Linda Kunje v The Electoral Commission and the Attorney General is distinguishable from the present proceedings on this basis"

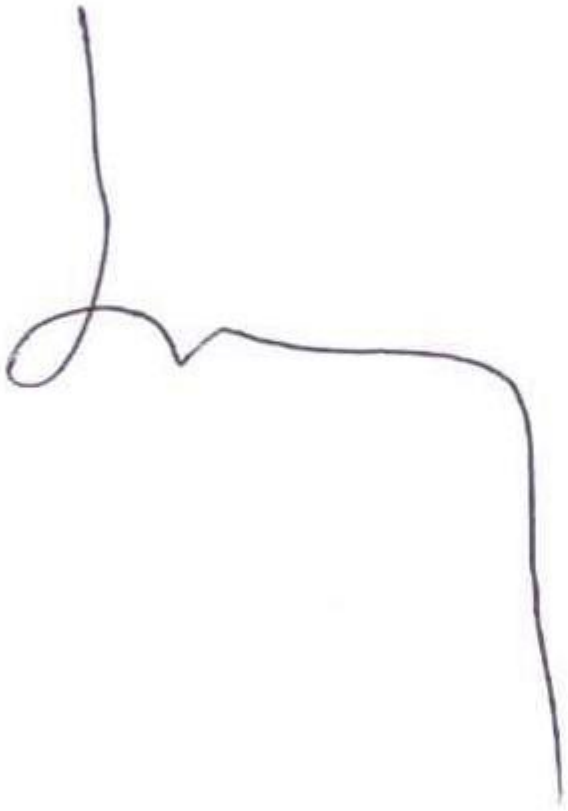
[32] See Dr. Bakili Muluzi v. The Director of the Anti-Corruption Bureau [supra]. See The Democratic Progressive Party v. The Attorney General (On behalf of The President of Malawi) & Tembo and Another v Speaker of the National Assembly [supra]

The application for an interim injunction is dismissed for being misconceived and improperly brought. It is further ordered that the prayer for the Interlocutory Injunction be dismissed with costs.

Costs

Costs to the 1st and 2nd Respondents.

Made in Chambers at the Supreme Court of Appeal, Blantyre this 11th day of January 2024.



JUSTICE F.E. KAPANDA SC

JUSTICE OF APPEAL