

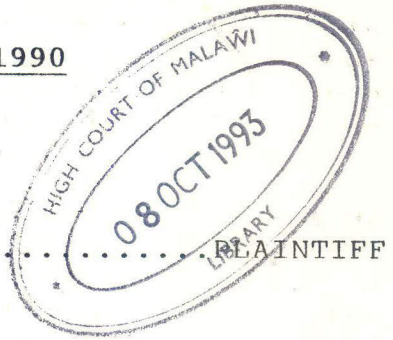
25 Jun 1992

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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 202 OF 1990



BETWEEN:

P T K NYASULU..... PLAINTIFF

- and -

MALAWI RAILWAYS LIMITED..... DEFENDANT

CORAM: CHATSIKA, J.

Fachi, Counsel for the Plaintiff
Msaka, Counsel for the Defendant
Kadyakale, Law Clerk
Longwe, Court Reporter

R U L I N G

Judgement in the above case was delivered on the 19th June 1992. Damages were awarded to the Plaintiff in the sum of K160,000.00. Immediately after the delivery of the said judgement, Counsel came to see me in Chambers, where Counsel for the Defendant indicated that it was his intention to appeal against the judgement. He also made a verbal application for a stay of the execution of the judgement pending the filing of an appeal and the hearing of the appeal. I refused to entertain the application at that stage and asked Counsel to file a formal application. Counsel for the Plaintiff graciously gave an undertaking not to execute until the formal application for a stay of the execution of the judgement was heard.

The formal application for stay of the execution of the judgement was supported by a lengthy affidavit sworn by Mr Msaka, who represents the Defendant. Paragraph 3 of the Affidavit, which states that the Defendant has good grounds of appeal, is divided into 15 sub-paragraphs, numbered alphabetically from (a) to (o). Each sub-paragraph attacks various aspects of the judgement. Paragraph 4 of the Affidavit epitomised all the matters that were deposed in paragraph 3(a) to (o) by stating that the proposed grounds of appeal raised substantial issues on the merits and that the intended appeal stands good chances of success. Paragraph 5 of the Affidavit stated that if the sum of K160,000.00 was paid to the Plaintiff, the Plaintiff would not be in a position to pay it back to the Defendant upon the judgement being overturned.

The Plaintiff filed an Affidavit in opposition. The substance of his affidavit was to the effect that he is in possession of real and movable property and indicated that if the intended appeal would be successful, he would be in a position to pay back the K160,000.00. He itemised various properties and their corresponding values.

The Plaintiff's affidavit, which was served on Mr Msaka on the very morning of the hearing of the application, caught him off guard and he asked for an adjournment in order to conduct searches at the Land Registry, at the Registrar General's Department and at the offices of the Commissioner for Road Traffic to satisfy himself as whether or not the various properties mentioned in the Plaintiff's affidavit indeed belonged to the Plaintiff. The adjournment was granted the following day, the 24th June 1992.

After his search in the various places, Mr Msaka filed another affidavit. At the resumed hearing of the application, Mr Nyasulu, the Plaintiff, tendered three documents. Deed No. 62260 showed that he was the title holder of Plot No. NM/P/2/4 measuring 2.248 hectares (about 6 acres) situated in Namyango within or on the outskirts of the City of Blantyre. Exh.2 showed that he was the lessee of Plot No. NM/11/1 and that he has made improvements thereon worth K100,000.00. Mr Msaka's affidavit which contained the result of his search showed that one property, a house in Sunnyside, was incumbranced to the New Building Society. The extent of the incumbrance was not stated. Mr Msaka did not find any evidence of the Plaintiff's title to some of the immovable properties which appear in Mr Nyasulu's affidavit but, as already shown above, as regards two of the properties, this doubt had been cleared.

In his affidavit, Mr Nyasulu stated that he owns a mini bus valued at K210,000.00, a maize mill valued at K22,000.00 and a private car valued at K20,000.00. In his affidavit Mr Msaka stated, and has also submitted at the hearing of this application, (a) that Mr Nyasulu has not furnished the Court with better evidence of the values of these properties and that the Court should exercise caution before accepting those values, (b) that all the properties could be described as "running stock" and that because of their constant use, even if the values given by Mr Nyasulu are accepted, their value depreciates every day and that by the time the appeal will be heard, these properties will have no value at all. I do not accept that all these properties will have no value whatsoever by the time the appeal herein will be heard.

Another point raised by Mr Msaka was that he found at the Registrar General's office information that Mr Nyasulu had applied for the incorporation of a limited company by the name of Tondole Enterprises Limited. He indicated that he believed that Mr Nyasulu intended to transfer all his

business and, therefore, all his properties to the company and that on the authority of Solomon -v- Solomon, Lee -v- Lee, Macaura -v- Rubber (the usual Company Law authorities on incorporation), it will not be possible to enforce payment against Mr Nyasulu if the properties were transferred to the company. There is no evidence to show that the Plaintiff intends to transfer all the properties mentioned in his affidavit to the proposed company. Mr Msaka's fears are based on mere speculation. In any event, I would like to base my decision on the present status of the properties.

In considering this matter it should always be remembered that a successful party to an action must not unnecessarily be deprived of the result of his action simply because the unsuccessful party intends to appeal against the decision of the Court. Against this principle must also be the consideration that it is the right of any party to an action to appeal and the Court should ensure that if the appeal is successful, it should not be nugatory simply because the respondent to the appeal has squandered what was obtained from the judgement appealed against and he is not in a position to satisfy the appeal judgement. It is Mr Msaka's very strong submission that this will be the case if the Plaintiff in this case is paid the K160,000.00 damages.

Mr Fachi, who appears for the Plaintiff, has submitted that the Plaintiff has proved that he has property sufficient to enable him to pay back the K160,000.00 should the intended appeal be against him. In his examination of Mr Msaka on oath, it was found that the Plaintiff was in possession of properties of the total value of about K587,000.00 and the Defendant did not readily have any evidence to challenge this proposition. Except for one property, a house at Plot No. NM/11/122, which was found to be in the name of Kwame Nyasulu, the Plaintiff's son, the Plaintiff proved that he held some interest in all the properties stated in his affidavit. In these circumstances, I am unable to find that the Plaintiff will be unable to repay the K160,000.00 if the appeal would turn to be against him.

I have already observed that Mr Msaka has summarised his many proposed grounds of appeal that the intended appeal stands good chances of success. I appreciate that the intended appeal is against my judgement. It is, therefore, not possible for me to readily accept Mr Msaka's assessment. I would be defeating my considered assessment of the evidence that came before me and my understanding of the law if I did that. However, when I consider the whole case very objectively, I find myself unable to agree with Mr Msaka's assessment. The more I read my judgement, the more I become convinced that it is right. I, therefore, leave it to the wisdom of the august and honourable learned lords in the Appeal Court to review it. My decision in determining this

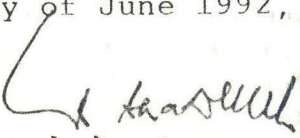
application will not depend on the likelihood or otherwise of the appeal being successful.

Finally, and in the alternative, Mr Msaka has asked the Court to consider making an order that the money be paid into Court to be invested in an interest-earning account in order that it be paid to whichever party will be entitled to it after the appeal has been determined. This submission has a lot of merit.

Before making any decision to this last submission, I have considered whether such a course would occasion any injustice to either of the parties. With regard to the Defendants, I have already found that the Plaintiff will be in a position to pay back the K160,000.00 if the appeal turns to be against him. This should allay any fears which the Defendants may entertain about the possibility of the appeal being made nugatory. With regard to the Plaintiff, I have taken into consideration what was stated by Mr Msaka, that the intended appeal may be heard in about 4 years from now if the previous record of the delays of hearing appeals in this Court is anything to go by. The Plaintiff's employment was terminated by the Defendants and the termination has deprived him of his salary. Mr Msaka submitted further that if the K160,000.00 is compensation for pension, then no injustice will have been occasioned by delaying its payment, since the pension was expected in about 12 years from the time of the termination of his employment. While this is true, it should be remembered that during that 12 years, when the Plaintiff would have been expecting his pension, he would have been in receipt of a salary. The act of the Defendants has deprived him of the salary. Any delay in paying the damages would only aggravate the financial problems which were created by the defendants.

Having taken all these matters into consideration, I can find no valid reason for withholding the payment of the damages. The application is, therefore, dismissed with costs. The Defendant has up to the 3rd July 1992 to honour the judgement.

MADE this 25th day of June 1992, in Chambers.


L A Chatsika
JUDGE