IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEUOS CIVIL CAUSE NO. 129 OF 2006

BETWEEN:

RIZWANA PARSONS ……...……APPLICANT

- AND -

OFFICER IN – CHARGE OF BLANTYRE
POLICE STATION……..……..1ST RESPONDENT

- **AND –**

DETECTIVE MANJOLO
CHAKANIKA (MRS) AND FIVE OTHERS…….2ND RESPONDENT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA
Mr Mwala, of Counsel, for the Plaintiff
Miss Kayuni, Senior State Advocate, for the State
Mr Mchacha – Official Interpreter

R U L I N G

Manyungwa, J

This is the respondent's application for stay of execution of the ruling that was made by Her Worship Kamowa at Blantyre Magistrate Court that Motor Vehicle Registration Number MBF 73-64F Landrover Freelander, be returned to the applicant Rizwana Parsons pending an appeal. The application is supported by an affidavit sworn by Miss Janet Ndagha Kuyuni, Senior State Advocate. There is an affidavit in opposition sworn by Mr Clement Masauko Mwala, for the applicant.

It is deponed by Miss Kayuni that the applicant herein commenced an application in the Senior Resident Magistrate Court Blantyre on 28th August, 2006 by way of motion for an order that the items which the respondents seized from her residential premises on 22nd August, 2006 be released forthwith. Miss Kayuni averred that the applicant had contended in the lower court that the police had visited the applicant's house on the material day in order to arrest one Khizer Elias but did not find him, so instead they seized a Landrover Freelander, which the police claimed belonged to the said Khizer Elias and that they suspected it of having been a stolen vehicle. However, the applicant had indicated that the said motor vehicle belonged to her and that she was in the process of purchasing it from Maguel Elias, a Mozambican national. The applicant claimed in the lower court further that on the day the police seized the vehicle, there was inside the vehicle an Acer Laptop Computer and money amounting to US$15,000.00 cash. It was further stated that Detective Inspector Agatha Chakanika, Investigative officer of the Anti-Motor Theft Unit was in charge of the team that visited the applicant's house on the material day, with a view to effecting an arrest after they received a tip that Khizar Elias, who is a suspected carjacker in the country was reportedly living at the applicant's house and using Landrover Freelander with Mozambican Registration Number MBF 73-64.

It was further stated that when the police visited the applicant's house they did not find one Khizer Elias, but suspected that he had escaped. The police indeed found the car but denied to have found a an Acer Laptop or money inside the car but instead they found some documents which included a passport belonging to Maguel Elias which they took to the police station. It was further stated by Miss Kayuni, that as the respondent waiting for the court's ruling, they sent the details of the motor vehicle they had seized from the applicant's premises to INTERPOL, and that on 31st August, 2006 the International Vehicle Crime Investigation in Pretoria faxed the

Malawi Police a document indicating that the vehicle in question was stolen at Kwazulu-Natal near Mozambique boarder on 21st November, 1998. The said fax was exhibited as exhibit "JNK 1".

Further, on 1st September, 2006 the police further found in the seized motor vehicle, a Malawi Revenue Authority Temporary Importation Permit (TIP) which indicated that the vehicle was allowed into Malawi on a Temporary basis. The said TIP was exhibited as "JNK 2". It was contended that since the vehicle came into the country on TIP, then it could not be sold whilst in the country as TIP is only issued to visitors. It was further argued that the TIP for the seized vehicle has since expired, and further that the person who brought the car into the country has since returned to Mozambique after selling the car to the applicant. Ideally therefore he is the one who should apply for the extension of the permit.

The lower court in its ruling of 8th September, 2006 found that the applicant had not proved that she had money amounting to US$15,000.00 and an Acer Laptop and also that she had not shown that the seized motor vehicle belonged to her, but nevertheless ordered that the motor vehicle be released back to the applicant within 7 days from the date of judgement. The respondent contended that since there is no evidence of sale of the car to the applicant, and in the absence of the owner the order made by the magistrate court lacks basis and would prejudice police investigations. Miss Kayuni further deponed that the police have since opened a case against the said Maguel Elias on charges of bringing in property dishonestly acquired outside Malawi under case docket number BT/CR/129/09/06. The respondents further contend that the police believe that the said Maguel Elias is the same Khizar Elias, whom they are looking for to come and answer charges of theft that have been made against him. Further, it is stated that the police would like to have Maguel Elias to explain how he got the said car before they can release the car either to him or make a decision to send the motor vehicle to South Africa. The police, after noting that there is laxity on the part of the applicant have engaged into their own investigations to see how they can get the said Maguel Elias to come to Malawi.

The respondents therefore pray that it would not be in the interest of justice that the said motor vehicle be released to the applicant because the respondents believe that to do so will be to afford Maguel Elias to simply take back the car before answering the queries raised.

In opposition, the applicant states that the respondents seized the motor vehicle in question on 22nd August, 2006 and that it is more than three months now with no progress, not even laying charges against the applicant thereby prejudicing the applicant and that since the vehicle is exposed to the sun, there is likelihood of damage due to non-use. Further it is contended that identifying a vehicle at the police does not assist the court as this evidence, if at all, should have been given at the court. The applicant contends that it is unfair on her part to be deprived of use of the motor vehicle merely on allegations which the State is failing to commence proceedings and prove the said allegations in court. It is further contended that the failure to commence proceedings against the applicant amounts to arbitrary deprivation and that the appeal is designed to frustrate the applicant and deprive her of the fruits of her litigations.

The main issue for determination is whether the court should extend and order a stay to the respondents pending appeal.

I must at the outset state the position of the applicable law which, I think is currently settled. The law is settled that an appeal does not operate as a stay of execution of the order or judgment appealed against except to the extent that the court below or the court of Appeal otherwise directs. It follows that service of the notice of appeal and setting down the appeal does not by itself have any effect on the right of the successful party to act on the decision on his favour and to enforce judgememt or order of the court below. If an appellant wishes to have a stay of execution of judgement he or she must expressly apply for one. Neither the court below nor the court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. The court does not have the practice of depriving a successful litigant of the fruits of his litigation. See the case ***The Annot Lyle***(1886) llP 116, CA. The court is likely to grant a stay where the appeal would otherwise be rendered nugatory or where the appellant would suffer loss which could not be compensated in damages. See ***Order 59 r 13 of the Rules of Supreme Court***. Besides the Supreme Court of Appeal in the case of ***Anti – Corruption Bureau V Atupele***

Properties Limited MSCA Civil appeal Number 27 of 2005 (unreported) as per the judgement of Honourable Justice Tambala, JA succinctly stated the applicable law on the topic at pages 5 and 6 as follows:-

> "I must now revert to the law relating to the stay of execution of the court's judgements. There are clearly four principles. The first is that it lies within the broad discretion of the court to grant or refuse an application for stay of execution. The second principle is that as a general rule the court must not interfere with the successful party's right to enjoy the fruits of his litigation. The third principle is an exception to the general rule and states that where the losing party has appealed and is able to demonstrate that the successful litigant would be unable to pay back the damages, in the event that the appeal succeeds, execution of the court's judgement may be stayed. The fourth principle is that even where the party appealing is able to show that the successful party would be unable to pay back the damages if the appeal succeeds, the court may still refuse an application for stay of execution, if upon examination of the facts of the case, an order for stay of execution would utterly be unjust. "(emphasis supplied)".

The cases of ***City of Blantyre V Manda*** Civil Cause Number 1131 of 1990 (unreported) ***Chilambe and Select and Save Kavwenje*** Civil Cause Number 1645 of 1993 (unreported) ***National Bank of Malawi V Moyo*** MSCA Civil Appeal Number 25 of 2005 (unreported) support this position. See also ***Donnie Nkhoma v National Bank of Malawi*** MSCA Civil Appeal Number 32 of 2005 (unreported) as per Honourabale Justice Tembo, JA.

In the case of ***City of Blantye V Manda*** (supra) Unyolo J, as he then was, had this to say:-

> "I think it is always proper for the court to start from the view point that a successful litigant ought not to be deprived of the fruits

> of his litigation and withholding monies, which, ***prima facie*** he is entitled. The court should then consider whether there are special circumstances which militate in favour of stay and the onus will be on the applicant to show or prove such special circumstances. The case of ***Baker V Lavery***, which I have cited above, seem to suggest that evidence showing that there was no probability of getting the damages back of the appeal succeeded, would constitute special circumstances. Broadly, I would agree with this statement but it is not a closed rule. The total facts must be considered fully and carefully. I would agree with this statement but it is not a closed rule. The total facts must be considered fully and carefully. I would in this context agree with the learned judge in ***Stambuli*** case that even where the respondent would not be able to pay back the money, the court could still refuse to grant an order of stay, if on the total facts, it would be utterly unjust to make such an order".

As has been pointed out above the question as to whether to grant a stay or not is entirely discretional. See ***Nyasulu v Malawi Railways Ltd*** [1993] 16(1) MLR 394.

In the instant case, there is evidence to show that **INTERPOL** on 31st August 2006 forwarded to the Malawi Police after they had enquired, a document exhibited "JNK 1" indicating that the motor vehicle, Landrover Freeland with Mozambican Registration Number MBF 73 – 64, which the Malawi Police seized from the appellant's house, was actually stolen at Kwazulu – Natal near Mozambique boarder on 21st November 1998 and a case docket was opened at Blantyre Police docket Number BT/CR/129/09/96. Further, the lower court despite the order it made, never found that the vehicle belonged to the applicant. The vehicle is a subject of an investigation and possibly a crime.

In these circumstances, I order and grant a stay of the lower court's ruling, until police investigations are over or until the appeal is heard.

Pronounced in Chambers at Blantyre this 29th day of March, 2007.

Joselph S Manyungwa

JUDGE