



JUDICIARY

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 1469 OF 2005**

BETWEEN:

AUSTIN CHITSUKWAPLAINTIFF

- AND -

ETHIOPIAN AIRLINESDEFENDANT

CORAM: THE HONOURABLE JUSTICE E. B. TWEA

Absent, of the Counsel for the plaintiff

Absent, of the Counsel for the defendant

Mrs V. Nkhoma – official Interpreter

J U D G M E N T

Twea, J

This is a summons for an order for stay of execution pending appeal to the Supreme Court of Appeal.

The facts of the matter are that the plaintiff obtains summary judgment against the defendant in the sum of US\$8,827.44 before the Assistant Registrar on January 10, 2006. When the plaintiff sought to enforce the judgment the defendant applied for and obtained a stay pending appeal to a judge in Chamber.

The parties appeared before the Judge in Chambers. The Judge delivered judgment on 19th October, 2007 and, again, found the case for the plaintiff. Again when the plaintiff sought to enforce the judgment the defendant sought an interim stay pending inter – parte hearing, until the appeal is heard in the Supreme Court of Appeal. This is the inter – parte hearing.

My duty is to decide whether or not a stay would be justified in this case. I am not concerned with the merits or demerits of the case. Be this as it may I would be entitled to look at the facts of the case, to determine whether or not the appeal is bona fides or merely for the purposes of buying time so that I exercise my discretion whether or not to grant the order for stay: **Ministry of Justice V Limbe (1) (1993) 16(1) MLR 317.**

I have examined the record and I find that the appeal is based on procedural technicalities as to admission of a case for summary judgment and a claim that the defendants had a defence on merit. My view is that the factual part is, basically, a general denial otherwise the defendant seeks to rely on the Warsaw Convention in respect of air carriage as an airline.

The general principles for granting stay were ably outlined by Tambala J.A. in the case of the **Anti – corruption Bureau V Atupele Properties Ltd** **MSCA Civ Ap. 27 of 2005:** First it is within the discretion of the Court. Secondly that the general rule is that the Court shall not interfere with the right of successful party to enjoy the fruits of litigation. Third where a respondent would be unable to payback the money then a stay may be justified. Lastly, the court would still have discretion to refuse a stay even

where the respondent is impecunious if the stay would be utterly unjust and oppressive. The bottom line is that the applicant must demonstrate that the respondent falls within the exceptions. It is not for the respondent to demonstrate capacity to payback. The duty lies on for the applicant to establish the respondents lack of capacity to payback. In the present case the applicant is the flag carrier for the Nation of Ethiopia. The respondent is a small time Malawian businessman. He is a vendor of telephone handsets which, on the facts, he buys in Dubai. The applicant averred that he does not have means to repay the judgment debt plus interest, nor does he have a registered business or business address. The respondent filed an affidavit in opposition. As I said earlier the respondent need not prove his means, it is the duty of the applicant to establish lack of means. The Court will exercise its discretion with due regard to the principles above stated.

In the present case I am satisfied that the applicant has established that the respondent is a man of modest means. He may not easily payback the money. However, I also find that, apart for the defence based on the Warsaw Convention, the applicant has a good case. I therefore grant the stay of execution subject to the applicant paying US\$8, 827.44 into court, within 14 days.

To this extent, the application succeeds.

Pronounced in Chambers this 24th day of January 2008 at Blantyre.

E. B. Twea
JUDGE