IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
Civil Appeal No 4 of 2011

(BEING IRC MATTER NO. 115 OF 2005)

BETWEEN:
EVANGELICAL DEVELOPMENT PROGRAMME.....APPELLANT

- AND –

MAHARA NYIRENDA.....RESPONDENT

CORAM: HON. JUSTICE POTANI
Mr.R. Mhone, of counsel for the Appellant
Mr. C. Kalua, of Counsel for the Respondent
Gangata, Official Interpreter

RULING

There is, pending before this Court, an appeal by Evangelical Development Programme, the Appellant, against the decision of the Industrial Relations Court awarding the respondent, Mahara Nyirenda, the sums of K730,269.00 as compensation and K15,226.56 as one month notice pay in an action for unfair dismissal. The matter is now before the court on an ***inter partes*** hearing for stay of execution of the order under appeal pending the outcome of the appeal. This hearing follows the direction of the Honourable Justice Manyungwa made on February 11, 2011, when he granted an ***ex-parte*** order of stay to the appellant.

There is a litany of case authorities on the law regarding the grant or refusal of stay pending an appeal. It is settled that as a general rule, a successful party to litigation is entitled to reap the fruits of the litigation even if there is an appeal pending and the clear case authorities on the point include **Re Annot Lyle** (1886) 11 PD 114 and **Wilson v Church** (No. 2) (1879) 12 Ch.D 454. It is, however, recognized that it is within the rights of the unsuccessful party to lodge an appeal and therefore its interests need to be safeguarded as well such that the court must also ensure that the appeal is not rendered useless or nugatory, as it were, if successful and this position is clearly enunciated in the cases of **Barker v Lavery** (1885) 14 OBD 769 and **Mhango v Blantyre Land and Estate Agency Limited** to10 MLR 55. The latter case is a decision of the highest court in this country, the Malawi Supreme Court of Appeal and has been referred to by counsel for the appellant in his written skeleton arguments. In short, therefore, the court can properly grant stay pending an appeal if satisfied that to refuse stay would have the net result of rendering the appeal nugatory if successful.

In the instant case, the appellant's case is that the respondent is a man of little means as such there is the likelihood that if the proceeds of the Industrial Relations Court order are paid to him before the determination of the appeal, he would not be able to pay back in the event of the appeal being successful hence stay should be granted. Counsel has cited the case of **Indebank Limited v George Khaki** MSCA Civil Appeal No. 35 of 2006 in aid of his case. On his part, counsel for the respondent's position is that the appellants themselves having made the respondent to be without means by dismissing him from employment cannot now turn around and say since the respondent has no means he should not be access the fruits of his litigation. In this respect, counsel relies on **City of Blantyre v Manda and Others** (1992) 15 MLR 114 in which the Court refused to grant stay of execution pending appeal notwithstanding that the respondents had no means as it was the appellants themselves who had rendered the respondents to be without means. The Court in arriving at the decision followed and was guided by the case of **Stambuli v. ADMARC** Civil Cause NO. 550 OF 1981 in which the Court refused to grant stay in favour of the defendants who had argued that the plaintiff would not be able

to repay proceeds of the judgment in his favour if their appeal would succeed as he had no means. The case had come about after the defendants had dismissed the plaintiff from employment. The Court in that case stated as follows:

> ***"In the particular case, ADMARC dismissed Stambuli, hence making him poor. Can the now turn around and say, 'Oh, Mr Stambuli, you are poor·? Such, in my view, would be uttery unjust"***

Counsel thus implores this Court to dismiss the appellant's prayer for stay of execution pending appeal.

The facts obtaining in this case largely resemble those in the **Blantyre City Council v Manda** case and indeed the **Stambuli v ADMARC** case. The principle these cases advocate has been religiously followed by this court over the years such that I would find the cases to be highly persuasive and I have no compelling reasons in this case to depart from them. Counsel for the appellant has drawn to the Court's attention that the case he relies on, that is, **Indebank Limited v George Khaki** earlier cited was decided by the Malawi Supreme Court of Appeal and therefore binding on this Court unlike the **Stambuli** and **Manda** cases which were decided by a court of equal jurisdiction to this Court and therefore not binding.

The **Khaki** case as decided by the Malawi Supreme Court of Appeal is quite distinguishable from the present case and indeed the cases of **Stambuli** and **Manda**. In the **Khaki** case the Court granted stay after finding that the appeal would be rendered nugatory if it would succeed. The Court found that the appeal would be rendered nugatory because if stay were to be refused the nature of the facts were such that the success of the appeal would require a re-hearing of the case before the lower court which the respondent, Mr. Khaki, would not be willing to pursue as he would have been paid the fruits of his litigation. The issue of the respondent's

impecuniosity did not at all feature in that case. The case would therefore not apply to the present matter. In the end result, the Court would apply the principle the **Stambuli** and **Manda** cases articulate and refuse to grant stay.

The appellants are ordered to bear costs of this application.

Pronounced in Chambers this day of March 25, 2011 at Blantyre in the Republic of Malawi.

H. S.B. Potani
JUDGE