JUDICIARY

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 1039 OF 2004

BETWEEN:

DAN KAMWAZA
t/a KAMWAZA DESIGN PARTNERSHIP.....APPELLANT

-AND –

THE REGISTERED TRUSTEES OF
MUSLIM ASSOCIATION OF MALAWI.....RESPONDENT

CORAM: THE HONOURABLE MR JUSTICE J. S. MANYUNGWA
Mr Chiwoni, of Counsel, for the appellant
Mr Chidothe, of Counsel, for the respondent
Mrs P. Mangison – Official Court Interpreter

RULING

Manyungwa, J

INTRODUCTION:

This is the respondent's application for an order staying execution of the judgement of Twea, J as he then was, made on 1st March, 2010 in which the learned judge entered summary judgement for the appellant in the sum of MK9,233,661.57 with interest as pleaded and costs. The application is made under Order 59 rule 1 of the Rules of the Supreme Court and is supported by an affidavit sworn by Mr Cassius Omar Chidothe, of Counsel for the respondent, who are the applicants in this matter herein. Counsel also filed skeleton arguments to buttress the respondent's case. The appellant, on the other hand, opposes the respondent's application for stay of execution and there is an affidavit in opposition sworn by Mr Daniel Chiwoni, of Counsel

for the appellants Counsel also filed skeleton arguments is support of the appellant's position.

THE RESPONDENT'S (APPLICANT'S) CASE

In his affidavit in support of the application for stay of execution Mr Chidothe deposed on behalf of the respondents that by a writ of summons issued on 14th April, 2004 the appellant brought the action herein against the respondent wherein the appellant claimed the sum of MK9,233,861.57 being money allegedly owed by the respondent in respect of alleged architectural and project management services allegedly rendered by the appellant to the respondent between 1994 and 2003, interest thereon at 3% above base bank lending rate from the date the said amount was allegedly due until payment and the sum of MK1,385,079.24 being collection costs. The deponent further states that on 25th May, 2005 the respondent duly served its defence on the plaintiff and that subsequently the appellant took out summons for summary judgement. The said summons was dismissed by the Registrar on 21st August, 2008 and that after the said dismissal, an appeal was lodged by the appellant to the judge in Chambers and that the same was heard by Twea, J as he was then, who subsequently delivered his ruling on 1st March, 2010 in the absence of the respondent and the appellant and the deponent depones further that the only time the respondent discovered about the said ruling having been delivered was on 18th March, 2010 when the respondent got a letter from the appellant's Counsel to which was attached the said ruling and which letter gave the respondents three days in which to pay the principal sum of MK9, 233,661.57 or risk execution. The deponent states therefore that the respondent being dissatisfied with the said judgement lodged an appeal against the said judgement without first seeking the leave of the court as is required under Section 21 of the Supreme Court of Appeal Act[1] as is evident from exhibit **"COC1"** and **"COC2"** respectively. The deponent further states that the respondent subsequently applied for and was duly granted an order ex – parte staying execution of the said judgement for 7 days within which the respondent had to file an inter – partes application for stay. It is further stated by the respondent that the respondent subsequently filed an inter – partes summons for stay of execution pending appeal and at the time scheduled for the hearing of the summons, Counsel Mr Felix Mipande who appeared for the respondent withdrew the summons upon discovering that leave to appeal had not been obtained. The deponent however now states that the anomaly has since been rectified as the

[1] The Supreme Court of Appeal Chapter 3:01 of the Laws of Malawi.

respondent has now applied and has been granted leave to appeal on 29th April, 2010 by my brother Kamwambe, J. The deponent contends that the appeal herein has a high likelihood of success as is evident from both the Notice of Appeal and the Grounds of Appeal filed on 29th April, 2010. The deponent further contends that the amount involved is huge and that the appellant will not be able to repay the respondent in the event of the respondent's appeal being successful and thus the appeal would be rendered nugatory. The deponent therefore prayed that the judgement herein dated 1st March, 2010 be stayed pending the determination of the appeal.

THE APPELLANT'S AFFIDAVIT

As stated earlier, the appellant opposes the respondent's application to stay execution of the judgement. In his affidavit in opposition to the summons herein, Mr Chiwoni, of Counsel deposed that the defendants obtained an order on 23rd March, 2010 ex – parte staying execution of the judgement pending an inter – partes hearing for stay of execution. The deponent further states that he attended court on the 19th of April, 2010 for an inter – partes hearing for stay of execution before my learned brother judge Kamwambe, at which the respondents withdrew the said summons for stay of execution on the basis that they no longer wished to prosecute the appeal against the said judgement as they wished to settle the matter. The deponent therefore contends that it is not true that the respondents withdrew the summons for stay of execution on the basis that leave to appeal had not been obtained as has been alleged in Mr Chidothi's affidavit at paragraph 11. The deponent further states that the appellant waited upon the respondent to make an offer for settlement of the matter out of court, and seeing that no such offers was forthcoming, the deponent's firm wrote a letter to the respondent's legal practitioners, a Messrs Max & Edine on the 28th of April, 2010 asking how the respondents intended to settle the matter herein following a commitment they had made before the court on 19th April, 2010. The deponent exhibited exhibit **"DC1"** being a copy of the said letter of 28th April, 2010.

The deponent therefore stated that the appellant was therefore surprised that instead of receiving a response from the respondents to the appellant's letter of 28th April, 2010 they were served with another application for stay of execution by the respondents this time around taken out by Messrs Chidothe and Company, who are legal Counsel for the respondents. The deponent therefore contends that the respondent having earlier on made a plea to settle the matter out of court, and the appellant having refrained from further

proceedings it is not open now to the respondent to make a fresh plea for stay of execution and so the deponent contends that this application is an abuse of process and should not be entertained. The deponent therefore prayed for the dismissal of the respondent's summons.

ISSUE(S) FOR DETERMINATION

The main issue(s) for the determination of the court are whether or not in the circumstances of the case, the court should grant the stay of execution of the judgement herein as prayed for by the respondents and their legal practitioners or whether the court should dismiss the respondents' summons as was submitted by the appellant's and his legal practitioners.

THE LAW

We must at the outset, state the law which, we think, is currently well settled. The law is settled that an appeal does not operate as a stay of the execution of the order or judgement appealed against except to the extent that the Court below or the Court Appeal otherwise directs. It follows therefore that service of the Notice of appeal, and setting down the appeal does not by itself, have any effect on the right of successful party to act on the decision in his favour and to enforce the judgement or order of the Court below. If an appellant wishes to have a stay of execution of the judgement he or she must make an express application 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 Annot Lyle***[1]. 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 the Supreme Court. Besides the Supreme Court of Appeal in the case of the ***Anti – Corruption Bureau V Atupele Propeties Limited***[2] as per the judgement of Honourable Tambala, JA, succinctly stated applicable law on the topic on pages 5 and 6 as follows:

> *"I must now revert to the law relating to the stay of execution of court's judgements. There are clearly four principles. The first is that it lies in 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*

[1] *The Annot Lyle* (1886) 11P, 114 at 116 CA

[2] *Anti – Corruption Bureau V Atupele Properties* MSCA Civil Appeal Number 27 of 2005

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 be utterly unjust".

The cases of ***City of Blantyre V Manda***[1], ***Chilambe and Select and Save V Kavwenje***[2] ***and National Bank of Malawi V Moyo***[3] support this position. You can also see the case of ***Donnie Nkhoma V National Bank of Malawi***[4] In the case of ***City of Blantyre 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 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 granting the order for 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, seems to suggest that evidence showing that there was no probability of getting the damages back if 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 in this context agree with the learned judge in the **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 for 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. In the case of ***Nyasulu V Malawi Railways Ltd***[5]

---

[1] ***City of Blantyre V Manda*** Civil Cause No. 1131 of 1990
[2] ***Chilambe and Select and Save V Kavwenje*** Civil Cause No. 164 of 1993
[3] ***National Bank of Malawi V Moyo*** MSCA Civil Appeal No. 25 of 2007
[4] ***Donnie Nkhoma V National Bank of Malawi*** MSCA Civil Appeal No. 32 of 2005
[5] ***Nyasulu V Malawi Railways Ltd*** [1993] 161 MLR394

their learned Lordships Unyolo JA, Msosa JA and Mbalame JA held in dismissing the appeal that:

> *"in weighing up the general rule that interference with the fruits of a successful litigant should not be encouraged against the possibility that a successful appeal may prove nugatory in the absence of a stay of execution, the final question was a discretionary one for the court to decide and dependant on peculiar circumstances of each case".*

In the instant case, taking into account all the affidavit evidence and regard being had to the persuasive legal arguments of both learned Counsel, for which the court is indebted, the position ought to be and indeed appears as follows: In determining whether the respondent has established before me any special circumstances to warrant the grant of an order for stay of execution of the judgement herein the court must have regard to all factors of the case. It has been contended by the respondents that the amount involved is huge and that if the money owing on the learned Twea, J's judgement is paid, the appellant would not be in a position to repay or, pay back the money in the event of the appeal being successful and that this would have the result of rending the respondent's appeal nugatory. According to the case of ***Baker V Lavery***[1], which we think is very illuminating on this point that evidence must be shown that there was no probability of getting back the money awarded under a judgement would constitute a special circumstance, which would influence a court to grant a stay of execution. We wish to say that we are in full agreement with this statement.

CONCLUSION

In these circumstances and on the basis of the foregoing, we are satisfied that the respondent has ably demonstrated that the appellant, if paid the money owing under a judgement debt, would, in the event of the appeal being successful not be in a position to repay or pay back the money. Consequently, we grant the respondent a stay of execution of the judgement that was delivered by Twea J, as he then was, on 1st March, 2010. The resultant Garnishee Order is also set aside. This stay is granted on the conditions that the respondent do pay the sum of MK1, 000,000.00 monthly into court the first payment to be made on 1st April, 2011, and thereafter to pay MK1, 000,000.00 monthly on every 30th of the month until the monies

[1] ***Baker V Lavery*** (1885) 14 QBD 769

owing under the said judgement are fully paid into court. Secondly, the respondent is ordered to have the appeal set down to be heard within the next three months from the date of this order.

COSTS

As regards costs these normally follow the event, however in the circumstances of this case, we are of the considered view that perhaps it would be fair if each party were ordered to pay their own costs.

Made in Chambers this 30th day of March at Principal Registry, Blantyre.

Joselph S. Manyungwa
JUDGE