



**JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY**

**MISCELLANEOUS APPLICATION NO 42 OF 2014**

**BETWEEN:**

**ELVIS BAULENI ..... 1<sup>ST</sup> APPLICANT**

**BIKO THINDWA ..... 2<sup>ND</sup> APPLICANT**

**RITA MAKWANGWALA ..... 3<sup>RD</sup> APPLICANT**

**-AND-**

**SUNBIRD TOURISM LIMITED ..... RESPONDENT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

Gondwe, of Counsel, for the Applicants

Mbeta, of Counsel, for the Respondent

Mrs. D. Mtegha, Official Interpreter/Recording Officer

Date of hearing: 7<sup>th</sup> August 2014

Date of judgment: 25<sup>th</sup> September 2014

**Kenyatta Nyirenda, J.**

**ORDER**

There are two applications in this matter. On 24<sup>th</sup> July 2014, the Respondent took out an Ex-parte Summons for an order staying execution of an order by the Industrial Relations Court sitting at Blantyre (hereinafter referred to as the "lower court") delivered on 23<sup>rd</sup> July 2014 awarding the Applicants K77,348,076.92 as

compensation for unfair termination of employment. I granted the stay on the condition that the Respondent file inter-parte summons for stay of execution pending appeal within 14 days from 24<sup>th</sup> July 2014.

The second application was made by the Applicants. On 29<sup>th</sup> July 2014, the Applicants filed with the Court an Ex-parte Summons for an Order Discharging Order for Stay of Execution and I ordered the summons to come inter-parte on 7<sup>th</sup> August 2014.

When the matter came for hearing before me on 7<sup>th</sup> August, 2014, the parties agreed to argue at the same time the two summonses, that is, Inter-parte Summons for an Order of Stay of Execution of Judgment Pending Appeal and Inter-parte Summons for an Order Discharging Order for Stay of Execution Pending Appeal. I heard the parties and reserved my ruling. I now proceed to render the ruling.

### Facts

The facts leading up to these two applications can be briefly stated. The Applicants commenced proceedings for unfair termination of employment in the lower court and the parties on 13<sup>th</sup> August 2013 executed a consent order whereby judgment was entered in favour of the Applicants and compensation was to be assessed within 14 days thereof. By its order on assessment of compensation dated 18<sup>th</sup> July 2014, the lower court awarded the Applicants the sum of K77,348,076.92.

The Respondent's application is supported by an affidavit sworn by Mr. Francis Kaduya. It might be useful to set out the material part of the affidavit-

- "7. **THAT** the Respondent is therefore desirous of appealing against the whole judgment on the following grounds-
- 7.1 *That the Order of payment of Compensation to the 2<sup>nd</sup> Applicant up to the time of Retirement is without legal basis.*
  - 7.2 *That the Court did not consider or give due weight to the mitigating factors and the period each employee had worked for the Respondent.*
  - 7.3 *That the Court erred in boosting the awards to the Applicants when no evidence was adduced to that effect.*
  - 7.4 *That the amount of award to the Applicants is against the weight of evidence.*
  - 7.5 *That the Assistant Registrar had no jurisdiction to determine and make the award herein and therefore the award is a nullity.*



8. ***THAT** the appeal herein has merit and the Applicants are people who cannot pay the said amount of money if the appeal is successful hence the need to stay its execution.*
9. ***THAT** an application was made to the Industrial Relations Court but the Assistant ordered that the application should be brought inter-partes. However, we were not confident that the application would be heard prior to the five days period the Respondent was given within which to pay the applicants."*

The Respondent's application is opposed by the Applicants and the Applicants actually, as already stated, filed an application to have the order for stay of execution discharged.

### Submissions

Counsel Mbeta, on brief from Messrs Knights & Knights, submitted that are three main grounds for granting a stay in the present case. Firstly, it was his contention that the Applicants would be unable to pay the money if the appeal is successful in that-

- “5.2.1. *The 1<sup>st</sup> Applicant was awarded MK28,466,270.00 as compensation for unfair dismissal. However, this person earns about MK900,000 per month as salary. It is therefore; hard to expect this person to pay back MK28,466,270 should the appeal be successful. It has not been shown that he has alternative means of making money. It would be prudent for the Court to stay the execution of the judgment in order not to put this applicant in an awkward situation where he has to pay back the money should the appeal be successful.*
- 5.2.2. *The 2<sup>nd</sup> Applicant was awarded MK42,068,288.92. This Applicant is not employed at the moment. Once this person gets the money, chances are he will use the money for his survival and will not be in a financial position as to repay this much should the appeal be successful. The Court would do greater good by staying the execution of the judgment so that this Applicant should not be put in that unfavourable situation of having to pay back the money if the appeal is successful.*
- 5.2.3. *The 3<sup>rd</sup> Applicant was awarded MK6,301,830.00. This Applicant is currently working for Southern Region Water Board. Her salary has not been mentioned neither has her position. Without her means of making money properly outlined, it looks rather that this person is not in a position to repay the money should the appeal be successful. So, it would also be in the best interest of this Applicant if he does not receive the execution is stayed so that this Applicant should not suffer the humiliation of being asked this money should the appeal be successful."*



appeal. He submitted that it was not enough for the Respondent to make a mere bare assertion regarding the Applicants' alleged impecuniosity. He further argued that the Respondent bore the onus to prove the Applicants' inability to pay.

Thirdly, Counsel Gondwe submitted that courts avoid unconscionable, unjust or inexpedient result even where a successful party is impecunious. He cited **AR Osman and Co v Nyirenda (1995) 1 MLR 13** where the Supreme Court of Appeal said-

*"We have also considered whether it would all the same be 'utterly unjust' or 'unconscionable' or 'inexpedient' to grant a stay in this case. In attempting to answer the question we have borne in mind the fact that the present case is not a case of debt recovered so as to restore the status quo nor is it a case of wrongful dismissal raising matters as those that caused concern in the Stambuli case, above mentioned. It is also noteworthy that the appellants have paid the K35 000 into court and the money has been deposited in an investment account where it is earning interest. On these facts we are unable to say that granting a stay would be 'utterly unjust' or 'unconscionable' or 'inexpedient'"*

Counsel Gondwe contended that the present case being an employment matter and a money judgment, it would be utterly unjust, unconscionable and inexpedient to stay execution as this would ultimately deny the Applicants the fruits of their litigation that started in 2011.

### Analysis

I have carefully perused all documents on the Court file, including the affidavits and written submissions filed by the parties, and listened to their counsel's oral submissions.

The legal principles which guide a court when considering an application for a stay of execution of judgment pending appeal are very clear. The general rule is that the Court does not make a practice of depriving a successful litigant of the fruits of his or her litigation: see **J.Z.U. Tembo v Gwanda Chakuamba**, supra, **Re Annot Lyle (1886) 11 PD 114** and **Wilson v Church (No.2) (1879) 12 Ch.D 454**. However, the Court will grant stay of execution of a judgment or order when it is satisfied that there are good reasons for doing so: **Attorney General v Emerson (1889) 24 QBD 56**. A Court would also order stay of execution pending appeal where it is satisfied that failure to order a stay would render the appeal nugatory: **Mhango v Blantyre Land and Estate Agency Limited 10 MLR 55** and **Barker v Lavery (1885) 14 QBD 769**. Further, a Court will order stay of execution



pending appeal when it is satisfied that the appellant would suffer loss which could not be compensated in damages: See paragraph 59/13/1 of the RSC.

In the present case, the Respondent's case boils down to two grounds, namely, (a) that the Applicants are persons of little means and as such, in the event of the appeal being successful, they will be unable to pay back any damages paid to them and (b) that the new approach, termed "the broad approach" requires the Court to grant the application if the Defendant is able to satisfy the court that without a stay of execution, he will be ruined.

Regarding the first ground, the onus lied upon the Respondent to demonstrate that the Applicants will not be able to pay back the compensation awarded them by the lower court. In **Anti-corruption Bureau v Atupele Properties Ltd**, supra, Tambala JA, made the following pertinent observation-

*"First it [stay of execution] is within the discretion of the Court. Secondly that the general rule is that the Court shall not interfere with the right of a successful party to enjoy the fruits of litigation. Third where a respondent would be unable to pay back 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 pay back. The duty lies on the applicant to establish the respondent's lack of capacity to pay back." - [Emphasis by underlining supplied]*

The first ground has to fall by the wayside because the Respondent has failed to discharge the burden of demonstrating that the Applicants lack capacity to pay back. I have read and re-read the affidavit in support of the application and all I see are assertions not backed by evidence. In this regard, it may not be out of place to quote at lengthy from the dictum by Mkandawire, J., as he then was, in **Khoza t/a Parre Communications v MBC (1999) MLR 134** at pages 135 and 136-

*"...the plaintiff has submitted that an appeal is not a stay of execution and the court should not make the practice of depriving a successful litigant of the fruits of its judgment. He submits further that a Court should not order (sic) a stay when (Khoza, supra) exceptional circumstances have been shown. He cited the case of Venetian Blind Specialists Ltd vs Bridge Shipping (Malawi) Limited Civil Cause No. 208 of 1984 (unreported). In that case the Court dismissed the application to stay execution because there was no affidavit. In the present case, there is an affidavit, but the assertion that the plaintiff will not be able to pay back the money has not been substantiated.*

*The general principle as stipulated under Order 59/13 of the Rules of the Supreme Court is that an appeal does not operate as a stay and the court does not make a practice of depriving a successful litigant of fruits of his litigation and locking up funds to which he is prima facie entitled. The court may however order that there are good reasons for doing*



so. *Where the appeal is against an award of damages, the long-established practice is that a stay will be granted only when the appellant satisfies the court that there will be no reasonable prospects of his recovering them in (Khoza, supra) the event the appeal succeeding – see Baker vs Lavery [1845] 14 QBD 769 CA. This requires the appellant to give good reasons why he believes that once the damages are paid, there is no prospect of recovering them in the event of the appeal succeeding.*

*In the present case, all the defendant has done is to make a bare assertion which is not supported by any facts. The judgment in the case of Baker v Lavery is very short. Lord Selborne LC said in his brief judgment.*

*“The defendant is not entitled to have the application granted as a matter of course. Evidence ought to have been adduced to show that the plaintiff would be unable to repay the costs if he should be unsuccessful before the House of Lords.”*

*In the case of Baker v Lavery, Venetian Blind Specialist v Bridge Shipping (Malawi) Limited (supra) and The Anoo v Lycle (1886) 11 PD 114 no affidavit was made in support of the application. But if it may asked; what is the difference between a case in which there is no affidavit and a case in which there is an affidavit which tells you nothing. In both cases, the application must fail because no good reasons or no special circumstances have been given why I must depart from the general principle. Where no special circumstances have been given a court is entitled to assume that if the damages are paid to the plaintiff, he will be able to pay back in the event of the appeal succeeding.” – Emphasis by underlining supplied*

In trying to get a full appreciation of the second ground, it might be useful to set out in full the relevant parts of the Respondent’s written submissions-

“4.2.1. *Initially courts considered the probability of the respondent paying back the money if the appeal is successful. This is seen in most of the Malawian cases above as well as the old English cases. One just needs to look at the case of AR Osman cited above to appreciate this. This view as used in the AR Osman case cannot be relied on in the current trend of the law.*

4.2.2. *However, around the 1990s in England, a school of thought emerged which viewed that, such a limited approach was rather too stringent to be realistic. Staughton LJ in Linotype-Hell Finance Limited v. Baker had some words for the old English cases, which some have been relied on by the Applicants. He put it as follows:-*

*“In The Supreme Court Practice 1991 vol. 1 para 59/13/1 there are a large number of nineteenth century cases cited as to when there should be a stay of execution pending an appeal. At a brief glance they do not seem to me to reflect the current practice in this court; and I would have thought it was much to be desired that all the nineteenth century cases should be put on one side and that one should concentrate on the current practice.”*

4.2.3. *The learned Judge then went on to stay what the current trend should be. He stated it like this:-*



*"where an unsuccessful defendant seeks a stay of execution pending on appeal to the court of appeal, it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success. The old rule that a stay of execution would only be granted where the appellant satisfied the court that if costs and damages were paid there would be no reasonable prospect of recovering them if the appeal succeeded is now far too stringent a test and does not reflect the court's current practice".*

4.2.4. *This is what we have termed 'the broad approach.' What comes out clearly in this is that Courts should not just dismiss application for stay of execution because of one consideration that is reasonable prospect of recovering damages when appeal is successful.*


4.2.5. *Courts in Malawi have refused stay of executions only on this basis. This practice seems to be too stringent and does not reflect current trends in the law. Courts should be more prepared to grant stay of execution where the appeal shows some degree of success and where the appellant would lose a lot if the stay is not granted."*

With due respect to Counsel Mbeta, I see nothing in the quoted passage which can be taken as representing a new approach and, for the record, I have yet to see a judgment of a court of record in Malawi where an application for stay of execution pending appeal was dismissed "*because of one consideration*". As I have sought to show herein, authorities abound for the legal position that the granting or refusal of an application for stay of execution pending appeal is made upon the Court's exercise of its discretion. In exercising its discretion, the court considers all the circumstances of the case. It weighs up the risks inherent in granting a stay and the risks inherent in refusing it. In short, the essential question is whether there is a risk of injustice to one or both parties if it grants or refuses a stay. This, however, being a judicial discretion, the discretion must be exercised based on legal principles and sound reasons, not on preference or convenience. I am unable to appreciate how such an approach can be termed "limited" or "too stringent". To the contrary, the approach must be commended for fostering flexibility.

### Conclusion

For the foregoing reasons, I am of the considered view that the application by the Respondent for a stay of execution of an order by the lower court is devoid of merit. In the result, it is accordingly dismissed with costs to the Applicants.

Pronounced in Chambers this 25<sup>th</sup> day of September 2014 at Blantyre in the Republic of Malawi.

  
Kenyatta Nyirenda

**JUDGE**