



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

**CIVIL APPEAL NO. 113 OF 2015**

**(Being Civil Cause No. 108 of 2015 in Principal Resident Magistrate Sitting at  
Blantyre)**

**BETWEEN:**

**HODGES CHATEPA ..... APPELLANT**

**-AND-**

**OLIVE CHATEPA (MRS) ..... RESPONDENT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

Mr. Lemucha, of Counsel, for the Appellant

Mr. Banda, of Counsel, for the Respondent

Ms. A. Mpasu, Court Clerk

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**ORDER**

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*Kenyatta Nyirenda, J.*

On 11<sup>th</sup> December 2015, the Appellant filed with Court an ex-parte summons for an order of stay of proceedings pending hearing and determination of an appeal [hereinafter referred to as “Summons for Stay of Proceedings”]. The application came before my sister Judge, Justice Dorothy nyaKaunda Kamanga. Her Lordship declined to grant the ex-parte summons and ordered that the summons come by way of inter-partes hearing on 14<sup>th</sup> December 2015. On the set hearing date, Her Lordship recused herself from handling the case.

For reasons which appear presently, it is necessary to reproduce the Summons for Stay of Proceedings *in extensio*:

***“INTER-PARTE SUMMONS FOR AN ORDER OF STAY OF PROCEEDINGS  
PENDING HEARING AND DETERMINATION OF THE APPEAL  
(Pursuant to the Inherent jurisdiction of the Court)***

***LET THE CONCERNED PARTY attend the Judge in Chambers .... on the hearing of an application on the part of the Appellant for an order staying proceedings herein pending hearing and determination of the appeal filed herein.***

***TAKE FURTHER NOTICE that the affidavit of TONY MICHAEL LEMUCHA annexed hereto shall be read in support of the application.***” – Emphasis by underlining supplied

The Summons for Stay of Proceedings is supported by an affidavit sworn on 11<sup>th</sup> December 2015 by Mr. Tony Michael Lemucha [hereinafter referred to as the “Appellant’s Affidavit”].

The Summons for Stay of Proceedings is contested by the Respondent and there is an Affidavit in Opposition thereto, sworn by Counsel Banda on 14<sup>th</sup> December 2015 [hereinafter referred to as the “Affidavit in Opposition”].

## **FACTS**

In as much as is necessary for purposes of the Summons for Stay of Proceedings, the relevant facts can be briefly stated as follows.

The Respondent commenced an action under Civil Cause No. 108 of 2015 in the Chief Resident Magistrate Sitting at Blantyre (lower court) seeking a protection order against domestic violence. The lower court granted an interim protection order on 5<sup>th</sup> November, 2015 [hereinafter referred to as the “1<sup>st</sup> Ruling”] in the following terms:

- “i) That the applicant (sic) should vacate the matrimonial residence forthwith.*
- ii) That he gets his personal effects from the matrimonial home through his lawyers.*
- iii) That he should continue providing for the home and maintenance of the children through payment of fees and upkeep.”*

The Appellant made an inter-partes application to the lower court to set aside or stay the interim protection order obtained by the Respondent and on 4<sup>th</sup> December 2015 the lower court delivered its ruling dated 2<sup>nd</sup> December 2015 [hereinafter referred to as the “2<sup>nd</sup> Ruling”] which concludes as follows:

*“The court therefore makes the following orders pending the conclusion of the divorce proceedings between the parties:*

- The applicant shall vacate the matrimonial home and relocate to an alternative accommodation to be arranged by the respondent.*
- The applicant shall take only her personal belongings and leave all items of joint matrimonial property.*

- *The custody of the underaged daughter shall be with the applicant.*
- *That the respondent shall continue providing for and maintaining the applicant and the children through payment of fees and upkeep.*
- *The parties shall not communicate except through their respective lawyers.*
- *The parties shall not indulge in any acts that constitute domestic violence under the Prevention of Domestic Violence Act.”*

On 8<sup>th</sup> December 2015, the Respondent filed with the lower court an ex-parte notice of application for a stay of execution of the 2<sup>nd</sup> Ruling pending determination of appeal or for variation of the said ruling. The lower court heard the application on the same day and granted a stay of execution of the 2<sup>nd</sup> Ruling. This effectively meant that the 1<sup>st</sup> Ruling was the operative one.

On 10<sup>th</sup> December 2015, the Appellant applied ex-parte for an order discharging and/or setting aside the order for stay of execution of the 2<sup>nd</sup> Ruling. The lower court refused the application on the ground that “the respondent has failed to arrange alternative accommodation for the applicant”. These words are endorsed on the draft “ORDER SETTING ASIDE ORDER FOR STAY OF EXECUTION”, a document prepared and filed with the lower court by Chagwamnjira and Company, legal practitioners for the Appellant.

The Appellant now seeks to resort to this Court with the same application and the reasons for doing so are contained in paragraphs 31 and 32 of the Appellant’s Affidavit:

- “31. THAT** the Appellant applied before the lower court for an order of stay of proceedings pending hearing and determination of the Appellant’s appeal herein and the lower court has indicated that the said application will be attended to on Monday 14<sup>th</sup> December, 2015. A copy of the summons for an order of stay of proceedings pending hearing and determination of appeal is now shown to me which I exhibit as “TML4.”
- 33. THAT** I believe that this will be too late since, as indicated by paragraphs 17 herein, the respondent has already instructed the Police and court marshals to evict the Appellant from the matrimonial home and the Appellant will be evicted any time from now.”

I have perused “TML4” referred to in the Appellant’s Affidavit and there is completely nothing therein to support Counsel Lemucha’s allegation that the lower

court had indicated that the application was to be heard on 14<sup>th</sup> December 2015. The

fact of the matter is that the lower court had refused the Appellant's application to set aside order for stay of execution. In the premises, paragraph 31 of the Appellant's Affidavit clearly contains falsehood calculated to mislead this Court.

It is trite that a person who makes an application to the court is under an obligation to the court to make the fullest and possible disclosure of all material facts within his knowledge and that if he does not make that fullest possible disclosure then he cannot obtain any advantage from the proceedings. Unless *uberrima fides* can be established, the court ought not go into the merits of the case, but simply say "We will not listen to your application because of what you have done": **Vitsitsi v. Vitsitsi [2002-2003] MLR 419 (SCA)** and **Koreia v. Designated School Board [1995] 2 MLR 649(HC)**. In light of the foregoing, the Appellant's Summons for Stay of Proceedings is dismissed.

In any case, and for the sake of completeness, the Summons for Stay of Proceedings was doomed to fail. It is the case of the Respondent that it is difficult for the Respondent to grasp the proceedings that the Applicant seeks to stay. The problems faced by the Respondent in this regard are well articulated in the "Affidavit in Opposition". Paragraphs 1 to 8 of the Affidavit are relevant:

- “2. THAT I was served with the Notice and Grounds of Appeal, the Inter-parte Summons for an Order of Stay of Proceedings Pending Hearing and Determination of the Appeal, the Affidavit in support and the Appellant's Skeletal Arguments. I am not however certain which proceedings are to be stayed.*
- 3. THAT the summons is about stay of proceedings herein pending hearing of the appeal. It is clear from the summons that the proceedings to be stayed are those in this particular cause.*
- 4. THAT the summons is about stay of proceedings herein pending hearing of the appeal. It is clear from the summons that the proceedings to be stayed are those in this particular cause.*
- 5. THE problem is that the Respondent is not aware of those proceedings in this Appeal Civil Cause that must be stayed. I cannot identify those proceedings.*

6. **THAT** the Affidavit in Support has brought more confusion in that it does not refer to the proceedings herein, but to proceedings in a different court altogether. The affidavit refers to different things and not to proceedings.
  
7. **THAT** the Appellant's Skeletal Arguments in support do not help either as these refer to a stay of execution pending appeal.
  
8. **THAT** according to the documents I have received from the Appellant herein I have tremendous difficulty as to exactly what I am supposed to respond to:
  - (a) Whether it is a stay of proceedings herein under Civil Appeal No. 113 of 2015 herein;
  - (b) If not the proceedings in (a) above, whether it is stay of proceedings in the lower court under Civil Cause No. 108 of 2015, which is not herein; and
  - (c) further if not those in (a) or in (b) above, whether the proceedings are a stay of execution under Civil Cause No 108 of 2015 in the lower court.”

Following from the foregoing, Counsel Banda submitted that the Summons for Stay of Proceedings has to fail on the grounds that (a) as a matter of fact, there are no proceedings under Civil Appeal Cause No. 113 of 2015 that can be stayed, (b) as a fact there is nothing else to prosecute under Civil Cause No. 108 of 2015 in the lower court in that the cause was about an application for a protection order, the lower court heard the parties and delivered its ruling.

I cannot agree more with Counsel Banda. In terms of the Summons for Stay of Proceedings, the Appellant seeks “an order staying proceedings herein”. Other than the appeal, the only proceedings before this Court relates to the Summons for Stay of Proceedings and it does not make sense for the Appellant to have these proceedings stayed pending the hearing of the appeal. Further, even if this Court were to give the Appellant the benefit of the doubt by assuming that the words “proceedings herein” in the Summons for Stay of Proceedings were inadvertently used in that he meant to have the proceedings in the lower court stayed, the Appellant's Affidavit is defective in that it does not identify the proceedings in the lower court that have to be stayed. Consequently, both the Respondent and the Court have been left to grope in darkness as regards the proceedings that have to be stayed.

All in all, I am satisfied that the Summons for Stay of Proceedings is frivolous and vexatious. It is, accordingly, dismissed with costs to the Respondent.

Pronounced in Chambers this 1<sup>st</sup> day of February 2016 at Blantyre in the Republic of Malawi.

**Kenyatta Nyirenda**  
**JUDGE**