



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL APPEAL NO. 21 OF 2015

(BEING CIVIL CAUSE NO. 132 OF 2015 BEFORE THE RESIDENT
MAGISTRATE COURT SITTING AT BLANTYRE)

BETWEEN:

DUNCAN SINGINI.....APPELLANT

AND

BERNADETA FRAZER.....RESPONDENT

CORAM: THE HONOURABLE JUSTICE MR. S.A. KALEMBERA

Mrs Amasi, of Counsel for the Appellant

Mr Chaponda, of Counsel for the Respondent

Miss Ngoma, Official Interpreter

RULING

Kalembera J

INTRODUCTION

This is an order on the Respondent's application to vacate the Order of Stay of Execution obtained herein. The application is supported by an affidavit sworn by Prosper Chaponda, of counsel for the Respondent, as well as skeletal arguments.



The Appellant has also filed an affidavit in opposition sworn by Phatuma Amasi, of counsel for the Appellant, as well as skeletal arguments.

BRIEF FACTS

The brief facts of this matter are not in dispute. The Appellant agreed to sell his car Mazda Bongo Minibus (unregistered) to the Respondent at a price of K2,150,000.00. According to the Sale Agreement (Ex "P 1") the Appellant was paid K1,340,000.00, and another payment of K460,000 was supposed to be made within two weeks and the vehicle would be collected by the Respondent. The balance of K350,000 to be paid in three months' time. Then the Respondent kept on asking for extensions within which to make the other payments. Later the Respondent claimed for the refund of her money with interest. The lower court entered judgment for the Respondent with interests. The Appellant filed summons to pay debt by installments as well as an appeal against the award of interest.

ISSUES FOR DETERMINATION

The main issue for determination is whether or not the order of stay herein be vacated.

LAW AND ANALYSIS

It is settled law that the court would only grant a stay order upon being satisfied that there are good grounds for doing so, as the court is not in the habit of or does not *'make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which he is prima facie entitled pending an appeal'* –(Ref: **The Annot Lyle (1886) 11P. 114 at 116; Monk v Bartram (1891) 1 Q.B. 346**). However the court is likely going to grant a stay where the appeal would otherwise be rendered nugatory –**Wilson v Church (No.2) (1879) 12 Ch.D. 454 at 458, 459, CA**, or the appellant would suffer loss which would not be compensated in damages. It must further be noted that the question whether or not to grant a stay is entirely in the discretion of the court –**Becker v Emerson (1889) 24 Q.B.D. 56 at 58, 59**. The court has to consider the unique facts of each case in exercising its discretion whether to grant a stay order or not.

A successful litigant as has been held, deserves to enjoy the fruits of his litigation, and a dissatisfied litigant has a right to lodge an appeal. It is the responsibility and duty of the court to ensure that, if an appeal is successful, it is not merely rendered academic. Where a successful litigant won't be able to pay back damages received in the event of the appeal being successful, a stay order ought to be granted. However are these general principles absolute? In the case of **The Anti-Corruption Bureau v Atupele Properties Limited, MSCA Civil Appeal No. 27 of 2005** (unreported) Tambala, JA gave this important guidance on the applicable law:

"I must now revert to the law relating to stay of execution of courts judgments. There are clearly four principles. The first is that it lies within the broad discretion of the court to grant or refuse an application for stay of execution. The second principle is that as general rule the court must not interfere with the successful party's right to enjoy fruits of 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 judgment 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 examining the facts of the case, an order of stay of execution would be "utterly unjust." The cases of **City of Blantyre v Manda & Others , Civil Cause No. 1131 of 1996**, **Chilambe & Select and Save v Kavwenje, Civil Cause No. 1645 of 1993**, and **National Bank of Malawi v Moyo, MSCA Civil Appeal No. 25 of 2003** support this position. In the case of **City of Blantyre v Manda (supra)** Unyolo J, as he then was, stated as follows:

"I think it is always proper for the court to start from the viewpoint that a successful litigant ought not be deprived of the fruits of his litigation and withholding monies to which *prima facie*, he is entitled. The court should then consider whether there are special circumstances which militate in favour of granting the order of stay and the onus will be on the applicant to prove or show special circumstances. The case of Barker v Lavery which I have cited above,

seems to suggest that evidence showing 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."** (emphasis added).

In the matter at hand, would it be just to vacate the order of stay. The brief facts of the case show that the Respondent was in breach of the sale agreement. She did not adhere to the conditions of the sale agreement in that she failed to pay the balance as agreed. Yet she wanted the Appellant to deliver possession of the vehicle to her despite her breach. Having been in breach, she turned around and sued the Appellant claiming a refund of the deposit she had paid with interest. In other words, the Respondent having been the one in breach of the sale agreement, is now benefitting from her breach in that the Appellant was condemned to refund the money with interest. The Appellant did not deliberately keep the Respondent out of her money, rather the money was rightly received as a deposit towards the purchase of the car by the Respondent. It is thus, likely that the Appellant will succeed on appeal as regards the interest.

I further agree with the Appellant, that in the event that the appeal succeeds, the Respondent has shown that she might not be in a position to pay back the money(interest), if she were to be paid by her failure to complete the payments of the remaining installments. Thus, the appeal would be rendered nugatory.

CONCLUSION

On the facts before me, I am inclined to conclude that the Respondent must not be allowed to benefit from the mess she herself created by breaching the terms of the sale agreement. It would be grossly unfair and unjust, in the circumstances, to vacate the order of stay. It has been demonstrated that if the appeal is successful it might be rendered nugatory. In the circumstances am inclined to

exercise my discretion in favour of the Appellant. The Respondent's summons to vacate the Order of Stay herein, is consequently dismissed.

Costs are in the discretion of the court. Having considered the peculiar circumstances of the parties, I hereby make no order on costs.

PRONOUNCED this 30th day of May 2016, at the Principal Registry, Blantyre.



S.A. Kalembera

JUDGE