



**JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL APPEAL NO. 30 OF 2015**

**BETWEEN:**

**NAMALETA CHIMPHEPO ..... 1<sup>ST</sup> APPELLANT**

**DOMINICO CHIMPHEPO ..... 2<sup>ND</sup> APPELLANT**

**-VS-**

**BURTON KACHIZA ..... RESPONDENT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

Mr. Wame, Counsel for the Appellants

Mr. Ulaya, Counsel for the Respondent

Ms. A. Mpasu, Court Clerk

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**ORDER**

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*Kenyatta Nyirenda, J.*

This is the Respondent’s Summons for an order setting aside an order of stay of execution pending appeal [hereinafter referred to as the “Respondent’s Summons”].

The facts leading up to the Respondent’s Summons can be briefly stated. The Respondent commenced his suit in the Second Grade Magistrate Court Sitting at Chikhwawa (lower court), being Civil Cause No. 112 of 2014, complaining that the Appellants were in unlawful possession of his land. On 18<sup>th</sup> February, 2015, the lower court delivered its judgment in favour of the Respondent and it ordered the Appellants to vacate the said land. On 29<sup>th</sup> May, 2015, the Appellants were granted an order staying execution of the judgment of the lower court pending the hearing and determination of the appeal against the decision of the lower court [hereinafter referred to as the “Stay Order”]. The Stay Order was granted subject to the following two conditions:



“2. *The Appellants do expedite the prosecution of their appeal herein by taking necessary steps in accordance with the rules of procedure.*

3. *Any application made in this matter by any party should be brought inter partes.*”

In terms of the affidavit in support of the Respondent’s Summons, sworn by Mr. Louis Ulaya, the Respondent seeks to have the Stay Order discharged on the ground that the Appellants have done nothing to prosecute or expedite the prosecution of the appeal since obtaining the Stay Order. The Respondent believes that the Appellants are merely using the Stay Order to deprive the Respondent the fruits of his successful litigation in the lower court

The Appellant is opposed to the Summons and it might be useful to set out the material part of the affidavit in opposition, sworn by Mr. Wame Pearson:

“3.1 *It is incorrect that the Appellants have not taken steps in the prosecution of the matter as alleged in the said affidavit. To the contrary the Appellants on numerous occasions have pushed for the record of Appeal to be produced so as to have the Appeal herein heard.*

3.2 *The Appellants have always been and are very much interested in having the Appeal heard and determined so that the matter is put to rest once and for all.*

3.3 *It is also prejudicial to the Appellants if the appeal herein is not heard as the same brings about uncertainty over the occupation of the said piece of land.*

3.4 *Further, I believe that it is in the interest of both parties that the status quo remains as the Respondent intends to build thereon hence if the stay order herein is vacated the Respondent would proceed to construct buildings thereon consequent which the Appellants would suffer irreparable loss should they succeed in the Appeal herein.*”

It seems to me that the Respondent’s Summons has to be determined within the context of Order 33 of the Subordinate Court Rules and Order 1 of the High Court Rules made under sections 59 and 29, respectively, of the Courts Act.

The Order 33 of the Subordinate Court Rules reads:

1. (1) *Appeals to the High Court shall be brought by giving notice of appeal in Form 26.*

(2) *The Appellant may appeal from the whole or any part of a judgment, and the Notice of Appeal shall state whether the whole or part only, and what part, of the judgment is complained of.*

(3) *The Notice of Appeal shall be instituted and filed in the proceedings in which the judgment appealed from was pronounced, and shall be filed within fourteen days from the day on which such judgment was pronounced. At the same time the Appellant shall pay the prescribed fee for such Notice.*

(4) *The Notice of Appeal shall be served by the appellant on all parties directly affected by the appeal or their legal practitioners respectively. It shall not be necessary to serve parties not so affected.*

2. (1) *When the appellant has complied with rule 1 of the Court appealed from shall prepare the requisite number of copies of the record comprising the pleading, the notes of evidence, the judgment appealed from, the documentary exhibits and any other relevant documents.*

(2) *As soon as the copies of the record are ready, the Court appealed from shall serve the appellant with a notice in Form 27.*

(3) *Upon request by the appellant and upon payment by the appellant of the cost of preparing the record the Court shall supply the appellant with one copy thereof*

(4) *Within fourteen days from the service upon him of the notice referred to in sub rule (2) the appellant shall prepare a Memorandum in writing setting fourth the grounds of appeal, and shall forward to the Court appealed from the number of copies of the Memorandum called for in the notice.*

3. *On receipt of the copies of the Memorandum of Appeal the Court appealed from shall prepare the Record of Appeal which shall consist of-*

(a) *the documents referred to in rule 2 (1); and*

(b) *the Memorandum of Appeal,*

*and shall forward the appropriate number of copies of the Record of Appeal to the Registrar of the High Court”*

On the other hand, Order 1 of the Rules of the High Court deals with appeals to the High Court from a subordinate court and rules 1 and 2 provide as follows:

*“1. On receipt of the copies of a Record of Appeal from a Subordinate Court the Registrar shall-*

(a) *give notice to the Appellant of the hearing fees payable in respect of the Appeal and demand payment thereof; and*

(b) *serve the Respondent or Respondents with the copy of the Record of Appeal*

2. *On payment of the hearing fees the Registrar shall enter the appeal and fix a date for the hearing thereof and shall give notice to the parties of the date so fixed.”*

It is clear that Order 33 of the Subordinate Court Rules and Order 1 of the Rules of the High Court place duties on the Appellant, the Subordinate Court and the Registrar of the High Court. The duties of the Appellant include preparing the Notice of Appeal in Form 26 of the Subordinate Court Rules, filing the Notice of Appeal within 14 days from the day of the judgment and serving the Notice of Appeal on the parties affected by the appeal.

Once the Appellant has complied with Order 33 rule 1, it becomes the duty of the lower court to prepare the required number of copies of the “Record of the Hearing”. After the “Record of Hearing” has been prepared, the lower court should serve the notice to that effect. The lower court, when requested and after the appellant has paid for the cost of preparing the ‘Record of Hearing’ shall supply the appellant with a copy of the ‘Record of Hearing.’ As soon as the Appellant supplies the Memorandum of Appeal, the lower court has a duty to prepare the “Record of Appeal” and the Memorandum of Appeal. Finally, the lower court has to send an appropriate number of copies of the ‘Record of Appeal’ to the Registrar of High Court.

On receipt of the Record of Appeal from the lower court, the Registrar is required to give notice to the Appellant of the hearing fees payable in respect of appeal and serve the Respondents(s) with the copy of the Record of Appeal. If the Appellant pays the hearing fee, the Registrar is supposed to enter the appeal and fix the hearing date and notify all the parties about the date.

Counsel Wame submitted that the Appellants did their bit under the rules by filing the notice of appeal. He thus contended that the Appellants should not be condemned for not taking steps which fall outside their purview. On his part, Counsel Ulaya argued that the Appellants were enjoined to expedite the prosecution of the appeal and, as such, it was not enough for the Appellants just to file a notice of appeal: they should have followed up with the lower court to ensure that the appeal record was prepared in time.

I am inclined to agree with Counsel Ulaya. The assertion by Counsel Wame that “the Appellants on numerous occasions have pushed for the record of Appeal to be produced so as to have the Appeal herein heard” was not supported by any evidence. There is nothing on Court record to show steps taken by the Appellants to expedite the prosecution of their appeal.

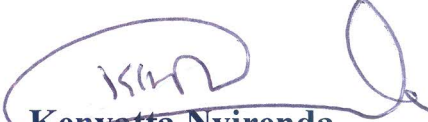
Almost twelve months have elapsed since the Appellants filed notice of appeal. I do not understand why it should take that long to have the record of appeal prepared. In the premises, I urge the Registrar (in liaison with the Chief Resident

Namaleta Chimphepo & Dominico Chimphepo v. Burton Kachiza

Kenyatta Nyirenda, J.

Magistrate) to ensure that the parties and his office make it possible to have this appeal heard not later than one month from today.

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



**Kenyatta Nyirenda**  
**JUDGE**