IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL APPEAL NUMBER 36 OF 2015

(BEING IRC NO. 175 OF 2015)

BETWEEN:

NATIONAL BUS COMPANY LIMITED.....APPLICANT

AND

MICHAEL JAMES BANDA & 53 OTHERS.....RESPONDENT

CORAM: THE HONOURABLE JUSTICE MR S.A. KALEMBERA

Mr Hara, of Counsel for the Applicant

Mr Chakuwawa, of Counsel for the Respondent

Miss Chimang'anga, Official Interpreter

RULING

Kalembera J

INTRODUCTION

This is an order on the Applicant's inter-partes summons for continuation of an order for stay of execution pending appeal. That the summons is supported by an affidavit sworn by Wanangwa Hara in support of the ex-parte summons for stay. The Respondent filed skeletal arguments in opposition. There is no affidavit in opposition, but at the hearing, the Respondent relied on the affidavit in opposition in the lower court. The Applicant also filed final submissions in support of summons for stay.

APPLICANT'S CASE

It is the Applicant's case as deposed by Wanangwa Hara, of counsel for the Applicant, that on or about 18th March, 2015 the Applicant were served with the Respondents' IRC Form 1 (statement of claim). On or about the 2nd of April, 2015 IRC Form 2 (statement of reply) was filed with the court and served on the Respondents. However, a notice of motion for leave to represent was not filed with the Court and the Respondent proceeded to enter a default judgment and subsequently a notice of assessment of compensation was issued against the Applicant. That on the date of the assessment, it was realized that the Applicant's legal representatives were not on record as they had not filed a Notice of Motion for Leave to Represent. The assessment went ahead in the absence of the Applicant's legal representatives.

That the Assistant Registrar dismissed the Applicant's application for stay of execution pending setting aside default judgment and also summons to set aside default judgment therein. The court further ordered the Applicant to compensate each of the 46 Respondents with the collective sum of **MK15,746,772.16.** The Applicants applied to the Registrar of the IRC for an ex-parte summons for stay of the decision pending appeal under Regulation 5A(1)(a) of the Industrial Court (Procedure) Rules. The application was entertained and dismissed by the Deputy Chairperson of the IRC stating that an appeal is not a ground for stay of execution unless the Appeal Court rules otherwise. That however, the jurisdiction in matters of stay at the IRC is exercised by the Registrar and not the Deputy Chairperson.

It has further been deposed that the Applicant is aggrieved by the decision of the Assistant Registrar and would like to appeal before the High Court of Malawi. That the Applicant's appeal has high probative chances of success. That the Applicant would suffer an irreparable loss and their appeal would be rendered superfluous in the event of success as the Respondents are clearly not in a financial state to pay back the money realized from the execution.

RESPONDENTS' CASE

It is the Respondents' case as deposed by Kayikani Chakuwawa, of counsel for the Respondents, that the (Applicants in the lower court), Respondents in this court, were at all material times employed on a permanent basis by the (Respondents in the lower court), Applicant in this court. On or around March, 2015 the Respondents were served with transfer letters to Chigumula, Mulli Brothers Limited Head Office without their consent. This is a different company altogether from the Applicant and there was/is no communication from the latter that it has been sold, transferred or otherwise disposed. And that the said transfer letters did not provide some relevant information. In view of the said matters the Respondents sued the Applicant on 18th March, 2015 claiming different reliefs. The Applicant herein filed no defence hence a default judgment was entered. Assessment proceeded despite that on the day the notice of assessment was filed it was discovered that there was a defence on the court file purported to have been filed some days earlier before the default judgment was entered. There was, however, no application for leave to represent. The Applicant, on day of assessment, came with counsel who decided not to attend the assessment.

In their application for stay, it is contended that the defence was filed on time and that it is a defence on the merits. Despite that, the Respondents contend that the following critical questions remain unanswered:

1. Why did they not file the application for leave to represent?
2. Why did they not take any step to find out what has happened to their defence when they were served with notice of assessment?
3. Why did they not apply for the stay before the assessment had taken place?
4. Why did they not attend the assessment on assessment day?

That it is clear that the Applicant deliberately allowed the default judgment and the assessment to pass. Lack of seriousness on their part should not be used to deny innocent litigants fruits of their litigation. That staying the execution at this stage would be very prejudicial to the Respondents as they have already spent a lot to reach this stage of the case. Some of them have been travelling as far as Mzuzu to prepare for their case. This despite that they were hit hard by the

dismissal as they were not paid anything at dismissal even their salary for the month they were dismissed. Furthermore, conducting assessment of almost 50 Respondents herein was a daunting task and a lot of time and energy was invested by the court. In the wake of lack of explanation from the Applicant as to why it had to let the assessment go without applying for the stay despite having been served with a notice of the assessment in good time makes the application herein an abuse of court process and a waste of court's time and resources. Furthermore, assuming that the default judgment herein was entered because there was no application for leave to represent that either does not make the default judgment irregular. It's trite that no counsel can represent a party at IRC without leave of the court. That it is therefore clear that the default judgment herein was entered when there was no defence on record on the court file and it is to that effect, a regular judgment. That the purported defence is not a defence on the merits and is a sham.

ISSUES FOR DETERMINATION

The main issue for determination is whether the order of stay of execution herein be continued or discharged pending appeal.

LAW AND ANALYSIS

I must state from the outset that I had directed at the end of the hearing that the Applicant must within 14 days file and serve their submissions on the Respondents. And that the Respondents to respond if need be within 7 days after being served. The Applicant filed their final submission but there is no proof that the same were served on the Respondents. No wonder that there is no response from the Respondents. In that regard, the Applicant's final submissions will not be considered. As regards the issues of stay 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 Cuase 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).

The court must therefore strive to use its discretion to come to a decision which is just and fair depending on the peculiar circumstances of each case. It is therefore not enough that since the successful litigant cannot pay back damages received then automatically a stay order ought to be granted. It remains the duty of the court to exercise its discretion on the facts before it, and come up with a just and fair decision. Thus, the court must avoid a situation where an employer unfairly dismisses an employee, and then tries to stop the employee benefitting from the damages arising from such unlawful dismissal just because the employee, the successful litigant, has be shown to be of no means. The court must do a balancing act and come up with a decision which as has been stated is not utterly unjust. In the matter at hand, there is a collective figure of **MK15,746,772.16** payable to the Respondents. The Applicant just claims that the Respondents would not be able to pay back in the event that the appeal is successful. However, the Applicant is falling short in that the Applicant has not demonstrated how each particular Respondent would not be able to pay back. The Applicant, as counsel for the Respondents has argued, ought to have brought evidence to prove that each particular Respondent would not be in a position to pay back the money in the event that the Applicant's appeal is successful. Without evidence as

to the impecuniosity of each Respondent it can only be speculative on the part of the court to decide that this particular Respondent cannot be able to pay back the money received per the schedule under Exhibit "WH 5". The Applicant ought to have led evidence showing that each particular Respondent would not be able to pay back their share of the money. Suffice to say though, that this was in a way a class action and as such the court must consider whether collectively the Respondents can pay back the money in the event that the appeal is successful. It is possible that others can pay back and others cannot pay back.

In the matter at hand, it is clear that had the Applicant been prudent, in the lower court, there would have been no default judgment and assessment of damages in the absence of counsel for the Applicant. If counsel for the Applicant had followed the rules of procedure applicable in the IRC, there would have been a statement of defence, acceptable in the IRC, on file. But due to some lapses, leave to represent was not sought and the statement of defence was therefore filed without such leave being sought and granted. It cannot therefore be said then that there was a defence on the merits when the default judgment was entered. And because counsel did not attend the assessment he missed an opportunity to explain to the court about the defence which was on the court file. However, it has been argued for the Applicant that the Applicant relied on sections 71(1) and 71(2) of the Labour Relations Act to address the informality of not filing the notice of motion for leave to represent, and the fact that the IRC shall not be bound by the rules of evidence in civil proceedings. And that in accordance with Rule 26(1)(a) of the Industrial Relations Court (Procedure) Rules, a statement of reply or defence was filed way before the default judgment was entered by the Applicants.

CONCLUSION

Having considered the peculiar circumstances of this matter, it is my finding that this was a class action against the Applicant and it is possible that not all the money can be paid back in the event that the appeal is successful. Furthermore, I have always held the view that clients must not suffer due to counsels' lapses in their handling of their clients' cases. All in all, this is a matter in which I am of the

considered view that it would be fair and just that I exercise my discretion in favour of the Applicant and that the stay order be maintained but with a condition. I consequently grant the application and continuation of the order of stay herein on condition that the Applicant pay into court the said sum of **MK15,746,772.16** within 14 days. I further order and direct that the said sum be kept in an interest earning account.

PRONOUNCED this 20th day of September 2016, at the Principal Registry, Blantyre.

S.A. Kalembera

JUDGE