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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS CIVIL CAUSE NUMBER 58 OF 2016

BETWEEN:

RASHID KASITO t/a SANWECKA TECH COMPANIONS APPELLANT

AND

JOHN NDAU

RESPONDENT

CORAM: JUSTICE M.A. TEMBO,

Mpombeza for the Appellant
Dzimphonje, for the respondent
Chanonga, Official Court Interpreter

ORDER

This is the order of this Court on the hearing of an application for continuation of an ex parte order staying execution of the decision of the Senior Resident Magistrate Court sitting at Zomba. The decision before the lower court was on the claim by the respondent to a sum of K400 198.05 being value of a lost cellphone which the appellant had contracted to repair for the respondent, damages for loss of use of the cellphone and K81 423.10 collection costs.

The facts of the matter are not complicated. The respondent had commenced his claim in this matter against the appellant before the lower court on 30th June 2015.



The appellant did not file a defence and a default judgment was entered on 22nd July 2015. A warrant of execution of the judgment was issued on 15th September 2015. The appellant on 15th September 2015 applied to set aside the default judgment. The hearing of that application was scheduled for 5th October 2015. The appellant did not prosecute his application. On 6th June 2016 the respondent eventually took out a notice for the matter to be tried and trial was set for 22nd June 2016. On that day the respondent's case was heard. Thereafter, the matter was adjourned to 30th June 2016 and the appellant undertook to file his defence by 27th June 2016 and to parade his witnesses at the hearing date set.

On 30th June 2016, the appellant's counsel did not appear for the trial. He also had not filed the appellant's defence. The respondent then applied that the lower court to enter judgment on the evidence on the record given that the appellant was only bent on obstructing the due administration of justice.

The lower court noted the procrastination of the appellant and concluded that it should proceed to determine the matter to prevent the appellant from denying the respondent speedy resolution of the matter.

The appellant then applied ex parte to this Court for an order staying execution of the lower court which was granted mainly on the appellant's contention that if a stay was not granted then the appellant's appeal will be rendered nugatory as the respondent is a man without means to pay back the judgment sum if the appellant's intended appeal succeeds. The appellant now seeks a continuation of the order staying execution.

The respondent contended before this court that although the appellant claimed that the respondent is a man without means he actually is a man of means and he can easily pay back the judgment sum in the event of the appellant's intended appeal being successful. The respondent contended further that the lower court was right to enter judgment in the circumstances where the appellant procrastinated and frustrated the due administration of justice.

This Court is conversant with the law on stay of execution. It is to the effect that successful litigants must enjoy the fruits of their litigation. The only time an order staying execution of a judgment will be granted is where the appeal has merit and is likely to succeed in the circumstances and there are good reasons for staying the

decision for instance where failure to stay the execution will render the appeal nugatory. Such as where the successful litigant will not be able to reimburse the judgment sum where an appeal is successful. See *Khoza t/a Parre Communications v Malawi Broadcasting Corporation* [1999] MLR 134.

This Court notes that the appellant might potentially have a meritorious appeal. However, the appellant was guilty of procrastination in his defence thereby frustrating the legal process before the lower court which is otherwise speedy. The respondent has suffered prejudice thereby. This Court cannot condone procrastination and obstructionist conduct at the bar.

Further, although the appellant claimed that the respondent is a man without means it is clear from the respondent's affidavit that he can easily pay back the judgment sum in the event of the appellant's intended appeal being successful.

There is therefore no good reason for staying the decision of the lower court in the circumstances where the appellant has been procrastinating in prosecuting his defence in the lower court and the respondent is a man of means who can pay back the judgment sum in the event that the intended appeal succeeds.

Consequently, this Court agrees with the respondent's contention and the order of stay granted by this Court ex parte is accordingly vacated with costs to the respondent.

Made in chambers at Blantyre this 6th September 2016


M.A. Tembo
JUDGE