



JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

MISCELLANEOUS APPLICATION NUMBER 82 OF 2016
(Being Civil Cause No. 46 of 2016, Midima Magistrate Court)

BETWEEN

JUDITH CHIMTENGO APPELLANT

AND

JAILOSI CHIMTENGO RESPONDENT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Masanje, of Counsel, for the Appellant
Mr. Kamkwasi, of Counsel, for the Respondent
Mr. O. Chitatu, the Court Clerk

ORDER

Kenyatta Nyirenda, J

This is an application by the Appellant for an order staying execution of two orders of the Midima Magistrate Court (lower court), dated 3rd May 2016 and 20th September 2016 respectively, pending appeal.

The application by the Plaintiff is supported by an affidavit sworn by Christopher Masanje and the relevant part thereof provides as follows:

- "2. THAT the Respondent went to court to claim repossession of the house in which the Appellant is living in; see the summons marked "EXPJ ". The claim was not for divorce.
- 3. THAT I am informed that the Respondent and the Appellant are or were husband and wife.
- 4. THAT I am further informed that the house in issue was bought when the parties herein were together as husband and wife and they stayed in it as their matrimonial home.
- 5. THAT I am also aware that the house was financed by a loan which the Respondent got from his employer and that there is a balance remaining to be paid.
- 6. THAT it is also said that the Respondent has married a second wife elsewhere leaving the



Appellant in the house with two children whom he does not support.

7. *THAT the court ordered that the parties herein are practically divorced when the petition before it was not for divorce and the court went ahead to make an order akin to the distribution of the interests in the house in question or a determination as to the ownership thereof and ordered the Appellant to vacate the house.*
8. *THAT the court also observed that at the time of the judgment the loan balance was about K4, 000, 000.00 an indication that the value of the house was beyond K2, 000, 000.00 which is the jurisdiction limit of the court. Further, the fact the house was used as security for the loan shows that the house is resting on registered land which is the ambit of the High Court.*
9. *THAT based on the above factors, the Appellant applied ex-parte for an order of stay of execution on 11th August and the order was granted.*
10. *THAT the order of stay was vacated on 20th September at the instance of the Respondent. I Exhibit the order of 20th September marked "EXP2"*
11. *THAT the court based its decision of 20th September on the fact that the Appellant received K2, 000,000.00 from the Respondent which the court ordered was in lieu of the Respondent's obligation to build a house for the Appellant and not the Appellant's share in the interest in the property. Moreover even if the K2, 000, 000.00 was for the construction of a house for the Appellant, a house cannot be constructed within three months without adequate money as the case herein.*
12. *THAT the court failed to consider the special circumstances that the Appellant pleaded that lack of jurisdiction is so special a factor for which an order for stay ought to be granted.*
13. *THAT further, the fact that the Defendant is living in the house with two children of the Plaintiff makes it more special that evicting them when they have nowhere to stay would cause irreparable humiliation which the three would not be compensated for considering it is the Defendant's husband doing that to his wife and children, people who ought to look up to him.*
14. *THAT it should however not be heard of the Respondent to say he paid K2, 000, 000.00 as the same was meant for the building of a house at the Appellant's home*

An obligation that has nothing to do with the Appellant's share in house in question.

15. *THAT the Respondent has also not been honouring the payment of the maintenance and the Appellant has been using the same money to feed the children, and take care of them.*
16. *THAT we have filed a notice of appeal with the lower court against the order of 3rd May 2016 and the appeal would be rendered fruitless if the order is not stayed, particularly the humiliation and breaching of trust obligations which cannot be compensated in monetary terms. I exhibit the notice of appeal marked "EXP3".*
17. *THAT the lower court further argued that the Respondent's job is at risk and therefore the balance of convenience lies in favour of evicting the Appellant yet the rights of the employer as a mortgagee towards the mortgagor are totally separate from the rights and the obligations of employer and employee and therefore employment rights cannot be threatened without remedy by the mortgage. "*

The application is opposed by the Respondent and he has filed an affidavit in opposition and the substantive part thereof reads:

- "3. THAT the Appellant misled the lower court (on ex-parte application for stay) by suggesting that I was still legally married to the Defendant at the time the court ruled on the issue of my house in Chilomoni in May, 2016.*
4. *THAT I repeat paragraph 3 hereof and aver that my marriage to the Appellant was annulled by the Blantyre Magistrate's Court in 2006. I attach and exhibit hereto a copy of the divorce certificate and mark it "JC 1 ".*
5. *THAT legally the house in question belongs to my employers, National Bank of Malawi as chargee and I only have some interest as chargor.*
6. *THAT it was only out of sympathy and love for my children that I allowed my former wife to come back into the house after I had divorced her. I had already remarried and relocated to Lilongwe all the time the Appellant and our children came back to the house in Chilomoni.*
7. *THAT following the order to pay K2, 000,000.00 (Two Million Kwacha) to the Appellant by the lower court on 3rd May, 2016 I had no money amounting to K2, 000,000.00 (Two Million Kwacha) to satisfy the court order.*
8. *THAT at the time of the ruling I had already been transferred (by my employer) to Lilongwe.*

9. *THAT since the house is charged to my employer I approached them and explained my predicament and discovered that a fellow employee based in Blantyre Mr. Hanif Hussein was interested to inherit my loan and acquire my interest in the property so that I paid the difference to pay the Appellant in accordance with the ruling.*
10. *THAT I repeat paragraph 9 hereof and state that the above arrangement was communicated to the Appellant.*
11. *THAT Mr. Hanif Hussein has been decorating and maintaining the house since he took over the loan from me and the Appellant as occupant has been aware of the developments. Mr. Hanif Hussein has even changed ownership of the house into his name and charged it to National Bank of Malawi, our mutual employer, since the Appellant was evicted.*
12. *THAT when I was given the difference mentioned in paragraph 9 hereof I took K2, 000,000.00 (Two Million Kwacha) and paid it into court at Midima. I attach and exhibit hereto a copy of the official receipt and mark it "JC 2".*
13. *THAT the Appellant upon being notified by the court about the payment into court gladly went to collect her share in the property (the K2, 000,000.00).*
14. *THAT it is pure fraud for the Appellant to allege that the court that helped her get K2, 000,000.00 from me as her share in the house has no jurisdiction.*
15. *THAT it is also pure fraud for the Appellant to stay in the house while she collected the K2, 000,000.00 from Hanif Hussein through me, our mutual employer, and the court.*
16. *THAT my employment contract with my employer is at stake. I attach and exhibit hereto a copy of email exchanges between my employer, Hannif Hussein (the buyer of the house) and myself and mark them "JC 3".*
17. *THAT the Appellant has not provided proof to this court that property in question is governed by the Registered Land Act and not a property under the Traditional Housing Area.*
18. *THAT the Appellant has not demonstrated any prospects of success of his appeal in her application.*
19. *THAT the Appellant has not demonstrated the basis of her belief that the Respondent will not be able to satisfy any judgment on appeal to render the appeal nugatory. "*

Counsel Masanje submitted that the affidavit evidence in support of the Plaintiff's application shows that this is a proper case for the Court to grant an order of stay. While conceding that the general rule is that a successful party should not be

deprived the fruits of his or her litigation, he contended that it is also true that courts have not hesitated to grant a stay where special circumstances obtain.

To show that special circumstances exist in this case, Counsel Masanje submitted that:

"There is clear evidence that the lower court lacked jurisdiction to deal with issues of ownership of the house in question though he had jurisdiction to order the Respondent to build the Appellant a house. Thus for the Appellant to be victimized by an order that was ultra vires the lower court is a special circumstance. This is a serious defect which the court should consider a special circumstance. "

The main thrust of the arguments by Counsel Kamkwasi in reply is that if Court were to grant the stay, the status quo is that the neither the Appellant nor the Respondent will have possession of the house. The point was put thus:

"There is a third party who has taken possession and ownership of the house. The Appellant wants to get back to this house. This would be untenable at law and in practice . The house is owned by National Bank of Malawi. It would not be a good decision to allow the Appellant to get back into the house with third party interests. "

The secondary thread of Counsel Kamkwasi argument is to the effect that it would be utterly unjust, unconscionable and inexpedient to stay execution without ordering the Appellant to refund the sum of K2,000,000.00. Counsel Kamkwasi submitted that the Appellant should not be allowed to blow hot and cold in the same breath: if the lower court lacked jurisdiction to handle ownership of the house, it also lacked jurisdiction to award her the sum of K2,000,0000.00 which had nothing to do with her claim for re-possession of the house.

Counsel Kamkwasi concluded by submitting that looking at all the circumstances of the case substantial justice was delivered by the lower court. He contended that the Court should be slow to intervene "in a matter where parties have agreed to take place in the lower court irrespective of value ... Why did she not raise the issue of jurisdiction at that time".

I have carefully perused all documents filed by the parties and listened to their counsel's submissions. The legal principles which guide a court when considering an application for a stay of execution of judgment pending appeal are very clear. The general rule is that the Court does not make a practice of depriving a successful litigant of the fruits of his or her litigation: see **J.Z.U. Tembo v. Gwanda Chakuamba, MSCA Civil Cause No. 230 of 2001 (unreported), Re Annot Lyle (1886) 11 PD 114 and Wilson v. Church (No.2) (1879) 12 Ch.D**

454. However, the Court will grant stay of execution of a judgment or order when it is satisfied that there are good reasons for doing so: **Attorney General v. Emerson (1889) 24 QBD 56**. A Court would also order stay of execution pending appeal where it is satisfied that failure to order a stay would render the appeal nugatory: **Mhango v. Blantyre Land and Estate Agency Limited 10 MLR 55** and **Barker v Lavery (1885) 14 QBD 769**. Further, a Court will order stay of execution pending appeal when it is satisfied that the appellant would suffer loss which could not be compensated in damages: See paragraph 59/13/1 of the RSC.

It is also the law that a party seeking a stay bears the duty to adduce evidence establishing special circumstances warranting the grant: see **Malawi Property Investment Company Limited v. The State and Minister of Physical Planning and Surveys, MSCA Civil Appeal No. 37 of 2008 (unreported)** and **Dr. Zaki Chalira v. ADMARC, HC/PR Misc. Civil Cause No. 74 of 2004 (unreported)**.

I have considered the circumstances of this case and I am inclined to exercising my discretion in favour of granting the relief sought by the Appellant. I am very much persuaded by the arguments by Counsel Masanje that lack of jurisdiction by the lower court amounts to a special consideration. In the present case, the lower court ended up determining issues that were not before it, namely, the status of the marriage and distribution of matrimonial property. As was aptly observed by the Supreme Court of Appeal in **Hetherwick Mbale v. Hissan Maganga Misc. Civil Appeal Cause No. 21 of 2013 (unreported)** at page 15:

"49... I am of the .firm view that what was allowed in those cases, though laudable, was in fact wrong and unlawful. Where proceedings are conducted by a court without jurisdiction they are and should be declared null and void. There is nothing to save. There is nothing to salvage.

As Kalgo J S C. so eloquently put it in Maaji, Galadima's case

'For if there is want of jurisdiction, the proceedings of the lower court will be affected by a fundamental vice and would be a nullity however well conducted the proceedings might otherwise be'

Achike J S.C put it bluntly when he says

'Consequently, all the proceedings in this case throughout its journey in the various courts were a mere exercise infutility'. "

Further, the fact that the parties conceded or acquiesced to the lower court assuming jurisdiction is neither here nor there. One of the leading authorities on the matter is **Bhima v. Bhima** wherein the Supreme Court of Appeal quoted with approval Spencer Bower's Estoppel by Representation, 2nd edn, at 136, para.142 (1966) where it is stated as follows:

"Not even the plainest and most express contract or consent of a party to litigation can confer jurisdiction on any person not already vested with it by the law of the land or add to the jurisdiction lawfully exercised by any judicial body; it is also plain that the same results cannot be achieved by conduct or inaction or acquiescence by the parties."

In the premises, the application for an order staying execution of the order of the lower court is allowed. For the sake of completeness, this also means that the Appellant must refund the sum of K2, 000,000.00 to the Appellant.

Pronounced in Chambers this 12th day of December 2016 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE