

**MALAWI JUDICIARY**  
**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**

**MISCELLANEOUS CIVIL CAUSE NO. 76 OF 2016**

**[BEING CIVIL CAUSE NO.2 OF 2016 BEFORE THE SECOND GRADE MAGISTRATES' COURT SITTING AT NAMITAMBO]**

**BETWEEN:**

**PHILEMON MAZINGA.....PLAINTIFF**

**AND**

**MASAUKO BENI.....1<sup>ST</sup> DEFENDANT**

**K. MISOKWE.....2<sup>ND</sup> DEFENDANT**

**A.J. PANE.....3<sup>RD</sup> DEFENDANT**

**CORAM: THE HON. JUSTICE H.S.B. POTANI**

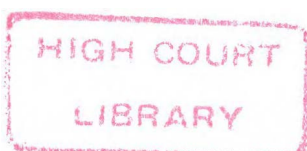
**Mr. Tandwe, Counsel for the Plaintiff**

**Mr. Kalua, Counsel for the Defendant**

**Mr. Mathanda, Court Clerk**

**RULING**

By way of an *ex parte* application, the defendants obtained an order of the court staying execution, pending appeal, against the judgement of the Second Grade Magistrate's [SGM] Court sitting at Namitambo in Chiradzulu district whereby it



was adjudged that the defendants do pay the plaintiff the sum of K1,500,000.00. The *ex parte* stay order required the defendants to file an *inter partes* application which was done and this is the court's determination thereon.

In support of the application, the defendants rely on the affidavit that was filed on the *ex parte* application as sworn by counsel, Wanangwa Kalua. There is no affidavit filed by the plaintiff as, according to counsel, the plaintiff was never served with the defendants' affidavit but counsel indicated that that notwithstanding the hearing of the matter could still proceed.

In the affidavit in support and counsel's arguments presented to the court, two points have been advanced in support of the application. Firstly, the defendants have argued that the judgement sum awarded by the SGM is in excess of the K1,000,000.00 statutory maximum provided for in section 39 of the Courts Act therefore was made without the requisite jurisdiction as such to allow execution to issue on such a judgement would occasion some injustice. The second point of argument is that from the SGM's judgement, it was not the defendants but some other persons who benefitted from the conduct or tort out of which the case arose as such it is submitted that it would be unjust for the defendants to pay the judgement sum.

The defendants' application is vigorously resisted by the plaintiff and in that regard counsel has put forward three points. In the first instance, counsel has faulted the application for not indicating in the summons under which provision or authority it is being made. In response to this, while admitting that indeed the summons has such an omission, it has been contended for the defendants that the initial *ex parte* summons having indicated the provision and authority under which the application for stay was made, that cures the omission in the *inter partes* summons. The court would tend to agree that since the *ex parte* summons clearly indicated the provisions


under which the application for stay was being made, the omission to so indicate in the *inter partes* summons ought not render the summons fatal. As rightly argued by counsel for the defendant, the latter summons being a consequence of the order made on the former summons, the two ought to be read together. It would, in the court's considered view be pedantic, in the circumstances, to throw away the application merely on the ground that the *inter partes* summons does not indicate the provision under which it was made.

The second argument of the plaintiff in challenging the application for stay is that there is no appeal on the basis of which an application for stay of execution pending appeal can stand. In this regard, counsel has drawn the court's attention to Order XXXIII rule 1 [3] and [4] of the Subordinate Court Rules which requires a notice of appeal to be filed within 14 days from the date of the judgement appealed against and to be served on all parties affected. According to counsel, there has been no notice of appeal exhibited by the defendants or served on the plaintiff such that as matters stand, there is no appeal on the basis of which stay of execution pending appeal can be had. In response, it has been contended for the defendants that having deposed in paragraph 5 of the affidavit in support that they have appealed and the plaintiffs having not filed an affidavit to dispute that assertion, it remains an

undisputed fact that the defendants lodged an appeal. Counsel has further argued that the present application having been made as a *Miscellaneous Civil Cause* and not under an *Appeal Cause*, the case file cannot be expected to contain the record of appeal and that the defendants proceeded by way of a *Miscellaneous Cause* because the record of the lower court proceedings is not yet ready. In all frankness, the court takes the defendants arguments and submissions with a pinch of salt. To begin with, if indeed the defendants filed a notice of appeal why not exhibit it in the affidavit in support even in a *Miscellaneous Cause* so as to demonstrate that indeed there is an

appeal as required by Order XXXIII rule 1 [3] of the Subordinate Court Rules. Again why not served it on the plaintiff as required by Order XXXIII rule 1 [ 4] of the Subordinate Court Rules. It is also the position of the court that the defendants cannot be heard to fault the plaintiff for not filing an affidavit to dispute paragraph 5 of the affidavit in support that the defendants have appealed when record shows serious doubts that the plaintiff was served with the affidavit in support. It should be remembered that that affidavit was initially used on an *ex parte* application at which point it was not served on the plaintiff and the defendants having merely adopted it at the *inter partes* hearing, the likelihood of it not having been served is there. In the end result, the court would find that the defendants have failed to show that there is an appeal on the basis of which an application for stay of execution pending appeal can stand and on that score, technical as it is, the application has no ground to stand on. Such being the case, it is regrettable that the court cannot proceed to consider the third argument by the plaintiff in opposition to the stay which goes to the merits of that application revolving around issues of the SGM having no jurisdiction and the defendants not being beneficiaries of the conduct leading to the action. The application is accordingly dismissed with costs to the plaintiff.

**Made this day of May 24 2017, at Blantyre in the Republic of Malawi.**

  
**H.S.B. POTANI**  
**JUDGE**