



IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
CIVIL CAUSE NO 6 OF 2014

BETWEEN

FRANK HARRISON AND 47 OTHERS.....PLAINTIFF

-AND-

MOTA ENGIL ENGENHARIA MALAWI.....DEFENDANT

CORAM

H/H B. CHITSAKAMILE, ASSISTANT REGISTRAR

Mr Kamunga for the Applicant

Mr Njobu and Miss Nyemba for the Defendant

Mr Alexander Tepeka, Official Interpreter

RULING

Introduction

The plaintiff took out an interpartes summons for stay pending appeal against the order on assessment of damages handed down by Her Honour Mrs Kaira on 30/12/16 awarding the plaintiffs a total of K70, 150,000. The said order was made after an assessment hearing that took the court to the locus, Zalewa. This was on the strength of a judgment entered against the defendants by consent of the parties.

The defendant filed a Notice of Appeal herein on 12/01/17 which was within the time prescribed by the rules of procedure. On the same day the court stayed execution pending appeal following the defendant's ex-parte application. There was meant to be heard an interpartes application for stay of execution on 31/01/17. The same was adjourned to 20/02/17 on which day

it was not heard as the Assistant Registrar was not available. It was then adjourned to 27/02/17 on which day the hearing failed again.

On 15/06/17 the plaintiff applied *ex parte* to vacate the order of stay of execution arguing that the interpartes application for stay was not being prosecuted by the defendant. The said application was granted and in consequence of the removal of the order of stay of execution, the Sheriff of Malawi visited the defendant to levy execution and seized the defendant's vehicles in the process.

On 22/06/17 the defendant applied for and was granted an order vacating the plaintiff's order of 15/06/17 and a further order restoring the order of stay of execution pending appeal that had been granted earlier.

Then the hearing of the inter-partes summons was scheduled for 18/07/17. Before the said date the plaintiff brought *ex-partes* summons to vacate the latest order of execution stating that it was an abuse of court process. Since there was already an inter-partes application pending, I elected to dismiss that application and have the defendant's application scheduled for 18/07/17 cover the same. The plaintiff then filed an inter-partes application to vacate the order stay of execution.

The Parties' Arguments

Counsels for defendant argued that they have appealed against the order on assessment of the Assistant Registrar particularly as to how she arrived at the figure of K70,150,000. They further wondered whether this was not a matter concerning special damages which should have been specifically pleaded. The awards, in counsel's view, appear to have been mere conjecture. They further took issue with the quality of the evidence that was relied on and whether or not the court had jurisdiction to undertake the exercise of assessment.

Furthermore, counsel argued that the plaintiffs herein are impecunious and in the event that they are paid the sums herein and the appeal is successful, they will not be able to pay back the money.

Various cases were cited to clarify the legal position on the grant or refusal of orders of stay of execution pending appeal. Counsel for the defendant particularly emphasized on the dictum of **Mwaungulu, J** (as he then was) in **Malawi Revenue Authority v Nadeem Munshi Civil Appeal No 67 of 2013(High Court, unreported)** that the court should consider all the circumstances of the case and the risk of injustice. The appeal in that case was against how a money judgment was arrived and the court stayed execution of the money judgment until the appeal was determined.

Counsel for the Plaintiff opposed the application for stay of execution. He argued that as per the case of **Stambuli v. ADMARC, Civil Cause NO 550 of 1991**, inability to pay back sums of money is not sufficient ground for obtaining a stay of execution. He further argued that the law is that one who wants to obtain a stay of execution must produce cogent evidence that there will be injustice if execution proceeds pending appeal. In this case he argued that the defendants were expected to show that the plaintiffs will be unable to pay. He cited the case of **Contract Facilities Ltd v. Estate of Rees and others**.

Counsel further argued that there were no serious issues for appeal in the matter considering that judgment was by consent and that the Assistant Registrar took time to visit the locus to do the assessment herein. He indicated by way of various exhibits that the defendant has all along agreed to pay and cannot turn around now. Further he faulted the defendant for raising issues with the pleadings now when such matters must be held to have been extinguished by the consent judgment.

He agreed with counsel for the defendant that the test of granting or refusing the stay is the risk of doing injustice when a stay is granted or refused. He submitted that it would be unjust to order a stay of execution where the intended appeal looks to be a sham and that the court should not deprive the plaintiffs the fruits of their litigation.

He then applied to vacate the latest order of stay of execution obtained herein stating that the defendant had not prosecuted their interpartes summons for stay for over 4 months. He contended that the defendant had obtained a stay of execution and sat on it whilst the plaintiffs were suffering. He also submitted that the sheriff fees and expenses for the execution levied on the defendants be paid by the defendants and not the plaintiffs as had been ordered in the stay order of 15/06/17. He argued further that there was nothing to stay as execution had been completed.

In reply, counsel for the Defendants argued that this application to vacate order of stay of execution was needless as practice is that the concerns are normally addressed on the hearing of an interpartes application for stay of execution which in this case had already been scheduled.

He further argued that counsel had wrongly cited Orders, 32 rule 6, 47 and 18. Furthermore, Counsel chronicled the events that led to the obtaining of the latest order of stay of execution stating that it was plaintiff's counsel's own conduct that led to the restoration of the original stay, its removal and its further restoration. He denied that it was in anyway an abuse of court process. He submitted that the application being unnecessary it was important that counsel be condemned to pay costs personally.

Further to that he opposed the prayer that the defendants be ordered to pay sheriff expenses arguing that it was the plaintiff who by irregular conduct had moved the Sheriff. Again, he stated that the prayer by the plaintiff on the sheriff fees was irregular as it was coming here when it should be an appeal.

He opposed the contention that execution had been completed stating that by law, it was only a seizure and removal that had happened and further that the same was stayed before further steps were taken.

Applicable Law

Order 59/13/2 provided a guideline when an application such as one before me is made. It is in the following terms:

"If an appellant wishes to have a stay of execution, he must make express application for one. Neither the court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. The Court does not make a practice of depriving a successful litigant of the fruits of his litigation. But the Court is likely to grant a stay where the appeal would otherwise be rendered nugatory or the appellant would suffer loss which could not be compensated in damages".

The legal principles which guide a court when considering an application for a stay of execution of judgment pending appeal are thus 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**, supra, **Re Annot Lyle (1886) 11 PD 114**. The Malawi Supreme Court of Appeal restated this position in **Dangwa and Another v. Banda [1993]** and **Mike Appel & Gatto v. Saulosi Chilima, [2013] MLR 231, MSCA**. Therefore, the fact that a party has exercised his or her right to appeal to a higher Court does not mean that the judgment appealed against must be stayed: see Order 59, rule 13 of RSC.

However, the Court is most likely going to grant a stay where the appeal, if successful, would be rendered nugatory: see **Wilson v. Church (No. 2) (1879) 12 Ch D 454**. In **Press Corporation v Cane Products Limited [2005] MLR 377**, the court emphasized that the burden to show special circumstances warranting a stay of execution is always on the applicant: see also **Mhango v. Blantyre Land and Estate Agency Limited 10 MLR 55** and **Barker v. Lavery (1885) 14 QBD 769**. The applicant therefore needs to demonstrate to the Court that there are special circumstances in favour of granting a stay. Further, a Court will order stay of execution pending appeal when it is satisfied that the applicant would suffer loss which could not be compensated in damages: See paragraph 59/13/1 of the RSC.

The court requires that evidence or facts be presented to the Court in order for it to properly assess the position: see **National Bank of Malawi t/a Nyala Investments, MSCA Civil Appeal Number 6 of 2005 (unreported)**. At the end of the day the question of whether or not to grant a stay is in the discretion of the Court and each case must be assessed on its facts and merits, **Nyasulu v. Malawi Railways Limited [1993] 16(1) MLR 394**.

Generally, the defendant bears the onus to prove that the Plaintiff will not be able to pay back the damages awarded to it. In **Anti-corruption Bureau v. Atupele Properties Ltd, MSCA Appeal Case No. 27 of 2005 (1st February 2007)**, Tambala JA (Rtd), made the following pertinent observations:

"First it [stay of execution] is within the discretion of the Court. Secondly that the general rule is that the Court shall not interfere with the right of a successful party to enjoy the fruits of litigation. Third where a respondent would be unable to pay back the money then a stay may be justified. Lastly, the court would still have discretion to refuse a stay even where the respondent is impecunious if the stay would be utterly unjust and oppressive. The bottom line is that the applicant must demonstrate that the respondent falls within the exceptions. It is not for the respondent to demonstrate capacity to pay back. The duty lies on the applicant to establish the respondent's lack of capacity to pay back."

In **Davies Lanjesi & Others v. Joshua Chisa Mbele, HC/PR Civil Cause 1 of 2014 (unreported)**. Katsala J, addressed the issue, at page 6, as follows:

"All that the defendant has done is to state that he is optimistic that his appeal will succeed as such the judgment must be stayed. He has gone to great length to set out his 20 grounds of appeal and the reliefs he expects to get from the Supreme Court of Appeal. Obviously, these are irrelevant in as far as the present application is concerned. Even if he were to state a million grounds of appeal, in my view, it would still be irrelevant and a waste of time, because grounds of appeal are not one of the considerations in an application of this nature. In other words, trying to demonstrate that the judgment appealed against is full of rubbish and will be reversed on appeal is pointless and a clear demonstration of lack of knowledge of the principles governing the application. As was said in the Chidzankufa case (supra) at 182:

"The obvious temptation to a judge in my situation, which temptation I have to suppress at all costs, would be to try to demonstrate that the judgment is not as hollow and/or baseless as the Plaintiff thinks. But I will not fall into such temptation because firstly, it is not the duty of the Court to defend its own judgment, secondly, such an exercise is not part of the Court's tasks on an application like that before me. In other words, it does not lie within my province to attempt to defend or indeed to join forces with the plaintiff in discrediting the judgment. So without saying whether the Plaintiff's appeal will

indeed succeed as is prophesied by the Plaintiff himself or that it will fail, as alleged by the defendant in its submissions, it is my view that the Plaintiff is labouring under a serious misconception of the principles that govern an application for an order of stay pending appeal. There is a very simple answer to the Plaintiff's argument. The fact that there are prospects of the appeal succeeding is not a ground upon which a stay can be granted. The words of Chatsika J, as he then was, in Nyirenda v AR Osman [1993] 16(1) MLR 400 at 403, readily come to mind.

'A judgment of a Court of competent jurisdiction remains enforceable regardless of the fact that there are good grounds that an appeal against the judgment will be successful.'

The Plaintiff's affidavit and submissions in so far as they purport to assert this point are not in any way helpful to his application. Clearly, this point has no merit. What else can I say? Is it not therefore surprising that, today, despite such unequivocal pronouncements from the Courts, the defendant can still raise the same argument?"

As can be seen, when faced with an application as the present one, the court is not expected to dwell much on the quality of the intended appeal.

In **Fumu Mdolo v. Bonifacio Mdolo & Muzipasi Moyo MSCA Civil Appeal No. 44 of 2016** the Supreme Court seems to indicate that the court still does have to consider the worthiness of the appeal when considering an application for stay pending appeal. The court said;

"convinced as I am that the appeal is worth pursuing, and that it will indeed be rendered nugatory if the lower Court judgment is enforced before it has been reviewed as intended by the Appeal Court, I grant the Applicant's prayer herein for stay of the same"

Determination

Having heard arguments from both parties, it is abundantly clear that there is an appeal against the order on assessment of damages made by the Assistant Registrar. The defendant obtained an order of stay of execution ex-parte until the appeal was determined. This was meant to be a routine inter-partes application for stay of execution of the said order. The application was heard in unprecedented circumstances because of intervening acts that led to the vacation, restoration, further vacation and restoration of the order that

had been obtained exparte. I have endeavoured to deal with what I consider the main issue, namely whether to grant an order of stay of execution pending appeal promptly without leaving the parties in gratuitous suspense.

The thrust of the application for stay is that there is an arguable appeal pending and that the appeal would be rendered nugatory if the plaintiffs are paid money and then the appeal succeeds because they would be unable to pay back the money.

Admittedly, the Notice of Appeal filed raises arguable issues that cannot just be wished away. The quantum of the award is itself under scrutiny. The defendant raises questions as to what type of damages were claimed, whether there should have been specific proof of the damages, them being special damages, the evidence relied on to arrive at such award, and many more issues of mixed fact and law.

The plaintiffs are a class of persons and sued as a class. Reading through the record of the assessment proceedings and the whole file generally, it is apparent that they are people without means to find money in the region of K70, 150,000.00 to pay back if need be in future.

As indicated by counsel for the defendant, the appeal is against a money order and the outcome thereof would affect the very money order in issue.

The defendants are a going concern and have substantial means and assets and would be able to satisfy the order if the appeal failed. The plaintiffs on the other hand would not be able to pay back. The fact that there is a real risk that the plaintiffs would not be able to pay back the money in the event of a successful appeal is a genuine and relevant consideration. The amount of money in issue herein is huge and the process to such award being made is being questioned in the appeal. In **Nyasulu v Malawi Railways Limited [1993] 16(1) MLR 391**, the MSCA granted a stay of execution agreeing that

the defendant would encounter considerable difficulties to recover the money that would be paid out if the appeal turned out successful.

In **National Bus Company Limited v. Banda and others, Civil Appeal No 36 of 2015, Kalemba, J**, after considering that the matter was a class action against the applicant such that if the appeal was successful not all the money could be paid back ordered the continuation of the stay of execution.

In the matter at hand, I am of the view that the appeal lodged is worth pursuing. If successful it would have repercussions on the monetary award made herein which perhaps would require paying back of the money by the plaintiffs. Having found that the plaintiffs are people without means it is only just that execution herein be stayed until the appeal has been heard and determined. The application for stay of execution pending appeal is accordingly allowed.

Let me now turn to the application filed counsel for the Plaintiffs to vacate the order of stay of execution for being an abuse of court process. The said application was surely superfluous as I thought it was well covered in the interpartes application for stay taken out by the Defendant. I am however compelled to comment on it because of the prayer on costs made by the defendant and the application that sheriff expenses be met by the defendants made by the plaintiff. I do understand that counsel for the defendant made the prayer having been forced to reply to this application when it was needless. Perhaps that is why he wanted counsel to bear the costs personally. He lamented that counsel came to court to vacate the order of stay of execution when both parties were waiting for the court to reschedule the interpartes application for stay, the same having failed because the Assistant Registrar was away. He wondered why counsel did not remind the court of this fact before making the application but vacated the order and unleashed the Sheriff. On his part, counsel for the plaintiff insisted that the defendant had sat on the order of stay of execution and had not

actively prosecuted their interpartes application for stay. He declined that he had suppressed any facts and urged the court to vacate the order of stay that was then ensuing.

I have read through the file to appreciate the general circumstances of the case and having read the affidavit in opposition and in support of restoring the stay, I am inclined to agree with the defendant. The failure to hear the interpartes application for stay was because the Assistant Registrar was not around and was expected to set a new date. Counsel need not have interpreted that to mean procrastination on the part of the defendants. Which is why when the Assistant Registrar read the affidavit of **Miss Chisomo Nyemba**, of Counsel in support of the application for stay, which put the matters into proper perspective, she readily granted the order of stay and restored the interpartes application for stay that was still pending.

My considered view then is that there was no abuse of the process of the court by the defendants when they obtained the order of stay and applied for stay of execution as has been determined now. As I said that this application was needless, it is dismissed with costs.

As for Sheriff fees and expenses, it was ordered that the Plaintiffs do pay the same by my sister who handled the application. I do not think I can order otherwise as I am not sitting on appeal and further in view of the total circumstances in the run-up to the making of the said order. Accordingly, the Plaintiffs will bear the Sheriff expenses for the execution levied on the Defendant.

Disposal

The short of it is that I hereby grant the order of stay of execution pending appeal as applied for by the defendant until the determination of the appeal.

The plaintiff's summons to vacate the order of stay granted on stands dismissed with costs and the Plaintiff are ordered to pay Sheriff fees and expenses as per the Order of Stay granted on 22/06/2017.

Pronounced in chambers this 10th day of July 2017



Benedictus Chitsakamile

ASSISTANT REGISTRAR