



**JUDICIARY
 IN THE HIGH COURT OF MALAWI
 PRINCIPAL REGISTRY
 CIVIL APPEAL NO. 13 OF 2015
 (BEING MATTER NOS. IRC MATTER NO. 448 AND 554 OF 2010)**

BETWEEN:

CHARLES MWASI AND OTHERS APPELLANT

-AND-

MALAWI REVENUE AUTHORITY RESPONDENT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Mumba, of Counsel, for the Appellants
 Mr. Majamanda, of Counsel, for the Respondent
 Ms. Jessie Chilimapunga, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is an application by the Respondent for an order suspending the enforcement of an order contained in my ruling dated 22nd January 2018 allowing amendments to be made to the notice of appeal by adding thereto and removing therefrom certain names (Ruling). The application is brought under O.28, r.48, of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as “CPR”].

The application is supported by sworn statement of Christopher Likomwa, the Respondent’s Legal Services Manager, and the relevant part thereof provides as follows:

- “3. ***THAT*** the claimants applied to amend the notice of appeal by among other things, adding new parties to the case.
4. ***THAT*** by a ruling dated 22nd January 2018 the court agreed to amend the notice of appeal which effectively introduced some 109 persons as parties to the action.

5. ***THAT** following the judgment aforesaid the court has scheduled the matter for assessment on 1st March 2018.*
6. ***THAT** in view of the fact that each of the 109 ex-employees of the Respondent has unique facts as they were getting different salaries and benefits, the Respondent will insist that there be a witness statement on behalf of each of the 109 ex-employees during the assessment of compensation. The Respondent also desires to use that opportunity for verification if such witnesses were indeed ex-employees of the Respondent.*
7. ***THAT** as the record will show the Respondent has applied against the judgment dated 22nd January 2018 to the Supreme Court of Appeal.*
8. ***THAT** I believe the appeal has high chances of succeeding as the grounds of appeal show.*
9. ***THAT** in the premises I believe that it will be a waste of court's precious time to do the assessment of compensation where the 109 ex-employees will have to be paraded as witnesses when there is a high chance that the Supreme Court of Appeal can reverse the High Court's decision.*
10. ***THAT** I believe that an order for stay of enforcement of the judgment dated 22nd January 2018 is necessary in the circumstances so that the assessment of compensation should be stayed pending the hearing and determination of the appeal."*

The application is opposed by the Appellants. Unlike the Respondent, the Appellants did not file any sworn statement.

There is only one issue for the determination by the Court in this application, that is, whether or not the enforcement of the Ruling should be suspended?

Counsel Majamanda submitted that the sworn statement by Mr. Likomwa shows that this is a proper case for the Court to grant the suspension being sought. He contended that much as the general rule is that a successful party should not be deprived the fruits of his or her litigation, it is also true that courts these days are not averse to readily taking into account all matters that would lead to achieving justice in a particular case. It might not be out of order to quote in full the relevant part of the Respondent's submissions:

“3.4 ... *the starting point is that a party that has a judgment in its favour is entitled to enjoy the fruits of litigation, the same of which should not be denied save in exceptional circumstances.*

3.5 *The Supreme Court of Appeal in the case of **Anti-Corruption Bureau vs Atupele Properties Limited**, MSCA Civil appeal No. 27 of 2005 (unreported) as per the*

judgment of Honourable Justice Tambala, JA succinctly stated the applicable law as follows:

"I must now revert to the law relating to the stay of execution of the court's 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 a general rule the court must not interfere with the successful party's right to enjoy the fruits of his 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 may 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 examination of the facts of the case, an order for stay of execution would utterly be unjust."

Also See Dwangwa vs Banda (1993) 6 (2) MLR 510.

- 3.6 *In Federal Commissioner of Taxation vs Myer Emposium Ltd (No.1) (1986) 160 C.L.R. 220, which was cited with approval in the case of V.D. Chidzankufa t/a V & C Distributors vs Nedbank Malawi Limited, MSCA Civil Appeal No. 70 of 2009, Dawson J had the following to say at pages at pages 222-3*

"It is well established by authority that the discretion which it confers to order a stay of proceedings is only to be exercised where special circumstances exist which justify departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal. See e.g. The Annot Lyle (1886) 11 PD 114 page 116. Scarborough vs Lew's Junction Stores Pty Limited (1993) VR 129 at page 130. Special circumstances justifying a stay will exist where it is necessary to prevent the appeal, if successful, from being nugatory. See: - Wilson vs Church (No. 2) (1879) 12 Ch. D. 454 at page 458. Klinker Knitting Mills Ptg. Ltd vs L'Union Fire Accident and General Insurance Co. Ltd (1937) V.L.R. 142. Generally, that will occur when, because of the respondent's financial state, there is no reasonable prospect of recovering money paid pursuant to the judgment at first instance. However special circumstances are not limited to that situation and will, I think, exist where for whatever reason, there is a real risk that it will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed." See: - McBride vs Sandland (No.3) (1918) 25 C.L.R. 369, at page 375." (Emphasis supplied).

- 3.7 *For a very long time, the jurisprudence in as far as it related to the law on stay of execution only dealt with the fear of an appeal being rendered nugatory in the event of its success on account of the impecuniosity of the respondent. It must be noted that there has been a significant shift in the same with the view to leaving the category of the issues to be considered by the court in exercising its discretion open, lest the said discretion be fettered.*

In FDH Bank Limited vs Maranatha Girls Academy Limited MSCA Civil Appeal No.22 of 2016, the court went ahead to even take into account the nature of the issues that are subject of the appeal. In a nutshell, the principle advanced by the court is to the effect that courts should not be so fast in denying such an application in cases where the legal issues involved are substantial (and novel) in nature. The court stated thus;

“First the court’s discretion to grant stay of execution must be exercised judiciously and it would be so exercised where it is shown that the appeal involves substantial points of law. Secondly, that issues being contested be in status quo until the legal issues are resolved. Thirdly, that a court will consider granting a stay of execution where the grounds of appeal filed do raise vital issues of law and there are substantial issues to be argued on them as they are. Further, it is settled law that where grounds exist suggesting that a substantial issue of law is to be decided on appeal in an area in which the law is to some extent recondite, and where either side could have a decision in his favour, a stay ought to be granted.”

- 3.8 *This is a case that brought into the fray the effects of a number of financial directives issued by the financial regulator (Reserve Bank) and their requirements, including the effect that the absence of an order staying execution would have had on the appellant in that case. Having made the observation above, the court concluded as follows;*

“I do not know any decision of this court in which the scope of this case appears to have been restricted. Further, this court is not aware of any decision that dealt with a similar case involving the effect and significance of directives of a financial regulator (Reserve Bank) on the banking industry as well as customers of the bank if a colossal sum is ordered to be paid by a bank as is being sought here. In a case in which a substantial point of law is involved, such as the effect of directives on the liquidity of bank(s) and the tangential consequences of the financial markets, one would want to err on the side of caution and order stay until the appeal is determined.

Further, this court is in full agreement with the principle that in order to obtain a stay of execution of judgment against a successful party an applicant must show substantial reasons to warrant a deprivation of the successful party of the fruits of litigation by any court. Thus, this court is in no doubt whatsoever that where grounds exist on the motion suggesting a substantial issue of law to be decided on the appeal in an area in which the law is to some extent obscure and where either side may have a decision in his favour such substantial grounds as would warrant an interference clearly exist. This is such a case where the law of banking is murky. I would for that reason order a stay of execution.”

- 3.9 *We submit that the appeal herein raises substantial issues that have to do with the effecting of amendments to a notice of appeal after judgment has been passed. Among other things the appeal seeks determination on whether the same automatically amends the judgment, and whether parties can be added to the appeal and benefit from the same without any extension of the time within which they ought to have appealed.”*

Counsel Majamanda also invited the Court to have regard to the overriding objective of CPR in deciding the present application. The point is fully addressed in paragraphs 3.10 to 3.14 of the Respondent’s Submissions and the same provide as follows:

- “3.10 On top of these factors that the court takes into account, we would be remiss in our duty not to bring to the courts attention the overriding objectives of the Courts (High Court) (Civil Procedure) Rules, 2017 which we submit should also be on the courts mind when exercising its discretion.*

The overriding objective of the rules

- 3.11 *The overriding objective of the rules, which is the dealing of proceedings in a manner that is just, includes the following: -*
- 3.11.1 *Saving expenses;*
 - 3.11.2 *Dealing with proceedings in a manner proportionate to the amount of money involved; and*
 - 3.11.3 *Allocating to a proceeding an appropriate share of the courts resources, while taking into account the need to allocate resources to other proceedings.*
- 3.12 *In seeking to achieve the objective, the rules call upon this court to actively manage cases and proceedings by among other things doing the following: -*
- 3.12.1 *Deciding the order in which issues are to be resolved;*
 - 3.12.2 *Fixing timetables or otherwise controlling the progress of proceedings; and*
 - 3.12.3 *Considering whether the likely benefits of taking a particular step justify the cost of taking it.*

See Order 1 rule 5

- 3.13 *As will be noted from the sworn statement filed in support of this application, each of the 109 ex-employees of the Respondent has unique facts simply because they were getting different salaries and benefits. Considering that all of them will have to take the stand, precious time and resources will be wasted if the assessment of compensation proceedings are not stayed. This is so because there is a high chance that the Supreme Court of Appeal can reverse this court's decision.*
- 3.14 *We respectfully submit that good case management intended at achieving the overall objective of these rules clearly requires that the said time and available resources be allocated to other cases whilst we await the outcome of the appeal being processed by the respondent herein. Otherwise a failure to do so would result in a waste of resources in the event of the appeal being decided in favour of the appellant."*

The main thrust of the arguments by Counsel Mumba in reply is that it would be utterly unjust, unconscionable and inexpedient for the Court to grant an order suspending the enforcement of the Ruling. The point was put thus:

- "4.1 *The power whether or not to grant a stay is in the discretion of the court. Accordingly, the Court in this matter can either grant or refuse to grant the stay. In the oft-cited case of The Anti-Corruption Bureau V Atupele Properties Limited the Malawi Supreme Court of Appeal held that the court may refuse to grant a stay where to do would be utterly unjust. See also the cases Evangelical Development Programme v Mahara Nyirenda Civil Appeal No. 4 of 2011 and Ekarhi Nawena v National Bank of Malawi Civil Cause No. 168 of 2007.*

- 4.2 *In this case the order of amendment simply removes and adds Applicants to the list of names of Applicants. These are Applicants who were retrenched by the Respondents in 2010. They have been waiting for justice for 8 years now. The order of stay would prolong that period. However, their colleagues whose names were on the initial list were already paid. This would be utterly unjust in the circumstances and the stay should be refused on that ground.*
- 4.3 *In paragraph 6 of the sworn statement of Counsel Likomwa it is stated that there are 109 Appellants that are involved and during the assessment, the Respondent will insist on each of them to produce a witness statement. This clearly shows that the Respondent wants to create a situation and then wants to use the same situation to its advantage.*
- 4.4 *Truth be told that the assessment of the 56 Appellants was done by the Respondent making the calculation based on the information the Respondent has in its store and which the Respondent used to calculate the compensations that were already paid after the Industrial Relations Court judgment and assessment. In the same manner, the Respondent can simply make the calculations without the insistence on the witness statement of each person.”*

Counsel Mumba cited a host of authorities such as **The Annot Lyle [1886] 11P, 114; Isihaka Lanjes & Others v. The Tobacco Control Commission, HC/PR Civil Cause No. 1425 of 2005 (unreported); Donnie Nkhoma v. National Bank of Malawi, MSCA Civil Appeal No. 32 of 2005 (unreported); Nyasulu v. Malawi Railways Limited [1993] 16(1) MLR 394 Chilambe and Select and Save v. Kavwenje, Civil Cause No. 164 of 1994** and O. 59, r. 13 of the Rules of the Supreme Court but he placed much reliance on two decisions by the Supreme Court of Malawi, namely, **The Anti-Corruption Bureau v. Atupele Properties Limited, MSCA Civil Appeal No. 27 of 2005** and **City of Blantyre v. Manda, Civil Cause No. 1131 of 1990 (unreported)** respectively.

With regard to **The Anti-Corruption Bureau v. Atupele Properties Limited**, supra, Counsel Mumba quoted the following passage at page 6 of the judgement:

“I must now revert to the law relating to stay of execution of court’s judgement. There are clearly four principles. The first is that it lies in the broad discretion of the court to grant or refuse an application for stay of execution. The second principle is that as a general rule the court must not interfere with the successful party’s right to enjoy the fruits of his 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 of that the appeal succeeds, execution of the court’s judgement may 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 examination of the facts of the case, an order for stay of execution would be utterly unjust”

The case of **City of Blantyre v. Manda** was cited for the following dicta by Unyolo, J, as he then was:

*“I think it is always proper for the court to start from the view point that successful litigant ought not be deprived of the fruits of his litigation and withholding monies, which **prima facie**, he is entitled. The court should then consider whether there are special circumstances which militate in favour of granting the order for stay and the onus will be on the applicant to show or prove such special circumstances. The case of **Baker V Lavery** which I have cited above, seems to suggest that evidence showing that 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”.*

Counsel Mumba concluded by submitting that the application must be refused because the Respondent has needlessly purposed to “create an expensive way of conducting the assessment of compensation and then relying on it as a basis for obtaining the stay”.

I have carefully perused all documents filed by the parties and listened to their counsel’s submissions. It is clear to me that there is a mismatch between the application (as couched/made by the Respondent) and the submissions advanced by the parties through their respective Counsel. In the premises, I have opted as a matter of prudence to start my addressing the threshold question, namely, whether or not the application is properly grounded?

It will recalled that the application by the Respondent is for an order suspending the enforcement of the Ruling. The application is brought under O.28, r.48, of CPR. It is necessary to quote in full the relevant part of the Respondent’s Skeleton Arguments. The part reads as follows:

“3.0 THE LAW

- 3.1 *Under Order 28 rule 48 of the Courts (High Court) (Civil Procedure) Rules, 2017, this Court retains the power to suspend any enforcement orders that this court can make under Order 28 of the rules.*
- 3.2 *In the exercise of the powers given to the court under Order 28, this court can suspend the enforcement order altogether or any part thereof, and can make orders that it considers appropriate.*

See Order 28 rule 50

- 3.3 *From the tenor of the provision cited above, it is clear that the court retains the ultimate discretion when it comes to deciding whether there should be a suspension/stay on an enforcement order or not.* – Emphasis by underlining supplied

It might not be out of order to give a background to Order 28 of the CPR. It is trite law that a judgement is not self-enforcing. There are essentially two groups of judgement debtors. The first group comprise solvent or honest (willing) debtors: these will invariably settle a judgement (debt) immediately after the judgement is entered. The second group consists of judgement debtors that do not voluntarily pay the judgement (debt). It is with respect to the latter group that judgement creditors are often times compelled to have to move the Court to enforce the judgement (debt). This is where Order 28 of CPR comes in: a party who has obtained a judgement in his or her favour seeks to get the “*aide of the Court*” to enforce the judgement.

Order 28 of CPR deals with enforcement of judgements. The general scheme of things under this Order is that an enforcement creditor applies for the issue of an enforcement order to enforce a judgement by filing an application with the Court. Unless the Court orders otherwise, the application may be dealt with or without a hearing and in the absence of the parties. Where an enforcement creditor so wishes, he or she may apply to the Court for an order (an “enforcement hearing order”) that the enforcement debtor or independent witness attends an enforcement hearing and be examined about his or financial circumstances and how he or she proposes to pay the amount of the judgment debt. Having considered the application, with or without an enforcement hearing, the Court may proceed to grant or refuse to grant an enforcement order.

Rules 1 and 2(1) of O. 28 give a clear guidance as to what the Order is about and these two rules are couched as follows:

- “1. *A judgment shall be enforced under an enforcement order as set out in this Order and the costs of enforcing an order shall be recoverable as part of the order.*
2. (1) *A judgment may be enforced by one or more of the following means—*
 - (a) *a seizure and sale order;*
 - (b) *third party debt order;*
 - (c) *a charging order;*
 - (d) *an appointment of a receiver;*
 - (e) *an order for possession of land;*

- (f) *an order for delivery of goods; or*
- (g) *an order to do or not to do a thing.”*

The seven modes of enforcement set out in O.28, r.2 (1), of CPR can be conveniently divided into two categories, namely, money orders (seizure and sale order, third party debt order, a charging order and appointment of a receiver) and non-money orders (order for possession of land, order for delivery of goods and order to do or not to do a thing): see O.28, r.2 (2), of CPR.

It is noteworthy that orders to do or not to do a thing are the subject matter of rules 44 to 51 of Order 28 of CPR and these rules provide as follows:

- “44. Rules 44 to 51 apply to an order where—
- (a) it is a non-money order;
 - (b) it requires a person to do an act within a specified time; and
 - (c) the person does not do the act within the time.
45. *The order may be enforced in one or more of the following—*
- (a) *holding the person in contempt of court;*
 - (b) *seizing the person’s property;*
 - (c) *where the person is a body corporate, holding its officers in contempt of court, or seizing its property.*
46. *The Court may also enforce an order to do an act by—*
- (a) *appointing another person to do the act; and*
 - (b) *ordering the person required to do the act to pay the costs and expenses caused by not doing the act.*
47. *The costs and expenses may be recovered under an enforcement order for a money order.*
48. An enforcement respondent may apply to the Court for an order suspending the enforcement of an order.
49. *The application under rule 48 shall be supported by a sworn statement and shall be filed and served on the enforcement creditor at least 7 days before the application is to be heard*
50. *The Court may—*

- (a) *suspend the enforcement of all or part of the order because facts have arisen or been discovered since the order was made or for other reasons; and*
- (b) *make other orders it considers appropriate, including another enforcement order.* – Emphasis by underlining supplied

As the matter presently stands, there is no application by the Appellants to enforce the Ruling or any other judgement in these proceedings, either under O. 28 of CPR or at all. Needless to say, no enforcement hearing has taken place. Neither has any enforcement order been issued by the Court. In short, there is neither an enforcement applicant nor an enforcement respondent (referred to in rule 48). In the premises, I fail to understand how O. 28, r. 48, of CPR comes into play.

All in all, as the application was brought under O. 28, r. 48, of CPR, the Court has not been properly moved. The application is incompetent and misconceived and ought to be dismissed. Accordingly, the application is dismissed with costs to the Appellants.

Pronounced in Court this 27th day of March 2017 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE