

MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

MISCELLANEOUS CIVIL CASE NUMBER 121 OF 2018

BETWEEN

EFFLET KAGALU..... APPLICANT

-AND-

CHISOMO NJOLOMOLE..... DEFENDANT

CORAM: THE HON. JUSTICE J. N'RIVA
Mr M G Chipeta, of counsel for the applicant
Respondent present in person
Ms Deliwe Mtegha, Official Interpreter

RULING

The parties in this case brought their dispute before a Senior Resident magistrate sitting at Blantyre. The court found in favour of the plaintiff. The defendant wants to appeal against the decision. She this filed for an application for stay of execution. I will call her the applicant and the plaintiff the respondent.

The applicant applied for stay of execution of judgment pending appeal. I granted it on hearing the application without notice to the other party but ordered that there should be a hearing with notice to the respondent. At the same time, the respondent applied for discharge of the stay order. The applicant's argument is that the appeal

would be rendered nugatory the if judgment is enforced. The argument is that the trial court made errors in the judgment. Counsel argued that after a quick perusal of the judgment, he is of the view the errors of the court are so have that the appeal is likely to succeed. Counsel argued that the court disposed of the matter in reliance of Criminal Procedure and Evidence Code when the matter was a civil one and that that the Court disregarded the defence evidence. Of course, counsel is yet to have recourse to the court record.

The respondent, on the other hand, said that while the matter was still in court, the appellant changed the name of the school. After the judgment, the appellant did not surrender the property in dispute back to him and dismissed all the teachers. He argued that a stay order can make the respondents bring new teachers and confuse the school.

Counsel for the appellant argued that the respondent admitted that he made changes in the face of the stay order. Thus, he did not come to the court with clean hands. Further, he did not dispute that if the appeal succeeded, it would be rendered nugatory. Counsel argued that the respondent only wanted the court to assist him perpetrate disregard of the stay order.

The question is whether y to continue with the stay or discharge it.

The law on stay of execution pending appeal has been well settled in many local cases (see *Jean Chirwa v Noreen Chirwa and Others* Civil Cause No. 523 of 2012 where the court discussed the law on stay of execution was discussed as follows:

‘The general principle is that a court of law should not make it a practice to deprive a successful litigant fruits of his litigation in anticipation of the outcome of the appeal as pronounced in *Annot Lyle* (1886) 11 PD 114.’

In *The Speaker of the National Assembly, Ex-parte v Hon. John Tembo* MSCA, Civil Appeal Number 27 of 2010 (unreported), the court laid down the following principles:

‘Stay of execution of judgment pending appeal has become common place in our courts and over the years clear principles for consideration have emerged. ... Some of the cases have been referred to by counsel in this matter from which the following cardinal principles resonate:

- i. The court does not make the practice of depriving a successful litigant fruits of his judgment.

ii. The court should then consider whether there are special circumstances which militate in favour of granting the order of stay and the onus will be on the applicant to prove or show such special circumstances.

iii. The court would likely grant stay where the appeal would otherwise be rendered nugatory or the appellant would suffer loss which would not be compensated in damages.

iv. Where the appeal is against an award of damages the established practice is that stay will normally be granted where the appellant satisfies the court that if the damages were paid, then there will be no reasonable prospect of recovering them in the event of the appeal succeeding'.

In the case of *Mike Appel & Gatto Limited v Saulos Chilima* [2014] MLR 231 at 238, commenting on these principles, the court observed as follows:

'Once an applicant has brought forward solid grounds for seeking stay, the court is then called upon to weigh the risks inherent in granting a stay and the risks inherent in refusing stay. This balancing process is what is here referred to as the court's discretion. Much as the court will start from the premise that courts will not make the practice of depriving successful litigants fruits of their judgment and much as the mere filing of an appeal and probability of success will not qualify as stay of execution; while a court will be concerned about the appeal not being rendered nugatory, ultimately it is about how the court weighs these considerations and what they translate to in the particular case'.

Recently, the courts have held that the paramount consideration should be justice or injustice to both parties. In doing this, the court is called upon to do a balancing act as to where justice or injustice will be achieved whether with grant or refusal of the grant of stay of execution pending appeal.

In *Contract Facilities Limited v Estates of Rees (deceased) & others* [2003] EWCA Civ 465, cited in *Chitawira Shopping Centre v HMS Foods & Grain Ltd* MSCA Civil Appeal No. 30 of 2015, the court said:

"The normal rule is neatly summarised in paragraph 21 of the judgment in *Hammond Suddards' Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 1915:

"By CPR rule 52.7, unless the appeal court or the court below orders otherwise, an appeal does not operate as a stay of execution of the orders of the court below. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend on all the circumstances of

the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay.

In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?

In the case of *Department for Environment, Food and Rural Affairs v Georgina Downs* [2009] EWCA CV 257, the court stated as follows:

‘A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted ...it is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture or because a threatened strike will occur or because some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the court of appeal.’

I have to decide whether justice will be served if I suspend the execution of the judgment of the trial court.

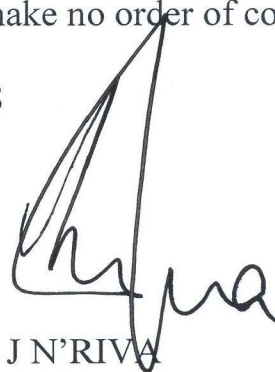
The main argument by the applicant is that there are prospects of the appeal succeeding and that therefore the appeal would be rendered insignificant. I should not comment on the issue of appeal being successful for fear of pre-empting at this stage. I should, therefore, refrain from commenting on the Criminal Procedure and Evidence Code and its disregard, if at all, of respondent’s evidence. That is for the substance of the appeal. This is a mere interlocutory stage.

Having looked at the authorities I have cited, I believe that an appellant has to show how the appeal would be rendered nugatory. This can be, for example, that the

subject matter of the appeal may no longer be available or that there would be no remedy for the appellant. This can be for example that by executing the lower courts judgment, the successful appellant would not get the redress for the success at the appeal. For example, the property may be dissipated or the respondent would not have means to surrender the judgment object or sum. As the courts are not normally desirous of stopping successful litigants from benefitting from the orders of courts, appeal courts should only be stopping the course of judgments upon being satisfied of special circumstances. Primarily, the appeal should have prospects of success and secondly, that the successful appeal would be but mere academic without the successful appellant getting the outcome of the appeal.

In the circumstances, I do not find convincing reasons to keep staying the decision of the trial court. I set aside the stay order. I order that the execution of the judgment of the trial court should proceed. I make no order of costs.

MADE the 27th day of August, 2018

A handwritten signature in black ink, appearing to read 'J N'RIVA', is written over a horizontal line.

JUDGE