



The Judiciary



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 857 OF 2015

BETWEEN

PETER NSONA.....CLAIMANT

AND

LUJERI TEA ESTATE LIMITED.....DEFENDANT

CORAM: A.J. BANDA, ASSISTANT REGISTRAR

Mr. T. Mwaungulu, of counsel, for the Claimant

Mr. Ulaya, of counsel, for the Defendant

M/s. D. Nkangala, Clerk

Banda, AR

RULING

Background

This is an application by the defendant for stay of enforcement of an assessment order dated 24th May, 2018 requiring the defendant to pay the claimant the sum of K19, 250, 000.00, pending the hearing and determination of an appeal being pursued by the defendant in the Malawi Supreme Court of Appeal. The defendant is dissatisfied with the decision of Honourable Justice D.T.K. Madise in the judgment after trial, in which he was found liable at the degree of 70% to the claimants claim for damages for personal injury. The judgment was

delivered on the 19th day of February, 2018. The defendant's present application is supported by a sworn statement deponed by Francisco Chikabvumba, of counsel. It is opposed by the claimant. The claimant did not file any sworn statement but filed submissions in opposition.

Facts

The facts as contained in the sworn statement of Mr. Francisco Chikabvumba are not in dispute. He deponed that an appeal has already been lodged with the Malawi Supreme Court of Appeal and that the appeal is not a sham that is merely intended to deprive the claimant the fruits of litigation, but is genuine and has high likelihood of success. The defendant believes that the claimant would not be able to pay back the sum of K19, 250,000.00 as seen from the facts that the defendant used to earn K850.00 per day, and that he is now out of employment and has lost earning capacity as a result of the accident.

The claimant states therefore that should the defendant's appeal succeed, in the Supreme Court, the appeal would be rendered nugatory and the defendant would suffer irreparable loss. The defendant therefore argues that the balance of justice requires that the order on assessment of damages be stayed pending the determination of the appeal by the Supreme Court of Appeal.

Issue

The court has to determine whether it should stay the enforcement of the assessment order pending the defendant's appeal to the Malawi Supreme Court of Appeal.

Analysis of Law and Fact

The defendant and the claimant agree on the principles that are applicable in applications like this one. The two parties also agree that whether this application is granted or not, is at the discretion of the court. It is a fact of law that discretion must be exercised judiciously. This entails that set principles must be followed. In an application like this one, the court must be mindful that it should not deprive a successful litigant the fruits of his litigation pending an appeal- **A.R. Osman and Co. v. Nyirenda [1995] 1 MLR 13 (MSCA); City of Blantyre v. Manda [1992] 15 MLR 114 (HC)**. There must be unusual circumstances that should compel the court to stay execution of an order. The burden is on the applicant, the one who wants the order stayed that must show the court the unusual circumstances in the case.

The defendant informs the court that the unusual circumstances are that the claimant will not be able to pay the money in the case that the appeal succeeds. It is my view that it would indeed be difficult for a person who is out of employment to pay back K19, 250,000.00. It is the case with the claimant in this case. Both parties further agree that in cases like this one, the applicant should not be the one responsible for the predicament the successful litigant finds himself in, that he cannot pay back the money in the case that the appeal succeeds- **Stambuli v. Admarc**

Civil Cause No. 550 of 1991 High Court, Principal Registry (unreported). The claimant believes that is the case in this instant case, as the claimant is out of employment and cannot earn as he had his arm amputated because of the negligence of the defendant held to be at 70% by the honorable Judge. The defendant thinks not. It is my view that the defendant, as the judgment of the court now stands, has played a part in the loss of earning. However, the part is minimal, as regards to the contribution of the defendant in making the claimant unable to repay the damages. As rightly argued by the defendant's counsel, the claimant was not in a position to repay a lump sum of K19, 250, 000.00 even before the accident, given his daily earning of K850.00.

The claimant however, brings in another dimension to his argument in opposition to the application, which is basic and fundamental. He stated that this is a case where the appeal by the defendant is on the judgment on liability as held by the honorable Judge, and not on the quantum of damages as determined by the Assistant Registrar. He submits that the Assistant Registrar conducted the assessment of damages in a delegated capacity, and as such the stay should have been obtained before the judge stating that the registrar has no jurisdiction as such to determine the application. The defendant counsel states that the registrar has got jurisdiction to hear such an appeal. He states that the fact that the registrar assessed the damages does not make the decision any lesser than that of the High Court judge. He cites the case of **Chidzankufa v. Nedbank [2008] MLR Commercial Court Series.**

I understand that under Order 25(1) of the Courts (High Court) (Civil Procedure) Rules, 2017 (CPR), the registrar's jurisdiction is a delegated one. Under the same order though the registrar has powers to handle cases of enforcement also of the registrar's own orders and under the Court's direction, the Court's judgments and orders too. I join the defendant's counsel in his view that the order on assessment is not made any lesser the decision of the High Court simply because it is by the registrar under delegated powers of the Judge. However, that is not the claimant's point. The claimant states that staying the assessment order when the appeal does not lie against the order on assessment but judgement on liability, like the case in this matter, amounts to staying the judgment of the High Court Judge.

The order on assessment is ordinarily a subset of the judgment on liability. An appeal of the decision of this court, which is of right, can lie on either the finding of liability or the quantum on assessment, or indeed both, as it is of right. It would be ideal in cases like this one, if an application is brought early, to stay the assessment of damages hearing. Such an application would be before the judge that heard the matter on liability, pursuant to the initial directions, or before a registrar if the judge so directs under Order 25 of the CPR. With this instant matter, an assessment hearing already took place. In a case like this one, it would be an academic exercise to proceed with the appeal without staying enforcement of the assessment order, when the claimant cannot repay the damages if the appeal is successful. The order on assessment was made by the registrar, pursuant to the Court's direction. The registrar should therefore have jurisdiction to stay this order as a result of the direction given to assess damages as part of the judgment, and of course, as the registrar's own order under O. 25 CPR. The claimant is only

prejudiced in incurring costs which he would otherwise have not incurred if this assessment hearing was stayed pending the appeal, that is to say where the appeal will be successful. Thankfully, the costs were already ordered for the claimant in the assessment order.

Conclusion

It is my finding in this case that the defendant's appeal would indeed be rendered nugatory if the enforcement of the damages is not stayed, as the claimant will be unable to repay the damages if the appeal succeeds. The court would not want to let the claimant who succeeded in this court to be at the mercy of the defendant, in the event that the appeal is not heard in good time for the defendant's own indolence. I will therefore order a stay of the execution of this assessment order, with the following conditions; in attempting to facilitate diligence on the part of the defendant, but without taking away the claimants rights of action in this court or in the court above should there be indolence on the part of the defendant in prosecuting the appeal;

- a. The defendant to deposit the sum of K 19, 250,000.00 with the court which shall deposit the same in an investment account that would earn interest to maintain value of the money, within 7 days of this order; proof of the deposition to be served on the claimant. Failure to abide by this condition will entitle the claimant to enforce the assessment order.
- b. The deposited money to remain in the account, until a further order by this court, upon any appropriate *interpartes* application by either party, or until the determination of the appeal by the Supreme Court of Appeal, whichever is sooner.
- c. The claimant is at liberty to enforce the payment of costs of the assessment hearing, if agreed, or after they are assessed. If they are not yet assessed, he is at liberty to seek the appointment with the registrar for assessment of those costs.

Lastly, each party will pay own costs of this application.

Made this 8th day of June, 2018



Austin Jesse Banda

ASSISTANT REGISTRAR