



**JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 261 OF 2012**

**BETWEEN:**

**PERFECTO PEST CONTROL (PPVT) LTD ..... CLAIMANT**

**-AND-**

**MALAWI LEAF COMPANY LIMITED ..... DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

Mr. Mumba, Counsel for the Claimant

Messrs Dzonzi and Mami, Counsel for the Defendant

Mrs. Doreen Nkangala, Court Clerk

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**RULING**

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*Kenyatta Nyirenda, J.*

This is this Court's ruling on a preliminary objection raised by the Claimant.

The background to the preliminary objection is of the simplest. On 27<sup>th</sup> September 2017, the Court made a ruling refusing the Defendant's summons for leave to file and serve a list of documents and witness statements out of time (Ruling).

On 9<sup>th</sup> October 2017, the Defendant filed with the Court a Notice of Motion for Leave to Appeal against the Ruling and the leave was duly granted. A Notice of Appeal was also filed on the same day.

The continued hearing of the case was scheduled for 14<sup>th</sup> November 2017. On 7<sup>th</sup> November 2017, the Defendant filed with the Court a notice to the effect that "*owing to circumstances beyond the Defendant's control, Messrs. Justin Dzonzi, Francis Mname and Martha Ngoma of Counsel for the Defendant shall be out of the country on the 14<sup>th</sup> day of November 2017*". The Defendant, therefore, sought

an adjournment of the hearing to another date after 23<sup>rd</sup> November 2017. The request for adjournment was positively considered: the hearing of the case was adjourned to 12<sup>th</sup> March 2018.

On 6<sup>th</sup> March 2018, the Defendant filed with the Court summons for stay of proceedings pending determination of appeal (Summons for Stay). For reasons which will become clear later in this ruling, the Summons for Stay will be quoted in full:

**“SUMMONS FOR STAY OF PROCEEDINGS PENDING DETERMINATION OF APPEAL**

**(Order 1, r.18 of the Supreme Court of Appeal Rules)**

**TAKE NOTICE** that prior to the commencement of the hearing of the Defence Case set down in open court on 12<sup>th</sup> day of March 2018 at 9 o'clock the Defendant shall make an application for the stay of these proceedings pending the determination of the appeal filed in this Court on the 9<sup>th</sup> day of October 2017 by the Defendant.

.....

*Dated this 2 day of March 2018.*

*Signed*

***Kainja & Dzonzi***

The Claimant responded by filing the following Notice of Preliminary Objection:

**“TAKE NOTICE** that during the hearing of the defendant's application for stay of proceedings pending the hearing and determination of the appeal, the claimant will raise a preliminary objection that the application offends section 3 of the Courts Act and Order 10 of the Courts (High Court) (Civil Procedure) Rules 2017 in that the summons was not issued by the Court and bears no seal of the Court.

*Dated this 12<sup>th</sup> day of March 2018.*

*Signed*

***GOLDEN & LAW***

The material part of section 3 of the Courts Act provides as follows:

*“(1) All summonses, warrants, orders, rules, notices and mandatory processes whatsoever, whether civil or criminal, shall—*

- (a) if issued or made by the High Court, be signed by the Registrar;*
- (b) if issued or made by the court of a magistrate, be signed by him,*

*and every such summons, warrant, order, rule, notice and mandatory process shall be sealed with the seal of the court issuing or making the same.*

*(2) All summonses, warrants, orders, rules, notices and other processes whatsoever, whether civil or criminal, issued or made by or with the authority of any court respecting any cause or matter within its jurisdiction shall have full force and effect and may be served or executed anywhere within Malawi."*

Order 10, r.1 and r.2, of the Court (High Court) (Civil Procedure) Rules [Hereinafter referred to as "CPR"] states:

- "1. A party may apply during a proceeding for an interlocutory order or direction of the Court by filing an application in a proceeding in Form 4.*
- 2. (1) An application in a proceeding shall–*
  - (a) be signed by the applicant or the applicant's legal practitioner;*
  - (b) cite the same parties as in the application and anyone whose interests are affected by the order sought; and*
  - (c) be signed and sealed by the Registrar."*

Counsel Mumba submitted that the provisions of section 3 of the Courts Act and Order 10, rr.1 and 2, of CPR must be complied with at all times. It was thus contended that in so far as the Summons for Stay was not issued and signed by the Court, the same is defective. Counsel Mumba concluded by praying for the dismissal of the Summons for Stay.

It is the case of the Defendant that the preliminary objection lacks merit and must be dismissed. Counsel Dzonzi advanced four grounds. The first ground has to do with double standards. Counsel Dzonzi invited the Court to note that the Claimant has done the very thing it accuses the Defendant of, that is, bringing an application that does not comply with s.3 of the Courts Act and Order 10, rr.1 and 2, of CPR.

Secondly, Counsel Dzonzi argued that whereas as a general rule, a summons ought to comply with Order 10, rr.1 and 2, of CPR, CPR also allows oral applications. Thirdly, Counsel Dzonzi alleged that a proper summons for stay was filed with the Court but the same has yet to be dealt with. He added that the same is not on Court file. Counsel Dzonzi also alleged that the Defendant's application to settle record of appeal had also met the same fate: it has yet to be dealt with. Counsel Dzonzi pointed out that the delay was being attributed to the long time it takes under Court Management System (CMS) to have documents scanned.

Fourthly, Counsel Dzonzi placed reliance on Order 2 of CPR (Effect of Non-compliance) which is couched in the following terms:

- “1. The failure to comply with these Rules or a direction of the Court shall be an irregularity.*
- 2. Notwithstanding rule 1, an irregularity in a proceeding, or a document, or a step taken, or order made in a proceeding, shall not render a proceeding, document, step taken or order a nullity.*
- 3. Where there has been a failure to comply with these Rules or a direction of the Court, the Court may—*
  - (a) set aside all or part of the proceeding;*
  - (b) set aside a step taken in the proceeding;*
  - (c) declare a document or a step taken to be ineffectual;*
  - (d) declare a document or a step taken to be effectual;*
  - (e) make an order as to costs; or*
  - (f) make any order that the Court may deem fit.*
- 4. An application for an order under rule 3 shall-*
  - (a) be made within a reasonable time and before the Party making the application takes a fresh step in the proceeding after becoming aware of the irregularity; and*
  - (b) set out details of the failure to comply with these Rules or a direction of the Court.”*

Counsel Dzonzi contended that non-compliance with Order 10, rr.1 and 2, of CPR was not fatal. It was merely an irregularity which was curable under Order 2, r. 2, of CPR which gives the Court a latitude of options from which the Court can pick depending on the circumstances of the case.

Counsel Dzonzi concluded his submissions by stating that in the event that the Court takes the view that it cannot entertain the Summons for Stay then the Defendant should be allowed to make an oral application under Order 10, r. 2, of CPR as read with r.9.

I have considered the submissions made by both Counsel. It is commonplace that the Summons for Stay does not comply with section 3 of the Act and Order 10 of CPR. To my mind, Order 2 of the CPR would be of no assistance to the Defendant. Firstly, the irregularity envisaged under Order 2 of CPR is one that relates to a properly issued court document. In the present case, it is the Summons for Stay itself that is defective. As such, Order 2 of CPR is of no avail to the Defendant.

Secondly, although failure to comply with CPR does not render a proceeding, document, step taken or order a nullity, it is important to remember that not all irregularities are curable. In terms of Order 2, r.3, of CPR, the powers of the court on non-compliance includes the power to declare a document to be ineffectual.

Thirdly, the Summons for Stay was brought under Order 1, r.18 of the Supreme Court of Appeal Rules - this is more than six months after the CPR came into operation (see GN 46 of 1997). In short, the Summons for Stay was brought under rules that no longer apply to proceedings before this Court. Thus, I have great difficulties in understanding how the Summons for Stay can be entertained by this Court.

Fourthly, there can be no doubt that the Summons for Stay is an application in a proceeding. Order 10, r.1, of CPR requires such an application to be filed with the Court in Form 4. The Summons for Stay does not meet the said requirement.

In the premises, and having regard to the foregoing, the Summons for Stay has to be rejected. I am fortified in my view by the provisions of Order 5, r.9, of CPR.

Before resting, I wish to observe that the Summons for Stay appears to have been brought as an afterthought. As already stated hereinbefore, the Notice of Appeal and the Notice of Motion for Leave to Appeal against the Ruling were filed with the Court on 9<sup>th</sup> October 2017. The Defendant made no attempt to seek stay of the proceedings before the set hearing date of 14<sup>th</sup> November 2017. The Defendant merely sought an adjournment on the ground that its legal practitioners would be outside Malawi on the material time. A party seeking stay of an order must do so expeditiously.

Having dismissed the Summons for Stay, the continued hearing of the case is set for 3<sup>rd</sup> July 2018 at 9 o'clock in the forenoon.

Pronounced in Court this 8<sup>th</sup> day of June 2018 at Blantyre in the Republic of Malawi.

A handwritten signature in black ink, appearing to read 'Kenya Nyirenda', enclosed within a hand-drawn oval.

**Kenyatta Nyirenda**  
**JUDGE**