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REPUBLIC OF MALAWI  
**IN THE HIGH COURT OF MALAWI**  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 2234 OF 2001

BETWEEN:

H.N CHIKAONEKA.....CLAIMANT

AND

BLANTYRE CITY ASSEMBLY.....DEFENDANT

**CORAM**

Mrs T. Soko : Assistant Registrar  
Mr Kalua : Counsel for the claimant  
Mrs Mdolo : Counsel for the defendant  
Mrs Mkandawire : Court Clerk

**RULING**

**Background**

The defendant herein filed an inter parte application for stay of execution of an order on assessment of damages dated 3<sup>rd</sup> November 2017 pending appeal to the Supreme Court of Appeal. The application is brought under Order 10 r. 1 of the Courts (High Court) (Civil Procedure) Rules. It is supported by a sworn statement of Isabella Mdolo Counsel for the defendant and there is a sworn statement of the plaintiff opposing the application.

## EVIDENCE

Hearing of the application took place on 25<sup>th</sup> April 2018 and the parties appeared through their Legal Practitioners. Counsel for the defendant adopted her sworn statement which stated that the plaintiff commenced an action against the defendant in 2001 claiming several reliefs namely K223, 124.28 as value of the business equipment, K280, 000.00 as a value of the vehicle, loss of business, interest, general damages for trespass, general damages for conversion and or detainue, collection charges and costs for the action. Counsel further explained that by judgment of 31<sup>st</sup> October 2013, the plaintiff was awarded general damages in respect of all the equipment and property lost. Further, the plaintiff was awarded collection costs and costs of the action. Counsel added that on 3<sup>rd</sup> November 2017 His Honour Mvula delivered an order on assessment in which he awarded the plaintiff a sum of K104, 953, 728.16 being the sum of K32, 518, 776.65 as damages for conversion, K53, 842,221.51 as damages for loss of use and K18, 593, 730.00 as damages for loss of business profits. Counsel expressed that the defendant being dissatisfied with the order of the Assistant Registrar lodged an appeal in the Supreme Court of Appeal.

Counsel exhibited a copy of notice of appeal as part of evidence. Counsel stated that the grounds of appeal in the exhibit have real prospects of success. Counsel argued that the K32, 518,776.65 is the sum of the market prices for the goods converted by the defendant at the time of the assessment when the law is well settled that damages for conversion are the value of the goods at the time of the conversion plus ant consequential loss flowing from the conversion which is not too remote. Further, Counsel argued that the market price summing to K32, 518,776.65 include market prices of goods that were not converted by the defendant and this was not only admitted by the plaintiff during assessment but the plaintiff also requested the Court to take off the same yet the Assistant Registrar still took the market prices of those goods in awarding the plaintiff the sum of K32, 518,776.65. Counsel also stated that the head of damages under loss of use was neither pleaded by the plaintiff in his statement of claim nor it was awarded by the Honorable Justice Chipeta in his judgment dated 31<sup>st</sup> October 2013. Counsel stated that damages on that head ought not to be awarded. Beside, Counsel stated that the award of K18, 593,730.00 as damages for loss of business was not supported by the evidence that was before the Court.

Counsel faulted the ruling of the Assistant Registrar for failing to take into account the delay of 8 years attributed to the Court's delay in delivering the defendant thereby prejudicing the defendant who in 2001 was faced with a claim for special damages totaling K503, 124. 28 plus other general damages which might not have exceeded K1, 000,000.00.

Counsel concluded that the sum of K104, 953,728.16 is a lot of money such that if the order were to be executed before the hearing of the appeal, it would be difficult to recover money from the plaintiff. Counsel gave an example of a bank statement that was exhibited in the plaintiff's affidavit 7 months ago which showed that there was a deposit of K2,000,000.00 but as of the end of 7 months the account had a balance of K373,991.07. Counsel stated that the plaintiff indicated that he owns property but there is no proof of that ownership as well as no proof of any evaluation report to substantiate the allegation. Counsel cited a case of **AR vs Osman and Co. vs Nyirenda (1995) 1 MLR 13** to substantiate the matter.

In opposing the application, Counsel for the claimant adopted the affidavit in opposition sworn by the claimant in which he stated that the matter was commenced 17 years ago on 27<sup>th</sup> August 2001 and the Judgment was delivered on 31<sup>st</sup> October 2013. The affidavit states that assessment of damages was delivered in November 2017. The claimant expressed that staying of execution of the assessment is unfair and constitutes a gross miscarriage of justice considering that he lost the property and business to the defendant's barbarism. The claimant stated that in any event the defendant will still have to compensate him and that in any event if the Supreme Court reduces the amount then he has a financial capacity to pay back the difference.

The claimant stated that he runs a very successful construction business namely Gtech Construction and he also has worked with a number of reputable organizations including standard Bank Malawi Limited and others. The claimant exhibited his bank statement showing the volume of transaction in his bank account. He stated that he owns a house at Chilomoni Fargo whose estimated open market value is around K45, 000,000.00 He added that he has motor vehicles and exhibited copies of motor vehicle registration certificates.

Counsel for the claimant argued that there has to be special circumstances and the burden of proving those special circumstances lies with the one seeking stay. Counsel cited a case of **Austin Chitsukwa vs Ethiopia Airways Civil Cause Number 1469 of 2005 and ACB vs Atupele Properties Ltd MSCA Civil Appeal No. 27 of 2005**. Counsel also cited a recent case of **Celcom Ltd vs Davie Huwa Civil Appeal No. 8 of 2016**. Counsel stated that there is no evidence on the part of the defendant to prove that the claimant does not have the capacity to pay back the money. Counsel said the defendant has not demonstrated anything to that effect. Counsel also stated that it is not enough to consider prospects of success as special circumstances. Counsel referred the Court to Celcom case where he stated that the Court failed to consider prospects of success as a special circumstance. Counsel stated that damages for loss of use was part of general damages and it doesn't need to be specifically pleaded. Counsel lamented that the case has been going on for 17

years and the move by the defendants to apply for stay could further delay the plaintiff from accessing the fruits of his litigation. Counsel stated that should the Court stay the execution then it should order that part payment of the judgment debt be paid to the claimant

In reply Counsel stated that the evidence that the claimant provided in this Court supports the defendant's submissions. Counsel also stated that the Court has the discretion to stay order. Counsel refused that the stay must have conditions. She stated that it will be difficult to compute how much the defendant must pay.

## ISSUES

Whether to stay execution of the ruling on assessment of damages pending appeal

## THE LAW

It is a general principle that the Court does not make a practice of depriving a successful litigant of the fruits of litigation pending an appeal. See AR Osman and Co vs Nyirenda 1995 1 MLR 14. On the other hand when a party has appealed, which is a right, the Court should see to it that the appeal, if successful, is not rendered nugatory. See AR Osman and Co. vs Nyirenda (supra). In addition, it is the duty of the Court to strike a balance between these two considerations in exercising its discretion as to whether it should grant stay or not. Further the Court has the duty to consider whether there are special circumstances which speak in favor or against granting a stay. The burden therefore lies on the applicant to show special circumstances warranting a stay of execution. Special circumstances vary for case to case. The Court then 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 AR Osman and Co. Vs Nyirenda

The case of Anti-Corruption Bureau vs Atupele Properties Ltd MSCA Appeal Case No. 27 of 2005 summarized the principles of stay of execution as follows:

*Firstly, 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 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 Court in Davies Lanjesi vs Joshua Chisa Mbele Commercial Cause No. 225 of 2009 stated that grounds of appeal are not one of the consideration in the application of stay of execution. The fact that there

are prospects of the appeal succeeding is not a ground upon which a stay can be granted. In **Nyirenda vs AR Osman 1993 16 1 MLR** the Court stated that 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. Also see **Celcom Limited vs Davie Huwa and Others Civil Appeal No. 8 of 2015** on principles governing stay of execution of a judgment.

## **DETERMINATION**

In the present matter, I have considered arguments from both parties. I have to state that I will not consider if the defendant has real prospects of success in the Supreme Court of Appeal as a ground of staying execution of the ruling for the reasons put in Lanjesi case and Nyirenda case.

What I will consider is if the defendant has raised any special circumstances to order stay of execution. The evidence is clear that motor vehicles have not been valuated. It must be known that property like motor vehicles depreciate in nature. The price at which the vehicles can be sold today is not the same price that will be sold next year and so forth. Motor vehicles keep on wearing and tearing and it is unpredictable whether the motor vehicles will still be functioning or be in the same condition in the next months, year or so. Therefore a motor vehicle is not a reliable source of raising funds to pay back the money in case the defendant is successful hence rendering the appeal nugatory. Besides, there is no evidence that the claimant owns a house in Chilomoni Fargo. If at all he owns a house at Chilomoni Fargo there is no substantive evidence that the value of the house is K45, 000,000.00. It is just a mere speculation by the claimant and the Court cannot rely on that assertion alone. I have gone through the bank statement of the claimant and the highest balance that he had at the bank from November 2017 to February 2018 was K3, 246,680.42. This is an indication that the funds of the claimant cannot suffice to pay back the money in case the defendant succeeds in the appeal.

On the foregoing reasons, the Court orders that the execution of the ruling of assessment be stayed pending the determination of the appeal by the Supreme Court.

The claimant complained that the matter has been ongoing for 17 years as such staying the order of the assessment will be unfair to the claimant. The issue of liability was resolved and the claimant is aware that the judgment is in his favour what is remaining is for the Court of appeal to determine the correct quantum of damages. Either to uphold the ruling of the registrar or to vary it by reducing the damages. The claimant will still enjoy the fruits of his litigation after that process is completed in my mind. I therefore retain that the execution be stayed pending the appeal by the Supreme Court.

Pronounced in chamber on this 28<sup>th</sup> day of May 2018.

A handwritten signature in black ink, consisting of a stylized 'T' and 'S' intertwined.

**T. Soko**

**Assistant Registrar**