



The Judiciary

IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY

JUDICIAL REVIEW CAUSE NUMBER 3 OF 2017

BETWEEN

BLESSINGS NKOKA.....1ST CLAIMANT

JUSTIN M. THAWANJI.....2ND CLAIMANT

AND

COUNCIL FOR MZUZU UNIVERSITY.....DEFENDANT

CORAM: B. SAMBO, ASSISTANT REGISTRAR (AG)

Mr. Jivason, of counsel for the Claimant/Respondent

Mr. Chunga, of counsel for the Defendant/Applicant

Mr. H. Kachingwe, Clerk/Official Interpreter

RULING

1. BACKGROUND

This is an application by the Defendant to stay execution of an order for taxation made by this court on the 15th of May, 2018 pending determination of the Defendant's application to review a taxation bill.

The Applicant contend that the Claimant's legal practitioner was of less than 10 year experience at the bar, therefore his hourly rate ought not to have been prescribed at MK25,000.00 per hour. They further contend that the matter was very simple to the extent that it was resolved without trial. They went on to submit that the bill presented by the claimant's counsel was duplicated, and the result of which was that they were awarded costs twice on one and the same bill. Finally, counsel Chunga prayed that failure for the court to grant the stay would render the impending application to review the bill nugatory.

In response, counsel for the claimants submitted that this application to stay the order for taxation of costs could only be acceptable in the presence of an application to review the bill. Counsel drew the attention of the court to the record, and observed that there was no such attendant application.

He further submitted that the Applicant had 21 days to apply for review of the bill of costs; which time got expired. He told the court that without the company of the intended application to review the bill filed and attached to the present application, the court lacks the basis to grant it. He further contended, without prejudice to the foregoing, that the court ought to have at the back of its mind the principle of civil litigation that a successful party should not be denied enjoyment of the fruits of his or her litigation. He thus said that granting the stay would have the effect of denying his claimants the fruits of their litigation.

Counsel Jivason further submitted that the Defendant was duly represented by counsel during taxation proceedings. He reminded the court that the Defendant's counsel had allowed the greater part of the bill to pass through unopposed, and hence it was strange to hear the same party that said the awards were infallible to change tune and register an opposition against its Certificate of Taxation after several days.

Counsel Jivason went on to submit that the Sworn Statement by Counsel Raphael Mhone was defective, and was not in tandem with Order 18 of the Civil Procedure Rules, 2017 in that it did not indicate that the deponent was aware that if it were to be used in evidence, and that if it contained falsehood, the deponent would be charged with perjury.

Counsel for the claimants, having adopted his sworn statement and his skeleton argument that he had filed in opposition to the present application, concluded by submitting that an application for stay of a court order without filing an intended subsequent application, renders the application to stay speculative or a mere wish, and the court lacks jurisdiction to grant it. He thus asked the court to dismiss the application with costs.

2. ISSUES

Whether the application to stay execution of the order of costs made on the 15th of May, 2018 should be granted pending review of the same.

3. DETERMINATION

I do not think it is necessary for me to dwell much on all issues raised by the parties in this matter bearing in mind that the underlying matter is one of whether the application for stay of execution of an order for costs should be granted or not pending an application for review of the order for costs. Most of the issues raised by the parties touch on the question of review of the order of

costs; whose time has not yet come. I will not respond to those issues as for the time being, for obvious reasons.

Counsel for the Claimant is of the view that the present application is a mere wish in that there no application to review the certificate of taxation. I share the same view with counsel for the claimants that, in the absence of the attachment of the said intended application, the present application could be regarded rather speculative and hence lacking legs to stand on. I have, however considered the submission, the sworn statement and the skeleton arguments furnished by counsel for the Applicant, and noted that he raises two serious points;

- i. That a review is salient because counsel for the claimant had duplicated his bill of costs, hence misleading the court, a situation which gave him the opportunity to be awarded costs twice on the same bill and matter
- ii. That a review was important because the action was quite elementary to the extent that it was disposed without trial.

While I also stand together with counsel for the claimant that the present application has delayed in that it has been filed outside the stipulated time of 'within 21 days', there is danger of occasioning injustice to the other party if I deny them the opportunity to be heard on the intended application to review costs. I will, for the avoidance of doubt, reproduce O.31 r 17 of the Courts (High Court) (Civil Procedure) Rules, 2017. But before then, I wish to say that the need to file the application for review of costs along with the application to stay can also be clearly seen under sub-rules 2,3 and 4 of the Order above. This is what Order 31 r 17 says;

- (1) A party to assessment of costs who is dissatisfied with any decision of the Court may, within 21 days after that decision, apply to the Court to review its decision. (2) An application under sub rule (1) shall

specify, in writing, the nature and grounds of the objections. (3) The objections under sub rule (2) shall be served on every other party to the proceeding, and the other party shall, within 21 days from the date of service, deliver answers to the Court, the applicant or other party to the proceeding. (4) The Court may receive further evidence at the hearing of an application under sub rule (1) and may order costs as it shall deem appropriate in the circumstances.

Admittedly, the present application has flouted a number of provisions in the Courts (High Court) (Civil Procedure) Rules, 2017. The manner in which it was drafted and filed, clearly tells that it was brought under the old law; Rules of Supreme Court notwithstanding that it was supposed to be treated as a new step. Hon Justice Ligowe, in **Fanwell Mwamlowe and another v Rumphi District Counsel and others**, Civil Cause Number 8 of 2016, when the Applicant filed a new step under the old law upon which the action was founded (hereinafter, 'the existing procedure rules'), he stated that if a party files a new step under the 'existing procedure rules', there is no point for the court to go into the substantive matters since it is as if the Applicant has made no application for the court to consider.

However, considering the grounds raised by the Defendants herein as to why they would want to apply for review of the bill of costs, I will treat the non-compliance by the Applicant herein as a mere irregularity.

The effects of non-compliance with the new rules are enshrined under O. 2 r 1. The provision reads;

The failure to comply with these Rules or a direction of the Court shall be an irregularity.

I therefore hold the application herein just in the same way as stated in the rules; 'an irregularity'.

I will now proceed to exercise my powers, in these circumstances, provided for under O. 2 r 3 of the rules. For the avoidance of doubt, these are what the rules say they are the powers;

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.

In this case, I declare the application to be effectual. I grant the order of stay pending the hearing of an application to review an order of costs. The Applicant should file the application to review the order of costs within 14 days from today. The short of this is that the Applicant should comply with the provisions of Order 31 r 17 of the Courts (High Court) (Civil Procedure) Rules, 2017 within 14 days from today.

Made in chambers at Mzuzu today on the 29th of June, 2018.



Handwritten signature of Brian Sambo, consisting of several overlapping loops and a long vertical line extending downwards.

Brian Sambo

Assistant Registrar