



IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

CIVIL DIVISION

CIVIL CAUSE NO. 08 OF 2016

**BETWEEN**

FANWELL MWAMLOWE..... 1<sup>ST</sup> APPLICANT

EDGAR MWAMLOWE..... 2<sup>ND</sup> APPLICANT

-and-

RUMPHI DISTRICT COUNCIL

(THE DISTRICT COMMISSIONER FOR RUMPHI)..... 1<sup>ST</sup> RESPONDENT

PARAMOUNT CHIEF CHIKULAMAYEMBE..... 2<sup>ND</sup> RESPONDENT

MABVUTO KACHIPAPA MWAMLOWE..... 3<sup>RD</sup> RESPONDENT

**CORAM: THE HON. JUSTICE T. LIGOWE**

Mr. G. Kadzipatike Counsel for the Applicant

Mr. W. Chibwe Jr. Counsel for the Respondent

Mrs. F. Luwe Official Interpreter

Mrs. R. Luhanga Court Reporter

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**RULING**

- 1 This is an application to set aside an Order staying execution of an Order of this Court. The Order of Stay was granted ex parte on 23<sup>rd</sup> January 2017 by the Hon. Justice Madise pending appeal to the Supreme Court of Appeal. The Order stayed was made by the same

Judge on 17<sup>th</sup> November 2016. It is an Order on the originating summons. Fanwell Mwamlowe and Edgar Mwamlowe brought in this case.

- 2 The application for stay of execution had been brought under Order 59 rule 13 of the Rules of the Supreme Court and Order 1 rule 18 of the Supreme Court of Appeal Rules.
- 3 The present application has been brought under Order 32 rule 6 as read with Order 59 of the Rules of the Supreme Court as read with sections 21 and 23 of the Supreme Court of Appeal Act.
- 4 The Respondents challenge the manner the application has been brought in view of Order 35 rule 9 of the Courts (High Court) (Civil Procedure) Rules 2017.\* These rules came into force on 3<sup>rd</sup> October 2017 and rule 9 provides that:

“Any application to the Court made on or after the commencement date shall be made in accordance with these Rules.”

- 5 The Rules of the Supreme Court applied to this Court before 3<sup>rd</sup> October 2017.
- 6 Counsel for the Applicants insists the application has been properly brought in view of Order 35 rules 3 and 6 of the same Courts (High Court) (Civil Procedure) Rules. Rule 3 states:

(1) Where a step in compliance with the practice under section 29 of the Act (the “existing procedure rules”) has been taken in an

existing proceeding, before the commencement date, in particular one that uses Forms or other documentation required by the existing procedure rules, the procedure shall proceed in the manner specified under the existing procedure rules.

(2) Any step which a party is required to take in response to something done by another party in accordance with the existing procedure rules shall be in accordance with those Rules.

(3) A party who is served with a mode of commencement under the existing procedure rules on or after the commencement date shall respond in accordance with those Rules and the instructions on any forms received with the mode of commencement.

(4) Where a proceeding has begun by a mode of commencement under the existing procedure rules, whether served before or after the commencement date, filing and service of the statements of case previously known as "pleadings" shall be done according to those rules.

7 Counsel for the Applicants argues that since stay of execution was granted ex parte under the Rules of the Supreme Court, this application needed to be made under those rules.

8 It is clear in citing Order 35 rule 3 of the "present procedure rules." Counsel is mistaken with the present application in response to a step taken under the "existing procedure rules" before the commencement date.

- 9 The application for stay of execution in issue was made ex parte and as such it required no response from the other party. And it was dealt with as such.
- 10 The present application, with due respect, cannot in any way be in response to the ex parte application. The present application is an application in its own right.
- 11 If sub rules (1) and (2) are not clear then sub rules (3) and (4) make it clearer. It cannot be better than that. Every new court process or step taken has a corresponding response. That is what Order 35 addresses.
- 12 Rule 6 (1) refers to a step taken under the "existing procedure rules" before the commencement date, that it shall remain valid on or after the commencement date. This is to validate all processes taken under the "existing procedure rules" which may be in conflict with the new rules. If it meant to validate steps taken under the "existing procedure rules" after the commencement date of the new rules, then there would not have been sub rules (2) and (3) as well as rule 9.
- 13 This application is a new step on its own right and is misconceived to have been brought under the "existing procedure rules."
- 14 Counsel cannot even rely on sections 21 and 23 of the Supreme Court of Appeal Act, when there is a specific rule providing for how an application in the case has to be brought.

15 The application is dismissed with costs. The position is the same as the Applicants have made no application at all for this Court to consider. There is no point going into the substantive matters. If the applicants wish they can file the application afresh following the proper rules.

16 Made in Chambers this 30<sup>th</sup> day of May 2018.

  
T. Ligowe  
JUDGE