



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**

CIVIL CAUSE NO. 132 OF 2015

BETWEEN:

ANTHONY BOTOMANI PLAINTIFF

-AND-

BILLY MOYENDA DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Ms. Banda, of Counsel, for the Plaintiff
Respondent, absent and unrepresented
Mr. Doreen Nkangala, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is the Plaintiff's application for an order staying execution of the judgment delivered by this Court on 8th November 2018. For reasons that will become apparent in a due course, it is necessary that the application be quoted in full:

"INTERPARTES APPLICATION FOR STAY OF JUDGEMENT PENDING APPEAL TO THE SUPREME COURT (Under section 21 of the Supreme Court of Appeal Act, Order 10, rule 1 of the Courts (High Court) (Civil Procedure) Rules and/or Order 59, rule 13 of the Rules of the Supreme Court and the Inherent Jurisdiction of the Court)

LET THE PARTIES through Counsel attend the Judge in Chambers on the 29th day of June 2018 at 9 o'clock in the forenoon on the hearing of an application by the Plaintiff for an Order of STAY of Judgement of His Lordship Honourable Justice Kenyatta Nyirenda of the 8th day of November, 2017 holding that the defendant and his clan are

entitled to be appointed to the office of Group Village Headman Duswa in Mulanje District.

TAKE NOTICE that the Sworn Statement of WANANGWA HARA filed together with the annexures thereto and delivered herewith will be used in support of this application.” – Emphasis by underlining supplied

The background to the application for stay is as follows. The Plaintiff commenced an action seeking a declaration and an order that the Plaintiff is the legitimate heir to the throne of Group Village Headman (GVH) Duswa, in the district of Mulanje under Traditional Authority (T/A) Mabuka. The Statement of Claim alleged that the Defendant and his kinsmen as well as the predecessors to the throne of GVH Duswa were not entitled to assume the chieftaincy of Duswa Village as they hail from Thyolo. It was also alleged that when the Defendant and his kinsmen die, they are buried in Thyolo and not in Duswa Village. The Statement of Claim ended with a prayer for, among others, the following reliefs:

- “7.2 A declaration and an Order that the Plaintiff be installed and enthroned as Group Village Headman Duswa;
- 7.4 A permanent injunction restraining the defendant from assuming the roles of, and continuing to act as group Village headman Duswa”.

By the Statement of Defence, the defendant denied each and every allegation of fact set out in Statement of Claim and further stated as follows:

- “4.1 the defendant was installed as group Village headman Duswa in 2002 and he has reigned as such since.
- 4.2 considering that the Plaintiff and his clan has not had any problem with the defendant installation and reigning as such it is surprising to him, after 13 years, to come to court to claim the chieftaincy
- 4.3 the defendant’s clan has been traditional leaders of Duswa village since 1893.
- 4.4 the dispute of the village was already adjudicated in 1994 by T/A Mabuka and he ruled in favour of my clan as the rightful heirs to the Duswa village.”

The Application for Stay is supported by a sworn statement by Mr. Wanangwa Hara and the relevant part thereof provides as follows:

“2. The Proceedings

- 2.1 The record of the Court will show that the Plaintiff and the Defendant are involved in a chieftaincy wrangle regarding who is the rightful heir or who should assume the chieftaincy of Group Village Headman Duswa in Mulanje District.

- 2.2 *After protracted discussions, attempts to resolve the matters before other Chiefs in Mulanje and before T/A Mabuka and later on the District Commissioner, the Plaintiff commenced these proceedings before the High Court.*
- 2.3 *The Plaintiff claimed for an Order/ Declaration that the Defendant was wrongfully appointed as Group Village Headman Duswa in the District of Mulanje under T/A Mabuka as such the appointment should be set aside.*
- 2.4 *The Plaintiff further claimed for an Order and/or declaration that the Defendant was removed and should cease to hold out as Village Headman Duswa.*
- 2.5 *The Plaintiff asserted that he is the rightful candidate to assume the throne of Village headman Duswa under custom and as such T/A Mabuka should be directed to appoint the rightful heir to the throne of Village Headman Duswa and in doing so he should consider the Plaintiff as n*
- 2.6 *The gist of the Plaintiff's case is that the Defendant and his kinsmen as well as the predecessors to the throne of Village Headman Duswa in the name of Davison Galima, Feston Galima were not entitled to assume the chieftaincy of Duswa Village in Mulanje as they hail from Thyolo. When they die, they are buried in Thyolo and not in Duswa Village. The Chieftaincy belongs to the Plaintiff's clan.*
- 2.7 *The record of the Court will show that on 8th November, 2018, His Lordship Honourable Justice Kenyatta Nyirenda made his Ruling on the matter finding that the Defendant and his clan are entitled to be appointed to the office of GVH Duswa in Mulanje District and they should be so appointed.*
- 2.8 *Displeased with the Ruling, the Plaintiff filed a Notice of Appeal and Summons to settle the record of appeal.*

3. *Special Circumstances to grant stay of Judgment pending appeal*

- 3.1 *In delivering the Ruling against the Plaintiff, the High Court misdirected itself on a number of issues.*
- 3.2 *The High Court erred by usurping the appointing powers and authority vested in T/A Mabuka when it ordered that Billy Moyenda is entitled to be appointed as the new Group Village Headman Duswa and that T/A Mabuka should appoint the defendant as GVH Duswa accordingly when it is T/A Mabuka who has statutory authority to appoint.*
- 3.3 *Secondly, the High Court erred by finding that the Defendant and his clan are entitled to the throne of GVH Duswa in Mulanje District when evidence was clear that the Defendant and his clan come from Thyolo,*

with their families there and when they die, they are buried in Thyolo where they have their own village under T/A Nchalimwela.

- 3.4 *The High Court erred in law and fact and custom in failing to appreciate that when a GVH dies, he is buried in his own village and not the village of others and in a different district altogether.*
- 3.5 *The High Court even so misdirected itself in holding that Suwachi and Davison Galima who previously served as GVH Duswa belonged to the defendant's clan when evidence from both the plaintiff and the defendant was not in dispute that Suwachi was of the plaintiff's clan and great uncle to the plaintiff and Davison Galima was from Thyolo and was buried there.*
- 3.6 *The foregoing found the grounds of appeal against the Ruling of the High Court and gives indications that the appeal has sufficient merit and raises serious questions to be looked at by the Malawi Supreme Court of Appeal. There is now produced and shown to me marked **WHI** a copy of the Notice of Appeal*

4. Balance/Risk of Injustice

- 4.1 *During the course of the trial and before, T/A Mabuka had stopped the Defendant from working as Group Village Headman Duswa for the matters to be resolved fairly. T/A Mabuka removed the village register from the Defendant and took over the affairs of the village through himself and his temporary appointees.*
- 4.2 *I verily believe the status quo should be maintained so that the parties should have a fair day in the appellate Court*
- 4.3 *There is a high risk with the hostility between the parties that the Plaintiff and his clan may be removed from their lands and banished from the village where the Judgment is not stayed on authority of the Defendant as Group Village Headman.*
- 4.4 *There is a high risk of injustice to be occasioned to the Plaintiff and his clan as they may even lose their final resting home.*
- 4.5 *T/A Mabuka will be forced to recognize the Defendant as Village Headman Duswa for now and for always without any powers to remove or suspend or appoint another Village headman in accordance with his statutory powers because of the Court's usurpation of his powers*

WHEREFORE, I humbly and respectfully pray that a stay of Judgment pending appeal of the decision of His Lordship Honourable Justice Kenyatta Nyirenda be granted in line with the relevant law. "

Counsel Banda submitted that there are good reasons for granting a stay of execution in the present case. The submissions are to be found in paragraph 3.2 of the Applicant's Skeletal Arguments in Support. The paragraph is couched in the following terms:

"3.2 THE PLAINTIFF'S CASE

- 3.2.1 *My Lord, the law is clear that a stay of execution will be granted where there are good reasons for doing so.*
- 3.2.2 *There are special circumstances in present case that render necessary the granting of the Order for Stay of Judgment dated the 8th day of November, 2017. pending appeal to the Malawi Supreme Court of Appeal*
- 3.2.3 *To begin with my Lord, the law gives the authority to the Chief to appoint a Group Village Headman and not to the court as such the court had usurped the power of the chief.*
- 3.2.4 *When making such an appointment, there is an underlying assumption is that the chief must do so according to customary law.*
- 3.2.5 *The Applicant and so T/A Mabuka are unfairly prejudiced since a pretender not from Mulanje-Duswa Village will have to be recognized as Group Village Headman for Duswa Village. And this will have to be for now and for always by virtue of the authority of the High Court and not by authority of T/A Mabuka the Chief Responsible for appointments, removal and suspension of subordinates Chiefs under his area of control.*
- 3.2.6 *My Lord if the stay is not granted, the Defendant will be recognized as Village Headman Duswa and will be given back the village register. There is great animosity between the parties that there is a high risk that the Plaintiff and his clan will be banished from Duswa Village to not set foot there again and they would lose their lands and final resting home to their prejudice.*
- 3.2.7 *The Plaintiff will lose everything and they will not have a fair day in Court.*
- 3.2.8 *My Lord, there is a glaring error in the Court's Ruling holding that Suwachi who previously served as GVH Duswa belonged to the defendant's clan when evidence from both the plaintiff and the defendant was not in dispute that Suwachi was of the plaintiff's clan and great uncle to the plaintiff. It was Davision Galima from Thyolo who was the Uncle to the Defendant. He was buried in his home village in Thyolo.*
- 3.2.9 *My Lord, the Plaintiff verily believe that the High Court erred and misdirected itself in law and evidence by failing to consider that it is a*

long-standing principle of customary law that customary law is geographically varied and within that it is locality and lineage-based. The customary law of one area is different from the customary law of another such that an outsider from a different location cannot claim title to a throne of another location. A person not belonging to the chieftaincy lineage cannot claim title to the said chieftaincy. It is in that regard that a person from Thyolo cannot claim title to the chieftaincy of a village in Mulanje, especially when he does not belong to the lineage which is so entitled to the chieftaincy.

- 3.2.10 *This appeal has sufficient merit. We verily believe that the appeal has chances of being successful.*
- 3.2.11 *At the same time, the risk of injustice is greater against the Plaintiff as above.*
- 3.2.12 *During the course of the trial and before, T/A Mabuka had stopped the Defendant from working as Group Village Headman Duswa for the matters to be resolved fairly. T/A Mabuka removed the village register from the Defendant and looks over the affairs of the village through himself and his temporary appointees.*
- 3.2.13 *We verily believe the status quo should be maintained so that the parties should have a fair day in the appellate Court. See **Msuku vs Msuku, MSCA Civil Appeal Number 39 of 2015**, where Justice Chikopa granted a stay in a similar chieftaincy dispute before the supreme court of Malawi. His Lordship Hon Justice Chikopa stated, the views of the supreme Court remained Constant. The matter is resolved on the balance of justice."*

The legal principles which guide a court when considering an application for a stay of execution of judgment pending appeal are very clear. The general rule is that the Court does not make a practice of depriving a successful litigant of the fruits of his or her litigation: see **Mike Appel & Gatto v. Saulosi Chilima [2013] MLR 231** and **Re Annot Lyle (1886) 11 PD 114**. Therefore, the mere fact that a party has exercised his or her right to appeal to a higher court does not mean that the judgment appealed against must be stayed.

In **Mulli Brothers Limited v. Malawi Savings Bank [2014] MLR 231**, the Supreme Court of Appeal set up a three tier test to be applied in exercising the discretion whether or not to grant a stay of execution of judgement pending appeal. The Court stated thus:

*"It is well to add that we understand the law to be that the test whether a stay should be granted in the three-part test from **RJR MacDonald Inc. (1994) 1 SCR 311** that also*

governs an interlocutory injunction: a serious issue to be tried, irreparable harm, and the balance of convenience. ”

Under the said new approach of three tier test, courts may also take into account, where necessary, the prospects of the appeal succeeding: see **Frank Jailos Chisakalimi v. Cassium James et al MSCA Civil Appeal No. 212 of 2016, Mulli Brothers Limited v. Malawi Savings Bank**, supra. In the latter case, the Supreme Court of Appeal made the following apt observation:

“Secondly, although courts approaching applications for a stay will not generally speculate about the appellant’s prospects of success, given that argument concerning the substance of appeal is typically and necessarily attenuated, this does not prevent them considering the specific terms of a stay that will be appropriate fairly to adjust the interest of the parties, from making some preliminary assessment about whether the appellant has an arguable case. This consideration is protective of the position of a judgment creditor where it may be plain that an appeal, which does not require leave, has been lodged without any real prospect of success and simply in the hope of gaining a respite against immediate execution upon the judgment.

It is our judgment that the above dictum captures what should inform an appellate court when considering an application for stay of execution from a court below it. We have seen that the appellant thinks that the court erred in not taking into account the payments that were made in satisfaction of the debt. However, it has been understood that the respondent’s claim took into account all the payments made by the appellant. Thus, it is doubtful that the appeal has been lodged with any real prospect of success. In our judgment it has been lodged merely in the hope of gaining a break against immediate execution upon the judgment.

We must add and put it here by way of observation that the comment by the Court in the passage which we have recorded above is illuminating. It indicates that there is no necessary requirement that the Court determines whether there is an arguable case on the appeal although it may be relevant in determining whether it is appropriate to grant a stay. ”

What emerges from the foregoing authorities is that the Court must consider all the circumstances of the case and determine from the same whether or not good reasons for staying execution of the judgment do exist and whether or not granting such a stay would be in the interest of justice.

Turning to the case under consideration, the prospects of the appeal succeeding are very remote. This is because even if the 1st Defendant was, for the sake of argument, indeed entitled to the chieftaincy herein, her claim for the same is doomed to fail on account of being made very late in the day. It is trite law that a person who seeks to lay claim to chieftaincy must do so timeously. In the landmark case of **Group Village Headman Kakopa & Others v. Chilozi & Another [2000-2001] MLR 140 (SCA)**, the Supreme Court had this to say on this aspect:

“Upon reading the judgment of the trial court, we are unable to agree with this finding by the court below. Our opinion is that the custom advanced by the appellants would apply if the wrongly appointed chief is to be removed timeously. But where the so-called illegally appointed chief is allowed to reign for almost twenty years and a new chief is appointed according to the local customary law, this Court will be unwilling to assist the appellants. The appellants are deemed to have acquiesced to the situation. As we observed earlier on, such an application to remove the wrongly appointed chief should have been made as soon as the opportunity to do so arose”


In the present case, the Plaintiff's own case is that the Defendant was appointed to be Chief in 2002: see paragraph 5.27 of the Statement of Claim. The Defendant has thus acted as GVH Duswa for more than 17 years. Needless to say, the Plaintiff's claim is inordinately delayed: see **Group Village Headman Kakopa & Others v. Chilozi & Another**, supra. In the circumstances, the likelihood of the Plaintiff's appeal succeeding is very minimal.

Further, it will be recalled that one of the reliefs prayed for by the Plaintiff is “*A declaration and an Order that the Plaintiff be installed and enthroned as Group Village Headman Duswa*”. The Court made it very clear in its judgement that in terms of section 9 of the Chiefs Act no other authority except a Chief has power to appoint GVH. The Court went ahead to cite the case of **Group Village Headman Mankhambira and Others v. Matekenya and others, Civil Cause No. 132 of 1999 (unreported)** in support of its holding. I, therefore, do not understand how the Plaintiff can now turn around and accuse the Court of usurping the appointing powers vested in T/A Mabuka. The Plaintiff is being disingenuous.

As the matter stands, the Plaintiff has failed to prove any special circumstances warranting a grant of a stay of execution of judgment pending appeal. He has not shown how he would suffer prejudice in the event that the execution of the judgment were not to be stayed. Additionally, in making his application, the Plaintiff suppressed various facts that are very material to the determination of the application.

All in all, the Appellant has failed to bring forward solid grounds for seeking an order staying execution of my judgment dated 8th November 2018 pending an appeal by the Appellant to the Supreme Court of Appeal. In the circumstances, the application for a Stay Order is dismissed.

Pronounced in Court this 23rd day of August 2018 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE