



**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
REVENUE DIVISION**

MISCELLANEOUS CIVIL APPLICATION NO. 27 OF 2015

**THE REGISTERED TRUSTEES OF
UNC PROJECT APPLICANT**

AND

MALAWI REVENUE AUTHORITY RESPONDENT

CORAM: HON. JUSTICE R. MBVUNDULA
Songea, Counsel for the Applicant
Sauti-Phiri, Counsel for the Respondent
Chimang'anga, Official Interpreter

RULING (No. 2)

On 15th August 2018 I delivered a Ruling whereby I upheld the respondent's application to discharge an injunction granted to the applicant on the ground that the same could not subsist independent of a pre-existing cause of action. The applicant applied for leave to appeal against, and for an order staying, the Ruling. Counsel for the applicant concurrently undertook to file the appeal within two days. I withheld my decision, which I now deliver.

The application for stay was made pursuant to Order 28 rule 48 of the Courts (High Court) (Civil Procedure) Rules, 2017 which provides: “An enforcement respondent may apply to the Court for an order suspending the enforcement of an order.”

The respondent opposes both the application for leave to appeal and for the stay order.

The reason advanced for opposing the leave to appeal is that there can be no appeal where there is no cause of action. Counsel opined that without a cause of action there is nothing to appeal against.

As regards the application for a stay order the respondent submitted that an order of stay would have the same effect on the respondent as the order of injunction which restrained the respondent from taking measures to recover the taxes claimed from the applicant. Counsel for the respondent pointed out that the applicant’s counsel had not cited any justification to warrant the grant of the stay. Counsel also referred to and relied upon the principle that a successful litigant should not be deprived of the fruits of his litigation. In response thereto counsel for the applicant submitted that the principle was not without exception, stating that the applicant has a right to appeal.

The principles governing the grant or otherwise of an order for stay are well stated in two decisions of this court. One is *City of Blantyre v Manda and others* 15 MLR 114 where it was held, *inter alia*, that the general rule is that a plaintiff is entitled to receive payment on a judgment in his favour even if an appeal is pending. However, courts can depart from this general rule, the only basis for exercising this discretion being evidence that there was no reasonable probability of getting back money paid if an appeal was successful. Even if such evidence was produced, a court could still refuse an application for stay where to grant the application would be “utterly unjust”. The other case is *Stambuli v Admarc* Civil Cause No. 550 of 1981 where Jere J observed as follows:

“If the court were as a habit to refuse the enforcement of its own judgment pending the hearing of appeals in the appellate court, this would be against the public policy, for it would tend to lengthen the period within which a successful party would collect his damages. It would further bring an element of uncertainty, hence encouraging parties to take the law into their own hands. However, the courts do realise that a party who has lost, has also, no doubt, the right to appeal to the appellate court and such appeal should not be pre-empted. It appears to me what is required is to balance between the two views, but the scales are more weighed in favour of a successful party.”

In the matter at hand no evidence was presented, nor was it argued, that if the taxes claimed were paid to the respondent the respondent would be unable to repay the same to the applicant if the appeal was successful. There is therefore nothing persuading me to be of the view that there is no reasonable probability of the applicant getting back the money if ~~an~~^{the} appeal was successful.

Secondly, considering that the respondent was, for more than three years, restrained by the order of injunction, from collecting the taxes, restraining the respondent further, would, in my view, be utterly unjust, more so in view of the fact that the applicant has no cause of action on record. I would agree with counsel for the respondent that the effect of doing so would be the same as sustaining the injunction.

Whilst I allow the applicant leave to appeal upon the considerations that it is the applicant's right to do so, that the appeal should not be pre-empted, and that the application was made without delay, I would, as regards the application for stay, exercise my discretion by towing the line whereby "the scales are more weighed in favour of a successful party", *per* Jere J in *Stambuli v Admarc*, and decline to grant an order of stay pending the appeal.

I make no order for costs of this application.

Delivered in chambers at Lilongwe this 13th day of September 2018.


R Mvundula
JUDGE