



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 523 OF 2012**

**BETWEEN**

JEAN CHIRWA.....PLAINTIFF

AND

NOREEN CHIRWA..... 1<sup>ST</sup> DEFENDANT

FDH BANK.....2<sup>ND</sup> DEFENDANT

NBS BANK LIMITED.....3<sup>RD</sup> DEFENDANT

E & E CONSTRUCTION.....4<sup>TH</sup> DEFENDANT

ALEXKA HOLDINGS LIMITED.....5<sup>TH</sup> DEFENDANT

**CORAM: THE HONOURABLE JUSTICE JOSEPH CHIGONA**

MR PATRICK MPAKA, OF COUNSEL FOR THE PLAINTIFF

MR TAMANDO CHOKHOTHU, OF COUNSEL FOR THE 2<sup>ND</sup> DEFENDANT

MR FELIX KAMCHIPUTU, OFFICIAL COURT INTERPRETER

**CHIGONA, J.**

**RULING**

The 2<sup>nd</sup> defendant through counsel brought an ex-parte application for stay of execution of judgment pending appeal and for inhibition order pursuant to Order 23 rule 9(c) of the Courts (High Court)(Civil Procedure) Rules, (to be referred herein to as Civil Procedure Rules) and Section 123 of the Registered Land Act. Upon reading and perusal of the supporting documents, and for fairness to be achieved, I ordered that the application be brought inter-partes so that I also hear the plaintiff. I granted the 2<sup>nd</sup> defendant an interim order of stay pending the hearing of the interpartes summons. The interpartes hearing took place on 14<sup>th</sup> June 2018.

During the interpartes hearing, counsel for the 2<sup>nd</sup> defendant applied for amendment of the summons to show that the application for stay is made under Section 23 of the Courts Act. The plaintiff through counsel did not object to the amendment hence the summons were duly amended. The application

for stay pending appeal is supported by sworn statement of counsel and skeletal arguments. Counsel duly adopted both the sworn statement and skeletal arguments. At this juncture, let me also put on record that I benefited from the oral submissions made during the hearing of the interpartes summons by both parties. In his sworn statement, counsel submits that he intends to appeal against the whole judgment of this court delivered on 28<sup>th</sup> May 2018 in this matter. In that judgment, I found in favour of the plaintiff and granted several reliefs as prayed for by the plaintiff. Let me put it on record that during the hearing, I also notified the parties that my judgment of 28<sup>th</sup> June 2018 left out a portion of evidence in cross examination of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Pursuant to Order 23 Rule 10 (1) of the Civil Procedure Rules, I notified the parties that the judgment would be corrected as the exclusion of the evidence in cross examination was an omission on the part of the court, to which both parties agreed. Suffice to say that the omission did not, in any way, affect the outcome of the case as the omitted evidence was well taken care of by the court through the submissions made by both parties.

The notice of appeal is exhibited as TLC 1. Counsel submitted that the stay of execution pending appeal is sought to avoid rendering the appeal nugatory once it succeeds. He states that if the land register is rectified pursuant to the judgment of this court, the appeal may be rendered nugatory in the event that the Claimant or the estate of Maria Aurora Fatima Chirwa (deceased) transfers the property to a third party for consideration without notice. Counsel also submitted that the Claimant admitted during trial that she is not currently working and that counsel is reliably informed by Counsel Alex Pangano Bonongwe of FDH Bank who knows the Claimant that she does not have means to compensate the 2<sup>nd</sup> defendant in the likely event that the 2<sup>nd</sup> defendant's appeal succeeds. Counsel also submitted that the 5<sup>th</sup> defendant through their directors and Counsel Madalitso Mmeta have assured him that the 5<sup>th</sup> defendant shall not transfer the property or deal with the property adversely until the hearing and determination of the appeal herein. During the hearing, counsel corroborated what he submitted in his sworn statement and prayed for stay of execution pending appeal.

In reply, counsel for the Claimant adopted both the notice and skeletal arguments he filed in opposition to the application. Counsel submitted that there is no application before this court worth adjudicating. Counsel submitted that the judgment made by this court is non money order and that the 2<sup>nd</sup> defendant was to make an application to suspend enforcement of this non money order under Order 28 rule 49 of the Civil Procedure Rules . Counsel emphasised that as per Order 35 rule 9 of the Civil Procedure Rules, any application is to be made under the Civil Procedure Rules. Counsel prayed to this court to declare the summons ineffectual and invalid pursuant to Order 2 rule 3 of the Civil Procedure Rules as there is no any application before this court.

Counsel went further to submit that Section 23 and 11(b) of the Courts Act are not procedural Clauses to base an application for stay. He states that these Sections are only giving powers to the Court to stay. Counsel submitted that the application defeated the overriding objective under Order 35 rule 9 which states that any application to the court made on or after the commencement date shall be made in accordance with these Rules.

On the substantive prayer of stay, counsel submitted that there is no need for stay in this case as the principles for granting stay pending appeal were not satisfied by the applicant as expounded in the case of **CHITAWIRA SHOPPING CENTRE V H.M.S. FOODS&GRAINS LIMITED**<sup>1</sup>. Counsel submitted that the application is just speculative that once the property is transferred back to the deceased estate then it will be transferred further to third parties. Counsel states that there is no cogent evidence to that speculation. Counsel submitted that justice needs to be done herein since its now 7 years since the case was commenced. He states that where findings of fraud and bad faith have been made, one needs to raise serious issues for the court to grant stay pending appeal. Counsel submitted that there are no serious grounds of appeal warranting stay pending appeal. He called upon the court to do a balancing act. He submitted that once that is done, it will tilt towards the Claimant herein. He submitted that if stay is not granted, then the property will remain the name of the deceased and an account made as ordered by the Court. However, counsel submitted, if stay is granted, everything will be postponed and the waiting will continue. Counsel submitted that that will not be just to the Claimant. Counsel then submitted that the property be transferred to the deceased estate as ordered and that the court should order that no further transfer of the property be done until the appeal is heard and finalised. On payment of damages, counsel submitted that that is not a ground for granting stay pending appeal. He submitted that taking that line of thinking will mean that poor people will be at the mercy of the rich.

In response, counsel for the 2<sup>nd</sup> defendant submitted that the plaintiff through counsel are not disputing the granting of the inhibition order. The only difference, counsel states, is that the plaintiff is of the view that an inhibition order be granted against the estate of the deceased not to transfer the property until finalisation of the appeal. On the irregularity cited by counsel for the plaintiff, counsel for the 2<sup>nd</sup> defendant submitted that an irregularity of that nature does not nullify any step taken pursuant to Order 2 Rule 2 of the Civil Procedure Rules. Counsel submitted that this court has power under Order 2 Rule 3(d) to declare the irregularity effectual. Counsel submitted that what should guide the court is the interest of justice.

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<sup>1</sup> MSCA Civil Appeal No. 30 of 2015

On powers of stay as provided in Section 23 of the Courts Act and Order 28 of the Civil Procedure Rules, counsel submitted the only difference is the terminology as Section 23 talks of suspending thereby giving powers to the court to direct a stay. Counsel submitted that Order 28 of the Civil Procedure Rules seems to restrict those powers of stay as contained in Section 23 of the Courts Act. Counsel submitted that as per Section 21(b) of the General Interpretation Act, where subsidiary legislation is fettering the powers of the Court, that subsidiary legislation is invalid. However, counsel stated that the court be guided by the Order 2 Rule 3(d) of the Civil Procedure Rules.

On the possibility of the appeal being rendered nugatory, counsel submitted that not all beneficiaries of the deceased estate are resident within Malawi. He states that it will therefore be difficult to reclaim the property where title has been transferred even to those outside Malawi. Counsel submitted that if the appeal fails, damages will be adequate remedy to compensate the plaintiff. However, counsel submitted, if the appeal is successful, it will be difficult for the plaintiff to be restituted as there is no evidence to that effect. In conclusion, counsel submitted that the facts herein weigh in favour of preserving the *status quo*.

The first issue that I have to deal with is the application (preliminary objection), if I may call it, by counsel for the plaintiff, to dismiss the present proceedings, as the same were commenced without following the dictates of the Civil Procedure Rules. Hearing from both counsel, it is clear to me that the 2<sup>nd</sup> defendant is not disputing, to some extent, the fact that the application was not commenced properly. I totally agree with counsel for the plaintiff that the application, purporting to stay a non-money order, was supposed to be brought under Order 28 Rule 49 of the Civil Procedure Rules. The 2<sup>nd</sup> defendant through counsel is not disputing that the judgment to be stayed is a non-money order. Hence, there was need to make such an application supported by a sworn statement, filed and served on the enforcement creditor (the plaintiff) at least 7 days before the application is to be heard. This was not done as the 2<sup>nd</sup> defendant through counsel purportedly made the application under Section 23 of the Courts Act. Let me mention that Section 23 of the Courts Act gives power of stay to the Court. It does not provide for the procedure on how such an application for stay is to be brought. In these circumstances, the Civil Procedure Rules provides a proper guide as to what should happen. Order 35 Rule 9 states that any application to the court made on or after the commencement date shall be made in accordance with these Rules. Hence, the present application by the 2<sup>nd</sup> defendant was to be made under these Rules and not the Courts Act. Let me also mention that Order 28 Rule 49 of the Civil Procedure Rules is not restricting the application of Section 23 of the Courts Act as Counsel for the 2<sup>nd</sup> defendant would want this court to believe. As already alluded to, Section 23 only gives power to stay but does not provide for the procedure. The procedure is provided for under the Civil Procedure

Rules. It is therefore my finding that the application was irregularly commenced.

Having made the above finding, I am of the considered view that this court has power under Order 2 Rule 3 (d) of the Civil Procedure Rules to declare a document or a step taken to be effectual. I therefore declare the irregular step taken by the 2<sup>nd</sup> defendant herein effectual. I have arrived at that decision pursuant to Order 1 Rule 5(b) and (d) of the Civil Procedure Rules in trying to save costs and ensuring that the present proceedings are dealt with expeditiously and fairly. I therefore proceed to deal with the substantive issue.

### **THE LAW**

The law on stay of execution pending appeal has been well settled in many local cases. The general principle is that a court of law should not make it a practice to deprive a successful litigant fruits of his litigation in anticipation of the outcome of the appeal as pronounced in **Annot Lyle**<sup>2</sup>. In the case of **Speaker of the National Assembly, Ex-parte v Hon. John Tembo**<sup>3</sup>, the following principles were laid down:

“Stay of execution of judgment pending appeal has become common place in our courts and over the years clear principles for consideration have emerged. The guiding principles however are in Order 53 r. 13/1 of the rules of the Supreme Court. That Order cites a number of cases specifically dealing with stay of execution of judgments. Some of the cases have been referred to by counsel in this matter from which the following cardinal principles resonate:

- i. The court does not make the practice of depriving a successful litigant fruits of his judgment.
- ii. The court should then consider whether there are special circumstances which militate in favour of granting the order of stay and the onus will be on the applicant to prove or show such special circumstances.
- iii. The court would likely grant stay where the appeal would otherwise be rendered nugatory or the appellant would suffer loss which would not be compensated in damages.

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<sup>2</sup> ( 1886) 11 PD 114

<sup>3</sup> MSCA, Civil Appeal Number 27 of 2010 (unreported)

iv. Where the appeal is against an award of damages the established practice is that stay will normally be granted where the appellant satisfies the court that if the damages were paid, then there will be no reasonable prospect of recovering them in the event of the appeal succeeding”.

In the case of **Mike Appel & Gatto Limited V Saulos Chilima**<sup>4</sup>, commenting on these principles, the court observed as follows:

“Once an applicant has brought forward solid grounds for seeking stay, the court is then called upon to weigh the risks inherent in granting a stay and the risks inherent in refusing stay. This balancing process is what is here referred to as the court’s discretion. Much as the court will start from the premise that courts will not make the practice of depriving successful litigants fruits of their judgment and much as the mere filing of an appeal and probability of success will not qualify as stay of execution; while a court will be concerned about the appeal not being rendered nugatory, ultimately it is about how the court weighs these considerations and what they translate to in the particular case”.

Recently, the courts have heard that the paramount consideration should be justice or injustice to both parties. In doing this, the court is called upon to do a balancing act as to where justice or injustice will be achieved whether with grant or refusal of the grant of stay of execution pending appeal. In **Contract Facilities Limited v Estates of Rees (deceased) & others**<sup>5</sup>, cited in **Chitawira Shopping Centre v HMS Foods & Grain Ltd** (supra), it was stated as follows:

“The normal rule is neatly summarised in paragraph 21 of the judgment in Hammond Suddards’ Solicitors V Agrichem International Holdings Ltd [2001] EWCA Civ 1915: “By CPR rule 52.7, unless the appeal court or the court below orders otherwise, an appeal does not operate as a stay of execution of the orders of the court below. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay.

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<sup>4</sup> [2014] MLR 231 at 238

<sup>5</sup> [2003] EWCA Civ 465

In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?

In the case of **Department for Environment, Food and Rural Affairs v Georgina Downs**<sup>6</sup>, the court stated as follows:

“ A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted...it is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture or because a threatened strike will occur or because some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the court of appeal.”

What this means is that the likelihood of success of appeal is not the only consideration that a court faced with the application for stay pending appeal should grapple with. The court should exercise its discretion in striking a balance as to where justice or injustice will be occasioned with or denial of the stay of execution pending appeal. The general rule still stands that granting or refusal to grant a stay of execution is in the discretion of the court and that each case has to be treated differently from other cases as circumstances always tender to differ.

The above, in a nutshell, is what has been stated to be the law governing stay of a judgment or order pending appeal.

### **FINDING OF THE COURT**

I have seriously considered the circumstances in the present case. The 2<sup>nd</sup> defendant's contention is that the plaintiff has no economic means to reconstitute in the likely event that the appeal is successful and the judgment is enforced. I am of the considered view that this consideration should not be overstretched as it tends to disadvantage those without economic means. **See Chitawira**

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<sup>6</sup> [2009] EWCA Civ 257

**Shopping Centre V H.M.S. Foods Grains Limited (supra)**. As courts, we should always strive to treat all litigants equally despite their financial muscle. I agree that in some cases, this consideration may guide the court depending on the circumstances. Reverting to the present case, I am of the considered view that the 2<sup>nd</sup> defendant cannot solely rely on the unemployment of the plaintiff as a ground for application of stay pending appeal. I am not convinced that this ground alone constitute special circumstances warranting stay of execution. I have noted that the 2<sup>nd</sup> defendant has placed the plaintiff centrally in their application for stay. The judgment of the court did not order that the properties in question should be transferred to the plaintiff. The judgment ordered rectification of the land register reverting ownership to the deceased Aurora Maria Chirwa. The 2<sup>nd</sup> defendant assumes that once the land register is rectified, then the property will be transferred to the plaintiff and her siblings. If such is the case, the 2<sup>nd</sup> defendant did not adduce evidence. The properties in question will be in control of the executors of the estate, who will manage the said properties to the best interest of the beneficiaries including the plaintiff.

I have to decide whether justice will be served with the grant or refusal of the stay herein. I am of the humble view that the interest of justice will be served if the stay herein is refused. The case at hand has already taken time to be finalised. The 2<sup>nd</sup> defendant has not even adduced any cogent evidence, to the satisfaction of this court, that once the stay is granted, then restitution cannot be made. There are no any special circumstances warranting granting of stay herein. The only issue that I think I should do in order to achieve justice to both parties is to order the executors of the deceased estate not to transfer the said properties to any third parties until the finalisation of the appeal. This means that the judgment can be enforced as ordered by the court. I am of the considered view that once the appeal is successful, it will be easy for the land register to be rectified so long as the property remains within the deceased estate. I have arrived at this decision following the undertaking by the 2<sup>nd</sup> defendant to expedite the appeal herein. I am of the considered view that in this way, justice will be achieved to both parties. In conclusion, what this means is that the application for stay pending appeal is dismissed and the interim stay granted is accordingly vacated.

Each party to bear its own costs

**Pronounced in Open Court** this 9<sup>th</sup> day of July 2018 at Chichiri, Blantyre.

  
Joseph Chigona

**JUDGE**