

JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 24 OF 2013

BETWEEN:

HOME MAKERS MALAWI LTD CLAIMANT

-AND-

PASTOR CAROL CHAPOMBA t/a CHISOMO

SCHOOL OF PRAYER DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Chagwamnjira, of Counsel, for the Claimant

Mr. Banda, of Counsel, for the Defendant

Ms. Doreen Nkangala, Court Clerk

RULING

Kenyatta Nyirenda, J.

Introduction

This is the Defendant's application for two orders, namely, (a) an order striking-out the notice of appeal and (b) an order discharging or vacating stay of execution of judgement.

The brief background to the application is as follows. The Appellant and the Respondent signed a consent judgment dated 17th January 2014 wherein the parties agreed as follows:

- "1. **THAT** the Defendant be at liberty to develop the site.
2. **THAT** before the Defendant starts the construction works on the site, the land forming the 20 plots be surveyed and cut off from the main piece of land by a registered surveyor.

3. **THAT** *for purpose of this exercise above Dr. Edward Chinkwenda ... is appointed surveyor to carry out the survey and demarcation of the plots known as SW8/599/7/8 from 1 to 20 inclusive.*
4. **THAT** *the Defendant shall comply with city bylaws.*
5. **THAT** *costs be in the cause."*

The surveyor demarcated the land. On 12th May 2016, the Court ruled in favour of the Defendant and it also made permanent the interlocutory order of injunction that had been granted against the Claimant and all other persons or third parties.

Some third parties obtained an order of injunction ex-parte dated 19th May, 2016 against the Defendant which was discharged by the Court on 29th May, 2016. The third parties sued the Defendant claiming title to the same land as *bona fide* purchasers for value without notice. The third parties lost their claim to the land as *bona fide* purchasers by ruling dated 29th June, 2017.

Meanwhile, on 2nd June 2016, the Claimant filed a notice of appeal. On 27th June 2016, the Claimant obtained leave to appeal [without leave to appeal out of time]. Thereafter, the Claimant filed and obtained an order of stay of execution of the judgment dated 12th May 2016.

The Defendant seeks to have the notice of appeal stricken-out on the “*grounds inter alia filling out of time; filling without leave to file out of time, appeal has no chance of success; for want of prosecution; the claimant has committed inordinate delay; appeal is against rule of law and public policy; litigation must back.*”.

As regards discharge or vacation of the stay of execution, the Defendant has put forward the following four grounds (a) abuse of court process, (b) the stay has no support of legal principles, (c) there is change of circumstances and (d) the stay is against rule of law and public policy in light of other outstanding judgements and interlocutory injunctions against the Claimant.

Sworn statements

The application is supported by a statement sworn by Mr. Edwin Banda and the material part thereof reads:

“The Notice Of Appeal

3. ***THAT*** *there is no valid notice of appeal. The present circumstances before the court are such that we cannot say there is an appeal in the court.*
- 3.1 *The notice of appeal was delivered in the wrong court, not in the Supreme Court of Appeal but only in the High Court. It has not been possible to*

prosecute the appeal for the same reason. The appeal is not guided by the laid down procedure

- 3.2 *The purported notice of appeal was filed out of time, without leave hence irregularly or improperly filed or contains dubious dates on the stamp relating to dates of filing. The order granting leave to appeal was purportedly signed on 27th June, 2016.*
- 3.3 *The notice of appeal was filed out of time without first obtaining leave to appeal out of time. The notice of appeal which was itself defective was irregularly filed before first obtaining leave to appeal. The procedure was flouted altogether and completely.*
- 3.4 *The claimant is not prosecuting the appeal and the circumstances are such that the intended appeal cannot be prosecuted. The claimant has taken nearly two years without prosecuting the appeal. There is inordinate incurable delay that cannot be compensated by damage or costs to the defendant who suffers gross injustice*
- 3.5 *The appeal is an abuse of process of the Court. I verily believe that the leave to appeal which was obtained after a defective notice of appeal was filed does not validate the defective appeal. Judgment appealed against referred to other previous judgments against the claimant. Another judgment came after notice of appeal.*
- 3.6 *The appeal is against one judgment when there are other judgments and orders of injunctions against the claimant which make the notice of appeal nugatory. The appeal is litigation upon litigation. Litigation is not coming to an end. The parties have been in court for 11 years. The rights of the defendant are not being protected.*
- 3.7 *There has been no further step taken by the claimant herein after the defective notice of appeal was issued. The claimant is simply setting one court against the other court hoping one would decide in his favour.*

The Order Of Stay of Execution

4. **THAT** *the order for stay granted in this matter is no longer tenable in the prevailing circumstances, on the grounds that follow.*
 - 4.1 *The order of stay was applied for and/or was granted on the basis that there was an ex-parte order of injunction against the defendant in relation to the same land. This ex-parte order of injunction was however vacated or discharged on 29th June 2016.*
 - 4.2 *The order of injunction that is effective in respect of the land is against the claimant and all of the orders of injunction the latest of which is attached hereto stop the claimant from dealing with the land, trespassing on or occupying it, or leasing to other tenants or selling the land.*

- 4.3 *The case commenced by the claimant's tenants against the defendant was dismissed because inter alia the claimant's tenants were not bona fide purchasers for value without notice. The defendant was again successful and again the Court decided the defendant had good title.*
- 4.4 *The order of stay was effectively granted against a consent judgment. The ruling of the Hon. Justice Kamwambe stayed herein is based on the consent judgment entered before the Hon. Justice Mwaungulu.*
- 4.5 *The order of stay is an abuse of court process. The claimant uses the order of stay to keep the defendant who is the successful litigant away from the land. The defendant has been kept away from the land she bought for 11 years now.*
- 4.6 *The claimant keeps litigating against public policy and staying one judgment knowing other judgments are still against it. By the stay the claimant is effectively getting an order of injunction against the defendant which the Court refused to give.*

5. ***WHEREFORE*** I pray for an order striking out the purported notice of appeal and for order vacating the order of stay made herein, with costs."

The Claimant is opposed to the application and it has, accordingly, filed a statement in opposition, sworn by Mr. Dick Chagwamnjira [hereinafter referred to as the "Claimant's sworn statement"]. For purposes of parity of treatment, I will also set out in full the relevant part of the Claimant's sworn statement. It states as follows:

"3. ***THAT the Respondents Grounds are premised on the following heads:***

- (a) *Filing appeal out of time*
- (b) *Filing appeal without leave to file out of time*
- (c) *Appeal has no chance of success*
- (d) *For want of execution*
- (e) *The Claimant has committed inordinate delay*
- (f) *Appeal is against rule of law and public policy*
- (g) *Litigation must come to an end*

4.0 ***THAT*** we disagree and our responses are as follows:

4.1. ***Filing appeal out of time***

4.1.1 *The Judgment was delivered on **12th May, 2016**. Thus being a final judgment six weeks within which to appeal would have expired on **18th June 2018** and would not have required leave to appeal.*

4.1.2 *Considering that the matter before the court was an inter-parties summons for continuation of injunction which when the judgment came ended up as a final judgment, and to be on a safer side, the appellant still filled an application for leave to appeal on **1st June 2016** which is barely **19 days** and just below three weeks from the date of judgment. A copy of the application is now shown to me which **I exhibit as HDC 1**.*

4.1.3 *The application for leave was duly submitted to the Court Registry on time and so was the notice of appeal itself. A copy of the filled notice of appeal is now shown to me which **I exhibit as HDC 2**.*

4.1.4 *Since the judgment of Justice Kamwambe was made on **12th May, 2016** the 6 weeks within which to appeal would have expired on **23rd June, 2016**. It is factually incorrect therefore to say the appeal was filed out of time.*

4.2 Filing appeal without leave to file out of time

4.2.1 *I repeat my arguments above and depone that the appeal was not filled out of time and it required no leave to file out of time even when we consider the judgment as interlocutory which it was not or final which it was.*

4.3 Appeal has no chance of success

4.3.1 *The appeal has merit and likely to succeed on the following grounds:*

4.3.2 *That the Judge based his Judgment on the findings of the Surveyor who was not the witness in the matter. There was no viva voce evidence from the Surveyor or affidavit or sworn statement.*

4.3.3 *The Appellant had no opportunity to cross examine the Surveyor on the basis of the facts submitted. This evidence was not scrutinized. The Surveyor went beyond what was instructed by the Court, i.e. dealing with the shortage of land.*

4.4 For want of prosecution

We repeat our arguments on 1.1 (a) and confirm that there has no want of prosecution the appellant having already done all that is required of it to do at law to have the matter set down. If there is any delay which is denied

the same is occasioned by the court for which the appellant has no control.

4.5 The Claimant has committed inordinate delay

The defendant is of the view that the Appellant has committed inordinate delay. However the events on the ground shows that the appellants has done all he is required to do in the circumstances in good time as follows;

*16th May 2016 judgment is delivered
1st June 2016 ex-parte summons for leave is filled at the court
1st June 2016 an order to appeal to the Supreme Court
2nd June 2016 Notice of Appeal
30th June 2016 exparte summons for an interim stay of execution of judgement
5th July 2016 order of stay of execution
11th July 2016 summons for settlement of record was filled
24 November 2016 order for settlement of record was filled*

*All of these are now shown to me which I exhibit as **HDC 3** as a bundle. It is clear that there is no inordinate delay on the part of the appellant as the rest of the matters like preparation of record and assigning the matter a date of hearing is beyond the control of the appellant.*

4.6 Appeal is against rule of law and public policy

In fact public policy demands that a matter has to come to its lawful completion by exhausting all available appellate structures.

4.7 Litigation must come to an end

The policy that requires that litigation must come to an end does not mean that an aggrieved party should be estopped from not appealing. The appeal itself is part of access to justice and the appellant is within his rights to ask the Supreme Court to intervene on a judgment that it is aggrieved with. The appeal itself is not against the law of public policy and once held will mean the matter will indeed come to an end after the appeal is held.

5.0 THAT there are three grounds in which the respondent would want the order of stay discharged as follows:

- 5.1 *The Respondent is of the view that the order was premised on third party order of injunction*
- 5.2 *The Respondent is of the view that the stay was granted against a Consent order*

5.3 *That the order of stay it is against public policy*

6.0. *THAT we disagree and our responses are as follows:*

- 6.1 *It is not true that the stay was applied for on grounds that there was an Exparte order on injunction on the same land on the contrary paragraph 4-17 of Peter Chinangwa's affidavit is clear as to what reasons the order of stay was granted. One of which is that they wanted the stay to be granted pending the hearing of the appeal herein because the appellant is of the view that they have a good case which will succeed on appeal.*
- 6.2 *The other reason was that the appellant had been served with the order of injunction obtained by third parties whose interest would be affected by the said judgment of Justice Kamwambe.*
- 6.3 *That if there is no stay the appellant would have to comply with the judgment to the detriment of other third parties subject matter of that case as a result of which the appellant would have make transfers of land which includes land of the other parties. Irrespective of the outcome of the other case the appellant here still requires the order of stay because discharging it means that the appellant would have to transfer to the respondent land which it no longer possesses for which it has no title by reason of earlier sales of such land.*
- 6.4 *The issue of the consent order is not relevant to the stay as neither is a judgment of Justice Kamwambe relied on the consent order nor was the application for stay reliant on that consent order. Therefore it can be a ground for vacating a stay as it will not form part of the reasons for that stay.*
- 6.5 *The order of stay is not an abuse of the court process, as the judgment of Justice Kamwambe only came out in 2016 and that is not 11 years ago. It is important to note that the respondent herself has commenced 4 court matters on the same matter and it is not right for the respondent to say the appellant keeps litigating on the same matter. They are no judgments against it apart from the judgment of Justice Kamwambe.*
- 6.6. *In fact there is no judgment by Justice Mwaungulu and the case on which the respondent is relying on is a case where the appellant was sued by the respondent herself together with other buyers, this means that she is aware that they are other people with interest on the same piece of land. It therefore becomes mandatory that this stay should not be discharged as it will affect rights of other parties rather than the appellant herself.*

7.0. CONCLUSION

- 7.1 *The Applicant having received all the services i.e. of the Notice of Appeal, Inter-parte Summons for Application for Stay of Execution of Judgment pending hearing and determination of the Appeal, Order Staying Execution of Judgment without refusing, or raising any preliminary*

objection on all those application she is estopped to so act now after the order of leave to appeal having been perfected.

- 7.2 *The claimant having filed all necessary documents, Notice of Appeal, Grounds of appeal, Notices of adjournment, Summons for Settlement of Record, he cannot be said that he had caused delays in prosecuting the matter, as issuing of the dates are made by the Court and are beyond his control. We pray that the present application be dismissed with costs.*

WHEREFORE *I pray that the defendant's application be dismissed with costs."*

Issues for Determination

There are basically two issues for the court's determination, namely, whether or not (a) the notice of appeal filed by the Claimant can be stricken-out on grounds that it was filled out of time or that there is inordinate delay in prosecuting the appeal and (b) the stay of execution of judgment can be discharged or vacated.

No Leave to Appeal Out of Time

The Defendant contends that the Claimant appealed out of time without seeking leave to do so. The contention is to be found in paragraph 3 of the Defendant's Skeleton Arguments and the same is couched in the following terms:

- "3.1 *The Judgment of Justice Kamwambe was pronounced on 12th May, 2016. An appeal against that judgment should have been by notice filed within 14 days if the Order was an interlocutory order or six weeks if that order was not an interlocutory order*
- 3.2 *If the Order of Justice Kamwambe dated 12th May 2016 was an interlocutory order, the last day of appeal was 26th May, 2016. The claimant could not appeal after 26th May without leave of the Court to appeal out of time. The claimant therefore was completely out of time to appeal as the leave to appeal was filed on 27th June, 2016.*
- 3.3 *if the order of Justice Kamwambe of 12th May, 2016 was not an interlocutory order, the 6weeks within which to appeal would expire on 23rd June 2016. The claimant could not appeal without leave to appeal as in the circumstances leave to appeal was mandatory.*
- 3.4 *The claimant did not obtain leave to appeal until 27th of June, 2016. The application for leave to appeal was made on 27th June 2016. By that date the claimant was clearly out of time to appeal, as that time expired on 23rd June, 2016.*
- 3.5 *The claimant did not seek leave to appeal out of time. The leave to appeal must be sought even where the appellant is within time. Therefore there should have been leave to appeal out of time and leave to appeal*

3.6 *Section 23 of the SCA Act provides as follows:*

23. (1) *If the person desire to appeal under this part from the High Court to the Court, he shall in such manner as may be prescribed by rules of court, give notice to the Registrar of the High Court of his intention to appeal-*

- (a) *within 14 days of judgment from which he wishes to appeal if such judgment is an interlocutory order;*
- (b) *within six weeks of the judgment from which he wishes to appealing any other case*

3.7 *The time for filing the notice of appeal expired on 26th May 2016 in the case of an interlocutory order and on 23rd June 2016 in respect of any other case section 23 (3) states that:-*

(3) *The Court may extend the time for giving notice of intention to appeal under this part, notwithstanding that the time for giving that notice has expired"*

The contention by the Defendant lacks merit and it has to fall by the wayside. It is commonplace that the judgment in issue was delivered on 12th May 2016 and that it was final judgment. That being the case, the Claimant had six weeks within which to appeal, that is, up to 18th June 2018, without the need to seek leave to appeal.

Further, the Defendant does not deny that the Claimant filed the Notice of Appeal on 2nd June, 2016. Actually, the same was served on the Defendant and service was duly acknowledged on 1st July 2016. The case of **Dr. Abdul Hamid Gatrad and Mrs. Rosemin Gatrad v. Steerling International Limited & Sanderson A. L. Sangwa, HC/PR Civil Cause No. 216 of 1989 (unreported)** stands for the proposition that the relevant date of issue of a court document is when the seal is placed on the document. In other words, a court document is filed upon receipt of the same by the Registry. What follows thereafter are administrative procedures over which a party may have little control, if any.

In light of the foregoing, I have no hesitation in holding that the Claimant appealed within time.

Want of Prosecution of the Appeal

The Defendant accuses the Claimant for inordinate delay in prosecuting the appeal. Counsel Banda invited the Court to note that there has been no prosecution for

nearly two years. Counsel Banda argued that the period of two years amounts to an abuse of process of court, particularly when regard is had to the fact that the Claimant and the Defendant have been involved in legal fights in the High Court over the land in issue for almost eleven years.

The Claimant denies being responsible for the delay in having the appeal prosecuted.

It states that it has done all that is required of it to do at law to have the matter set down.

Having perused the Court file, I am inclined to agree with Counsel Chagwamnjira that the Claimant has done all that it is required of it to have the appeal prosecuted: see paragraph 4.5 of the Claimant's sworn statement which gives a chronology of steps taken by the Claimant in prosecuting the appeal and the respective time lines.

Order of Stay of Execution of Judgment

Counsel Banda forcefully submitted that the order of stay of execution of judgment be discharged or vacated. It may not be out of place to quote his submissions in full:

- "8.1. The Order of stay of execution was premised on the fact that there was a valid notice of appeal and the appeal process was genuine one. Now that the notice and appeal have otherwise, namely that they are not valid. As such the order of stay cannot stay.*
- 8.2 The stay of execution is an abuse of the Court process; it is being used to shield an appeal process that is not being prosecuted for almost 2 years. What the stay has achieved is to allow the plaintiff abuse and take advantage of the successful defendant.*
- 8.3 The order of stay was obtained in default of appearance by the defendant. It was obtained after an irregular service of the application on the defendant, where the defendant had less than a day's service. The defendant was served on Friday after 4:00 pm for a hearing on Monday at 2:00pm. That service was irregular."*

I have critically considered the submissions by the Defendant and it is clear that the same are mainly premised on the contention by the Defendant that the Claimant appealed out of time without seeking leave to do so. Having held that no leave to appeal was required, the contention by the Defendant cannot be sustained.

Conclusion

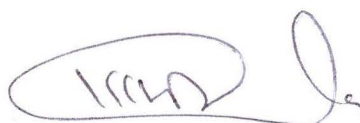
Before resting, I wish to make the following observations. A party seeking to have a notice of appeal stricken-out on the basis of an irregularity must make an

application to that effect within a reasonable time and, in any case, before taking a fresh step in the proceeding after becoming aware of the irregularity.

In the present case, the Defendant became aware of the notice of appeal in 2016 and she proceeded to accept services of all the processes thereafter, such as the inter-parte summons for application for stay of execution of judgment pending hearing and determination of the appeal, order staying execution of judgment. At no time did the Defendant refuse or raise any preliminary objection on all those applications. The Defendant has to be estopped so to act at this stage.

All in all, in view of the foregoing and by reason thereof, the application by the Defendant has to be dismissed with costs.

Pronounced in Chambers this 13th day of September 2018 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE