



MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
APPEAL CASE NO. 4 OF 2020

BETWEEN

NAVAYA JACKSON.....APPLICANT

-AND-

FAINESS NAVAYARESPONDENT

RULING

This is an application for stay of execution of a judgment of the lower court pending an appeal. The parties appeared before the Court of the First Grade sitting at Nchalo. The applicant is dissatisfied with the judgment and wants to appeal to this Court. Pending the hearing of the appeal, he wants this Court to stay the decision of the lower court. The application has with it a sworn statement in support. He first made an application in the trial court which court dismissed the application on the ground that the applicant did not demonstrate that there was likelihood that the appeal would succeed.

In this Court, in this application, he argues that the court below dismissed his application without weighing the likelihood of his appeal succeeding.

The law on stay of execution pending appeal is well settled. in *Jean Chirwa v Noreen Chirwa and Others* Civil Cause No. 523 of 2012 the Court said:

‘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* (1886) 11 PD 114.’

In *The Speaker of the National Assembly, Ex-parte v Hon. John Tembo* MSCA, Civil Appeal Number 27 of 2010 (unreported), the court laid down the following principles:

‘Stay of execution of judgment pending appeal has become common place in our courts and over the years clear principles for consideration have emerged. ... 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.
- 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 *Mike Appel & Gatto Limited v Saulos Chilima* [2014] MLR 231 at 238, 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 held 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* [2003] EWCA Civ 465, cited in *Chitawira Shopping Centre v HMS Foods & Grain Ltd* MSCA Civil Appeal No. 30 of 2015, the court said:

"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.

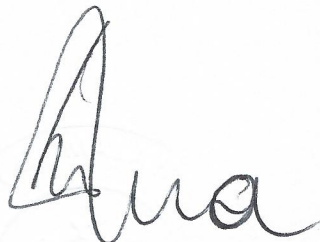
In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in 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* [2009] EWCA CV 257, 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.’

The sworn statement in support of the application for stay does not exhibit why the Court stay the execution of the judgment. I, therefore, do not find special circumstances warranting granting of stay of the judgment in this matter I, therefore, dismiss the application to stay the execution of the judgment. It should be emphasised that it is not only the question of showing a likelihood of a successful appeal, one has to show special circumstances warranting stay of execution.

MADE the 28th day of February, 2020

A handwritten signature in black ink, appearing to read "J N'RIVA". The signature is written in a cursive style with a large initial "J".

J N'RIVA
JUDGE