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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 924 OF 2014

BETWEEN

MICHAEL GABRIEL.....CLAIMANT

AND

YUSUF AUF.....1st DEFENDANT

REUNION INSURANCE COMPANY LIMITED.....2nd DEFENDANT

Coram: **WYSON CHAMDIMBA NKHATA (AR)**

Kanyenda- of Counsel for the plaintiff

Chipili- of Counsel for the defendant

Chitsulo- Court Clerk and Official Interpreter

RULING

This application was made under order 10 rule 1 of the Courts (High Court) (Civil Procedure) Rules, 2017 (hereinafter CPR, 2017). The applicant seeks an order to discharge an order for stay pending appeal, an order that the sum of K5,710,000.00 paid to court by the defendant be remitted to the plaintiff and an order for costs.

The grounds for the application set out in a sworn statement by **David Kanyenda** of Counsel are that the applicant commenced this matter by way of writ of summons on or about the 17th of September 2014. The defendant failed to file court process within the prescribed timelines culminating in entry of a default judgment dated 11th of February 2015. By an order on assessment of damages dated the 26th of February 2015, the Assistant Registrar awarded the plaintiff the sum of K5,710,000.00 covering all heads of his claim and costs. Subsequently, the defendant applied for an order of stay of execution pending appeal. By an order dated the 23rd of March 2015 the Assistant Registrar granted the order for stay of execution pending appeal. Further, the Assistant Registrar directed the defendant to file an *inter partes* application for stay within 7 days of order made on the 23rd of March 2015. The defendant duly lodged the *inter partes* application for stay of execution within the prescribed 7 days timeframe. Upon hearing both parties the Assistant Registrar dismissed the defendant's application to set aside the default judgment by an order dated 18th of May 2016. Further the Assistant Registrar directed the defendant to satisfy the judgment debt within 14 days from the 18th of May 2016. The defendant did not satisfy the judgment debt. Instead, on the 7th of June 2016 they applied for and obtained a further order of stay of execution of the assessment order pending determination of an appeal against the Assistant Registrar's order dismissing the application to set aside default judgment.

With the foregoing, the claimant believes that the defendant has failed, refused and neglected to take effective steps for prosecution of the appeal. It is contended that a period exceeding 24 months has elapsed since the order of the stay of execution was issued yet the defendant has omitted to set down the appeal for hearing. The claimant is therefore of the view that the conduct of the defendant is unreasonable and calculated to deprive a successful litigant the fruits of litigation. Further, the claimant is of the view that the defendant is clearly guilty of excusable and inordinate delay prosecuting the appeal. It is also their belief that the defendant has employed the appellate process to abuse the claimant and deprive him the judgment debt.

The defendants, on the other hand, did not file a sworn statement in opposition to the application. However, the court heard **Chipili** of Counsel during the hearing of the application. It was his submission that he had nothing in response to what they had done or not done but that they had had a break in at their offices and they did not have a file until they were informed of the pending hearing. He averred that many files were taken during the break in and they did not know that this file was among those taken. It was his submission further that they went to Messrs Makiyi, Kanyenda and Associates to borrow their file and photocopy documents and that is the file he is using now. They came to see the court file and they could not access it until the previous day. It was his submission that in circumstances they could not file an affidavit in opposition. He therefore prayed that in the interest of justice, they be given 21 days to respond and for the plaintiff to respond to their response.

In response to Counsel Chipili's submission, Counsel Kanyenda stated that on the issue of the break in there was no credible evidence validating that the same had taken place and that it resulted in theft of files. It was his opinion that even if it was true the defendants had ample time to do the needful. He further contended that the maximum for service for interlocutory applications is two clear days and the defendants were served on the 23rd of January 2019 which was about three ago. In this case, efforts were made apparently a day before the hearing. It was his view that the request for 21 days only aggravates issues.

Basically, this is the gist of the application and opposition to the application. The main issue for determination is whether the order of stay of pending appeal herein be continued or discharged. This court is aware that a successful litigant deserves to enjoy the fruits of his litigation, and a dissatisfied litigant has a right to lodge an appeal. In the case of **City of Blantyre v Manda & Others, Civil Cause No. 1131 of 1996** Unyolo J, as he then was, stated as follows:

"I think it is always proper for the court to start from the viewpoint that a successful litigant ought not be deprived of the fruits of his litigation and withholding monies to which *prima facie*, he is entitled. 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 special circumstances. The case of Barker v Lavery which I have cited above, seems to suggest that evidence showing there was no probability of getting the damages back if the appeal succeeded, would constitute special circumstances...."

The court must therefore strive to use its discretion to come to a decision which is just and fair depending on the peculiar circumstances of each case. In this case, the defendant being dissatisfied with the Assistant Registrar's order dismissing the defendant's application to set aside the default judgment applied for and obtained an order of stay of execution of the assessment pending determination of an appeal against the said Assistant Registrar's order. Apparently, this was in the year 2016. A perusal of the court record indicates that nothing further was done beyond obtaining the said stay pending appeal. I was hoping an explanation of some sort would be proffered to the court opposing the fact that they have not lodged an appeal or perhaps the reason why they have taken this long without prosecuting the same if at all it was lodged. Unfortunately, the defendants came to court and in Counsel for the defendant's words *could not comment on what they have done or not done*. The defendants wants the court to believe that they did not have a file due to a break in at the office which resulted into theft of files and the file for this matter being one of them. I was quite mesmerized with the casual

approach with the way this matter was put before the court. The defendants did not find it necessary to support the assertions of theft in any way with any evidence. All the same, assuming indeed it was true that there was a break in at their office resulting to lose of the file, one wonders why upon being served with a notice for this application they waited until a day before hearing to start running around making photocopies of the file when the notice of this application was served on the defendants some weeks ago. I also take note that the intention to appeal was expressed in the year 2016. I am of the opinion that the defendants are enjoying the comfort of the stay pending appeal while they are not serious about pursuing the appeal.

On the basis of the foregoing, it is my finding that the defendant took no steps whatsoever over a period sufficient for the matter to be dismissed for want of prosecution. In the case of **Alex Kachingwe v Electricity Supply Corporation of Malawi** Personal Injury Case No.691 of 2014 (unrep) Justice Kenyatta Nyirenda stated as follows:

Public policy requires that litigation must come to an end. There should be a point where matters should be closed. The delay here is so prolonged that there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest in the administration of justice demands that the action should not be allowed to proceed.

In the premises, it is the finding of this court that the delay herein is clearly inordinate and inexcusable and allowing the stay pending appeal to subsist would be prejudicial to the interests of the plaintiff. This application must succeed in its entirety. The stay pending appeal is hereby discharged. Further, this court makes an order that the sum of K5,710,000.00 paid to court by the defendant be remitted to the plaintiff. The plaintiff is also granted costs.

MADE IN CHAMBERS THIS 5TH DAY OF MARCH 2019


WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR