



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION

CIVIL APPEAL NUMBER 13 OF 2021
(Being Matter No. IRC PR 841 of 2019)
(Before Honourable Justice Mambulasa)

BETWEEN:

THE CENTRAL EAST AFRICAN RAILWAYS LIMITED.....APPELLANT

-VS-

CHRISTINA CHITHILA.....1ST RESPONDENT

-AND-

KONDWANI MKONDA.....2ND RESPONDENT

-AND-

DAVID KWENDA.....3RD RESPONDENT

-AND-

CHIMETA MULAMBIA.....4TH RESPONDENT

CORAM: HON. JUSTICE MANDALA MAMBULASA

Mr. Patrick Gray Mpaka, Advocate for the Appellant

Mr. Happy Wongani Mwangomba, Advocate for the Respondents

Mr. Obet Chitatu, Court Clerk

RULING

MAMBULASA, J

Introduction

- [1] The Respondents were former employees of the Appellant. Their employment services were terminated. They sued the Appellant in the Industrial Relations Court alleging discrimination, unfair labour practices, and unlawful and unfair termination of employment.
- [2] By its decision rendered in March 2021, the Industrial Relations Court found for the Respondents. In April 2021, the Appellant paid the Respondents the sum of MK839,353,770.20 in respect of the Industrial Relations Court's awards for severance pay and bonus. The Appellant was dissatisfied with the other parts of the Judgment. It filed a Notice of Appeal against the said Judgment in the lower court.
- [3] On 11th August, 2021, the Industrial Relations Court awarded the Respondents the sum of MK3,657,648,455.71 as compensation and ordered the Appellant to pay them the same within six weeks from the date of that order. The Appellant sought an order staying execution of the Order on

Assessment of Compensation but the Industrial Relations Court declined to grant the stay.

- [4] On 23rd September, 2021 the Appellant applied to this Court, on without notice basis, for stay of execution of the Judgment and Order on Assessment of Compensation pending appeal or in the alternative for payment of judgment debt into court pending appeal. The application was brought under section 23 of the Courts Act,¹ section 65 (3) of the Labour Relations Act² and under the Court's inherent jurisdiction.
- [5] This Court granted the Appellant the said stay of execution of the Judgment and Order on Assessment of Compensation. It also ordered that the sum of MK3,657,648,455.71 be paid into court within 90 days and deposited into an interest earning account pending the hearing and determination of the appeal.
- [6] On 1st October, 2021, the Respondents applied to this Court to set aside the order staying execution and ordering payment of the compensation into court on a number of grounds. Among other grounds are that the Appellant suppressed material facts, the order which this Court made was unjust and inequitable and that the Respondents already made a commitment under oath to refund the money should the appeal succeed. The Respondents also prayed in the alternative that should the court be minded to maintain the Stay

¹ Cap. 3:02 of the Laws of Malawi.

² Cap. 54:01 of the Laws of Malawi.

Order, then, it should consider varying the Order for Payment into Court and allow part of the compensation to be paid to the Respondents.

[7] The Respondents' application was set down for hearing on 26th October, 2021 at 09:30 a.m. On that day, the parties requested to meet privately to negotiate and that they did and the Court allowed it in the spirit of Order 1, rule 5 (5) (e) of the Courts (High Court) (Civil Procedure) Rules, 2017. An offer was made by the Appellant to pay a certain percentage of the compensation to the Respondents while the appeal is being pursued. However, the Appellant's representative needed to seek the approval of the Board of Directors before it could commit itself to making the payment. The approval of the Board of Directors was sought and it was granted. However, the Respondents rejected the offer proposed by the Appellant as being extremely on the lower side. Thus, the parties were unable to agree on a fair and reasonable percentage of the compensation that could be paid to the Respondents by the Appellant while the appeal is being pursued. The parties agreed that where they would not be able to reach a consensus, then, this Court should proceed to make its decision on the application and also determine what in the circumstances would be a fair and reasonable percentage that could be paid by the Appellant to the Respondents.

Issues for Determination

[8] The issues falling for determination before this Court at this stage are:

- 8.1 Whether or not the stay of execution of the Judgment and Order on Assessment of Compensation and the Order for Payment into Court of the sum of MK3,657,648,455.71 should be set aside?
- 8.2 If the application is declined by the Court, whether the Order for Payment into Court can be varied to allow the Respondents receive part of the compensation and what that percentage should be?

The Law

[9] It is one of the principles that the question whether to grant a stay of execution pending appeal or not, is entirely in the discretion of the court. In doing so, the court has to consider unique facts of each case when exercising its discretion whether to grant stay or not.³ The discretion ought to be exercised judiciously.

[10] In *Malawi Revenue Authority -vs- Nadeem Munshi*⁴ the Court said:

A court considering stay of proceedings must realize that it is exercising discretion which, like other discretions, must be exercised judiciously, comporting that the court must account for all material factors on all circumstances of the case. Failure to consider material factors and placing undue emphasis on a factor or circumstance is wrong exercise of jurisdiction... **The critical consideration is**

³ *National Bus Company Limited -vs- Michael James Banda & 53 others*, Civil Appeal No. 36 of 2015, (High Court of Malawi) (Principal Registry) (Unreported). See also *Anti-Corruption Bureau -vs- Atupele Properties Limited* Civil Appeal Case Number 27 of 2005 (SCA).

⁴ Civil Appeal Cause Number 67 of 2013 (High Court of Malawi) (Principal Registry) (Unreported).

“whether there is a risk of injustice to one or other or both parties if it grants or refuses stay” [*Emphasis supplied*].

[11] The critical consideration by the Court should basically be where the interests of justice tilts between granting and refusing a stay. Thus, where the refusal of stay would be unconscionable and unjust, then the same has to be granted. In the Supreme Court of Appeal for Malawi decision of *Mike Appel & Gatto Limited -vs- Saulosi K Chilima*⁵ the Court stated as follows:

Clearly, from this authority, the approach should be to look at all the facts of the case and base the court’s decision on what is “just” and “expedient” in all the circumstances of the case...A consideration of “risk of injustice” and “prejudice” would encompass the considerations currently and conventionally considered; **but it also allows for other considerations relevant in the case.** Liberal in that way, a court has a wider premise upon which to exercise its discretion in granting or refusing to grant stay of execution [*Emphasis supplied*].

[12] In *Malawi Housing Corporation -vs- Koman Franklin Nyasulu*⁶ the Supreme Court of Appeal for Malawi in considering an application for stay of execution pending appeal stated that the Court should consider whether there are special circumstances which militate in favour of granting the order for stay of execution. The Court said:

It is trite law that the Court should start from the view point that a successful litigant ought not to be deprived of the fruits of his or her litigation and withholding monies to which he or she is entitled. The Court should then consider

⁵ Civil Appeal Case Number 20 of 2013 (SCA).

⁶ [2007] MLR 214 at 215 - 216 (SCA).

whether there are special circumstances which militate in favour of granting the order for stay. The onus, in that regard, will be on the applicant to prove or show such special circumstances.

[13] In *Thomson -vs- CGU Insurance Ltd*⁷ the Supreme Court of Appeal for Malawi stated the principles governing stay of execution as follows:

13.1 The court will not grant a stay unless it is satisfied that there is a good reason for doing so;

13.2 The court does not “make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which he is *prima facie* entitled” pending appeal⁸; and

13.3 The practice is that a stay will normally be granted only where the applicant satisfies the court that if the judgment money is paid then there will be no reasonable prospect of recovering it in the event of the appeal succeeding.

[14] In *National Bank of Malawi -vs- Moyo*⁹ the Supreme Court of Appeal for Malawi (Tambala JA sitting) held that if the court were as a habit or practice to refuse the enforcement of its own judgments pending the hearing of appeals in the Appellate Court, this would be against public policy for it

⁷ [2008] MLR 402 at 403 - 404 (SCA).

⁸ *Mike Appel & Gatto Limited -vs- Saulosi K Chilima* [2013] MLR 231 (SCA).

⁹ [2008] MLR 51.

would tend to lengthen the period within which a successful party would be able to 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 an unsuccessful party has rights to appeal to the Appellate Court and that such appeals should not be pre-empted. That what is required is to strike a balance between the two views however the scales weigh more in favour of a successful party. The Court further held that it is wrong for an employer to dismiss an employee and when sued by the employee who successfully obtains damages, to turn around and say that the employee is too poor to pay back the damages because he is unemployed and that damages should not be paid to him pending the hearing of an appeal.

[15] The holding in *National Bank of Malawi -vs- Moyo* has been followed by the High Court in a number of cases.¹⁰

[16] In applications of this nature, guiding principles would depend on the individual circumstances and merit of each case. The individual circumstances of each case would determine whether the case falls within the scope and parameters of any other laid down principles.¹¹

¹⁰ See for instance, *Evangelical Development Programme -vs- Mahara Nyirenda* Civil Appeal No. 4 of 2011 (High Court of Malawi) (Principal Registry) (Unreported) and *Catholic University of Malawi -vs- Valera* [2011] MLR 16.

¹¹ See *East African Development Bank -vs- Blueline Enterprises Ltd* [2006] 2 EA 51 CAT.

Analysis and Application of the Law to the Facts

- [17] The parties are agreed on the exercise of discretion by the court in applications of this nature. The Respondents however, submitted that the Appellant's Sworn Statement in Support of its Application was speculative. It did not state any facts acceptable at law warranting the grant of stay pending appeal. The Appellant on the other hand argued that it will be exposed to more risk of non-recovery if the sum of MK3,657,648,455.71 would be paid to the Respondents before the appeal is heard and determined as each one of them has struggled to find alternative employment and failed at business ventures they attempted.
- [18] This Court does not agree with the Respondents on this point. The Appellant exhibited the Respondents' Witness Statements in the lower court marked, "DM4" in which the 1st Respondent admitted in paragraph 6.12 that she considered that she would not be able to find another job due to her age and scarcity of jobs. Again, in paragraphs 6.13 to 6.15 the 1st Respondent admitted to have failed to run small scale businesses due to poor business conditions and was unable to pay school fees for her children and service a National Bank of Malawi loan.
- [19] Similarly, the 2nd Respondent admitted in paragraph 6.14 of his Witness Statement in the lower court that he was also unable to secure employment due to his age and specialty i.e. railway engineering. Again, in paragraphs 6.15 and 6.16 of the same, he stated that his tailoring business failed and that he suffered a lot of hardships and fell into loan arrears with his Standard Bank loan.

[20] The 3rd Respondent is in no different position. In paragraphs 6.14 of his Witness Statement in the lower court, he admitted to be suffering hardship and was unsuccessful in pursuing employment. He also attempted to turn his personal motor vehicle into a taxi in order to make ends meet, but owing to stiff competition and the advent of Covid-19, no success was registered in that business.

[21] The story of the 4th Respondent is also the same. In paragraph 6.14 of his Witness Statement in the lower court, he admitted to have failed to secure employment. In paragraph 6.16 of the same, he states that he sold all his property and his confectionary business failed.

[22] Even though the Respondents are law abiding citizens and made an unconditional commitment under oath in the lower court to repay any money they would be required to pay back should the appeal filed by the Appellant succeed and stand by the same in this Court, this Court entertains serious doubts of their ability/capacity to pay back the full amount if this Court ordered that it be paid to them in view of the foregoing evidence. It is settled law that evidence showing that there is no probability of getting back money awarded under judgment if money so awarded was paid to respondent is a special circumstance which could influence the court whether to grant a stay or not.¹² Of course, the fact that the respondent would not be able to pay back the money cannot in all cases operate as a ground for stay of execution

¹² See *AR Osman and Co -vs- Nyirenda* [1995] 1 MLR 13; *City of Blantyre -vs- Manda and others* [1992] 15 MLR 114. *Thomson -vs- CGU Insurance Ltd* [2008] MLR 402 at 403 - 404 (SCA).

of a judgment. It is still open to the court to refuse a stay of execution if on the facts of a particular case, it would be “utterly unjust”, or “unconscionable” or “inexpedient”. In the present case, and on the authority of *Malawi Housing Corporation -vs- Koman Franklin Nyasulu*, this Court is satisfied that the Appellant has demonstrated with facts and evidence that the Respondents’ impecuniosity constitutes special circumstances for granting and maintaining a stay of execution of the Judgment and Order on Assessment of Compensation pending appeal.

[23] There would surely be a risk of injustice or prejudice to the Appellant if its appeal succeeded and then it was not able to recover anything from the Respondents. It would actually render the appeal nugatory and this Court has a duty and responsibility to ensure that, that does not happen.¹³

[24] One of the unique facts of this case which also exercised this Court’s mind, even without considering the audited accounts of the Appellant, is the sheer magnitude of the compensation. The sum of MK3,657,648,455.71 is not a small amount going by the size of our economy. This Court agrees with the Appellant’s observation that the judgment debt here is so huge that it would have an adverse effect on any organization. This Court did not, in the limited time it considered and researched on this case, come across an employment/labour case in which such a quantum of compensation was involved. If this sum was paid to the Respondents in full and the Appellant’s appeal succeeded, going by the evidence produced by the Appellant on the Respondent’s financial capacity, the Respondents would actually struggle to pay it back.

¹³ See *AR Osman and Co -vs- Nyirenda* [1995] 1 MLR 13.

[25] Placing reliance on *City of Blantyre -vs- Manda*¹⁴, Advocate Mr. Mwangomba submitted that there is no justice nor equity in paying money into court instead of the Respondents to redress the wrong that they suffered. He quoted Unyolo J (as he then was) who opined in that case that:

Mr. *Mbendera* asked that the money should be paid into court and remain there pending the determination of the appeal, should the Court be minded to refuse the application as I have done. With respect, I can myself see no reason in law, or in justice, why the plaintiffs/respondents should not have their money now.

The Appellant, on the other hand, through Advocate Mpaka argued that payment of money into court would be in the interest of justice. The benefit of granting or maintaining payment into court outweighs the detriment of allowing payment to the Respondents as it has been shown that chances are high that the Appellant may never recover the money if it is paid to them in full. However, if payment is made into court, whichever party is successful is guaranteed to be able to collect the Judgment sum from the Court. It is this Court's view that indeed, it would be safer and in the interest of justice to have this sum paid into court so that depending on the outcome of the appeal, either party could then have access to it. The circumstances of this case would demand so for a reason that the court will explain shortly below. For now, it is fair to state that there is still a place for payment into court in our system.

¹⁴ [1992] 15 MLR 114 at 118.

[26] However, the Respondents cited a number of decisions both from the Supreme Court of Appeal for Malawi and this Court in which courts declined to stay execution of judgments pending appeal even in cases where it was shown that the claimants were unemployed and were not able to pay back the money.¹⁵ Advocate Mr. Mwangomba, passionately argued that this case is on all fours with the *Moyo*¹⁶ case as well as the *Stambuli* case cited with approval in the *Moyo* case and urged the Court to set aside the stay it granted and also the order for payment into court.

[27] A perusal of the decisions referred to by the Respondents suggest that the thread running through them is that the lack of means of the respondents was connected to their dismissal from employment. In the present case, the Respondents were paid the sum of MK475,799,910.05 at the time of termination of their employment with the Appellant in 2019 as severance pay. Then, in April this year 2021 following the judgment of the Industrial Relations Court rendered in March 2021, the Respondents were paid the total sum of MK839,353,770.20 in respect of the difference between severance pay the Respondents ought to have been paid and what was actually paid and bonus. In total, the Respondents have been paid the sum of MK1,315,153,680.25 to-date, less applicable taxes. Advocate Mr. Mwangomba argues that this sum is contractual and has nothing to do with compensation assessed by the Industrial Relations Court on 11th August 2021 and that the two should not be conflated. That may well be the case.

¹⁵ In addition to *note 9 and 10* above, the Respondents also cited the case of *Catholic University of Malawi -vs- Varela* [2011] MLR 16.

¹⁶ n9 above.

However, the position of the law as this Court understands it, is that the court must look at all the facts of the case before it when considering whether to grant a stay or not.¹⁷ In the view of this Court, even though this sum has nothing to do with the compensation awarded on 11th August 2021, it is a factor that must be considered by the court. It is the considered view of this Court that in the circumstances of this matter, more especially, the payment of MK839,353,770.20 made to the Respondents by the Appellant this year in April, it would not be “utterly unjust”, “unconscionable” and “inexpedient” to maintain the stay of execution and payment into court order. The impecuniosity of the Respondents a few months down the line cannot be imputed to the termination of their employment with the Appellant. Thus, this case is distinguishable from the authorities relied upon by the Respondents.

[28] In view of the foregoing, the stay of execution of the Judgment and Order on Assessment of Compensation pending the hearing and determination of the appeal which the Court granted to the Appellant on 23rd September 2021 shall be maintained. The risk of not being able to recover the full amount by the Appellant if it was to be paid to the Respondents at this stage should the appeal succeed is real, if the Witness Statements which the Respondents gave in the lower court are anything to go by. The commitment under oath to repay the money by the Respondents, should the Appellant’s appeal succeed can no longer hold in view of that evidence. On the authority of *Mike Appel & Gatto Limited -vs- Saulosi K. Chilima*, the payment of the total sum of MK1,315,153,680.25 by the Appellant to the Respondents, whether it was contractual or not, between the years 2019 and April 2021, is a relevant

¹⁷ n5 and n4 above.

consideration in this case. On the totality of all the factors and circumstances of this matter and the relevant applicable principles governing this area of the law, the application by the Respondents to set aside the Stay Order is denied. Having reached this conclusion, this Court does not see any point in dealing with the other grounds raised by the Respondents as in its view, they cannot overturn the final result.

[29] The other limb of the Respondents' application was that should the Court maintain the Stay Order, then, it should consider varying the Order for Payment into Court and allow part of the compensation to be paid to the Respondents. It is this alternative prayer by the Respondents that essentially triggered negotiation by the parties. The parties having failed to agree, this Court was given authority to determine what would be a fair and reasonable percentage that the Appellant could pay to the Respondents in the interim, regard being had to all the factors and circumstances of the case. This Court is of the view that a fair and reasonable percentage that the Appellant should pay the Respondents at this stage of the proceedings be pegged at 15% of the compensation. The 75% that the Respondents prayed for, is, in the view of this Court, on the higher side given the risk of injustice or prejudice alluded to above that if the Appellant's appeal were successful, it would be rendered nugatory and the Respondents themselves would struggle to pay back the compensation. 85% of the compensation is what should be paid into court into an interest earning account pending the hearing and determination of the appeal in this matter. Thus, the alternative prayer by the Respondents for variation of the Order for Payment into court succeeds to this extent only.

[30] Costs are awarded in the discretion of the Court as is provided by law. It is ordered that each party will bear its own costs of this application.

[31] All factors being equal and depending on how fast other processes are concluded in the Industrial Relations Court by the parties, the Court shall endeavor to set down the appeal in the forthcoming “Friday Makuta” sitting which shall commence on 11th January, 2022.

Finding and Determination

[32] In view of the foregoing, the application to set aside the stay of execution of the Judgment and Order on Assessment of Compensation is denied. The alternative prayer by the Respondents for variation of the Order for Payment into court is granted. 15% of the compensation awarded by the Industrial Relations Court on 11th August, 2021 shall now be paid to the Respondents. 85% of the compensation shall be paid into court pending the hearing and determination of the appeal. Both payments to be made by the same due date of 23rd December 2021 as per the Order of 23rd September, 2021.

[33] Each party shall bear its own costs for this application.

[34] Made in Chambers this 15th day of December, 2021 at Blantyre, Malawi.



M. D. MAMBULASA
JUDGE