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REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CASE NO. 440 OF 2016

BETWEEN

MARYAM SYMON (Suing as wife of HABINA PETROL CLEVER
(deceased) and on behalf of other dependants of the deceased)CLAIMANT

AND

MR. DILLY KUMWENDA.....1ST DEFENDANT
WORLD VISION INTERNATIONAL.....2ND DEFENDANT
UNITED GENERAL INSURANCE COMPANY LIMITED.....3RD DEFENDANT

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

- Mr. Mwabungulu- of Counsel for the Claimant
- Mr. Mbendera -- of Counsel for the Defendant
- Ms. Chida - Court Clerk and Official Interpreter

RULING ON AN APPLICATION FOR STAY OF PROCEEDINGS

INTRODUCTION

1. On 18th June, 2016, the Claimant commenced action against the 1st and 3rd Defendants seeking damages for loss of dependency and loss of expectation of life. The record indicates that by the Order of amendment of writ of summons dated 13th October, 2016, the 2nd Defendant was added as a party to the action. On 19th December, 2016, a default judgment was entered against the 2nd Defendant for failure to serve its Defence on the Claimant.

2. The matter then proceeded to trial as against the 1st and 3rd Defendants. The Judge dismissed the Claim against the Claimant for Non-Attendance. The matter is pending before the Supreme Court. On 19th

May, 2021, the Claimant took out Assessment proceedings against the Defendant in respect of the default judgment it already obtained in 2016. The Assessment proceedings were conducted on 26th May, 2021. This is the 2nd Defendant's Application to stay proceedings pending resolution of the appeal between the Claimant and 1st and 3rd Defendants.

THE APPLICANT'S CASE

3. The gist of the application as discerned from the oral submissions in support by Mr. Mbendera of Counsel and skeleton arguments is that the negligence of the tortfeasor, the 1st defendant, who was the driver of the motor vehicle at the material time of the accident has not been made out. He submits that the action against the 1st and 3rd was dismissed in its entirety and the claimant is appealing against that decision by Honourable Justice Chirwa and its yet to be heard by the Supreme Court. He contends that the liability of the 2nd defendant hinges on the claimant succeeding against the 1st defendant. They further contend that in the event the appeal is unsuccessful there shall be no basis of liability on the part of the 2nd defendant herein.
4. In the alternative, Counsel Mbendera contends that if the 2nd defendant is required to set aside the default judgment, there is no current live matter before the court since the same was dismissed in its entirety for non-attendance on the part of the claimant. He submits that good case management in the circumstances of this case would require that time and resources be allocated to other cases whilst parties await the outcome of the appeal being processed by the claimant.

THE RESPONDENT'S CASE

5. On the other hand, the claimant opposes the application. It is submitted on her behalf that the Default Judgment stipulates that 2nd Defendant is obliged to pay damages for loss of dependency and loss of expectation of life and the same has not been set aside. They argue that the Claimant was at liberty to assess damages against the 2nd Defendant. They submit that the issue of pending appeal against the 1st and 3rd Defendants has nothing to do with the 2nd Defendant. They argue that it is possible for the Court to hold some Defendants liable and others not and that it would not then lie in the mouth of those on whom liability has been found to decline to pay damages simply because others have not been found liable. They submit that Orders of the Court must be complied with.
6. In addition to the foregoing, it is submitted on behalf of the claimant that the matter as against the 1st and 3rd Defendants was concluded when the Court dismissed the Case for non-attendance. They point out that Claimant's appeal does not operate as a stay of proceedings. In as far as the matters were concluded, even on technicalities pending appeal, the Claimant is at liberty to proceed against the defendant who has been found liable. Applying to stay proceedings appeal by the Defendant is

tantamount to taking advantage of an order which does not concern them. The Order of dismissal for non-attendance, creates rights as between the Claimants and the 1st and 3rd Defendants. Further, this application seeks to circumvent Order 12 rule 21 of the CPR. It should be noted that the Default Judgment was filed in 2016. Since then, three years down the line, it has never been challenged.

THE APPLICABLE LEGAL PRINCIPLES

7. The legal principles which guide a court when considering an application for a stay of execution of judgment pending appeal are very clear. The general rule is that the Court does not make a practice of depriving a successful litigant of the fruits of his or her litigation: see **J.Z.U. Tembo v. Gwanda Chakuamba, supra, Re Annot Lyle (1886) 11 PD 114**. Essentially, what it entails is that the fact that a party has exercised his or her right to appeal to a higher Court does not mean that the judgment appealed against must be stayed: see **Celcom Limited v. Davie Huwa and Others; Civil Appeal No. 8 of 2015**.

8. Nevertheless, the Court is most likely not going to grant a stay where the appeal, if successful, would be rendered nugatory: see **Wilson v. Church (No. 2) (1879) 12 Ch D 454**. The applicant, therefore needs to demonstrate to the Court that there are special circumstances in favour of granting a stay. Further, a Court will order stay of execution pending appeal when it is satisfied that the applicant would suffer loss which could not be compensated in damages. Evidence or facts must be presented to the Court in order for it to properly assess the position: see **National Bank of Malawi t/a Nyala Investments, MSCA Civil Appeal Number 6 of 2005 (unreported)**. At the end of the day the question of whether or not to grant a stay is in the discretion of the Court and each case must be assessed on its facts and merits, **Nyasulu v. Malawi Railways Limited [1993] 16(1) MLR 394**.

DETERMINATION

9. I have carefully perused all documents on the Court file, including the written submissions filed by both parties, and listened to both counsels' oral submissions. Firstly, the respondent argues that the application is misconceived as it was not brought under any law and that the applicant made an attempt to rectify by citing the inherent jurisdiction the court. At the hearing of the 2nd Defendant's application for stay of proceedings, the 2nd Defendant applied to amend its application to indicate that the said application was made under section 57 of the Courts Act. Section 57 of the Courts Act provides that "a subordinate court may suspend any execution, judgment or order issued, given or made by such subordinate court for such time and on such terms as it shall think fit." The applicant in their skeleton arguments concede that s.57 of the Courts Act pertains to subordinate courts but they argue that they

also brought the application under the inherent jurisdiction of the court considering that the Courts (High Court)(Civil Procedure) Rules 2017, there is no provision for an application for a stay of proceedings.

10. Having seen the arguments by both parties, I took note that it is not contradicted that there is no provision under the CPR 2017 for which Counsel for the defendants could have based his application. In the case of *Bango v Attorney General and Another* (532 of 2012) [2014] MWHC 474 (16 June 2014) Justice Tembo stated:

This Court has therefore considered the submission of the plaintiff on the matter of this Court's inherent jurisdiction and concludes that this Court has inherent power to regulate its own procedure, which should include power to stay proceedings in appropriate cases, even if the rules of procedure do not provide for the same. See *Gala Estate Limited v Cheeseborough Ponds (Mal) Ltd* [1991] 14 MLR 81.

11. Based on the foregoing, I do not find it anomalous for the court to entertain this application in the circumstances.
12. Moving on, in the present matter, the applicant has made an application for stay of assessment of damages proceedings. Apparently, there is a default judgment was entered against the 2nd Defendant for failure to serve its Defence on the Claimant. The default judgment was on 19th of December 2016. Observably, the same has not been challenged or set aside so to say. The applicant contends that there is a no live matter considering that the same was dismissed in its entirety upon failure by claimant to pitch up for trial. I do not agree with this contention. The fate of the 2nd defendant had already been decided through the default judgment and the matter was proceeding against the 1st and 3rd defendant. It is clear therefore that the dismissal was against the 1st and 3rd defendant. I am of the view that it is not correct to say that there is no live matter in the face of a default judgment that was not challenged. I agree with the respondents that the application seeks to circumvent Order 12 rule 21 of the CPR.
13. Apart from that, the primary consideration in the court's determination will be whether the applicant for the stay has discharged the onus of demonstrating that there is a proper basis for the stay. Observably, the application herein is based on an appeal by the claimant. I noticed that this put them in awkward position because they could not ably satisfy one of the requirements for grant of a stay which is whether there are reasonable prospects of success of the appeal lodged by the claimant. The issue of pending appeal against the 1st and 3rd Defendants has nothing to do with the 2nd Defendant. in my opinion, the contention that proceeding with the assessment proceedings does not advance good

case management is not enough to compel the court to deny a successful party of the fruit of its litigation.

14. All in all, in deciding 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 finalized. The 2nd 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. In conclusion, what this means is that the application for stay of proceedings pending resolution of the appeal between the Claimant and 1st and 3rd Defendants is dismissed with costs.

DELIVERED IN CHAMBERS THIS 21ST DAY OF JUNE 2021


WYSON CHAMDIMBANKHATA

ASSISTANT REGISTRAR