The Republic of Malawi

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
MATRIMONIAL CAUSE NO. 45 OF 2015

BETWEEN

VIOLET PHIRI ..... PETITIONER/RESPONDENT

AND

AMOS PHIRI ..... RESPONDENT/APPELLANT

CORAM : JUSTICE W. Y. MSISKA

: Mr. Kita, of Counsel for the Petitioner/Respondent

: Mrs. Ottober, of Counsel for Respondent/Appellant

: Zulu, Official Interpreter

RULING

Introduction

This is a ruling of the Court on preliminary objections raised by the Respondent/Appellant. The Petitioner (Respondent) applied to this court to strike out a notice of appeal pursuant to Order I, Rule 18 of the Supreme Court of Appeal Rules. The matter was set down for hearing on 10th March 2021. On

8th March, 2021, the Respondent/Appellant filed a notice of preliminary objections indicating to the Court that on the hearing of the application to strike out the notice of appeal, the Respondent/Appellant was desirous to have two issues resolved by the Court first, before the application to strike out notice of appeal is heard. The two issues that the Court is called upon to resolve are that:

(a) Order I rule 18 of the Supreme Court of Appeal Rules under which the application by the Respondent/Petitioner is based does not provide for striking out the appeal and, therefore, the application to strike out the notice of appeal has been incompetently brought; and

(b) The High Court does not have jurisdiction to strike out the notice of appeal.

On the date of hearing of the application to strike out notice of appeal, both parties were agreed that the Court should first consider the preliminary objections raised by the Respondent/Appellant before hearing the application to strike out the notice of appeal. It was thought that the resolution of the two issues were determinant, either way or the other, of the life of the summons to strike out notice of appeal.

Submissions by the Respondent/Appellant

When arguing the first issue, Counsel for the Respondent/Appellant acknowledged that Order I rule 18 of the Supreme Court of Appeal Rules deals with concurrent jurisdiction between the High Court and the Supreme Court of Appeal. As such, an application in which there is concurrent jurisdiction between the two courts, an application should first be brought before the High Court and if the High Court refuses to grant the application, then that same

application should be brought as a fresh application before the Supreme Court of Appeal. It was the further argument of Counsel that Order I rule 18 of the Supreme Court of Appeal Rules is about prematurity and maturity of applications before the Supreme Court of Appeal. Therefore, Order I rule 18 has nothing to do with striking out the notice of appeal. Since the applicant has cited a wrong provision under which the application is based, the application ought to be dismissed. As authority for the proposition that an application should be based on some rule and, in absence of citing the rule or indeed citing the wrong rule under which the application is brought, the application is incompetent, Counsel cited the case of ***FW, Kalinda v. Limbe Leaf Tobacco Civil Cause No. 1542 of 1995*** in which Chimasula Phiri, J. as he then was, stated that the rationale for indicating the provision under which an application is made is to ensure that both the court and the other party are given opportunity to prepare for the matter.

On the issue of the High Court not having jurisdiction to strike out a notice of appeal, Counsel submitted that the High Court derives its jurisdiction from section 108 of the Constitution and section 11 of the Courts Act. It was the contention by Counsel that neither of the provisions gives the High Court power to strike out an appeal let alone a notice of appeal. If such course of action were allowed, then the end result of the application by the Petitioner/Respondent would be extinction of the appeal under section 7 of the Supreme Court of Appeal Act. It is only the Supreme Court of Appeal that has power to determine an appeal.

Submissions by Petitioner/Respondent

In response Counsel for the Petitioner/Respondent argued that the notice of preliminary objections be strike out notice of appeal for being incompetent

states as follows *"…. Preliminary objection for the hearing of the Defendant's application for stay of hearing of assessment of damages and stay of execution of judgment."* There is no such application before the Court. Further, there is nothing in Order 10 rule 1 of the Court (High Court) Civil Procedure Rules, 2017 (CPR) which states that a party can file a notice of preliminary objections. As authority to support is argument Counsel cited the case of ***Dr. Saulos Chilima and Dr. Lazarus Chakwera v. Electoral Commission & Another Constitutional Reference No. 1 of 2019*** where the Court struck out a certificate of non-compliance because CPR do not provide for the filing of such a document. Similarly, the CPR does not provide for a notice of preliminary objection. If, therefore, there was irregularity or non-compliance in the application by the Petitioner/Respondent, the proper way was to make an application under Order 2 CPR and not by way of preliminary objection.

On the contention that the application to strike out notice of appeal is not provided for under Order I rule 18 Supreme Court of Appeal Rules, Counsel stated that Order I rule 18 Supreme Court of Appeal Rules simply provides for the mode of lodging any application with the effect that if there is concurrence of jurisdiction, the first port of call is the High Court. The same is true for Order 10 rule 1 CPR, which is, so to speak, a general provision under which applications are or, may be made. It is for that reason that Order I rule 18 of the Supreme Court of Appeal Rules should be understood in that light.

As regards the issue of the High Court lacking jurisdiction to strike out a notice of appeal, Counsel for the Petitioner/Respondent argued that the High Court has jurisdiction to entertain an application to strike out a notice of appeal. Counsel cited Order III rule 19 of the Supreme Court of Appeal Rules as authority. Learned Counsel pointed out that when parties appeal to the Supreme

Court of Appeal against decisions of the High Court, the Supreme Court of Appeal will be seized of the matter and therefore assume jurisdiction when the appeal has been entered in the Supreme Court of Appeal. Where an appeal has not been entered, every application must be made to the High Court. As to the meaning ascribed to the words "entering the appeal" Counsel cited the case of ***Lackson Chimangeni Khamalatha and Others v Secretary General Malawi Congress Party and Others MSCA Civil Appeal No. 67 of 2016*** wherein Chipeta JA held that an appeal is entered where the record of appeal has been filed with the Supreme Court of Appeal and the matter has been assigned a case number.

Submissions in reply by the Respondent/ Appellant

Counsel for the Respondent/Appellant was brief and submitted that though the application refers to preliminary objection to the hearing of the Defendant's application for stay of hearing of assessment of damages, the Court will remember that I appeared before it in another matter which was based on this subject. It was an oversight on the part of the Respondent/Appellant not to effect corrections in the papers. Otherwise, the Petitioner/Respondent has not suffered any prejudice as shown by his extensive oral response to the preliminary objections. Though the CPR do not specifically provide for the mode of bringing before the Court preliminary objections, the notice of preliminary objection is properly before Court under the doctrine of inherent jurisdiction which has also been cited as a basis for lodging the notice of preliminary objections.

It was the argument by Counsel that although Order I rule 18 of the Supreme Court of Appeal Rules may be a general provision, but it cannot be relied

upon as a basis for the application to strike out a notice of appeal. Order I rule 18 of the Supreme Court of Appeal Rules has nothing to do with striking out a notice of appeal.

Lastly, it was the view of learned Counsel for the Respondent/Appellant that in the case of ***Lackson Chimangeni Khamalatha and Others v. Secretary General Malawi Congress Party and Others (supra)*** nowhere in the judgment has it been said that the High Court has powers to strike out a notice of appeal.

Law and Argument

It must be pointed out that the application to strike out the notice of appeal is premised on Order I rule 18 of the Supreme Court of Appeal Rules. Order I rule 18 is reproduced in full for the sake of putting matters into context. It states as follows: -

> *"Whenever an application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below but, if the Court below refuses the application, the applicant shall be entitled to have the application determined by the Court."*

The understanding by this Court is that, and as rightly observed by both the Respondent/Appellant and Petitioner/Respondent, Order I rule 18 of the Supreme Court of Appeal Rules confers on the High Court (Court below) and the Supreme Court of Appeal (the Court) concurrent jurisdiction. This concurrent jurisdiction is triggered when the High Court (Court below) refuses to grant an application. In the consideration of this Court that for the High Court (Court below) to exercise such concurrent jurisdiction, the basis of an application should invariably be in accordance with the practice and procedure

governed by the rules of procedure being used in the High Court (Court below) in this case the Court (High Court) Civil Procedure Rules 2017. In circumstances where the High Court (Court below) refuses the application, the applicant is entitled to have recourse to the Supreme Court of Appeal (Court) for determination. It, therefore, follows that where the applicant has recourse to the Supreme Court of Appeal, he shall have regard to practice and procedure in that Court as regulated and governed by the Supreme Court of Appeal Rules.

In the present application, this Court is of the firm view that not all applications are subject to concurrent jurisdiction. There are a selected few applications, and these selected applications have corresponding rules of procedure in both superior courts. Examples of applications in which the two would be said to have concurrent jurisdiction and, by no means exhaustive, are those applications which involve suspension or stay of execution; and leave to appeal. If such applications are refused by the High Court (Court below) then the applicant can still call in aid the Supreme Court of Appeal (the Court) by lodging a fresh application in that Court for its determination.

It should be acknowledged that the Courts have on uncountable times emphasized the need to cite the rule or indeed the rules upon which an application is premised. In a case where a rule upon which the application is brought is not cited, the application is incompetent. It is the view of this Court and I hasten to say that the rules cited as the basis of an application should be the rules governing and regulating practice and procedure in the particular Court in which the application is brought for determination. This Court is fortified in its reasoning by the judgment of the Malawi Supreme Court of Appeal in the case of ***The State v Minister of Finance and Another ex Parte Bazuka Mhango and Others Civil Appeal No. 17 of 2009 (unreported)*** in which the Court expressed itself as follows:

"The basis of the applications exercised our minds. The respondent cited the inherent powers of the High Court and section 108 of the Constitution. We had difficulty in accepting this. The practice and procedure in the High Court is governed by section 29 of the Courts Act. The High Court is enjoined to follow the practice and procedure under the Supreme Court Practice Rules, 1999 edition unless supplemented by the rules made under the Courts Act.....We are aware that the appellant did not take issue with the basis of or the Order itself in the Court below. The assumption was that the Court below had such inherent power to order "release of allowances" because it enjoyed unlimited jurisdiction under section 108 of the Constitution. We would be very slow to endorse this"

The application which has given rise to the preliminary objections has been premised on rules of procedure alien to this Court. As this Court understands it, O.I rule 18 of the Supreme Court of Appeal Rules cited as the basis for the application to strike out notice of appeal is only applicable to applications lodged in the Supreme Court of Appeal. Unless specifically provided for under the Supreme Court of Appeal Rules, this Court does not see the reason why it should be called upon to determine an application using rules of procedure regulating and governing practice and procedure in a different court. The tools of trade for this Court are the CPR made under section 67 as read with section 29 of the Courts Act and not the Supreme Court of Appeal Rules made under section 27 of the Supreme Court of Appeal Act.

On the issue raised by Counsel for the Petitioner/Respondent that the Court (High Court) Civil Procedure Rules generally and, in particular, Order 10 rule 1 does not provide for a notice of preliminary objection, this Court agrees with

that observation. However, it should be noted that the notice of preliminary objections under consideration has also been premised on the doctrine of inherent jurisdiction. It is the understanding of this Court that inherent jurisdiction is used as a fall-back position in situations where there is no specific rule of law that provides for the mode of bringing to the attention of the court a particular matter or issue for its determination. In the case of ***Grobbelaar v News Group Newspapers Ltd [2002] UKHL 40*** the House of Lords adopted a definition of inherent jurisdiction as follows:

> *"The inherent jurisdiction of the court may be defined as being the reserve or fund of power, residual source of powers, which the court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."*

Similar views were also expressed by the Malawi Supreme Court of Appeal in the case of ***Registered Trustees of Youth and Society v Greizedar Jeffrey and Others Civil Appeal No. 70 of 2018*** wherein Mzikamanda, JA stated as follows:

> *"Inherent jurisdiction is a doctrine of the English common law that a court has jurisdiction to hear any matter that comes before it, unless a statute or rule limits that authority or grants exclusive jurisdiction to some other court or tribunal. The doctrine of inherent jurisdiction is resorted to sometimes in order that injustice be avoided and efficiency in litigation be ensured. Some look at inherent jurisdiction as residual, automatic or ex officio authority*

of the court of law to regulate proceedings before it to facilitate the exercise of full judicial powers by the court."

Clearly, the doctrine of inherent jurisdiction serves to fill the lacunae to enable the proper administration of justice. This Court adopts these insightful sentiments and states that the notice of preliminary objections was properly before the Court.

This Court also agrees with Counsel for the Petitioner/ Respondent that the way the notice of preliminary objection was framed was misleading. Correctly, the notice of preliminary objection as framed made reference to different matters which matters were not before the court. For that reason, it ought not be entertained. However, from the spirited, extensive and formidable arguments by Counsel for the Petitioner/ Respondent against the preliminary objections was indicative of the fact that he was in no way prejudiced by the mistakes or errors appearing in the notice of preliminary objections. Further, this Court being mindful of the overriding objective of the CPR, it was of the view that the error was not substantive as to warrant expungement.

Disposal of the matter

The Court has carefully considered the arguments by both Counsel, the skeletal arguments and case authorities cited both in support and in opposition to the preliminary objection. This Court has come to the conclusion that the first preliminary objection has been made out. The rule cited as the basis for striking out the notice of appeal does not have application in this Court and cannot in any way be used as a basis for bringing such an application in this Court. All in all, as the application was brought under Order I rule 18 of the Supreme Court of Appeal Rules, this Court has therefore not been properly moved. The

application is misconceived and incompetent and ought to be dismissed. Accordingly, the application to strike out notice of appeal is dismissed with costs to the Respondent/Appellant.

Having found that the application is incompetent and misconceived on the first limb of the preliminary objection, it is the considered view of this Court that it will not be worthwhile to consider in detail the second limb of the preliminary objection with respect to lack of jurisdiction by the High Court as at the very least it has been rendered moot.

Pronounced in Chambers this 30th day of March 2021 at Lilongwe in the Republic of Malawi.

W.Y. MSISKA
JUDGE