

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

JUDICAL REVIEW CASE NUMBER 48 OF 2021

BETWEEN:

THE STATE (on the application of CHOKANI MHANGO) CLAIMANT

AND

COMPTROLLER OF STATUTORY CORPORATIONS 1st DEFENDANT

THE SECRETARY TO THE PRESIDENT AND CABINET 2nd DEFENDANT

THE ATTORNEY GENERAL 3rd DEFENDANT

CORAM: JUSTICE M.A. TEMBO,

Machinjiri and Bhana, Counsel for the Claimant

Bonomali, Counsel for the Defendants

Mankhambera, Court Clerk

ORDER

1. This is the order of this Court on the claimant's application to set aside and/or vacate an order of suspension of enforcement of the judgment of this Court, delivered by my brother Judge who has since been appointed to the Apex Court. The order sought to be set aside and/or vacated was also delivered by my brother Judge on 4th October, 2022. The application is contested by the defendants.
2. The facts on this application are not complicated. On 24th August, 2022, the Court delivered judgment granting the claimant all reliefs sought in his

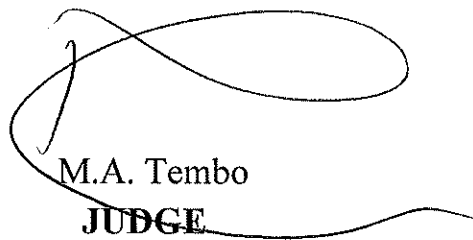
application for judicial review in this matter. On 8th September, 2022, the defendants served the claimant an Order for leave to appeal to the Supreme Court of Appeal and a Notice of Appeal outlining grounds of appeal. On 4th October, 2022, Counsel for the defendants through a WhatsApp conversation sent a text message to Counsel Bhana, of a picture of the first page of the 'Application without Notice' seeking an order suspending enforcement of the judgment of the Court in this matter pending appeal. No service of the 'Application without notice' nor any Order made pursuant to the Application without Notice has been made on counsel for the claimant up to the date of the instant application, being today.

3. The claimant asserts that if the Application Without Notice was made in good faith the defendants would have promptly served counsel for the claimant copies of all documents used to obtain the Without Notice Order suspending enforcement of the judgment of this Court. The claimant further asserted that failure or neglect to effect service of the said documents has the effect of deliberately keeping the claimant uninformed about the basis and legitimacy of the Application Without Notice. For that reason, the claimant seeks that the Order suspending enforcement of the judgment herein obtained on the Without Notice Application be vacated and/or be set aside.
4. The case of the defendants is as follows on their failure to serve the Order suspending enforcement of the judgment of this Court and on the present application. Counsel Bonomali confirmed sending a text message to Counsel Bhana showing that the Order suspending enforcement of judgment herein had been granted. And that therefore the claimant was aware of the Order suspending enforcement of the judgement.
5. Counsel Bonomali indicated that he was unable to file a formal Order suspending enforcement of judgment because his colleagues whom he sent to Court to collect the documents filed by the defendants after judgment informed him that this matter was reassigned to this another Judge whose identity was not yet known. And that the failure to serve the said Order was therefore neither deliberate nor in bad faith.
6. The defendants then asserted that the enforcement of the judgment was based on the condition that the defendants' appeal be prosecuted within 90 days and that as of today that period has not yet lapsed and therefore this application ought to be dismissed as an abuse of the court process.

7. This Court observes that the Order in question herein, having been noted by the Judge's minute on record in the usual fashion, was notified by WhatsApp text to the claimant's counsel on 4th October, 2022. The defendants have however not yet served filed and served the said Formal Order to date. They defendants were however able to file a response to the claimant's application to vacate the said Order. In the circumstances, this Court is unable to appreciate how the defendant's counsel can assert that he was informed that it was not known as which Judge had been assigned this matter after my brother Judge was appointed to the Supreme Court of Appeal. In any event, this Court is of the firm view that any counsel who properly applies his mind to the issue would easily find out to which Judge a matter has been re-assigned by making inquiries to the Registrar's office. Regrettably, the defence never did that in the present matter. The result is that we have an adverse order against the claimant suspending enforcement of a judgment. The adverse order keeps the claimant out of the fruits of his litigation. That adverse order was obtained without notice to the claimant, which is not a problem in itself since the Rules of procedure allow for the same. The major problem is that the adverse order and the basis on which it was sought and granted has never been made available to the claimant.
8. In the usual course of things, once such an adverse order is made there is provision of an opportunity for the same to be tested by the party against whom it is made, in this case it would be the claimant. That opportunity could not be availed to the claimant in the present matter because the defendant obtained the adverse order and neither served the said order on the claimant nor the documents on which the said order was sought and eventually obtained.
9. This Court bears in mind that whenever an order is sought and obtained by a party and such an order ought to be drawn up by such a party, then the party seized of drawing up the order must do so within seven days of obtaining the order. See Order 23 Rule 2 (3) (a) of the Courts (High Court) (Civil Procedure) Rules. The defendants never drew up the said order since 4th October, 2022 until today. The other party to this matter, the claimant, could not draw up the order since it was obtained in his absence. The claimant has been kept unaware of the formal order or basis for the same and has been unable to challenge the same as a result until now.

10. In the circumstances, this Court observes that the defendants' actions indeed show bad faith in the manner they proceeded after obtaining the order in question. They never drew it up within seven days or at all.
11. This Court observes that it has a duty to ensure the overriding objective of the Courts (High Court) (Civil Procedure) Rules which is to deal with matters justly, including by ensuring that the parties are on equal footing. See Order 1 Rule 5 (1) (a) of the Courts (High Court) (Civil Procedure) Rules. In the present matter, to ensure that both parties are on equal footing, this Court grants the relief sought by the claimant. This is to ensure that the defendants do not benefit from the manner in which they proceeded contrary to the Rules and to the detriment of the claimant after obtaining the order in question herein.
12. The claimant's application is therefore granted with costs.

Made in chambers at Blantyre this 9th December, 2022.



M.A. Tembo
JUDGE