



Republic of Malawi
IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
BLANTYRE REGISTRY
COMMERCIAL CAUSE NUMBER 316 OF 2019
(Before Msungama, J.)

BETWEEN:

JIMMY KATUMACLAIMANT

AND

HTD LIMITEDDEFENDANT

CORAM:

M.T. Msungama, Judge

Banda, of Counsel, for the Claimant

Misanjo (on brief), of Counsel, for the Defendant

Makondi, Court Clerk

Ruling

1. On the 17th day of October 2023, this court delivered its judgment in favour of the Claimant. In the said judgment, the Court ordered that the Defendant should refund the sum of MK7,358,661.40, together with interest and collection fees thereon, to the Claimant.
2. The Defendant is not happy with the judgment and is appealing against the decision to the Supreme Court of Appeal to have the same reversed.
3. In view of the legal position that the lodgement of an appeal to a superior court does not act as a stay, the Defendant has applied to this court for an order to have the execution of the judgment suspended pending the determination of the appeal. The application is opposed by the Claimant. Therefore, the sole duty of this court at this stage is to determine whether a case has been made out to warrant the court to exercise its discretion in favour of the Defendant by ordering a suspension of the enforcement of the judgment until the appeal has been determined by the Supreme Court.

4. The Defendant's application is supported by a sworn statement sworn by Counsel Tamani Tembo. There is also a skeletal argument filed in further support of the application. Counsel Tembo depones that the grounds on which the application is made are twofold as follows:

- a) It is likely that the appeal will be successful.
- b) The Claimant is not a man of means and has no identifiable address as a result of which he may not be able to pay back the adjudged amounts to the Defendant if and/or when the appeal succeeds thereby rendering the appeal nugatory.

5. The order of stay of execution of a judgment is granted at the entire discretion of the court: **Becker v Earl's court Ltd** (1911) 56 SJ 206; **Stanbic Ltd v Phiri** [2005] MLR 410; **Nyasulu Malawi Railways Limited** (1993) 16 (1) MLR 394. In deciding whether or not to exercise its discretion to stay, each case must be assessed on its own facts and merits. The discretion is exercised on what is just and expedient: In **Malawi Revenue Authority v Nadheem Munshi** Civil Appeal Cause No. 67 of 2013 the court stated that;

"A court considering a stay of proceedings must realise 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 a wrong exercise of discretion...The critical consideration is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay"

6. In **Mike Appel & Gatto Ltd v Saulosi Chilima** MSCA Civil Appeal No. 20 of 2023 Chipeta JA stated as follows:

"... the approach should be to look at all facts of the case and base the court's discretion on what is just and expedient in all 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 a stay of execution."

7. The rights of the parties must be properly balanced to avoid injustice: **Malawi Housing Corporation v John Suzi Banda** MSCA Civ. Appeal No.73 of 2018 (Unreported). In **The Sate v Inspector General of Police & Others** Misc. Civil Appeal No. 5 of 2022 Kapanda JA stated that in weighing whether there is a real risk of injustice to one or other or both parties if the court grants or refuses to grant an order of stay, the court must consider the following:

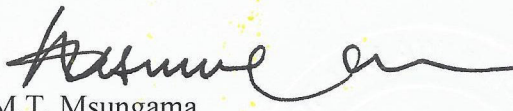
- a) If a stay is refused, what are the risks of the appeal being stifled;

- b) If a stay is granted and the appeal fails, what are the risks that the applicant will be unable to enforce the judgment; and
 - c) If a stay is refused so that the judgment is enforced and then the appeal succeeds, what are the risks of the appellant being unable to recover any moneys being paid to the respondent.
- 8. Evidence in support of an application should be full, frank and clear. Further, it is important for the court to have a full understanding of applicant's affairs: **Hammond Suddard Solicitors v Agrichem International Holdings Limited** [2001] EWCA Civ. 1915. Where an applicant pleads possible ruin if the stay is not granted, it is incumbent upon him to provide evidence of such ruin or injustices: **Windward Enterprises Limited and Caribbean Destination Management Services v Royal Bank of Scotland t/a NatWest** Eastern Caribbean Supreme Court Claim No. SLUHCU2006/0001.
- 9. Let us deal with the first ground on which the application is made, to wit, that the appeal is likely to succeed. With due respect to counsel, what he is asking this court to do is effectively to invite it to assess its own judgement and render an opinion on it. What would be the effect of this court agreeing with the Defendant that the appeal is likely to succeed? That would, in my opinion prejudice the position of the successful party as the court would effectively be making an admission to the effect that it made errors which are likely to result in the judgment being overturned by the superior court. That would be an absurd position. Further, such an invitation is to put the court in a difficult position where it would be defending its own judgment, an equally absurd position. This is why in the modern times the prospects of success of the appeal is no longer considered a serious point of consideration by the court in determining as regards whether a stay should be granted pending an appeal. That ground fails.
- 10. As regards the second ground on which the application is based, I also find that the Defendant has failed to convince this Court that the Claimant is a man of straw who is likely going to be unable to repay the awarded amounts to the Defendant should the appeal succeed. The onus of proof in this respect was at all material times on the Defendant. Apart from counsel asserting that the Claimant is a man of straw and without an identifiable address, no material has been made available to this court to support this assertion. As it is, this just remains an assertion without any basis and I so find.
- 11. I must add that although the onus was always on the Defendant to prove the assertions of impecuniosity (on the part of the Claimant), out of an abundance of caution, the Claimant swore a statement in which he stated that he is a man of means and has a verifiable address. The Claimant states that he has several properties including Plot No.1 Deed Registration

Number 89422 located in Thyolo. which is valued at MK316 million. Copies of both the title deed and the valuation report in respect of the property were attached to his sworn statement as JK2 and JK3. It was further evidence that he has flats that are currently being rented to the Malawi University of Science and Technology (MUST). He realises rentals in the sum of MK570,000 every three months. The Claimant attached a copy of a payment voucher in respect of payment of rentals by MUST. The Claimant further swore that he has other properties at Misesa comprised in Title Number Misesa 1/117, Misesa 1/118 and Misesa 1/119. He attached to the sworn statement copies of the relevant title deeds as JK5, JK6 and JK7. The Defendant has not made any attempt to dispute what the Claimant has stated in his sworn statement. I therefore find that the Claimant is a man of means who can ably refund the adjudged sums to the Defendant in the event of the appeal being successful.

12. I find that there is no justification to deny the Claimant, a successful litigant in this matter, the fruits of his successful litigation. The justice of the matter, in this case, tilts in favour of denying the application for a stay/suspension of enforcement of the judgment. The application is, therefore, dismissed with costs.

Delivered in Chambers on the 1st day of February 2023 at the High Court of Malawi, Commercial Division, Blantyre Registry.


M.T. Msungama
JUDGE

THE HIGH COURT
(COMMERCIAL DIVISION)
BLANTYRE