REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI SITTING AT BLANTYRE

PRINCIPAL REGISTRY

ELECTION PETITION NO. 8 OF 2019

IN THE MATTER OF SECTION 100 (1) OF THE PARLIAMENTARY AND PRESIDENTIAL ELECTIONS ACT

AND

IN THE MATTER OF AN ELECTION PETITION BY GERALD KAZEMBE

(Before Honourable Justice Nriva)

BETWEEN

GERALD KAZEMBE----------PETITIONER

AND

THE ELECTORAL COMMISSION----------1st RESPONDENT

RALPH JOOMA----------2nd RESPONDENT

CORAM: HIS HONOUR E. BLACKBOARD DAZILIKWIZA PACHALO DANIELS

Mr. Dzonzi, Counsel for the Petitioner,

Mr, Fremont Banda, Counsel for the 2nd Respondent ,

Mr. F. Mathanda, Clerk/Official Interpreter,

RULING

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1. It is vehemently refusing to die. It is so persistent in its knocking on the doors of my sacred chambers. I mean, it is mostly used as a sword and perhaps not as a shield. Mostly, it knocks on my door times and again, and yet, with violent and eloquent force. In fact, it is good that it keeps coming, for each time it does, it elongates the mind of this Court to even finer jurisprudential places. This, I mean in thought. Perhaps, it is time to say my opinion over it, without fear of rebuke and or contradiction. Or will it be a judicial kamikaze? If development of jurisprudence will come with some ram's

neck put on the edge of a sharp sword from those of old, then perhaps that is to be taken as part of the process. But, are contradictions not important to the soul of jurisprudence? Of course they are. But, should we not be respectful when at it? Of course courtesy demands no less and so does the doctrine of precedence. But all this, I mean the argument made by Counsel for the Respondent in the main. Time is not ripe yet for me to announce it. But I will. However, the long and short of what is before me is that, the Petitioner has approached this Court today, seeking the indulgence of the Court to consider suspending the execution of an enforcement order which he claims the Respondent has obtained against him enforcing an order of costs imposed on him by the Court.

This he has done because he seeks to appeal the decision of the Court on the merits and that to avoid endeavouring into a voyage of futility, the learned Counsel has advised this Court that not giving them a stay may render their appeal a nullity or indeed nugatory as the lawyers say it. In response, there was a flood of biblically forceful arguments made by the learned Counsel for Respondent ruthlessly attacking the application that is now before me. In the main, Counsel for the Respondent argues that the application before me is incompetent because there is no order on enforcement of the order on costs and therefore there is nothing that this Court should pretend to stay or suspend. Similar to this argument, is his further argument that the application before me is *res judicata* on the premise that this application was ever before my learned friend His Honour Msokera (As he then was) sitting as a Registrar when he declined a similar application on the premise that the application suffered from immaturity and that it was brought when there was no enforcement order obtained by the Respondent who received costs in their favour after being successful in Court as against the Petitioner .

2. As it were, the learned Counsel for the Respondent has further argued that in the event that this Court does find that the application can be entertained, Counsel argues that the application has cited the wrong law and from that premise alone, it must be dismissed for it suffers competence issues**.** This he submits that the application is supposedly coming under Order 28 rr 1, 3, 48 & 50 of the Courts (High Court) (Civil Procedure) Rules, 2017 which is an Order that does not provide for an application to stay proceedings or indeed the execution of an enforcement order as herein claimed. He in essence argues that under Order 28 of the Courts (High Court)(Civil Procedure) Rules, 2017, there has been no enforcement order obtained.

3. Perhaps, more on his argument is the fact that having gone through the submissions made by Counsel, this Court has come to a perusal that Counsel further suggests that the issues before me are in his view contentious and that this Court must not masquerade as though it could be competent to handle this because if after my order, a party is bruised by it they may not have the chance to appeal to the Supreme Court of Appeal, arguing that his understanding of the *Elida Liphava & Others v Prime Insurance Company Limited & Another Civil Appeal No. 40 of 2019(Unreported)* case, is such that the Supreme Court of Appeal does not take appeals from the decisions of the Registrar other than those on assessment of damages. In essence, he argues that the issue before me is susceptible to an appeal by either party, therefore I must refer the

matter to the honourable judge under Order 25 Rule 2 of the Courts(High Court)(Civil Procedure) Rules, 2017. The Petitioner on the other hand, in essence says I should proceed for there is nothing contentious before me.

4. Moreover, and yet without relenting, Counsel for the Respondent argues that, in any case, this Court does not have jurisdiction to preside over this application because in his view and according to paragraph 4.2.3 of his skeleton arguments in opposition to the application by the Petitioner , I have no authority from the honourable judge to deal with this matter. As it were, Counsel has again argued that the Registrar does not have inherent jurisdiction and that the Petitioner should not be allowed to rely on that where the powers of the Registrar are categorically outlined on Order 25 of the Courts (High Court)(Civil Procedure) Rules, 2017. Last but not least, is the argument for the Respondent that the principles for granting suspension of execution do not support suspension of this application. To support this argument, the learned Counsel has argued that the Petitioner has failed to demonstrate that there are good and exceptional circumstances to warrant the grant of a suspension order or that there is a good reason to depart from established principles of law. However, the law as I understand it now, is that, the principle is whether denying or granting suspension would occasion an injustice or would risk some prejudice to either party. See *Mike Appel and Gatto v Saulos Chilima MSCA Civil Appeal No. 20 of 2013(Unreported).*

5. Nevertheless, I must pause and say that, there are a lot of arguments made in opposition but I must be quick to admit that, what I have now is enough for this Court to determine the question that is before it without venturing into an academic discourse. Suffice to say that, I commend Counsel for the Respondent for his thoughtful and mature submissions. I have read them deep and within. They are impeccable. Be that as it may, I will not relent to disagree with Counsel should the law permit the Court to so do.

6. Indeed, I must first disagree with Counsel for the Respondent for he seems to strongly think that this Court does not have authority to hear these proceedings. I mean, he with respect incorrectly suggests in his submissions that this Court does not have authority to proceed herein. That is in my view an argument not evidentiary supported neither should this Court consider that it is any material. This, I say because unknown to Counsel , a thing of which Counsel ought to have verified with the record of the Court, Counsel must be aware that this application was filed with the Court on 3rd October, 2022. The office of the Registrar forwarded the matter to the judge now presiding, for his action and or directions whatever the honourable judge would deem fit. On 28th October, 2022, the honourable judge presiding over this matter directed my office to deal with this application. All Counsel was to do, was to be a bit curious before he made the argument that he has submitted with force on but suffers its death with ease. In fact, this Court proceeded to hear this application fully knowing that Order 25 Rule 1 of the Courts (High Court)(Civil Procedure) Rules, 2017 was complied with. I accordingly dismiss the argument that Counsel has made this far. As it were, any argument premised on this presupposition has an obvious fate. It will not be sustained.

7. Again, this Court sitting as it does further disagrees with Counsel for the Respondent and yet with greatest respect for suggesting to this Court that his understanding of the *Elida Liphava* case is that if this Court is to make a decision that does not resonate with what they seek in this Court then they may not be able to appeal to the Supreme Court of Appeal. Perhaps, the wisdom of the Court in the case of *Maitland Trustees Limited v Mulli Brothers Limited Civil Cause No. 297 of 2018(Unreported)* where the Court held as follows may be relevant:

> *"With greatest respect, I further hold the view that it is incorrect to comprehend the Elida Liphava & Others v Prime Insurance Limited & Another (Supra) case to mean that one Cannot appeal to the Supreme Court of Appeal the decision of the Registrar even where Order 25 Rule 1 of the Courts (High Court) (Civil Procedure Procedure) Rules 2017 was complied with. That is not a correct interpretation as suggested by the reasonings of Counsel for the defendant. I decline to give life to such reasonings. They are unsustainable in their defiance of the correct interpretation of the Elida Liphava case. All in all, just like argued by Counsel for the claimant, I decline the invitation to exercise my mind under Order 25 Rule 2 of the Courts (High Court)(Civil Procedure) Rules 2017 on the premise that there is nothing contentious before me, because the understanding of this Court is that whether an issue is contentious or not is not such because Counsel says it is, in my considered view, that must remain a question of fact and that the Registrar has to exercise his mind on such A question before we end up abusing and hiding under Order 25 Rule 2 of the Courts (High Court) (Civil Procedure) Rules 2017, to refer every issue to the Judge."*

On this we must add that, and of course premising on the permissive words of the Supreme Court of Appeal in the *Elida Liphava* case, the possibility of an appeal must not be understood to be the exhaustive factor on which the issue before the Registrar may be deemed to be contentious. I mean, the complexity of the issues, although listed under 25 of the Courts (High Court) (Civil Procedure) Rules, 2017 in the main, but judicial prudence may require the Registrar to invoke Order 25 Rule 2 of the Courts (High Court) (Civil Procedure) Rule, 2017. That in my view speaks to where there are complex legal questions even though the main question may be something that ordinarily the Registrar can handle. This, I say because it is possible for even an application to strike proceedings under Order 25 Rule 1(j) of the Courts (High Court) (Civil Procedure) Rules, 2017 to end in a situation where one party gets aggrieved with the decision of the Registrar, should a party then be denied the right to appeal? Certainly not. Should they appeal to the High Court? Of course not.

As if the above is not enough, the Court in *Givemore Maloya v Patson Phiri Personal Injury Cause No. 87 of 2019 (Unreported)* made similar observations couched as follows:

> *"I must further say that I do not think this matter or any matter where the learned judge has given authority to the Registrar to deal with any particular application, Counsel should be worried that they may not have the right to appeal to the Supreme Court of Appeal. In fact, when that happens the decision of the Registrar retains the authority from the honourable judge and it should*

in my humble view be appealable to the Supreme Court of Appeal because then, the decision is the decision of the judge done by him through his messenger. As it were, I have always understood the maxim, "Qui facit per alium facit per se" to mean that he who does anything through another does it by himself."

8. Perhaps, this maxim still remains sound in law and otherwise. However, this Court understands that preliminary issues must not find their way in the Supreme Court of Appeal for lack of finality. Perhaps, where a preliminary issue is susceptible to appeal the Registrar should refer that to the judge? But even then, there has to be finality still. But that said, we must remain within the confines of the prescriptions of statute. In any case, I have difficulties to fathom how Counsel for the Respondent presumes that even where the Judge has granted authority under Order 25 Rule 1 of the Courts (High Court)(Civil Procedure) Rules, 2017 and the Registrar makes a decision that cannot be appealed to the Supreme Court of Appeal. To be respectfully fair with the Superior Court, perhaps once the opportunity presents itself the Superior Court will clarify itself, but respectfully my reading of the Supreme Court of Appeal decision is that in that case the Registrar did not have authority to proceed as he did. Like found above, this is not the case before me. Before me is an authority from the honourable judge under Order 25 Rule 1 of the Courts (High Court)(Civil Procedure) Rules, 2017 such that whatever decision I make must be seen to be the decision of the High Court and in fact it must be seen to be the decision of the honourable judge who has given me the authority to deal as it were. Perhaps, I must add that in a true construction of section 21 (1) of the Supreme Court of Appeal Act, one would note that this finding is far from being wanting. The relevant part of the section provides as follows:

> *"An **appeal shall lie** to the Court **from any judgment** of the "High Court" **or** "any judge" thereof in any civil cause or matter:*
>
> *Provided that no appeal shall lie where the judgment (not being a Judgment to which section 68 (1) of the Constitution applies) is—*
>
> *(a) An order allowing an extension of time for appealing from a Judgment;*
> *(b) An order giving unconditional leave to defend an action;*
> *(c) A judgment which is stated by any written law to be final;*
> *(d) An order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree nisi on which the order was founded has not appealed from that decree:*
>
> *And provided further that no appeal shall lie without the leave of "**a Member of the Court**" **or** of the "High Court" **or** of "the judge" who made or gave the judgment in question where the judgment (not being a judgment To which section 68 (1) of the Constitution applies) is..."*
>
> *(Emphasis Added)*

9. Certainly, the Registrar is not the High Court, and I must not be misconstrued to be that ambitious. But, not only does this Court admit to be a far distant junior at the bench, but I must further admit, that judicial wisdom comes with age at times and I am still in my infancy stages still craving for the milk of the law. Needless to say, my understanding or construction of the proviso herewith is that using the literal rule of interpretation, one would note that the phrase *"a member of the Court"* initially refers to a justice of the Supreme Court of Appeal. See section 2 of the Supreme Court of Appeal Act as read together with section 105 and not section 67(2) of the Constitution of the Republic. Again, immediately after this, the word *"or" of the "High Court"* when read as one, connotes a further use of the word: *"a member of"*, only that such a word, further extends to the High Court. So a proper construction of section 21(1) and more so on the proviso, clearly shows that the honourable judges are not the only members of the High Court neither are they the only judicial officers thereon as will be argued in the immediate next. This interpretation must be understood with the totality of the enabling statutes. Thus, section 8 of the Courts Act which is couched as follows must be invited:

> *(1) The Registrar* ***shall exercise jurisdiction, powers and duties as The Chief Justice may, by rules prescribe,*** *from time to time.*
>
> (2) *Subject to the general or special directions of the Chief Justice, or to the* ***directions of the High Court*** *in any particular cause or matter, the manner in which Deputy Registrars, Assistant Registrars and other* ***officers of the High Court*** *(other than District Registrars and the staff of District Registries) carry out the duties imposed upon them by this or any other written law or otherwise shall be under the control and superintendence of the Registrar.*
>
> *(Emphasis Added)*

The reasoning of this Court is that when construing statutes including section 21 of the Supreme Court of Appeal Act, regard must be had to other enabling statutes which should include the Constitution as the first authority, and also the Courts Act. In any case what comes clear under section 8 (2) of the Courts Act, is that the Registrar, the deputy Registrar and the Assistant Registrar are members or indeed officers of the High Court. Not only are they mere officers but as would be seen below they are judicial officers whose judicial decisions as a general rule, having complied with section 8(1) of the Courts Act, by rules under Order 25 Rule 1 of the Courts (High Court)(Civil Procedure) Rules, must have their judicial decisions appealable to the Supreme Court of Appeal. I respectfully disagree with any argument and or authority that suggests otherwise.

Arguably, that means leave or permission to appeal can be obtained from a member of the High Court other than the judge who made the decision who if the facts permit leave or permission to appeal may be sought from. Comparatively, section 109 of the Constitution of the Republic which provides as follows only speaks to the number of Judges that at minimum the High Court should have:

> *"The Judges of the High Court shall be such number of Judges,* ***not being less than three,*** *as may be prescribed by an Act of Parliament."*

(Emphasis Added)

10. Thus, in my view, the section should not be understood to mean that the High Court only comprises of the honourable judges because the Registrar under section 2 of the Courts Act, is a member of the High Court. Put differently he may not be the High Court but that is where his office lies. Logically, his judicial decisions must as a matter of logic lie in the High Court even though his are delegated powers. Moreover, Counsel for the Respondent must be reminded that under section 111(4)(c) of the Constitution of the Republic, the Registrar is a judicial office recognised by the Constitution as such. The section provides as follows:

> *"For the purposes of this Chapter,* ***"Judicial office"*** *means the office of...the Registrar or deputy Registrar of the Supreme Court of Appeal or the High Court."*
>
> *(Emphasis Added)*

When this provision is read together with section 2 of the Courts Act, one would note that his judicial office is in the High Court. That is how I understand the unambiguous section 21 of the Supreme Court of Appeal of Act. As it were, is the Registrar not an officer of the High Court? Certainly he is. I mean where does the Registrar sit when he is assigned work under section 8(1) of the Courts Act as read together with Order 25 Rule 1 of the Courts (High Court) (Civil Procedure) Rules 2017? Vehemently, I must answer that he sits in the High Court, because the powers he exercises to a limited extent are those of the High Court as defined under Order 1 of the Courts (High Court)(Civil Procedure) Rules, 2017 as read together with Order 25 Rule 1 of the same rules. As it were, section 2 of the Courts Act must be called to duty and it is couched as follows:

> *"Registrar means the Registrar* ***of*** *the High Court and includes a Deputy Registrar and an Assistant Registrar."*
>
> *(Emphasis Added)*

11. It is a basic and elementary rule of statutory interpretation that where there is no ambiguity, the person of the judicial officer must not cloth themselves with legislative powers and attach meaning to any statutory provision other than the ordinary meaning of the words. I thought this is a basic statutory interpretation rule? In fact, unless an absurdity would be occasioned with the literal interpretation, there is no need for the Court to be overzealous and legislate on the bench. That said, the use of the word, *"of"* between "Registrar" and the "High Court", ordinarily points to the place where the Registrar functions. That clearly shows that the High Court has an office within itself although not particularly stated, but one office occupied by the Registrar. This logically follows that when the Registrar decides, he decides from that office where enabling laws in terms of jurisdiction have been complied with. This is why this provision, as argued in the *Elida Liphava* case and correctly so in my view, must be read together with Orders 1 Rule 4 and Order 25 of the Courts (High Court) (Civil Procedure) Rules 2017. With this, I should hold it to be the position in my view that where the Registrar operates with the directions of the judge under Order 25 Rule 1 as read together with section 2 of the Courts Act and Order 1 Rule 4 of the Courts (High Court)(Civil Procedure) Rules, it is not correct to conclude that the decisions made thereunder may

not be appealable to the High Court. So any argument suggested by Counsel as such I respectfully do not agree with.

12. Perhaps even more particularly and indeed coming back to section 21 of the Supreme Court of Appeal Act as cited above, what in my view comes out clear with my reading of the *Elida Liphava* case is that the Supreme Court of Appeal in that case did not apply any rules of statutory interpretation over this provision. Agreeably perhaps it needed not to, because the issue was to construe the above section with Order 25 Rule 1 which was not complied with in that case. As it were, I do not need to repeat myself that respectfully Counsel must not compare mangoes with sugarcane. This case is factually distinguishable with the case that the Superior Court to which this Court cannot pretend to be wiser for it is far from getting even closer to its sacred seniority. Suffice to say that, this Court will not be shy to express a thought of its own, and if anything ours is to make the mistakes we should do, and with their wisdom is to guide. That said, I had my own occasion to further interpret section 21 of the Supreme Court of Appeal Act, and my finding is that using the literal rule of interpretation, the use of the operative word *"or"* between *High Court* and *any judge* connotes that particularly speaking, the judge is not the only officer in the High Court.

    In fact, what that means an appeal shall lie from two options, one from any judgment of the High Court, and any judge. Thus, the operative word "or" between "High Court" and the word, "any judge" must be construed to give two options. Assume this interpretation is found wanting, again when one reads the proviso of the above section one would not that the analysis above is logical. Thus, when it comes to leave or permission to appeal, in the proviso, the operative word "or" gives three options namely; permission to appeal may be sought from a member of the Supreme Court of Appeal, the High Court and the judge who made the decision. If the Judge was the only person from whence an appeal would lie, there was no need to separate the wording with the operative word, "or".

13. In my considered view, without pretending to be more zealous than it is necessary, I hold the view that under section 21 of the Supreme Court of Appeal Act, as read together with section 2 of the Courts Act, as well as Order 1 Rule 4 and Order 25 Rule 1 of the Courts (High Court)(Civil Procedure) Rules, 2017, where the Registrar sits with his limited jurisdiction and with the instructions of the Judge seized of the matter, any decision made will be made in the High Court and if the principle of law still holds to be *qui facit per alium per se*, then such a decision made from delegated powers must be seen to be the decision of the honourable judge and therefore an aggrieved party can well appeal to the Superior Court as it were.

    I mean, Mwaungulu J (As he was then) in the case of <u>*George Sakonda v SR Nicholas Civil Cause No. 67 of 2013(Unreported)*</u> being a judgment on liability, had the following to say:

> *"Appeals to the Supreme Court of Appeal...stall because of the uncertainty on appeal forums on the Registrar's assessment of damages. Registrars, for all that*

is worth, do a great good job and it is inconceivable that on matters on which they have been made dominant participant, ***their decisions on assessment of damages*** *which,* ***in fact are decisions of this Court*** *and, on correct appeal jurisdiction, are* ***appealable to the Supreme Court of Appeal,*** *never appear in law reports or some form of publication. Yet Registrar's awards actually inform the Supreme Court of Appeal and the High Court (Tabord v David Whitehead & Sons (Malawi Lid (1995) 1 MER 297)."*

(Emphasis Added)

Although the decision of the eloquent Hon. Judge Rtd, particularly referred to assessment of damages being the decisions of the High Court, I am impotently unable to find any reason in both fact and law as to why anyone including Counsel for the Respondent would argue as if the Registrar when makes a decision under Order 25 of the Courts (High Court)(Civil Procedure) Rules, 2017, having authority from the honourable judge under Rule 1 of the said Order, then Counsel should have any worry as if the decision of the Registrar made thereunder may not be the decision from the High Court and therefore appealable to the Supreme Court of Appeal.

14. Consequently, I respectfully decline to agree with Counsel who suggests that what I have before me is contentious and therefore he may not be allowed to appeal, if he ends up being aggrieved. This I hold because it is my finding that respectfully Counsel misconstrued the Supreme Court of Appeal in the case herein heavily relied on. Again perhaps just to comment that what I have before me is in summary a very elementary issue. The issue is, is there an enforcement order before me that can be stayed or not? That is the crux of this case. I must repeat myself that what is a contentious matter must in my view be a question of fact but if my memory serves me well, judicial policy requires that indeed where matters are complex perhaps the judge seized of the matter must deal with the case.

    That is agreed. But when that happens the Registrar must not be a robot as though he may not have a mind of his own which is why you cannot be a Registrar unless you meet particular requirements. That argument is neither here nor there. But this Court will not agree with Counsel simply because he raised a weapon of contentiousness of an issue when he should only use that as a shield perhaps. Because it is possible to for a registrar to seemingly proceed to handle for instance an application to set aside default judgement and miss it on a point of law as he does that, when that happens shouldn't the aggrieved party be allowed to appeal where such a decision came after full compliance with Order 25 Rule 1 of the Courts (High Court)(Civil Procedure) Rules 2017? I think the appeal should lie in the Supreme Court of Appeal in that case.

15. As it were, the matter may be contentious as Counsel submits but with the aforementioned reasons, I do not agree more particularly with the factual premise of this case, that he may not be allowed to appeal if he is aggrieved by the decision of this Court. That argument is largely dismissed again on the premise that Counsel assumed that this Court did not have the authority to handle this matter pursuant to Order 25

Rule 1 of the Courts (High Court)(Civil Procedure) Rules, 2017. Well as enunciated earlier there is such authority on record as it would reflect. Again, it is clear from the reasoning of Counsel , that his understanding of the *Elida Liphava* case is that the Supreme Court of Appeal can only hear appeals from the judge or juxtaposed to mean the High Court. With respect, that is not fully correct. As it were, section 104 of the Constitution of the Republic must be called to the aid of this Court as follows:

> *(1) There shall be a Supreme Court of Appeal for Malawi, which shall be a superior court of record and shall have such jurisdiction and powers as may be conferred on it by this Constitution or by any other law.*
>
> *(2) The Supreme Court of Appeal shall be the highest appellate court and shall have jurisdiction* ***to hear appeals from the High Court*** *and* ***such other courts and tribunals*** *as an* ***Act of Parliament may prescribe.***
>
> *(Emphasis Added)*

If Counsel was to first address this Court from the prescriptions of statute, perhaps he would not be fearful by suggesting that the Supreme Court of Appeal can only hear an appeal only if a judge of the High Court made the impugned decision. I mean, the provision here is clear, and my reading of section 21 of the Supreme Court of Appeal Act, is that a regime is given that the Supreme Court of Appeal can be approached from multiple avenues including from a decision made by the Registrar. Perhaps just to clarify I mean only those decisions made on behalf of the honourable judge seized of any matter, because such powers even though are exercised to a limited extent, but they are powers of the High Court. See Order 25 Rule 1 of the Courts (High Court) (Civil Procedure) Rules, 2017. Consequently, apart from District Registrars as is prescribed under our laws, no appeal would logically lie in the High Court from a decision of the Registrar, because that decision would as a matter of common sense be a decision from the same Court.

As it were, let me warn myself again, that it remains correct to understand *Elida Liphava* case to mean that the honourable judge seized of any matter is the sole owner and or in-charge of that matter for the purposes of case management and that the Registrar is simply his or her messenger. In any case, if any law other than these statutes would suggest otherwise, I would under the authority of section 48(2) of the Constitution of the Republic remain utterly dissuaded.

16. Be that as it may, let me consider the other argument which Counsel for the Respondent made. Nevertheless, I must be quick to point out that this is also another argument which has the propensity of negating any attempt to go further in my analysis of the issues if I address that argument in the positive. Counsel has argued that the application for stay has cited the wrong law and that he submits to be fatal and on that premise this Court has to dismiss the application herein. Counsel for the Petitioner has brought his application under Order 28 rrr 1, 3 48 and 50 of the Courts (High Court) (Civil Procedure) Rules 2017. The title of his application is: ***"APPLICATION FOR***

SUSPENSION OF ENFORCEMENT OF AN ORDER FOR COSTS PENDING HEARING OF THE APPEAL." Counsel for the Petitioner has brought this application claiming that they have been served with a statutory demand filed at the commercial Court. He argues, in essence that is an enforcement order.

On this, I must agree with Counsel for the Respondent. I do not think this is the correct provision under which such an application must be brought before this Court. I must say, there are no convincing arguments from the Petitioner on this as to why the application is supposedly brought under these provisions. The statutory demand served on them is a first step towards bankruptcy proceedings. As it were, this Court had the occasion of briefly interacting with the Insolvency Act and noted that a statutory demand is premised on section 190 of that Act. For the avoidance of doubt, this Court had some mind encounter with section 188(1)(a) of the Insolvency Act which provides as follows:

> *"a debtor shall be adjudicated bankrupt where a creditor of the debtor petitions the Court for a bankruptcy order..."*

Furthermore, section 188(2) of the Insolvency Act is further couched as follows:

> *"The Court* ***shall not make a bankruptcy order*** *on a creditor's petition unless one of the following grounds of adjudication is established to the satisfaction of the Court.*
>
> > *(a) failure to comply* ***with a statutory demand*** *issued under section 190;..."*
>
> *(Emphasis Added)*

17. As it were, even a rudimentary perusal of the above provision only shows that the first step that the creditor should do if he was to petition the Court for bankruptcy as against the Petitioner, is to file for a statutory demand. This he did. It is rather extremely strange how Counsel for the Petitioner wants to suggest that, that process is equivalent to an enforcement order within the spirit of Order 28 of the Courts (High Court) (Civil Procedure) Rules, 2017. The effect may be the same, but that is not an enforcement order. As it were, what the law is thinking here, is to further give a person near bankruptcy some dignified opportunity to redeem himself if he can. That, is a fair process in my view.

Thus, I am unable to fathom how the learned Counsel for the Petitioner has premised his application under Order 28 of the Courts (High Court) (Civil Procedure) Rules 2017. As it were Order 28 of Courts (High Court) (Civil Procedure) Rules, 2017 provides for various modes of enforcement and it lays down how each regime is regulated, prepared and indeed obtained in Court. I have read Order 28 once, and for this case, I read it even twice, and again more, but I saw nowhere within Order 28 where statutory demand as seen under section 190 of the insolvency Act, is to be viewed as one of the

enforcement mechanisms within Order 28 of Courts (High Court) (Civil Procedure)Rules, 2017. Perhaps Order 28 rule 1 must be called for the occasion:

> *"A judgment shall be enforced under* ***an enforcement order as set out in this Order*** *and the costs of enforcing an order shall be recoverable as part of the order."*
>
> *(Emphasis Added)*

18. Unfortunately, it is perhaps agreed that the essence of a statutory demand may be technically a way of enforcing a judgment debt. But, it is a first step towards bankruptcy proceedings. Thus, to strongly agree with Counsel for the Respondent , I do not think Order 28 will give aid to the Petitioner. I mean, the above provision shows that a judgment can be enforced by an enforcement order as set out in the Order. Painfully, there is no regime of statutory demand under Order 28 of Courts (High Court) (Civil Procedure) Rules, 2017, which Counsel for the Petitioner seeks to use to stay that statutory demand. The question is, why not approach the Court where the statutory demand was issued? I have no answer as yet and I warn myself not to speculate.

    Needless to say, perhaps Counsel for the Petitioner must respectfully be reminded that it has not skipped the mind of this Court that Order 28 Rule 2 of Courts (High Court) (Civil Procedure) Rules, 2017 even agrees with my position. The said Rule provides for the modes of enforcement which painfully does not include a statutory demand. There is a reason why that is not the case. Again, with respect, it is safe to say, if an enforcement order will be obtained in this Court, it will be obtained within Order 28 unless otherwise prescribed.

    The long and short of this immediate analysis is that I agree with the reasoning of Counsel for the Respondent that the Petitioner has cited a wrong provision. The provisions he cited do not cloth the Court with the power to entertain an application for suspension of a statutory demand. With respect I agree with Counsel that the application by the Petitioner is competently deficient. The consequence should be fatal. Perhaps the words by Justice Kenyatta Nyirenda in the case of *George Kainja and Others v Attorney General and Others Judicial Review No. 48 of 2022 (Unreported)* may be timely:

> *"It is commonplace that a party who seeks to move the Court has to cite The specific provision (s) of the law that clothes the Court with the jurisdiction That the party seeks to invoke. An application that does not cite the law under which it has been brought is as good as* ***an application grounded on a wrong*** *legal provision.* ***both are bound to fail****, that is, the applications will be dismissed in limine: see Chande v. Indefund Ltd 2010 MLR 229."*
>
> *(Emphasis Added)*

19. I cannot pretend to have anything of sufficient use to add other than to pronounce that what I have before me is an application which suffers competency issues. In the words of Counsel for the Respondent , the application is incompetent and its fate like seen

herein is death on arrival. On this point, and in agreement with Counsel for the Respondent , I should dismiss the application because its voice of incompetence is loud. I must add that, the application pretended to also invoke the inherent jurisdiction of this Court. I do not think I should even consider that argument because it is clear that I need not to have inherent jurisdiction to suspend, order or deny what under Order 25 Rule 1(m) of the Courts (High Court)(Civil Procedure) Rules, 2017 is non existent. Put differently, there is no material before me that should justify the use of inherent jurisdiction where under Order 25 Rule 1 (m) of the Courts (High Court) (Civil Procedure) Rules, 2017. This analysis agrees with how the learned Justice Kenyatta Nyirenda held in *George Kainja and Others v Attorney General and Others (application for stay) Judicial Review No. 48 of 2022(Unreported)* where the eloquent Court held as follows:

> *"Three principles emerge from the foregoing, namely, the so-called inherent jurisdiction (a) is equitable in nature, (b) is solely intended to ensure justice, and (c) has to be exercised with restraint and discretion. This means that a prayer based on the* ***Court's inherent power cannot be granted as a matter of right****. In short,* ***it is not enough for a party seeking to invoke the Court's inherent jurisdiction to simply state that he or she will call in aid the principle of the Court's inherent jurisdiction.*** *He or she is required to establish why resort to this principle is necessary in the case before the Court."*
>
> *(Emphasis Added)*

20. As it were, to agree with Counsel for the Respondent , that before me there is no material as regards why if anything the Court should use its inherent jurisdiction. On this again, I decline the invitation to use inherent jurisdiction and the consequence is that the application has no legs on which to brood its life on. Thus, it suffocates to death in its infancy.

In any case, the application seems to further take us to Order 28 RR 48, 50 which basically in my view supports an application for suspension of an enforcement order. Nonetheless, a closer inspection of Order 28 Rule 44 of the Courts (High Court)(Civil Procedure) Rules 2017, just like argued by the Respondent , reveals that the rules 44 to 51 do apply to orders to do or not to do a thing. He correctly in my view, submits that if anything an order on costs could be enforced by a money order which arguably is not what rules 44 to 51 of Order 28 of Courts (High Court) (Civil Procedure) Rules, 2017envisages. On this I must comment, I think the rules on this were not properly crafted. Thus, the restriction on rule 44 needed not to extend to rules 48 and 50. The essence of these rules needed to be separate as it were, because they are the ones that provide for suspension. But because of the restrictions under rule 44, the assumption is that, that is not applicable in this case. Sadly, I agree with Counsel for the Respondent that if anything the costs would be enforced by a money order under Order 28 Rule 1 (2) of the Courts (High Court)(Civil Procedure) Rules 2017. All this I say, because it is unfair to demand from Counsel a provision on which to bring his any application where the rules themselves are confusing. Thus, suspension of an enforcement order is allowed under Rule 50, but ironically rule 44 confines its applicability from rules 44 to

51. Whatever the mischief that rule seeks to achieve, has hidden itself so deep from my faculties. All in all, what I have said here, I have only done that in passing.

21. In the event that the reasonings of this Court are found wanting, but again, this Court had the occasion to also consider the *res judicata* argument advanced by Counsel for the Respondent . His argument is that, this issue was already settled by my learned friend Msokera (As he was then) sitting as the Registrar where he dismissed a similar application which the Petitioner sought, immediately after an order on cost against them was made. The reasoning correct in my view, of the Court was that there was no order on enforcement obtained under Order 28 of the Courts (High Court) (Civil Procedure) Rules, 2017 which the Court would have suspended. Thus, the Court concluded that the application was premature. Again, having noted this, I must say I agree entirely with Counsel 's analysis of the law on this issue. However, reading the Petitioner 's submissions, it would appear that the Petitioner holds the view that there has been change in circumstances in that under section 190 of the Insolvency Act a statutory demand has been issued against them at the Commercial Court which in essence is an enforcement mechanism. Well, I have already settled on this, and I refuse to repeat myself.

22. Suffice to note that, the application by Counsel for the Petitioner like earlier observed seems to come under Order 28 of the Courts (High Court) (Civil Procedure) Rules 2017 but there has been no enforcement order issued by this Court under Order 28 of the Courts (High Court)(Civil Procedure) Rules 2017, on which Counsel should have premise his application on. If anything, Counsel for the Respondent has argued that if bankruptcy proceedings were to be successful at Commercial Court that is when the order would be enforced. I did not receive any concrete arguments by Counsel for the Respondent on this. In any case, according to the facts of this case, so far as this Court is concerned there has not been an enforcement order which has been obtained and capable of being enforced and or suspended. Consequently, we get back to the position that we were before my learned friend Msokera (As he was then). With this, the matter is indeed *res judicata*. I must dismiss it.

23. The application be and is hereby dismissed.

24. One thing that has come to the sanctified mind of this Court is that, Counsel for the Respondent sought for this Court to dismiss this matter with costs. He has been successful on the first part. But on this, he must not. As it were, costs are in the discretion of this Court under Order 31 Rule 3 of the Courts (High Court) (Civil Procedure) Rules, 2017. I mean, if the Petitioner be a necessitous man, truly speaking he may not be a man of liberty at all, for his are many a problem. As such, this Court as it is known to be a fountain of justice, must not even add to many of his liabilities. Thus, if bankruptcy proceedings are yet to be commenced as against his person, then I must be slow to even make those proceedings a reality. With this in mind, I think justice being a lady so blind to issues of feelings as she so pretends, but she is equally cunning as to treat people with dignity. As such, it is only dignifying that I make no order on

costs. Conversely, each party must shoulder for their own costs. The Court must lessen many a burden of litigants so far as it is within its power.

25. It is so decided.

Any party aggrieved by the decision of this Court, having been given the authority to deal with this matter by the honourable judge seized of this matter under Order 25 Rule 1 of the Courts (High Court) (Civil Procedure) Rules, 2017, has the right to appeal, notwithstanding that such a right must be exercised within 21 days from the date of this order.

MADE in chambers this 13th June, 2023 at the High Court of Malawi, sitting at Blantyre, Principal Registry, Civil Division.

Elijah Blackboard Dazilikwiza Pachalo Daniels

ASSISTANT REGISTRAR