



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
REVENUE DIVISION
JUDICIAL REVIEW CASE NUMBER 11 OF 2022

BETWEEN

THE STATE (on application of ALLIANCE ONE
TOBACCO (MALAWI) LIMITED)

CLAIMANT

-AND -

THE COMMISSIONER GENERAL OF MALAWI
REVENUE AUTHORITY

DEFENDANT

CORAM: HON. JUSTICE JOSEPH CHIGONA

MR. NJOBVU, OF COUNSEL FOR THE CLAIMANT

MS. NYEMBA, OF COUNSEL FOR THE CLAIMANT

MR. CHUNGU, OF COUNSEL FOR THE DEFENDANT

MR. FELIX KAMCHIPUTU, LAW CLERK

ORDER

INTRODUCTION:

1. The Claimant, Alliance One Tobacco (Malawi) Limited, commenced judicial review proceedings against the defendant. The main ground for commencing of judicial review proceedings was the refusal of the defendant to entertain the appeal by the claimant that was filed out of time, despite an extension of time granted by the defendant. This Court,

through an Order dated 19th May 2023, upon hearing both parties declined the claimant permission to commence judicial review proceedings on the ground that there was no any appeal before the defendant as the purported appeal by the claimant was made out of time and the claimant did not seek extension of time before the defendant. The claimant being aggrieved with the decision of the Court, filed an application for stay of the Order pending an appeal before Supreme Court of Appeal. This is the Court's decision on that application.

ISSUE(S) FOR DETERMINATION

2. In my considered view, the first issue to be resolved is whether this Court has jurisdiction to hear the present application or not.

THE LAW AND DISPOSAL OF THE APPLICATION

3. As already stated, the claimant's original application presented before this court sought permission to commence judicial review proceedings against the decision made by the Commissioner General. Thus, on the 19th of May, 2023, this court delivered its ruling, rejecting the request for permission to pursue judicial review.
4. In this instance, the Claimant made an application with notice for suspension of the Court's Order pending appeal.
5. It is clear that the claimant intends to challenge this Court's Order refusing permission for judicial review by appealing to the Supreme Court of Appeal. The claimant in their sworn statement in support of the application by counsel Njobvu strongly believes that their appeal has a high likelihood of success. Apart from that, the claimant has advanced issues of capacity to pay the demanded taxes amounting to MK14 Billion. The argument is that the claimant has no capacity to pay such an amount. They argued that paying that amount will mean closing their business in Malawi. The defendant opposed these arguments and stated that the claimant has the capacity to pay and that the likelihood of the appeal succeeding is doubtful. At this juncture, this Court will not delve into these issues for reasons to be known below.

6. The Claimant seeks stay of the Order refusing permission for judicial review pending appeal. This Court has to resolve whether the procedure adopted by the claimant in seeking a stay order before this court is correct or not.
7. The Supreme Court of Appeal has settled the position that where leave for judicial review is denied, the remedy is not to appeal against the denial. Rather, it is to file a fresh application before the Supreme Court of Appeal. In the case of **The State (on application of Flatland Timbers Ltd.) vs Department of Forestry**¹ the supreme Court held that:

“Coming to the substance of this matter, first we must emphasize that where leave for judicial review is denied the remedy is not to appeal against the denial. It is to resubmit the request for leave to the Supreme Court of Appeal. To that extent therefore any reference to an appeal in cases where leave has been denied are with respect most likely misplaced.”
8. Similarly, in **The State (on Application of Getrude Hiwa v Office of the President and Cabinet and Secretary to the President and Cabinet**,² Chikopa JA had this to say:

“.. with the greatest respect we are not able to grant either application. In the relation to leave the way forward once an application for judicial review has been denied is not to appeal. It is to make a fresh application before this Court”
9. In the recent case of **FDH BANK PLC v THE COMMISSIONER GENERAL OF THE MALAWI REVENUE AUTHORITY**³, while interpreting Order 1. r.18 of the Supreme Court of Appeal Rules, Kalembera JA had this to say:

“Thus, it is very clear that the appropriate or proper way of proceeding before this Court, after denial of leave or permission to commence judicial review, was as done by Senior Counsel in bringing a fresh application before this Court...”
10. In fact, in the same matter of **FDH BANK PLC v THE COMMISSIONER GENERAL OF THE MALAWI REVENUE AUTHORITY**⁴, the Supreme Court of Appeal (full bench) dismissed the purported appeal for flouting procedural rules with costs to the Respondent.

¹ MSCA Civil Case Number 25 of 2021

² MSCA Civil Re-application for Judicial Review number 42 of 2021

³ MISC. Civil Appeal Number 12 of 2023

⁴ MSCA Civil Appeal Number 09 of 2023

It is imperative therefore that parties must always follow the prescribed procedure before making any application before a Court of law. Any remedy that a party seeks has a requisite procedure.

11. It is very clear therefore that an appeal will not lie against a denial of permission for judicial review to the Supreme Court of Appeal. The correct procedure is to lodge a fresh application for permission for judicial review before the Supreme Court of Appeal. I am of the view therefore that any purported application for stay pending appeal following a denial of permission for judicial review is misplaced. It follows therefore that the Supreme Court of Appeal has the jurisdiction to hear both applications for permission for judicial review and stay of the defendant's decision pending determination of the issues. It is therefore the considered view of this Court that the application for stay is misplaced and must fail in its entirety as it has no legs to stand on. I therefore dismiss the application.

12. The claimant is also condemned to pay costs of the present application.

**MADE IN OPEN COURT THIS 31ST DAY OF OCTOBER 2023 AT PRINCIPAL
REGISTRY, REVENUE DIVISION, BLANTYRE.**


JOSEPH CHIGONA

JUDGE