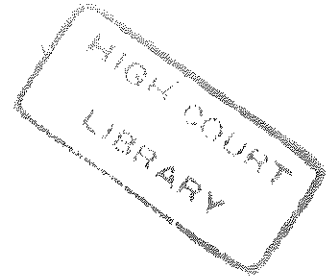




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**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
MISCELLANEOUS CIVIL CAUSE NUMBER 59 OF 2023
(Before Honourable Justice Muhome)**

BETWEEN:

COUNCIL OF THE UNIVERSITY OF MALAWI

APPLICANT

AND

**CHIKUMBUTSO GREMU
ARTHUR MTEGHA
HUMPHREY KUMWEMBE
JOEL KUMWENDA
CHISOMO KAUNDAMA
NOORDEEN MALANGA
GRACE KANKUZI
PETER KAMIZA TEMBO
DANIEL MWENYE**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT
8TH RESPONDENT
9TH RESPONDENT**

CORAM: HON. JUSTICE ALLAN HANS MUHOME

Mr Francisco Chikabvumbwa, of Counsel for the Applicant
Mr Joseph Kamkwasi, of Counsel for the Respondents
Ms Fareeda Chida, Official Interpreter

RULING

1. The background to this Application is that the Respondents were awarded a global sum of K388,204,079.40 by a Judgment of the Industrial Relations Court (IRC) dated 25th March 2022, following a finding of unfair labour practices.
2. On 10th May 2022, the execution of the award of the said sum of K388,204,079.40 was stayed by the IRC on condition that the Applicants pay 60% of the Judgment sum, which was duly paid, pending the hearing of the Applicants' appeal in the High Court. The Notice of Appeal to that effect was duly filed on 11th April, 2022. However, it remained on court file and was never served until after 8 months, when the Respondents filed an application to discharge the stay. According to the Applicants, this was due to their inadvertence.
3. On 18th April 2023, the IRC delivered a Ruling discharging the Order for Stay of Execution and ordering the Applicants to pay the remaining 40%.
4. The present Application is therefore inviting this Court to grant an order for suspension or stay of enforcement of the IRC Ruling dated 18th April, 2023. It is supported by sworn statements of counsel for the Applicants and the Applicants' Director of Finance and Investments, Mr George Namandwa. The Application is vehemently opposed by the Respondents and each one of the nine Respondents has filed a sworn statement in opposition, detailing their qualifications and capacity to repay the Judgment sum, in the event of an adverse outcome, on appeal. Both parties have also filed skeleton arguments which have been useful in the disposal of this matter.
5. In essence, the Applicants' arguments are that their grounds of appeal have high chances of success and having already paid 60% of the Judgment sum, it would be unfair to order them to pay the balance of 40% based on a technicality. That would render the appeal nugatory. Counsel submitted that the IRC was wrong in treating the delay to serve the Notice of Appeal as fatal to the Applicants' appeal. Counsel cited Rule 25(4) of the IRC (Procedure) Rules 1999 which enjoins the IRC to exercise its powers with regard to 'substance rather than form'. Counsel for the Applicants emphasised that the relevant authority from the High Court is that of *Namaleta Chimphepo & Dominic Chimphepo v*

Burton Kachiza (Chimphepo Case)¹ wherein a delay of 12 months was established, however, Kenyatta Nyirenda J. rejected an application to discharge an Order for Stay of Execution and instead ordered that the appeal process be expedited, in order to meet the ends of justice. Counsel further relied on the sworn statement of one George Namandwa which attempted to demonstrate the Applicants' weak financial position.

6. The Respondent's counsel made his submission under the following heads. Firstly, that the Court should disregard Mr George Namandwa's evidence, under paragraphs 10 and 11 of his sworn statement. The evidence detailed the Applicants' weak financial position to meet the 40% balance of the Judgment debt. He submitted that this would have been relevant had this been a 'Judgment Debtor Summons application'. Secondly, Counsel for the Respondents argued that Order 33(1) of the Subordinate Court Rules was breached by the Applicants as the same makes it mandatory that a Notice of Appeal be filed and served before a Record of Appeal can be prepared by the Court. The provision uses the word 'shall' rather than 'may' making it mandatory. He relied on the High Court Ruling in the **Chimphepo Case** (above) where Kenyatta Nyirenda J, summarised the relevant law, at page 4, as follows:

It is clear that Order 33 of the Subordinate Court Rules and Order 1 of the Rules of the High Court place duties on the Appellant, the Subordinate Court and the Registrar of the High Court. The duties of the Appellant include preparing the Notice of Appeal in Form 26 of the Subordinate Court Rules, filing the Notice of Appeal within 14 days from the day of the judgment and serving the Notice of Appeal on the parties affected by the appeal.

Thirdly, Counsel submitted that it is trite that a court of law should not make a practice of depriving a successful litigant, the fruits of his litigation in anticipation of the outcome of appeal as pronounced in **Annot Lyle**² and by the Supreme Court of Appeal in **National Bank of Malawi v D. Nkhoma t/a Nyala Investments**,³ among many other authorities.

¹ Civil Cause No. 30 of 2015.

² (1886) 11 PD 114.

³ MSCA Civil Appeal Number 6 of 2005 (Unreported).

Lastly, counsel submitted that delay is not a matter of technicality but rather the law. He submitted that failure by the Applicants to serve the Notice of Appeal in 8 months should be treated as fatal. This should be distinguished from the *Chimphepo Case* (above) where filing and service was done but the Record of Appeal took 12 months to be prepared by the lower court.

7. In reply, the Applicants' counsel reiterated his main arguments and added that the Respondents were aware of the appeal, regardless of the service of the Notice of Appeal, hence they were able to make an application to discharge the stay. He added that the word 'shall' in Order 33 of the Subordinate Court Rules should be distinguished from a situation where the same had been provided for in a substantive Act of Parliament. He submitted that, considering the prejudice that the Applicants would suffer, the delay should not be considered as fatal, in the circumstances.
8. The Court considered both arguments and appreciates that a court of law should not make a practice of depriving a successful litigant, the fruits of his litigation in anticipation of the outcome of appeal per *Annot Lyle*¹ and *National Bank of Malawi v D Nkhoma t/a Nyala Investments*.²
9. Through their individual sworn statements, the Respondents have each shown their qualifications and capacity to repay the Judgment sum, in the event that the Applicants succeed on appeal. This Court shall however, decide the present Application on the balance of justice and fairness.
10. This Court is also reluctant to consider the Applicants prospects of success on their appeal. On the facts of this case, we find the same unnecessary. See *Frank Jailosi Chisakalima v Cassium James and Others*³ and *Nyirenda v AR Osman*.⁴
11. We agree with Counsel for the Respondents that the Applicants' weak financial position to meet the 40% balance of the Judgment debt is irrelevant to the present Application. That piece of evidence may be most relevant when an application is made to settle the Judgment debt through instalments.

¹ (1886) 11 PD 114.

² MSCA Civil Appeal Number 6 of 2005 (Unreported).

³ MSCA Civil Appeal Number 212 of 2016.

⁴ [1993] 16(1) MLR 400 (HC).

12. The question whether the delay herein is fatal has exercised the Courts mind. We agree with Counsel for the Respondents that the Applicants were in breach of Order 33(1) of the Subordinate Court Rules which makes it mandatory that a Notice of Appeal be filed and served before a Record of Appeal can be prepared by a lower court. However, we do not think that the said delay is fatal, in the circumstances, for the following reasons:

- i) The Applicants having already paid 60% of the Judgment sum, it would be unfair to order them to pay the balance of 40% based on a technicality. Their appeal is against the whole of the lower court's judgment and so if the whole amount were paid, the same would surely render the appeal nugatory. See *Chibuku Products Ltd v John Miller*¹ and *Speaker of the National Assembly ex-parte John Tembo*.² We agree with Counsel for the Applicants that perhaps the IRC should have considered Rule 25(4) of the IRC (Procedure) Rules 1999 which enjoins the IRC to exercise its powers with regard to 'substance rather than form' and therefore treat the delay to serve the Notice of Appeal as excusable.
- ii) As correctly observed by the Respondents, the High Court Ruling in the *Chimphepo Case* can be distinguished from the present case, to the extent that in the *Chimpepo case*, the Notice of Appeal had been served. However, in order to meet the ends of justice, the Applicants must be allowed to pursue this appeal. The Court has considered that, on the available authorities and evidence, the risk of prejudice or injustice lies against the Applicants and so this Court exercises its discretion in favour of the Applicants – see the dictum of the Supreme Court of Appeal in *Mike Appel and Gatto Limited v Saulos Chilima*.³
- iii) The law itself does not stipulate the time within which the Notice of Appeal should be served on the other party. However, this Court must still more apply the reasonableness test. A period of 8 months, in our view, lies on the boarder-line. The Applicants are saved by the peculiar facts of this case and foremost being that 60% of the Judgment sum was already paid.

¹ HC Civil Cause Number 50 of 2017 (Unreported).

² MSCA Appeal Number 27 of 2010 (Unreported).

³ (2014) MLR 231 at 238.

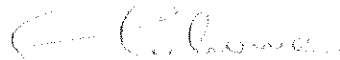
iv) The Court is of the further view that had a Notice of Appeal never been filed at all, it would have been in the interest of justice that the Respondents access the remaining 40%, which is not the case herein.

13. Therefore, an order is hereby granted for the suspension or stay of enforcement of the IRC Ruling dated 18th April, 2023.

14. Costs are in the discretion of the Court¹ and in the present circumstances, the Court orders that the Applicants bear the cost of this Application, as they are guilty of the inadvertence causing a failure of service of the Notice of Appeal for a whole period of 8 months.

15. It is ordered that the appeal be expedited.

Made in Chambers this 19th day of May, 2023.



Allan Hans Muhome

JUDGE

¹ See section 30 of the Courts Act (Cap 3:02 of the Laws of Malawi) and Order 31, rule 3 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017.