

Procedure
stay of execution

14/10/93

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 153 OF 1993



BETWEEN:

H TEMBO.....PLAINTIFF

AND

INDUSTRIAL DEVELOPMENT GROUP.....DEFENDANTS

CORAM:

L A Chatsika Judge

Nakanga, of counsel for the Plaintiff
Chisanga, of counsel for the defendant
Mthukane, Official Interpreter

10/18/94

RULING

59, rule 13(1)

This is an application made in terms of order 59/13/1 of the Rules of the Supreme Court by the unsuccessful defendants, the Industrial Development Group, to stay the execution of the judgement given in favour of the plaintiff, H Tembo pending the hearing and the determination of the appeal to the Malawi Supreme Court of Appeal which has been filed by the defendants. The application is supported by an affidavit deposed to by Mr Mayer Gravel Chisanga, Counsel for the Defendants/Applicants. In the affidavit, Mr Chisanga states that the plaintiff is unemployed and is therefore a man of no means. He goes on to state that if the judgement is enforced, it will render the appeal, if successful, nugatory because the plaintiff, being a man of no means, will be unable to repay the money to the defendants/Appellants. Mr Chisanga has submitted that should the Court be inclined to order the immediate execution of the judgement it should include certain conditions such as paying the judgement debt into court and to have it held by the court in trust pending the outcome of the appeal when the court would pay it either to the plaintiff if the appeal is unsuccessful or to the defendants if the appeal is successful.

The plaintiff/Respondent has filed an affidavit in opposition. In the affidavit, the plaintiff has stated that he is a builder by trade and is the holder of a City and Guilds Advanced Building certificate and that he is presently employed by Azizi Commercial at Naperi Construction at a salary of K800 per month. He has

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stated further that he has a house valued at K40,000 and movable property therein valued at K10,000. Lastly he stated that he has inherited benefits which are invested in a Bank Savings Account to the tune of K30,000. He therefore gave assurance that if an order for immediate execution of the judgement is made, and should the defendants be successful in the appeal which they have filed, he will be in a position to pay back the money.

The general principle governing the execution of judgements is that the court does not and should not "make a practice of depriving a successful litigant of the fruits of his litigation and locking up funds to which he is prima facie entitled" pending an appeal. (see the Ann Lyle (1886) 11 P D 114). This principle is based on sound logic as well as common sense. The aim of taking an adversary to court and praying for a certain remedy is to be awarded such remedy if you are successful in the litigation. To stay the execution of the judgement pending an appeal would generally defeat this purpose. Against this principle, however, in the consideration which has been expressed in a number of authorities that "when a party is appealing, exercising his undoubted right to appeal, this court ought to see that the appeal, if successful, is not nugatory (see Wilson v church, (No 2) 1879 12 Ch A 454). It is therefore in the discretion of the court to weigh the two consideration and grant or refuse the application to stay the execution of the judgement having regard to the merit and circumstances of the particular case.

Reading order 59/13/1 closely and from the authorities which are cited there, it becomes clear that the paramount consideration in refusing or granting an application for a stay of the execution of a judgement pending an appeal is whether the appeal, if successful, will be nugatory, by proving for example that the respondent will be able to pay back the money to the successful appellant. The court has no right, legal or moral, to deny him the fruits of his litigation up to that stage of the proceedings.

In Wilson -v- Church (NO 2) (Supra), the Defendants were expected to pay under the judgement a large number of bondholders who were scattered on the continent in Europe, in South America and in the United States of America. It was submitted to the satisfaction of the court that if the money was paid to all the bondholders before the appeal was heard it would be extremely difficult and in some cases impossible to recover all the money in the event the appeal being successful. It was held that, that would make the appeal nugatory and the application to stay execution of the judgement pending an appeal was granted.

In The Attorney General - v - Emerson and others (1889) 24 QBD, 56 judgement was given in favour of the successful defendants whereby the Attorney General, who was the unsuccessful plaintiff was ordered to pay a large sum of money to the defendants through their solicitor. The court further refused

the Attorney Generals application for a stay of the execution of the judgement and the payment of costs. In an application made by the Attorney General for an order directing the defendants' solicitor to give an undertaking to repay the costs to the Attorney General if the appeal were successful, the court exercised its discretion having regard to the circumstances of the case and made an order that the proceedings shall be stayed pending the appeal unless the defendants' solicitor gave his undertaking to repay, if the appeal is successful. (see also The Retata (1879) PB 118 at P131 and 132).

In the instant case, the plaintiff successfully sued the defendants and was awarded damages in false imprisonment and recovered his unpaid salary to the total amount of about K31,000. Contrary to what has been stated in Mr Chisanga's affidavit, the plaintiff in his affidavit stated that he has immovable and movable property of the total value of K50,000 and has inherited funds which are invested in a Bank savings Account amounting to K30,000. He is also employed and has a salary of K800 per month. I am therefore satisfied that, if the appeal herein will be successful, the plaintiff will be able to repay their money to the defendants and the appeal will not be nugatory.

This citation is wrong. Cannot be found

I must repeat what I have already stated above that the paramount consideration in applications of this nature is whether the appeal will be rendered nugatory if the application to stay is refused. Once the court is satisfied that the appeal will not be rendered nugatory by refusing the application to stay the execution of the judgement, it would be wrong to deny the successful litigant the fruits of his litigation on any other fanciful and capricious considerations.

Accordingly the application fails and it is hereby ordered that the judgement which the plaintiff obtained herein together with the order for costs be executed unconditionally forthwith.

Costs for this application to the respondent.

Made in Chambers this 14th day of October 1993 at Blantyre.


L A Chatsika
JUDGE