



**JUDICIARY**

**IN THE HIGH COURT OF MALAWI  
FAMILY AND PROBATE DIVISION**

**MATRIMONIAL APPEAL NO. 33 OF 2022**

(Being Civil Cause No. 1702 of 2021 in the Senior Resident Magistrate Court sitting at  
Lilongwe)

**BETWEEN**

**AGNESS MWENITETE ..... APPELLANT**

**AND**

**GIFT JERE ..... RESPONDENT**

**CORAM : MWALE, J.**  
: Mndala, counsel for the Appellants  
: Kaonga, counsel for Respondents  
: Kalumbi, Court Reporter  
: Mpandaguta, Court Interpreter

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**Mwale, J.**

**RULING ON APPLICATION FOR STAY OF EXECUTION PENDING APPEAL**

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**Introduction**

1. The application before me is made under order 10 rule 1 of the Courts (High Court) Civil Procedure Rules as read with order 48 rule 1 of the same.
2. The applicant's marriage to the respondent was dissolved by the court of the Senior Resident Magistrate sitting at Lilongwe on 23<sup>rd</sup> November 2022. Being dissatisfied with the order on property distribution, the applicant has filed a Notice of Appeal in the lower court. In order to preserve the status quo whilst awaiting the hearing of the appeal in the High Court, the applicant also applied for an order of stay of enforcement in the lower court. The lower court however did not grant the order largely on the basis that the property in question is not perishable.
3. The applicant is nonetheless concerned as consequent to the order of distribution the respondent has tried to forcefully evict tenants in a house that has been distributed to him and he is attempting to sell properties that were distributed to him with a view to defeating her interests in the pending appeal. The applicant is also concerned that one of the properties distributed to the applicant is a plot on which she and the issue to the marriage are residing. Further, the applicant believes the respondent will squander any money from the sale of the properties and would be in position to repay the applicant should she succeed. She therefore seeks the order of enforcement on the grounds that the appeal shall be rendered nugatory in the event that the respondent disposes of the properties.
4. The respondent opposes the application to the fullest extent. He asserts that the lower court dismissed the application for stay on the grounds that a successful litigant should not be denied the fruits of litigation. It is further, his evidence that upon the dismissal of the application in the lower court, he gave notice to the tenant in the Shire house to vacate as he intends to live in the said house since he has shared custody and would like to live with the children in decent accommodation. He denies any intention on his part to sell any property and further denies any intent to evict the applicant from the premises at which she currently resides. He sees no reason why he should not be able to pay the applicant back should that be required if the appeal succeeds.
5. The respondent's contrary view as to any mischievous intent is that it is the applicant who is intent on frustrating the process and depriving him of his court ordered just dues.

#### **The Law**

6. 10 rule 1 of the Courts (High Court) Civil Procedure Rules provides as follows:

*"A party may apply during a proceeding for an interlocutory order or direction of the Court by filing an application in a proceeding in Form 4."*

Order 28 rule 1 of the same Rules, which regulates enforcement orders, provides as follows:

*“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.”*

This application has been brought under order 28 rule 48 which provides as follows:

*“An enforcement respondent may apply to the Court for an order suspending the enforcement of an order.”*

7. The weight of the law is behind the courts not making a practice of depriving a successful litigant the fruits of his or her litigation (see *Ulalo Investments Ltd and another v Southern Africa Enterprise* Misc. Civil Appeal No.45 of 2009 MSCA [2009] MLR amongst others). This cardinal principal is however tempered by the realization that a losing party has the right to appeal and that such an appeal should not be preempted. The courts must therefore balance the two views (*National Bank of Malawi Ltd v Moyo* MSCA Number 25 of 2003).
8. Further, the Supreme Court of Appeal decision in the case of *Anglia Book Distributors Limited v The Registered Trustees of Karibu Ministries t/a Karibu Academy* Misc. Civil Appeal No. 54 of 2015 (and upheld by it in *Sakarani Mhango and another v Imran Limula* Misc. Civil Appeal No. 514 of 2016) determined the following prerequisites for the grant of an order of stay:
  - (a) There must be a serious matter to be tried.
  - (b) Damages would not be an adequate remedy.
  - (c) Whether justice would be achieved by maintaining or altering the status quo.
  - (d) The relative strength of the parties case must be as such as would militate in favour of granting the stay.

Since courts should be slow to grant orders of stay unless there is good reason, the paramount consideration in such cases is that suspending the enforcement should be that justice shall be achieved whatever the outcome of the appeal.

9. In *Attorney General v Sunrise Pharmaceuticals and another*, (MSCA Civil Appeal 13 of 2013) [2013] MWSC 1 (22 July 2013) the Supreme Court of Appeal held that:

*“where legality, regularity and excess of judgment are in issue, they constitute sufficient reasons for granting a stay: National Bank of Malawi v Aziz Mahomed Issa and another, and Ishmael Sabadia and Lennie Nkhonjera v Elizabeth*

*Moto (supra). This is paramount because a judgment, once issued, is enforceable not withstanding that it is illegal or irregular until it is set aside."*

10. Further, the onus of demonstrating what injustice would be occasioned if the stay order is not granted rests with the applicant (*Dr Saulos Chilima and Dr Lazarus Chakvera n Professor Arthur Peter Mutharika and the Electoral Commission* Constitutional Reference No. 1 of 2019).

#### **Court's reasoned determination**

11. It is the applicant's case that in line with the Supreme Court of Appeal decision in *Attorney General v Sunrise Pharmaceuticals and another* (above), an irregularity or illegality exists in the judgment of the lower court and therefore an order of stay ought to be granted. Further, the applicant risks losing her property, including her current residence if this is not done and therefore justice will not be served if the order is not granted.
12. The respondent has in response raised a point of law challenging the validity of the application, arguing that there is no valid enforcement order under the Courts (High Court) Civil Procedure Rules. According to counsel for the respondent, the essential precondition to filing for a stay based on order 28 rule 48 of the Rules is the existence of an order of enforcement, granted by the Court. Counsel for the respondent has cited the decision of the Honourable Nyirenda J., in the case of *Chitenthe Kachali v AG*, Civil Cause No. 598 of 2018 where he stated:

*"In the present case there is no application by the Defendant to enforce the judgment of this court dated 8<sup>th</sup> February, 2022 or any other judgment or order in these proceedings, either under Order 28 of the CPR or at all. Needless to say. No enforcement hearing has taken place. Neither has any enforcement order been issued by the Court.*

...

*All in all as the application has been brought under order 28 rule 8 of the CPR, the Court has not been properly moved. The application is incompetent and misconceived and ought to be dismissed. Accordingly the application is dismissed with costs to the Claimant."*

13. Indeed the applicant in her application has cited order 28 rule 48 of the said Rules as the basis of the application. This provision (reproduced above) enables an applicant to apply for suspension of execution of an order of execution. The provision is preceded by order 28 rule 1 which provides that a judgment shall be enforced under an enforcement order as set out in that order. The operation of order 28 rule 48 must be based on an existing order of enforcement granted by the Court.

14. There is a difference between an application for suspension of an order execution of a court an application for an order of stay of the judgment of a court. In any matter, the judgment of a court is final and must be executed without further ado. In the words of Lord Justice Twea SC, JA in *Attorney General v Sunrise Pharmaceuticals and another* (above)

*"a judgment, once issued, is enforceable notwithstanding that it is illegal or irregular until it is set aside."*

The Court in **Charles Mwase and Others v. Malawi Revenue Authority**, HC/PR Civil Appeal No. 13 of 2015 (unreported) also made explicit reference to the enforceability of judgments with reference to order 28 rule 48 as follows:

*"It is trite law that a judgement is not self-enforcing. There are essentially two groups of judgement debtors. The first group comprises solvent or honest (willing) debtors: these will invariably settle a judgement (debt) immediately after the judgement is entered. The second group consists of judgement debtors that do not voluntarily pay the judgement (debt). It is with respect to the latter group that judgement creditors are often times compelled to have to move the Court to enforce the judgement (debt). This is where Order 28 of CPR comes in: a party who has obtained a judgement in his or her favour seeks to get the "aide of the Court" to enforce the judgement.*

*Order 28 of CPR deals with enforcement of judgements. The general scheme of things under this Order is that an enforcement creditor applies for the issue of an enforcement order to enforce a judgement by filing an application with the Court. Unless the Court orders otherwise, the application may be dealt with or without a hearing and in the absence of the parties. Where an enforcement creditor so wishes, he or she may apply to the Court for an order (an "enforcement hearing order") that the enforcement debtor or independent witness attends an enforcement hearing and be examined about his or financial circumstances and how he or she proposes to pay the amount of the judgment debt. Having considered the application, with or without an enforcement hearing, the Court may proceed to grant or refuse to grant an enforcement order."*

The applicant did not make an application to stay the judgment, but to stay an order of execution when the respondent has not been granted any order of execution by the Court. Under the premises, the Court is well within its rights to dismiss the application with costs as did the Court in *Chirenthe Kachali v AG* (cited above).

15. I am however minded that there is a substantive issue at stake which needs to be dealt with as a matter of urgency. I will therefore dismiss the application before me without making an application as to costs in favour of respondent on the basis that although costs usually follow the event, the issue of costs is discretionary. There is still a substantive issue to be

determined. I am giving the applicant an opportunity to refile her application in accordance with the in accordance with the Rules within 7 days of the order herein.

I so order.

**MADE** in chambers, in Lilongwe this 27<sup>th</sup> day of **January 2023**



Fiona Atupele Mwale

**JUDGE**