



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
CIVIL CAUSE NUMBER 49 OF 2016
(Before Honourable Justice Muhome)**

BETWEEN:

PATRICK MUMBA

CLAIMANT

AND

OPPORTUNITY INTERNATIONAL BANK OF MALAWI

DEFENDANT

CORAM: HON. JUSTICE ALLAN HANS MUHOME

Mr Shepher Mumba, of Counsel for the Claimant

Mr Given Phiri, of Counsel for the Defendant

Ms Fareeda Chida, Official Interpreter

RULING

1. The Claimant obtained a Summary Judgment against the Defendant for damages for trespass, defamation and violation of the right to privacy assessed at K17 million.
2. This Court granted a stay without notice on 29th November 2023 and ordered that both parties be heard on 14th December 2023. Counsel for the Defendant filed his application with notice and signed it himself, without the same being issued by the Registrar as

required under section 3 of the Courts Act Cap 3:02 of the Laws of Malawi and Order 10 rules 1 and 2 of the CPR. Counsel for the Claimant took issue with this, submitting that there is no application before this Court due to this irregularity. He cited *Perfecto Pest Control (Pvt) Ltd v Malawi Leaf Company Limited* Civil Cause No. 261 of 2012 where Justice Kenyatta Nyirenda correctly ruled that non-compliance with section 3 of the Courts Act and Order 10 rule 1 of the CPR is fatal and cannot be cured under Order 2 of the CPR. However, this can clearly be distinguished from the present case where this Court had already appointed the date of the hearing with notice through its initial order of stay which was granted without notice. We thus dismiss that preliminary objection.

3. Reverting to the stay itself, this Court agrees with the Claimant's Counsel that the law on stay pending appeal is well settled by the Supreme Court of Appeal decision of *National Bank of Malawi v D. Nkhoma t/a Nyala Investments*, SCA Civil Appeal Number 6 of 2005 (Unreported). In that case, the Court stated that 'there can be no doubt that in order to enable a court to determine whether an appeal, if successful, would be nugatory by reason that there is no reasonable probability of an appellant getting the money back, is a matter of facts or evidence which an appellant must present to a court for assessment.'
4. This Court has observed that the issue of liability is settled and what is being appealed against is the quantum of damages. This means that the appeal will not be rendered nugatory if a stay is not granted. Much as the record indicates that the Claimant vacated the premises which were trespassed, there is no evidence that the Claimant ceased to be the owner of the same. The Defendant bears the burden of proving that the Claimant is impecunious and the fact that the Claimant obtained a loan from the Defendant, which he repaid in full, does not prove that there will be no reasonable prospect of recovery of the damages in the event that the appeal succeeds. We are fortified in this reasoning by the dictum of Mzikamanda JA (as he was then) in the case of *Malawi Revenue Authority v Mwase and Others* MSCA Civil Application Number 28 of 2018 where he stated that:

The state of impecuniosity to be relied on in an application such as the present one should be as at the time of the application and not as the situation was, say eight or nine years before the application. It was for the applicant to demonstrate impecuniosity at the time of the application. In any event, not everything paid out would be due for recovery where liability on the part of the appellant was not challenged.

5. The Court has considered that, on the available authorities and evidence, the risk of prejudice or injustice lies against the Claimant and so this Court exercises its discretion in favour of the Claimant – see the Supreme Court of Appeal Ruling in *Mike Appel and Gatto Limited v Saulos Chilima* (2014) MLR 231 at 238. Costs are in the cause.

Made in Chambers this 15th day of December, 2023.

A handwritten signature in black ink, appearing to read 'Allan Hans Muhome', written in a cursive style.

Allan Hans Muhome

JUDGE