IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

M.S.C.A. CIVIL NO. 30 OF 1988
(Being Civil Cause No. 15 of 1986)

BETWEEN: LILONGWE MECHANICAL DEVELOPMENT LTD ..... APPELLANT

- AND -

T. M. PHIRI ..... RESPONDENT

CORAM: MTEGHA, J.

Msisha of Counsel for the Appellant
Kumange of Counsel for the Respondent
Kadyakale, Law Clerk

R U L I N G

This is an application to stay execution of judgment which the respondent obtained on 22nd November, 1988, amounting to K2,310.00. In the alternative, the application seeks for an order that the amount awarded on the said judgment be paid into court to abide the outcome of the appeal against the judgment. Further, the application seeks for an order that the legal practitioner for the respondent do give a personal undertaking to refund the party to party taxed costs which may be awarded by the High Court to the respondent. The application is supported by an affidavit taken out by Mr. Msisha. The affidavit discloses, in the main, that notice of appeal has been served on the respondent and that the applicant has good and substantial prospects to succeed in the appeal. The affidavit also discloses that the respondent stated in evidence during trial of the action that he was not employed and it is therefore likely that in the event of the appeal succeeding the amount paid will not be refunded to the applicant.

After hearing Mr. Msisha's submissions, Mr. Kumange, for the respondent has raised a preliminary issue which this court ought to decide first.

It was Mr. Kumange's submission that this application is misconceived and it should be dismissed. He has argued that under 0.59/13/4 of R.S.C. the application should have been made in the first instance to the court below, and if possible, at the time when the court gave judgment. If that was not possible, to the same judge subsequently. In the present case, Mr. Kumange argues, the application has been brought in the Supreme Court, which is wrong.

2/.....

In reply, Mr. Msisha submits that indeed this application should have been brought before the trial judge, namely Justice Jere; but he is no longer in service, and, in any case both the High Court and Supreme Court have jurisdiction to hear this application. It was his submission that the instructions to appeal came late and therefore the application for these orders were lodged late.

I agree that in this type of application the jurisdiction of both courts is concurrent. Indeed, the Supreme Court has independent jurisdiction to stay proceedings pending appeal. What Mr. Msisha does not say, however, is that the exercise of that jurisdiction is limited in that the application must first of all be refused by the lower court and then he should apply to the Supreme Court, and that application is not an appeal. As Brett, MR said in Cropper v. Smith (1883), 24 Ch. D 305 at p. 311:

> "it seems to me that these cases do not contain anything that conflicts with the view I have expressed as to the true construction of rules 16 and 17 (in our case O.59/13/4) that there is an independent jurisdiction in this Court to stay proceedings pending an appeal, but the court is not to exercise that independent jurisdiction until an application has been made to the same effect and decided upon in the Court appealed from, and that that is the only condition limiting the exercise of the jurisdiction of this Court. It does not limit the jurisdiction, it limits the exercise of it....."

In my opinion, it does not matter whether Judge Jere was no longer available, the point is that the application should have first brought before the High Court and any judge could have taken it, and that if that court had refused to grant the application, then it would have been open to the applicant to apply to this Court, not by way of appeal, but by way of original jurisdiction. For these reasons, I hold that the application was misconceived and I dismiss it with costs.

MADE in Chambers this 14th day of February, 1989, at Blantyre.

H. M. Mtegha
JUDGE