IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

M.S.C.A. CIVIL APPEAL NO.8 OF 1989

(Being Civil Cause No.105 of 1988)

BETWEEN:

KASUNGU FLUE CURED TOBACCO AUTHORITY ..... APPELLANT

AND

RABSON K.J. ZGAMBO ..... RESPONDENT

BEFORE: The Honourable Mr. Justice Tambala
Jussab, Counsel for the Appellant
Mhango, Counsel for the Respondent
Kadyakale, Court Clerk

RULING

This is the appellant's application to the Supreme Court of Appeal seeking directions regarding the effect of its judgment delivered on 6th May, 1991 on the sum of K25,899.25 paid by the appellant to the respondent pursuant to a judgment of the High Court. The application also sought a stay of the retrial which was ordered by this Court pending the hearing of the application. Mr. Jussab, counsel for the appellant, swore an affidavit in support of the application.

Mr. Mhango, representing the respondent, strongly opposes the application. He firstly contends that the present application constitutes an abuse of the process of the court. Secondly he argues that the Supreme Court of Appeal duly exercised its discretion when it refrained from ordering the respondent to return the money which he recovered on the basis of the High Court judgment. Thirdly he gave notice that at the hearing of the present application he would move the Court to strike off the appellant's defence in Civil Cause No.769 of 1991 and that judgment should be entered for the respondent. He has since abandoned the notice of motion.

A brief history of the dispute between the parties would be pertinent. In October, 1987 the respondent commenced an action against the appellant. He sought an account and repayment of all monies found to be due after taking such

account. The case was set down for hearing in the Lilongwe District Registry on 31st January, 1989. The parties were duly notified about the date of hearing. Neither the appellant nor his counsel appeared on the date of hearing. The Court proceeded to hear the respondent and his witness in the absence of the appellant. On 14th February, 1989 the Court delivered judgment in favour of the respondent: A sum of K7,044.17 was found due and payable to the respondent by the appellant according to the judgment. The Court then ordered interest on the sum of K7,044.17 to be assessed by the Registrar and subsequently paid to the respondent. The assessed interest came to K18,805.08. The respondent was also awarded K50.00 as general damages. He was, therefore, granted a total of K25,899.25.

The appellant subsequently applied to the trial judge to set aside the judgment in terms of O.35/2 of the Rules of the Supreme Court. The application was unsuccessful. Then he sought leave to appeal against the ruling dismissing the application. Leave to appeal was granted. He later brought two applications before a single Judge of the Supreme Court of Appeal. He sought, in the applications, leave to extend time for giving notice of appeal against the judgment of the High Court and the ruling relating to the application to set aside the judgment. On 9th October, 1989, the appellant was granted leave to appeal against the High Court judgment.

The appellant then appealed to the Supreme Court of Appeal. He sought retrial of the action. The appeal was heard on 16th April, 1991. During the hearing of the appeal Mr. Mhango raised a preliminary objection. He argued that the record was defective because it incorporated the judge's notes other than a transcript of the shorthand notes taken in the course of hearing. He also argued that it was not made clear whether the appeal was against the High Court judgment or its ruling on an application to set aside judgment. He finally pointed out that the record for appeal excluded the judgment, the subject of the appeal.

In its ruling delivered on 6th May, 1991, the Supreme Court of Appeal upheld Mr. Mhango's objection. It did not proceed to hear the appeal. It ordered the appellant to pay the costs of both the trial and the appeal. It however set aside "the decision" of the High Court and ordered a retrial. The Court was silent on whether the money paid to the respondent following the trial court's judgment should be paid back to the appellant. This application is a product of such silence.

After the ruling by the Supreme Court of Appeal all was not quiet between the parties. The respondent took out a notice requesting that the action should be set down for trial. It was returnable on 1st July, 1991 before the District Registrar in Lilongwe. Then both parties agreed that

the setting down of the action for trial should be done by the Principal Registry to which the action should be transferred. Before the matter was transferred and registered in the Principal Registry the appellant obtained an ex parte order from the District Registrar in Lilongwe requiring the respondent to pay back the judgment sum of K25,899.25.

Upon being served with the ex parte order, the respondent made an application to set aside the order on the ground firstly that it was made in his absence and before he was given a chance to be heard and secondly that the Supreme Court of Appeal did not direct that the sum awarded should be paid back. It was set down for hearing on 21st September, 1991 in the Principal Registry to which the action was transferred and registered as Civil Cause No.769 of 1991. It was subsequently adjourned to 13th November, 1991.

In the meantime the appellant made an application to stay proceedings pending repayment of the judgment sum of K25,899.25. It was set down for hearing on 13th November.

The respondent made another application to the Registrar seeking further directions including a direction for a speedy trial and to have the matter set down. The application was heard on 12th November when it was ordered by agreement:

1. That the action be accorded a speedy trial and given an expedited date of hearing

2. That the appellant should deliver and serve on the plaintiff further and better particulars as specified in the order

3. That the respondent be granted leave to amend his statement of claim and serve a Supplementary Affidavit of documents with a corresponding liberty on the part of the appellant

4. That the two other summonses pending before the Court be stayed.

The two summonses which were ordered to be stayed related to the respondent's application to set aside the ex parte order and the appellant's application to stay proceedings pending the repayment by the respondent of the money recovered by virtue of the abortive trial.

Mr. Mhango by way of a preliminary objection contended that this Court should not hear the present application on the ground that the appellant was guilty of abuse of the court

process. He argued that there is an order of the District Registrar dated 1st July, 1991 requiring the respondent to pay back the money which he recovered by virtue of the High Court judgment. He has pointed out that that order is still valid. He contended that the appellant's application to stay proceedings pending repayment of the money by the respondent was couched in the same words as the present application. He argued that the appellant is making this application in order to circumvent the Registrar's order made on 12th November. He further argued that when the Registrar stayed the respondent's application to stay the ex parte order and the appellant's application to stay proceedings pending the repayment of the money it was clearly understood that these two applications were to await the speedy trial of the action.

Mr. Mhango has, in my view, made formidable arguments and I am compelled to agree with him. There is indeed an ex parte order of the Court. It is still valid. It has not been set aside. It is not affected by the Registrar's order of 12th November, 1991. I do not see any necessity for the present application. It seems to me an abuse of the court process to seek relief in one court and when the same is granted to refrain from acting on it but to apply for a substantially similar relief from another court. I think this is what the appellant is doing here. The appellant wants me to state that the effect of the ruling of the Supreme Court made on 6th May is that the respondent has no right to retain the money which he recovered on the strength of the High Court judgment and that he should return the same to the appellant. But he has the High Court's order requiring the respondent to pay back the money.

Then with the appellant's agreement the Registrar ordered a stay of his application for stay of the proceedings pending repayment of the money by the respondent. I have not examined the application to appreciate its wording but I would agree that its effect is the same as the present application. If I direct, in the present application, that the respondent is not entitled to the money and that he must pay it back, I would be contradicting that part of the Registrar's ruling which stayed the appellant's application. I agree that the appellant, by this application, is trying to circumvent an order of the Court which was made with his agreement. I agree further that that constitutes an act of abuse of the court process.

I would, therefore, uphold Mr. Mhango's preliminary objection and come to the conclusion that this application must be refused. It is a waste of the time of the court and an abuse of its process.

In the event that I am wrong in holding that the appellant's application is an abuse of the process of the court, then I would agree with the appellant that the Supreme

Court of Appeal having set aside the judgment of the High Court, on the strength of which the respondent recovered the money, there is now no longer any basis for the respondent's retention of the money. I am of the clear view that after setting aside the judgment the Supreme Court of Appeal had no discretion to exercise in relation to the money paid or any act done pursuant to the abortive trial. The natural and logical result of the setting aside of the High Court judgment is that the money which the respondent recovered from the appellant must be paid back. He would, however, be required to pay back the actual money which he recovered. That would exclude costs for both the abortive trial and the appeal in the Malawi Supreme Court of Appeal and the Sheriff's fees and expenses and any other costs or expenses connected with the enforcement of the abortive judgment. According to Mr. Mhango's submissions and on the basis of the Assistant Sheriff's letter dated 25th October 1989 it would seem to me that the respondent would be required to pay back K21,045.88.

In the event I would dismiss the appellant's application with costs.

MADE in Chambers this 10th day of February, 1992, at Blantyre.

D.G. Tambala
JUDGE