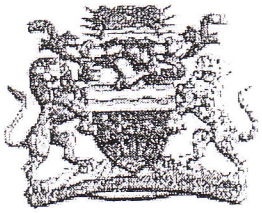
obligation to which he is subject as a trustee, or as a family representative;

(ii) the registration of any person under this Act shall not confer on him any right to any minerals or to any mineral oils as defined in the Mining Act and the Mining Regulations (Oil) Act respectively unless the same are expressly referred to in the register.

We must observe, without more, that the circumstances of the instant case have no relevance to section 27. We are in agreement with the submission of Counsel for the appellant that the appellant had purchased Keza Office Complex from Atupele Properties Limited after both the High Court and this Court, in the capacity of its single member as earlier observed, had allowed the disposal of Keza Office Complex, by refusing to allow the ACB to continue restricting the disposal of Keza Office Complex through a restriction notice. In these circumstances, we concur with learned Counsel for the appellant that it would be absurd, unreasonable and indeed quite unfair to now allow seizure of Keza Office Complex and freezing of the income therefrom when Keza Office Complex is in the hands of a third party who is not connected with the offences under the Corrupt Practices Act and indeed a third party who acquired Keza Office Complex upon furnishing valuable consideration, in the sum of MK285 million. We in that respect, again, observe that the sale under court order had been effected when the High Court and this Court had vacated, so to speak, the restriction notice which the ACB had earlier on obtained. In the circumstances, the appellant was under no restraint of any kind in regard to which he had to guard against, even the fact that there were court proceedings relating to Keza Office Complex. The effecting of the sale had the prior authorization of the Court. We would on that ground alone allow the appeal.

Be that as it may, it is also the considered view of the Court that Keza Office Complex is not dissipating, in that it is intact. The notion of "technical dissipation" espoused by the learned Judge in his Judgment, we reason, does not have any grounding in the law.

Besides we must say it again, as noted above, that this Court has not at any time by its decision, not even that in the **ACB –v- Atupele Properties Limited** delivered on 2nd March, 2007, reversed the rulings of the High Court and of a single member of this Court in regard to the vacation of the restriction notice in question. Thus, it remains a firm view of this Court that the sale of Keza Office Complex was and is still sanctioned by Court in that regard.



IN THE MALAWI SUPREME COURT OF APPEAL

PRINCIPAL REGISTRY

MSCA CIVIL APPEAL NO. 41 OF 2009

(Being Lilongwe District Registry Civil Cause No. 806 of 2005)

BETWEEN:

NBS BANK LIMITED.....APPELLANT

- and -

R.J. HAMDANI.....RESPONDENT

BEFORE: **THE HONOURABLE JUSTICE TEMBO, SC, JA**
THE HONOURABLE JUSTICE SINGINI, SC, JA
THE HONOURABLE JUSTICE TWEA, JA

Khuze Kapeta, SC, Counsel for the Appellant
Mulele (Mrs), Counsel for the Appellant
Mvalo, Counsel for the Respondent
Balakasi, Court Clerk
Singano(Mrs), Senior Personal Secretary

JUDGMENT

TEMBO, SC, JA

This is an appeal by NBS Bank, the appellant, against a decision of this Court in a ruling made on 10th June, 2009, by Honourable Justice Tambala, in a capacity of a single member of this Court, in Chambers. By that decision, the learned Justice of Appeal refused to grant an application of the appellant for leave to file a notice of appeal out of time.

The appellant has raised three grounds of appeal as follows: (a) that the learned Justice of Appeal erred in not taking into account the contents of the court file in the lower court which had the notice of appeal plus application for stay not issued by the court; (b) that the learned Justice of Appeal erred in refusing to grant leave when the affidavit of Dick Chagwamnjira state that there was an appeal filed in time but unissued by the lower court, and that this fact was not controverted by the Respondent; and (c) that the learned Justice of Appeal erred in finding that the delay was caused by the appellant when the same had been caused by the court's failure to issue the filed documents in time.

Consequently, the appellant's prayers are that we (a) find that the decision of the learned Justice of Appeal was wrong in that the appellant had filed a notice of appeal in time but that the same was not issued by the court and that the Appellant's appeal has high chances of success; (b) reverse the ruling of the learned Justice of Appeal; (c) grant leave to the Appellant to lodge an appeal out of time against the High Court decision in question; and finally (d) condemn the Respondent in costs of the instant appeal.

We hasten to state the fact that there is also an appeal of the Respondent against the decision of the learned Justice of Appeal which was made on 23rd July, 2009. By that decision, the learned Justice of Appeal granted an application of the Appellant for stay of execution of the High Court decision made in open court by Kamanga, J, on 30th day of May, 2008, and which was later certified in writing to have been so made by Mzikamanda, J, on 20th February, 2009. The Respondent has raised several grounds of appeal and mainly that the learned Justice of Appeal erred in law in ordering stay of execution pending appeal when there was no appeal on the main action, thus, following dismissal earlier by the same learned Justice of Appeal of the Appellant's application to appeal out of time against the decision of the High Court. Consequently, it is the prayer of the Respondent that, among other things, we should (a) find that the decision of the learned

Justice of Appeal was wrong and contradictory to his own earlier decision in the same matter, where and when the learned Justice of Appeal dismissed the appellant's application to appeal against the judgment of the High Court out of time; and (b) reverse the decision of the learned Justice of Appeal in that having dismissed the Appellant's earlier application for leave to appeal out of time, there is no appeal pending determination in this Court, against the judgment of the High Court, thus, there cannot be a stay of execution of a judgment pending an appeal which is in fact not lodged and pending before this Court.

We heard legal arguments of counsel of both parties to the instant appeal. They have also filed written skeleton arguments. We first deal with the Appellant's appeal against the decision of the learned Justice of Appeal refusing the appellant's application for leave to appeal out of time.

To begin with, we would like to agree with the view of the learned Justice of Appeal that the relevant and, therefore, applicable law herein is **Order III rule 4 of the Supreme Court of Appeal Rules** (Cap. 3:01) which prescribes that an application for enlargement of time within which to appeal must be supported by an affidavit showing (a) good and substantial reasons for failure to appeal within time; and (b) grounds of appeal which ***prima facie*** show a good cause why the appeal should be heard. To be successful, the affidavit in support of the application for enlargement of time must satisfy both factors, thus (a) and (b). Where the application or the applicant stumbles on only one of these factors, the application fails in its entirety.

In coming to his decision, the learned Justice of appeal, among other things, considered and stated the following:

> *"The law requires that in civil matters the unsuccessful party has to appeal within six weeks after the judgment is given in the High Court.... In the present case the delay is for 13 months after the*

judgment was read out in Court. This is inexcusable delay.

In the case of ***Mbewe v Admarc 16 (1) MLR 301****, this Court held that even where good and substantial reason for the delay in appealing within time is established, the application to appeal out of time may be refused where the delay is inordinate. In that case a delay of three months was held to be inordinate. In the present case the delay is 13 months after the judgment was pronounced in open court. That delay is excessive and unpardonable. I know of no rule that states that time starts running after perfection of judgment. In my view time started running against the losing party on the day that the judgment was read out in Open Court, on 30th May, 2008.*

The result is that the present application must be dismissed on the ground that the applicant has failed to establish a good and substantial reason for failure to appeal within time. I would also dismiss the application on the additional but separate ground that the applicant is guilty of excessive delay in commencing the appeal".

Section 23 (1) (2) of the **Supreme Court of Appeal Act** (Cap.3:01) prescribes as follows -

"1. *If a person desires to appeal under this part from the High Court to the Supreme Court, he shall, in such manner as may be prescribed by Rules of the Court give notice to the Registrar of his intention to appeal -*

(a) within 14 days of the judgment from which he wishes to appeal if such judgment is an interlocutory order;

(b) within six weeks of the judgment from which he wishes to appeal in any other case.

2. The Court may extend the time for giving notice of intention to appeal under this Court, notwithstanding that the time for giving such notice has expired".

During the hearing of the appeal, learned counsel for the appellant sought to impress upon us that the Appellant had in fact filed its appeal within the time prescribed under section 23 (1)(b) of the Supreme Court of Appeal Act, thus, within six weeks from the time the judgment was delivered in open court. On the other hand, counsel for the appellant maintained that the court failed to issue the notice once it had been so filed. A glance at the court record, especially pages 18-23 to which the attention of this Court was particularly drawn, does not bear out the position maintained by learned counsel for the appellant in that regard. They, in particular, argued that the notice of appeal was dated, and lodged with the court on 12 June, 2008, after 30th May, 2008, the judgment date in open court. To the contrary, a glance at the notice of appeal at folio 22 and 23 of the court record clearly indicates the date of 17th June, 2009. In the circumstances we cannot fault the learned Justice of Appeal when he reasoned that in the instant case the delay was for thirteen months after the judgment was read out in open court. In that respect, it is also our view that such a delay is an inexcusable one. We, therefore, dismiss the appeal. It is so decided.

We now must revert to the Respondent's appeal against the grant of the order of stay. The case of the Respondent, in the main, is that by the time the Appellant brought up its application in that regard, its application for leave to appeal out of time had already been refused by the learned Justice of Appeal. Consequently, there was not then an appeal pending before this Court. It is therefore argued for the Respondent that, such having been the case, it was improper for the Appellant to have brought before the Court an application for stay of execution pending determination of an appeal from the judgment of the High Court when in fact there was a subsisting binding order of the Court refusing leave to appeal

out of time. Learned counsel for the Respondent further argued that the learned Justice of Appeal erred too in granting the order of stay of execution pending determination of an appeal against the judgment of the High Court when in fact there was no such appeal before this Court, and when the learned Justice of Appeal himself had already refused leave to bring up such an appeal out of time.

A glance at the court record, in particular folios 30 to 33 and 66 to 73, clearly shows the following: To begin with, that the learned Justice of Appeal made his ruling on 10th day of June, 2009, by which he refused to grant an application of the Appellant for leave to appeal out of time; that subsequent thereupon, in particular, on 23rd July, 2009, the learned Justice of Appeal granted a stay order, as follows –

> *"Having heard both counsel and considered the skeletal arguments of counsel I am of the view that the application for stay must be allowed. I allow on this condition that K1.4 million be paid to the respondent as part of her damages and that this amount shall be taken into account when a decision on appeal is finally reached."*

With respect, we are of the firm view that the learned Justice of Appeal erred in supposing that there was an appeal lodged and pending determination before the Court, when in actual fact an application for leave to appeal out of time had earlier been refused by the learned Justice of Appeal. We must, however, point it out that counsel concerned should share the burden of blameworthiness for having created and therefore given such wrong impression to the learned Justice of Appeal, namely, that there was then an appeal pending before this Court. Otherwise, it cannot be reasonably explained why the learned Justice of Appeal appears to have affirmatively indicated the view that there was an appeal pending before this Court, by stating in his order that **"K1.4 million be paid to the respondent as part of her damages**

and that this amount shall be taken into account when a decision on appeal is finally reached."

In the circumstances, we fully share in the view of the learned counsel for the Respondent that it was improper for the Appellant to have brought before this Court an application for stay of execution pending determination of an appeal from the judgment of the High Court when in fact there was a subsisting binding order of the Court refusing leave to appeal out of time. Likewise, the learned Justice of Appeal too erred in subsequently granting a stay order in those circumstances. Hereinabove we have dismissed the appeal of the Appellant against the decision of the learned Justice of Appeal refusing leave to appeal out of time. This means, therefore, that there was not then and there is not now an appeal pending determination before this Court. In the circumstances, an order for stay of execution cannot be sustained. We accordingly allow the Respondent's appeal. It is so decided. Costs are for the Respondents for both appeals considered and determined herein.

DELIVERED in Open Court on this 26th day of April, 2010 at Blantyre.

Signed.....
Hon. Justice A.K. Tembo, SC, JA

Signed.....
Hon. Justice E.M. Singini, SC, JA

Signed .....
Hon. Justice E.B. Twea, JA