



JUDICIARY

IN THE MALAWI SUPREME COURT OF APPEAL

MSCA Civil Appeal No. 48 of 2014

BETWEEN

MULLI BROTHERS LIMITED

APPELLANT

AND

MALAWI SAVINGS BANK LIMITED

RESPONDENT

CORAM: D.F. MWAUNGULU, JA

Mmeta & Gondwe, Counsel for the Appellant

Kauka, Counsel for the respondent

Minikwa, Official Court Interpreter

Mwaungulu, JA

JUDGMENT

*Précis*

If I was not dismissing the application for want of jurisdiction, I was, on principle going to grant an injunction pending appeal.

*Background*

The appellant borrowed money from the respondent under a mortgage covering property in the southern region, outside Blantyre City. After necessary notices, the respondent purported exercising its power of sale. The appellant, startled, fervently and hurriedly sued the respondent

claiming, among other things, payment rescheduling. The respondent counterclaimed for the money due on the loan and interest. Two days before the court below delivered judgment, the parties applied to the court not to deliver judgment because of a compromise based on which the parties were to file a consent order. Curiously, the Court below, refusing even to file it, never heard the application and, nevertheless, delivered its judgment, probably already written but not circulated to the parties under Practice Statement (Supreme Court: Judgments) [1998] 1 WLR 825, stating:

*“At the last day of hearing on 18<sup>th</sup> August, 2014, I gave counsel for the Plaintiff two weeks to file submissions in line with order 19 rule 2 of the Court below Rules. Mr Kauka for the Defendant duly complied with this directive. However, Mr. Gondwe for the Plaintiff did not. The court was then surprised when in the afternoon of 17<sup>th</sup> September, 2014 Mr Gondwe brought a strange summons for this Court to stay delivery of its judgment pending the recording of a consent judgment between the parties. The Court declined to issue this summons. I must say that the conduct of the Plaintiff’s attorneys in these proceedings has been far from impressive. As observed by the Supreme Court of Appeal, these attorneys do not seem to be advising their client properly. Perhaps it is the lay client who is advising the lawyers on matters of law. This is very unfortunate.”*

The court below in its judgment dismissed the appellant’s action and found for the respondent on the counterclaim. The appellant appealed and applied for stay of execution pending appeal on the monetary judgment. The respondent, prompted by some comments at the hearing, proceeded to exercise the power of sale under the mortgage. The appellant before the court delivered its judgment on his application for stay of execution applied for an injunction pending appeal to restrain the respondent from exercising the power of sale under the mortgage. The full court delivered its judgment refusing stay before this order. This decision follows a majority of a full court, I dissenting, refusing stay of execution pending appeal. That decision has little, if any, impact on this application, to restrain the respondent from exercising the power of sale under the mortgage.

The respondent cannot directly execute on, land and realty, the subject of this mortgage. For monetary judgments, which this one is, warrants of execution can only be against movable property. Warrants of execution, except for possession of land, do not apply to immovable property. As I understand it, the properties subjects of this mortgage are not, by their situation, registered land under the Registered Land Act. According to the only two Government Notices, the Registered Land Act only applies, respectively to Blantyre and Lilongwe cities. Under the Sheriffs Act, the judgment creditor can, under the Registered Land Act, whether or not there has been execution against movable property, obtain a charging order. The properties the subject of this mortgage are situate in places other than Blantyre and Lilongwe cities and are, therefore, outside the scope of the Registered Land Act. To them, sections 25 to 39 of the Sheriffs Act apply. Consequently, the power of sale, envisaged in the Sheriffs Act, only arises if there is a charging order and a judgment creditor obtains a specific court order to sell the land by public auction. The judgment creditor must, however, have a return nulla bola on a writ of fieri facias. Clearly, therefore, the respondent was not proceeding under the judgment of the Court below

when it advertised the properties for sale. The respondent was acting under the power under the mortgage. To both powers of sale, therefore, the order staying execution does not apply.

*Principles on which a court grants an injunction pending appeal*

This application and the application for stay of execution pending presuppose an appeal to this court premised on that the judgment of the court below was the operating judgment. The appellant, however, in its subsequent purported appeal and its application to stay execution and interim injunction misinterpreted the implication of the judgment of the Court below. This court, however, has power to grant an injunction pending appeal and based on *American Cyanamid Ltd v Ethicon Ltd* *American Cyanamid v Ethicon* [1975] A.C. 396; [1975] 2 W.L.R. 316 (*Green Communications Ltd and another v Standard Bank* (2015) Civil Appeal Case No 29 (MSCA) (unreported); *Ketchum International v Group Public Relation Holdings* [1997] 1 WLR 4). In *Norvatis AG v Hospira UK Ltd* [2013] EWCA Civ 583, Floyd LJ with who Lewison and Kitchen LJ agreed, approved this statement from the transcript of the judgment of Pumfrey J in *Servier v Apotex* (unreported, 6 July 2007):

*"In circumstances such as the present, I can see no reason why the familiar principles of American Cyanamid v Ethicon, with the necessary qualification that the question is no longer whether there is a triable issue, but whether there is a prospect of an arguable appeal should [not be] the principles to apply. And so in a case in which I thought there was a real prospect of success on an appeal, I would myself be inclined to continue the injunctive relief if it had been granted before trial."*

In *Minnesota Mining v Johnson and Johnson* [1976] RPC 671 Buckley LJ said:

*"Where an injunction is an appropriate form of remedy for a successful plaintiff, the plaintiff, if he succeeds at first instance in establishing his right to relief, is entitled to that remedy upon the basis of the trial judge's findings of fact and his application of the law. This is, however, subject to the defendant's right of appeal. If the defendant in good faith proposes to appeal, challenging either the trial judge's findings or his law, and has a genuine chance of success on his appeal, the plaintiff's entitlement to his remedy cannot be regarded as certain until the appeal has been disposed of. In some cases the putting of an injunction into effect pending appeal may very severely damage the defendant in such a way that he will have no remedy against the plaintiff if he, the defendant, succeeds on his appeal. On the other hand, the postponement of putting an injunction into effect pending appeal may severely damage the plaintiff. In such a case a plaintiff may be able to recover some remedy against the defendant in the appellate court in respect of his damage in the event of the appeal failing, but the amount of this damage may be difficult to assess and the remedy available to the appellate court may not amount to a complete indemnity. It may be possible to do justice by staying the injunction pending the appeal, the plaintiff's position being suitably safeguarded. On the other hand it may, in some circumstances, be fair to allow*

*the injunction to operate on conditions that the plaintiff gives an undertaking in damages or otherwise protects the defendant's rights, should he succeed in his appeal. In some cases it may be impossible to devise any method of ensuring perfect justice in any event, but the court may nevertheless be able to devise an interlocutory remedy pending the decision of the appeal which will achieve the highest available measure of fairness. The appropriate course must depend on the particular facts of each case."*

In *Ketchum International v Group Public Relation Holdings* [1997] 1 WLR 4, Stuart Smith LJ said:

*"Moreover, I cannot see any reason in principle why the considerations which are applicable when the court is considering the grant of a Mareva injunction should not be applied in favour of a plaintiff, even if he has lost in the court below, though the question will not be 'Does he have a good arguable case?' but 'Does he have a good arguable appeal?' This is likely to be a more difficult test to satisfy, and, if the case turns upon questions of fact which the judge has resolved against the plaintiff, may well be insuperable. This threshold must be at least as high as that which has to be satisfied when the court considers whether or not to grant leave to appeal where that is required."*

Floyd, LJ, in *Norvatis AG v Hospira UK Ltd* said:

*"I would summarize the principles which apply to the grant of an interim injunction pending appeal where the claimant has lost at first instance as follows:*

*i) The court must be satisfied that the appeal has a real prospect of success.*

*ii) If the court is satisfied that there is a real prospect of success on appeal, it will not usually be useful to attempt to form a view as to how much stronger the prospects of appeal are, or to attempt to give weight to that view in assessing the balance of convenience.*

*iii) It does not follow automatically from the fact that an interim injunction has or would have been granted pre-trial that an injunction pending appeal should be granted. The court must assess all the relevant circumstances following judgment, including the period of time before any appeal is likely to be heard and the balance of hardship to each party if an injunction is refused or granted.*

*iv) The grant of an injunction is not limited to the case where its refusal would render an appeal nugatory. Such a case merely represents the extreme end of a spectrum of possible factual situations in which the injustice to one side is balanced against the injustice to the other.*

*v) As in the case of the stay of a permanent injunction which would otherwise be granted to a successful claimant, the court should endeavour to arrange matters*

*so that the Court of Appeal is best able to do justice between the parties once the appeal has been heard.”*

I would only comment on item (ii). There is an instance where it should be usual to consider the relative strength of the parties' cases; this is where the balances or scales are equal on the other considerations. *American Cyanamid Ltd v Ethicon Ltd* should be understood as laying a methodology discussed fully in *Joubertina Furnishers (Pty) Limited (t/a Carnival Furnitures v Lilongwe City Mall* (2013) Miscellaneous Civil Application No 41 (HC) (PR) (unreported).

*Are there triable issues on appeal?*

The first consideration, therefore, is whether an interim injunction, subject to the jurisdictional question considered later in the judgment, should be given in this case and the first consideration under *American Cyanamid Ltd v Ethicon Ltd* is whether there are triable issues on appeal. When considering serious issues for the appeal, the court cannot consider all matters of law and fact the lower court considered; that is for the appeal hearing. The court considers points raised by the affidavit, judgment and the grounds of appeal which put the judgment at askance. The court however, must consider all factors pertinent to the discretion. The appeal is against the whole judgment. Under Order 3, rule (2) (6) of the Supreme Court of Appeal Rules, provided parties are appraised, the court on appeal is not restricted to the grounds of appeal. Order 3, rule 26 of the Supreme Court of Appeal Rules provides:

*“The Court shall have power to give any judgment or make any order that ought to have been made, and to make such further or other order as the case may require including any order as to costs. These powers may be exercised by the Court, notwithstanding that the appellant may have asked that part only of a decision may be reversed or varied, and may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision.”*

One must guard against a mini appeal where matters for a substantive hearing exhaust in what are really interlocutory processes. Seriousness of an issue for appeal, however, is a soigné and condign consideration for execution of a judgment should be allowed or refused where clearly the appeal would be, respectively, unsuccessful or successful.

In relation to the power of sale under a mortgage, in *Mulli Brothers Ltd v ECO Bank Ltd* (2013) Civil Cause No 660 (HC) (PR) (unreported) the court below, reviewed the common law in other jurisdictions, more especially from Australian, Jamaican and English jurisdictions, demonstrating that rules that interim injunctions would not be granted, according to this Court's decision in *New Building Society v Mumba*, to restrain a mortgagee from exercising the power to sell unless, according to the lower court's decisions of *Mkhumbwe v National Bank of Malawi* and *First Merchant Bank v Lorgat* (2002) Civil Cause NO. 3917, the mortgagor tendered the money owing, were general rules. The common law applies *American Cyanamid v Ethicon Ltd* [1975] A.C. 396; [1975] 2 W.L.R. 316 and, therefore, in appropriate cases, interim injunctions are possible and plausible.

One cardinal exception to the general rule is where the power under a mortgage has not become exercisable for, surely, in such a situation, a mortgagee cannot and should not exercise the power of sale (dissenting judgment of Phillips JA in the Jamaican Supreme Court of Appeal in *Ledgister and another v Jamaica Redevelopment Foundation* [2013] JMCA App 10; per Campbell JA in the Court of Appeal of New South Wales in *Bayblu Holdings Pty Ltd v Capital Finance Australian Limited* [2011] NSWCA 39; *Harvey v McWatters* (1994) 49 SR (NSW) 173; *Allfox Building Pty Ltd v Bank of Melbourne Ltd* (1992) NSW Conv R 55-634). Moreover, an interim injunction will, among other considerations, be granted where the amount claimed is wrong or uncertain (*Clarke v Japan Machines (Australia) Pty Ltd (No 2)* [1984] 1 Qd R 421). The lower court summarised the appellant's claim as follows:

*“The Plaintiff asserts that in arriving at the figure of K3.2 billion, the Defendant simply added up outstanding balances in various bank accounts which had not been verified by the Plaintiff and/or independently; that the restructured loan was offered haphazardly and agreed under duress by the Plaintiff as the Defendant had stopped granting banking facilities and bonds to the Plaintiff who was pushed to a corner to the extent that the Plaintiff agreed to the amalgamated sum without verification; that the free will of the Plaintiff in entering into such a loan agreement was vitiated by the Defendant's high handed manner in which they negotiated the loan agreement through duress. The particulars of duress are stated to be:*

1. *That by suspending all facilities in line accounts including bonds, the Plaintiff's business was paralyzed and in a bid to normalize the situation the Plaintiff agreed to a loan comprising those amounts that were not independently verified.*
2. *That by simply adding up the various accounts balances, the Defendant's conduct was not compliant with prudential lending rules as issued by the Registrar of Financial Institutions under the Financial Services Act as some of these account balances were off balance book of the Defendant in terms of such rules as they should have been written off.*

*On the ground of unfair conduct, the Plaintiff alleges that the loan facility never provided for default terms and penalties in the event that there were breaches in the repayment up until 2016, the time the duration of the facility would come to an end and that the Defendant reneged on an assurance that the loan would be repaid from the proceeds of sale of tea from the Plaintiff's tea estate which tea is a seasonal crop and that payments would thus be staggered in relation to the tea season.”*

The judgment clearly demonstrates that the court below never considered and made findings on some, if not critical, aspects of the appellant's claim. It, however, addresses some issues raised in the skeletal arguments that must seriously be considered on appeal. First, the appellant vehemently questions the respondent's lumping claims from different accounts. The court below makes no specific finding, only records payments made on different times and overlooked considering whether these payments were for the same accounts. There is doubt, unless one reads the record, whether, all these different accounts were subject of the mortgage or

were payments for one or more accounts. Secondly, the judgment suggests the mortgage never provides what happens if the loan is not payable by 2016. The mortgage either provided for periodic instalments which the appellant breached or the loan was fully payable in 2016 although the appellant made periodic payments. If the latter, the power of sale, until 2016, was not exercisable.

Secondly, the lower court considered the plea of economic duress rather haphazardly. Relying on, *Mwalwanda v Sipedi* [1990] 13 MLR 278; and *Speedy's Ltd v Finance Bank Of Malawi Ltd* [2001-2007] MLR 373, the court concluded that interest rates of a certain percentage above the base rate were not exorbitant. On the other hand, low interests, even if concessionary, on a huge borrowing may be exorbitant. Moreover, all depends at the base rate too. On any of these aspects, the court would reopen the transaction under section 3 of the Loan Recovery Act. Once one accepts, as the court below did, that under the Loan Recovery Act an agreement may be reopened, the Supreme Court has to reconsider the lower court's suggestion that the appellant's request was, because of *Littleways Building Contractors v Mike Appeal & Gatto Ltd* (2010) Commercial Cause No 108 (HC) (Comm.) (unreported), for a court rewriting a contract.

Thirdly, it is unclear how the court below actually dealt with the plea of economic duress and the doctrine of unconscionable conduct. The court below just records generally that the appellant's first witness supports the defendant's case. More is required when considering economic duress that does not come through in the judgment. McHugh JA in *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40, 45-46, said:

*"The rationale of the doctrine of economic duress is that the law will not give effect to an apparent consent which was induced by pressure exercised upon one party by another party when the law regards that pressure as illegitimate: Universe Tankships Inc of Monrovia v International Transport Workers Federation [1983] 1 AC 366 at 384 per Lord Diplock. As his Lordship pointed out, the consequence is that the "consent is treated in law as revocable unless approbated either expressly or by implication after the illegitimate pressure has ceased to operate on his mind" (at 384). In the same case Lord Scarman declared (at 400) that the authorities show that there are two elements in the realm of duress: (a) pressure amounting to compulsion of the will of the victim and (b) the illegitimacy of the pressure exerted. "There must be pressure", said Lord Scarman "the practical effect of which is compulsion or the absence of choice".*

*The reference in Universe Tankships Inc of Monrovia v International Transport Workers Federation and other cases to compulsion "of the will" of the victim is unfortunate. They appear to have overlooked that in Director of Public Prosecutions for Northern Ireland v Lynch [1975] AC 653, a case concerned with duress as a defence to a criminal proceeding, the House of Lords rejected the notion that duress is concerned with overbearing the will of the accused. The Law Lords were unanimous in coming to the conclusion, perhaps best expressed (at 695) in the speech of Lord Simon of Glaisdale "that duress is not inconsistent with act and will, the will being deflected, not destroyed". Indeed, if the true basis of duress is that the will is overborne, a contract*

*entered into under duress should be void. Yet the accepted doctrine is that the contract is merely voidable.*

*In my opinion the overbearing of the will theory of duress should be rejected. A person who is the subject of duress usually knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than take an alternative course of action. The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress. In their dissenting advice in *Barton v Armstrong* [1973] 2 NSWLR 598; [1976] AC 104, Lord Wilberforce and Lord Simon of Glaisdale pointed out (at 634; 121):*

"... in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law; for this the pressure must be one of a kind which the law does not regard as illegitimate. Thus, out of the various means by which consent may be obtained - advice, persuasion, influence, inducement, representation, commercial pressure - the law has come to select some which it will not accept as a reason for voluntary action: fraud, abuse of relation of confidence, undue influence, duress or coercion." In *Pao On v Lau Yiu Long* [1980] AC 614, the Judicial Committee accepted (at 635) that the observations of Lord Wilberforce and Lord Simon in *Barton v Armstrong* were consistent with the majority judgment in that case and represented the law relating to duress."

*It is unnecessary, however, for the victim to prove that the illegitimate pressure was the sole reason for him entering into the contract. It is sufficient that the illegitimate pressure was one of the reasons for the person entering into the agreement. Once the evidence establishes that the pressure exerted on the victim was illegitimate, the onus lies on the person applying the pressure to show that it made no contribution to the victim entering into the agreement: *Barton v Armstrong* (at 633; 120).."*

Finally, as we see later, the court, on appeal, if it comes to that, will consider the whole matter from a compromise reached before the judge in the court below commenced writing the judgment.

There are, therefore, in this case triable issues which go to whether the mortgagee's power had become exercisable. The mortgagee's power, depending on the loan and the mortgage agreements, arises where the appellant's default is established. It remains uncertain if, as the appellant contends (and the court made no finding), when the respondent lumped sums from different accounts that may or may not be covered by the mortgage. Economic duress, properly canvassed, and it was not the case here, vitiates the mortgage on which the action here bases.



Moreover, if, as the appellant claims, certain amounts were not catered for, the claim is probably wrong and on that score, among other things, an interim injunction is possible.

Moreover, if a mortgagee fails to ascertain the proper value of the property, fails to raise sufficient awareness of the sale and cannot demonstrate the bona fides of the sale, there are triable issues based on which, among other things, the court can and should grant interim relief (*James v Australia & New Zealand Banking Group Ltd* (1986) 64 ALR 347); *Martinson v Clowes* (1882) 21 CH. D857; *Hodson v Deens* [1903] 2 CH. D647; *Latec Investment Ltd. V Hotel Terrigal (in liquidation)* (1965) 113 CLR 265; *ANZ Banking Group v Bangadilly Pastoral Company Pty Ltd.* (1978) 139 CLR 195; and *Tse Qwong Lam v Wong Chit Sen* [1983] 1 WLR 1349, [1983] 3 All ER 54). Moreover, where a mortgagor offers alternative security or a repayment scheme, it is a triable issue whether the alternative security or scheme is credible and worthy (*Glandore Pty Ltd v Edlers Finance & Investment Company Ltd* (1984) 57 ALR 186; *Linnpark Investments Property Ltd v Macquarie Property Development Finance Ltd.* [2002] WASC 272; *Grose v St. George Commercial Credit Cooperation Ltd.* [1991] NSW ConvR 55; and *Notars v Hugh* [2003] NSWSC 440).

A mortgagee is not a trustee for the mortgagor for the power of sale and, consequently, a mortgagee must look to ones interests. The common law, however, proceeds on Lord Chancellor Herschel's statement in *Kennedy v De Trafford* 1896, 1 Ch 762):

*"... if a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if not impossible, to establish that he had been guilty of any breach of duty towards the mortgagor. Lindley L.J. in the Court below, says that "it is not right or proper or legal for him either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor." Well, I think that is all covered really by his exercising the power committed to him in good faith. It is very difficult to define exhaustively all that would be included in the words "good faith", but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion. Of course, if he wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith."*

In Australia, in *Commercial and General Acceptance Ltd v Nixon* (1981) HCA 70, 3 Gibbs CJ, said:

*'[A]lthough a mortgagee is not a trustee of the power of sale for the mortgagor, it is nevertheless clear that in conducting a sale of the mortgaged property he is not entitled to sacrifice the interest of the mortgagor in the surplus of the proceeds of the sale. It is equally clear that the mortgagee must exercise the power in good faith'.*

Good faith involves selling at a fair price, a fair market price. The mortgagee must obtain a fair market price (*Silven Property Ltd v Royal Bank of Scotland plc* [2003] EWECA 1409; *Palk v Mortgage Finding plc* [1993] Ch 330; and *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR

1349). In *United States v Cartwright*, 411 US 546 (1973) the United States Supreme Court defines a fair market price as

*‘the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.’*

The duty to sell at a fair market value means ‘the mortgagee is bound to sell fairly, and to take reasonable steps to obtain a proper price; but the mortgagee may proceed to a forced sale for the purpose of paying the mortgage debt,’ per Barton J in *Pendlebury v Colonial Mutual Life Assurance Society Ltd* (1912) 13 CLR 676. “ ... [I]n the case of a sale by a mortgagee, if he omits to take obvious precautions to ensure a fair price, and the facts show that he was absolutely careless whether a fair price was obtained or not, his conduct is reckless, and he does not act in good faith,’ per Barton J in *Pendlebury v Colonial Mutual Life Assurance Society Ltd*. In *Pendlebury v Colonial Mutual Life Assurance Society Ltd* the court held that the mortgagee disregarded a mortgagor’s interests by inadequate advertising and failure to obtain a fair price. In *Sablebrook P/L v Credit Union Australia Ltd* [2008] QSC242, 42 the mortgagee sold the property at \$240,000 in April 2003. In December 2002 it was valued for \$225,000. The mortgagee never sought expert valuation advice, never received an updated valuation, and never had information on market trends. “I find, said Applegarth, “that its [the mortgagee’s] failure to obtain an updated valuation in April 2003, an updated valuation opinion from HTW or at least, an estimate of current market value from local real estate agents breached its statutory duty in circumstances in which it had no reliable information concerning the current market value of the land it proposed to sell by private treaty.” I must add that for land not covered by the Registered Land Act, the duty of good faith arises from the common law. In *Nilrem Nominees Pty Ltd v Karaley Ltd* ((2000) WASC 82), mortgagee failed to obtain a valuation, the sale was saved by adequate advertising. The court, however said the failure ‘is an indication of a lack of prudence’ (para 3). However, it was held that the extensive advertising made up for the lack of valuation: ‘A lack of a valuation would be most significant if a property was sold for a low price after an inadequately advertised auction or after an inadequately advertised private sale.’ In *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, it was held that the advertisement must be adequate and containing all necessary particulars, in that case, the fact that the mortgagor obtained permission to build 100 flats on the piece of land. Certain considerations, however, may, in certain circumstances, be indication of bad faith: selling to the mortgagee or people connected with the mortgagee (*Farrar v Farrars Ltd* (188) 40 Ch D 395; *Tse Kwong Lam v Wong Chit Sen*), selling to employees of the mortgagee (*Tse Kwong Lam v Wong Chit Sen*). The mortgagee must demonstrate that the mortgagee aimed at a fair price. Jacobs J in *Australia and New Zealand Banking Group Limited v Bangadilly Pastoral Commercial Limited* (1978) 139 CLR 195 at 201 said:

*“It is true that bona fides in this connexion is not concerned with the motive for exercising the power of sale but, once the decision to sell has been made, it is concerned with a genuine primary desire to obtain for the mortgaged property the best price obtainable consistently with the right of a mortgagee to realize his security. At the same time the mortgagor is concerned with his own interests and not with the interests of the mortgagee or subsequent incumbrancers, and therefore a wide latitude has been allowed to him in his manner of exercising his power of sale. However, when there is a possible conflict between that desire and a desire that an associate should obtain the best possible bargain the facts must show that the desire to obtain the best price was given absolute preference over any desire that an associate should obtain a good bargain.”*

Concerning the power of sale under the mortgage, the only things the respondent did was advertise sale of the property and, at the court’s prompting, obtain an evaluation. The respondent never checked market trends, never floated the property among estate agents, to name a few. The respondent, in relation to a fair market price, is not exuding good faith.

#### *Are damages an adequate remedy*

Once there is a triable issue, the court should consider whether damages are an adequate compensation for losses the respondent may, on the appellant’s undertaking to pay damages, suffer because of an interim injunction. Damages are inadequate compensation if neither can pay them. Courts almost invariably order interim injunctions on realty or land because no piece of land or realty is like another. It is unnecessary, therefore, to consider the parties’ capacity to pay; the matter must resolve on balance of justice.

#### *Balance of Justice*

When considering balance of convenience or justice, courts consider what, between allowing or refusing interim relief, results in better or greater justice or convenience or better or greatly ameliorates injustice or inconvenient whatever the outcome. In considering balance of justice, one primary consideration is whether, at the end of the appeal, justice is increased or injustice reduced by maintaining the status quo. The status quo envisaged where a mortgagor desires to prevent, before a hearing, the mortgagee from exercising the power of sale, is that it, generally, leaves the mortgagor with the benefit of the money and the security. The status quo ante would be where, to the detriment of the bank, depositors and supporters, the loan and interest are unpaid. That interest and principal remain unpaid for long is pertinent in balancing convenience and justice (*Wernard Electrics Pty Ltd v Hartmax Mortgage Management Ltd* (unreported), NSWSC, 3186 of 1994, 27 July 1994 *Tekininvest Pty Ltd v Laza Room* [2004] NSWSC 940). Generally, as Palmer J, observed in *Tekininvest Pty Ltd v Laza Room* failure to pay militates against granting an injunction. Interest rates are high; the Reserve Bank of Malawi, under the Reserve Bank Act, to quell inflation, recently fixed the base rate at 25%. Granting an injunction escalates financial hardship on the mortgagor and could dissipate the security

(*Emmanuel Orchards Pty Ltd v National Australia Bank Ltd* (2003) SASC 368. It is an unfair outcome, however where, maintaining the status quo, by refusing the injunction, leaves a situation where the mortgagee sells the property at less than a fair price, a fair market value. Maintaining status quo must not result, unless in a pressed sale, entail that the property be sold under or at the same value when it can and should search a greater value (*James v Australia and New Zealand Banking Group* (1986) 64 ALR 347; *Davis v Taylor* (1948) 48 SR (NSW) 209; and *Kennedy v De Trafford* [1897] AC 180)). Moreover, there is no good faith where, without explanation, property is sold to people connected to a mortgagee (*Martinson v Clowes* (1821) Ch.D. 857; *Hodson v Deans* [1903]2 Ch.D. 647; *Pendlebury v Colonial Mutual Life Assurance Society Ltd* (1912) 13 CLR 676). Against this, however, is the consideration that the parties changed this elementary status quo ante by compromise and forbearance.

The House of Lords, now the United Kingdom Supreme Court, considered the principle of forbearance in *Tool Metal Manufacturing Co. Ltd v Tungsten Electric Co Ltd* [1955] UKHL 5 (16 June 1955) based on principles in *Hughes v Metropolitan Railway Co* (1877) 2 App.Cas 439 as Bowen LJ explains them in *Birmingham and District Land Co v London & North Western Railway Co* (1888) 40 Ch.D. 268, 286. Forbearance can be withdrawn in many ways (per Viscount Simonds in *Tool Metal Manufacturing Co. Ltd v Tungsten Electric Co Ltd*). There must, however, be agreement (per Tucker, LJ). These principles are considered at length in the court below in *Mulli Brothers Ltd v Ecobank Malawi Ltd*.

There is a letter the respondent wrote the appellant, apparently, after negotiations, rescheduling payments. This was forbearance, not retracted, based on which the parties must abide by the terms of their agreement and forego the power of sale. I was initially indignant that the appellant never accepted the offer. I was told across the bar that, in fact the appellant and the respondent agreed on these terms but there will problems about the respondent's legal practitioner's fees. That is now water under the bridge because, just before the court below delivered its judgment, the parties resolve whatever problems there were with costs. Evidence of the compromise is right in the judgment of the court below in the statement quoted above. The parties approached the court together a day or two before the judge was to deliver the judgment that they wanted the court to record their consent judgment. The Judge refused completely to hear the application. This, as we see shortly, the court below was not supposed to do.

Courts look favourably to a mortgagor who, either because the mortgagor is unable to pay or offers alternative security (*Glandore Pty Ltd v Edlers Finance & Investment Co Ltd* (1984) 4 FCR 130; 57 ALR 186; [1985] ATPR 40-517; Baker J in *Linnpark Investment Pty Ltd v Macquarie Property Development Finance Ltd* [2002] WASC 272). Equally, courts would order an injunction where the mortgagor offers to redeem the property within reasonable time the mortgagor can get refinancing (*Grose v St George Commercial Credit Union Ltd* (1991) NSW Conv R 55-586).” In *Grose v St George Commercial Credit Corp Ltd* the court said:

*“In plaintiff’s case should be considered on two sides. The first side is that he claims to be in a position to redeem the mortgage, not immediately but as he would put it in June, the prediction being 21 days from today, although complete precision is not to be expected. In support of that he produces a letter offering finance from the Public Investment Company Limited, a company which appears to operate in the very distant places of the Isle of Man and Connecticut, and this offer is borne out to some degree by an affidavit of Mr. MacEnroe, a person associated with Public Investment Company Limited, made on 24 May, some days before the offer ... the offer suggests that subject to conditions which in this kind of business are not unusual, there is a willingness to advance to the plaintiff enough money to pay out the defendant’s claim within the time I have mentioned. Much experience have taught me that such proposals are not always fulfilled, but on its face it appears to be a suitable and reliable proposal, subject to no abnormal contingencies, although too many contingencies to which finance is subject in the ordinary course of business. That is to say the plaintiff is in substance claiming that he can redeem the mortgage within a fairly short time.”*

In this case, the parties, after assessing risks and implications compromised and, from the look of things agreed on terms on which they would deal with the matter. That agreement, un-retracted, the power of sale is not exercisable except when the mortgagor does not abide by the agreement and the mortgagee withdraws the forbearance. That to me is a matter that tilts justice in favour, of course, allowing the parties to do what, in the light of their financial circumstances, they conceive to be the best solution to their problem. It would incongruous to justice that parties having agreed to their dispute they should be saddled by a judgment which, as we see shortly, is inconsequential on their compromise.

*The mortgagor’s case is stronger*

I would, in the circumstances of this case think that this is a case where, apart from anything else, the injunction should be granted on the relative strength of the parties’ cases. The prospects of the appeal succeeding are good and not so much based on the matters directly arising on the matter. The consequence of the lower court’s judgment, since the court below perceived or became aware of a compromise, is that it is the compromise, not the judgment that is effective. “It is elementary,” said Brooks L.J., in *Prudential Assurance Company Ltd v McBain Cooper (A firm) and others* [2000] EWCA Civ 172. “that parties to private litigation are at liberty to resolve their differences by a compromise, and that an unimpeached compromise represents the end of the dispute or disputes from which it arose (see Foskett, The Law and Practice of Compromise (4th Edition 1996), p 90, citing *Plumley v Horrells* (1869) 20 LT 473 per Lord Romilly MR ...” In *Knowles v Roberts* (1888) 38 Ch D 263, 272, Bowen LJ said: “As soon as you have ended a dispute by a compromise you have disposed of it.” In the Court below refusing the application, it actually missed an opportunity to do the needful and actually follow what, if Counsel had submitted or been requested to submit, was the correct approach where, like here, parties have reached a compromise before a court delivers judgment. Brook, L.J., in

*Prudential Assurance Company Ltd v McBain Cooper (A firm) and others* [2000] EWCA Civ 172 mentions a court's duty faced with a compromise:

*"If they presented a consent order to the court, the court would normally not be concerned to approve or disapprove its terms before directing that it should be entered (see Noel v Becker [1971] 1 WLR 355 and Bruce v Worthing DC (1994) 26 HLR 223)."*

In *Noel v Becker* Judge Brown the complainant's counsel, much like in this case, informed the court below that the parties agreed terms of a compromise as set out in the schedule to an order. The Judge refused to make the order. On appeal to the Court of Appeals, Davies, LJ, with whom Edmund Davies and Karminski, LJJ, agreed, said:

*"Our attention was called to Practice Direction (Minutes of Order) [1960] 1 W.L.R. 1168. The second paragraph is not in view unimportant in this context. It read:*

*"In the case of terms scheduled to a consent order these terms represent an arrangement between the parties, and the registrar is not concerned to approve them, although he may properly offer suggestions upon them if it appears to him that they may cause some difficulty."*

*I think that that applies to the present case. These terms were scheduled to the consent order and, speaking for myself, I do not think that the judge was concerned to approve them or disapprove them. There is nothing in the order which the court was asked to make which is outside the jurisdiction of the court; and, without more ado, I would say that the county court judge fell into error here and ought to have made the order agreed upon between the parties.*

Edmund Davies LJ., added:

*"The county court judge appears to have taken upon himself a duty of scrutiny and vigilance in relation to the Tomlin Order drawn up by the parties which he was not called upon to exercise. He fell into that error and as a result this appeal has had to be brought. I agree, both parties concurring, that the appeal should be allowed in the manner directed by Davies L. J."*

The court below should have heard the application and granted the consent order agreed between the parties.

Where parties reach a settlement, a court may, in its discretion and without affecting the compromise, still deliver a judgment but only for espousing a legal principle or address a public interest concern. The starting point is *Don Pasquale (A firm) v Customs and Excise Commissioners* [1990] 1 WLR 1108. The dispute between the VAT taxpayer and the Commissioners was settled and, there was no issue between the parties to the appeal. The head note reads:

*“Where an appeal, which has become academic because the parties have settled, raises a matter of procedure in the administration of justice that is unlikely to come before the Court of Appeal in another case, the court will in the exceptional exercise of its jurisdiction permit the appeal to proceed.”*

Lord Justice Donaldson, MR, with who Leggatt and Sir Roualeyn Cumming-Bruce LJJ, agreed, allowed the hearing and having the matter determined, not on the compromise, but the principle. The Master of Rolls said, at pages 1109-1110:

*““The appeal by the Customs and Excise Commissioner against a decision of Roch J. on appeal from the V.A.T. tribunal has been set down for hearing, but has been mentioned to us today because the dispute as between the V.A.T. taxpayer and the commissioners has been settled, and it follows that there is no longer any issue as between parties to the appeal...”*

As between the parties, with a compromise or settlement, there is no longer any issue live between the parties. The Master of Rolls then lays down the general principle in relation to a compromise on a purely private matter, which this one is:

*“As Mr. Sankey readily admits, and as is further admitted in a very helpful skeleton argument signed by Mr. Fleming of counsel, the position is that, on House of Lords authority, where there is no live issue between parties to a private law action, it is not for the courts to hear appeals merely because the decision under appeal has widespread ramifications in terms of determining private rights.”*

The Master of Rolls continued:

*“In order to distinguish the House of Lords Attitude in relation to private law issue it has been submitted to us that the issue raised is one of public law. I am bound to say that I do not think that it is. But equally, it is not a matter of private law ... As I say, for my part I do not think we are faced with a public law issue, but there is an analogy because it is concerned with the administration of justice ...”*

The Master of Rolls, with who the other Lordships agreed, allowed the appeal to proceed, preserving the compromise, ‘provided the position of the tax payer is protected.’

In *Barclays Bank PLC v Nylon Capital LLP* [2000] EWCA Civ 172, a decision of the England and Wales Court of Appeal, Lord Neuberger, MR., said:

*“I turn now to deal with a very different issue. After Thomas LJ had prepared his judgment in draft, and circulated it to Etherton LJ and me, the parties notified the court that they had reached agreement and effectively requested the court not to give judgment.*

*Where a case has been fully argued, whether at first instance or on appeal, and it then settles or is withdrawn or is in some other way disposed of, the court retains the right to decide whether or not to proceed to give judgment. Where the case raises a point which it is in the public interest to ventilate in a judgment, that would be a powerful reason for proceeding to give judgment despite the matter having been disposed of between the parties [Emphasis Supplied]. Obvious examples of such cases are where the case raises a point of law of some potential general interest, where an appellate court is differing from the court below, where some wrongdoing or other activity should be exposed, or where the case has attracted some other legitimate public interest.”*

The Master of Rolls refers to when a matter is settled, or is withdrawn or somehow disposed of, expressions broad enough to cover everything including disposal with or without a consent order. The MR of Rolls refers to another consideration, the stage at which the judgment is to be delivered:

*“It will also be relevant in most cases to consider how far the preparation of any judgment had got by the time of the request. In the absence of good reason to the contrary, it would be a highly questionable use of judicial time to prepare a judgment on an issue which was no longer live between the parties to the case. On the other hand, where the judgment is complete, it could be said (perhaps with rather less force) that it would be a retrospective waste of judicial time and effort if the judgment was not given.”*

The Master of Rolls further confirms that, the court should regard the wishes of the parties, express or implied:

*“The concerns of the parties to the litigation are obviously also relevant and sometimes very important. If, for their own legitimate interests, they do not wish (or one of them does not wish) a judgment to be given, that request should certainly be given weight by the court. (Of course, in some cases, the parties may request a judgment notwithstanding the fact that there is no longer an issue between them).”*

Where factors weigh equally, the desire of the parties for not having the judgment tilts the balance:

*“Where there are competing arguments each way, the court will have to weigh up those arguments: in that connection, the reasons for any desire to avoid a judgment will be highly relevant when deciding what weight to give to that desire.”*

The Master of Rolls then proceeded to consider the situation in the case:

*“In this case, I consider that the argument for handing down our judgments is compelling. First, by the time we were informed that the parties had settled their differences, the main judgment, representing the views of all members of the court, had been prepared by Thomas LJ, in the form of a full draft which has been circulated to Etherton LJ and me. Secondly, a number of the issues dealt with in that judgment are of some general significance. Thirdly, although we are upholding the judgment below, we*



*are doing so on a rather different basis, so it is right to clarify the law for that reason as well. Fourthly, so far as the parties' understandable desire for commercial privacy is concerned, we have not said anything in our judgments which are not already in the public domain, thanks to the judgment below. Finally, so far as the parties' interests otherwise are concerned, no good reason has been advanced for us not giving judgment."*

In *Barclays Bank PLC v Nylon Capital LL* there was no reference to the earlier decision of *Prudential Assurance Company Ltd v McBain Cooper (A firm) and others* [2000] EWCA Civ 172, a judgment under Practice Statement (Supreme Court: Judgments) [1998] 1 WLR 825. This case is very much like the present. In that case, like here, the parties had not even drawn the order. The judge was asked to adjourn judgment so that later he could make a Tomlin Order on an application which the parties were going to make. There was no Tomlin order already. That decision, the only difference being that the court below did not proceed under Practice Statement (Supreme Court: Judgments) [1998] 1 WLR 825, is like the present case where the request was made few days before the court delivered judgment.

*Prudential Assurance Company Ltd v McBain Cooper (A firm) and others* decision was an appeal by the defendants, supported by the claimants, against a ruling that the would hand down his written judgment in notwithstanding that parties compromised their dispute shortly before the judge was originally due to hand down his judgment. The judge tried the matter between 22nd and 29th June 1999 and completed the draft written judgment on 14th September. He sent it to parties under Practice Statement (Supreme Court: Judgments) [1998] 1 WLR 825. He fixed 18<sup>th</sup> October 1999 to deliver judgment. The judge imposed an embargo on the notification of the terms of the judgment to the parties until 4pm on Friday 15th October 1999. Just before the judge was to deliver judgment on 18th October, the parties asked the judge to adjourn hearing for him to make Tomlin order on a paper application they would be making to him. The England and Wales Court of Appeal determined that the judge below could deliver the judgment because it was written and there was an issue of public interest necessitating delivery of the judgment. Brook, LJ, with who Walker and Gibson LJJ., first stated principles applicable where, like here, judgment is not given in advance and the judgment is not under the Practice Direction:

*"Before I consider the terms of that practice statement, so far as they are material, it will be convenient to set out the governing principles of law which would have been applied in a case not affected by this new practice, where judgment was given orally, in the traditional manner, or was handed down in writing without any prior notice. "It is elementary that parties to private litigation are at liberty to resolve their differences by a compromise, and that an unimpeached compromise represents the end of the dispute or disputes from which it arose (see Foskett, The Law and Practice of Compromise (4th Edition 1996), p 90, citing Plumley v Horrells (1869) 20 LT 473 per Lord Romilly MR; and Knowles v Roberts (1888) 38 Ch D 263 per Bowen LJ at p 272).The House of Lords has on occasion declined to hear an appeal in the context of private litigation once it has perceived that the original lis between the parties is at an end, whether by virtue of a compromise or because, as in Ainsbury v Millington [1987] 1 WLR 379, there has been such a change in the underlying factual situation that the remedy sought by the appellant*

*no longer raises any live issues. In Sun Life Assurance Company of Canada v Jervis [1944] AC 111 Viscount Simon LC set out the governing principles in these terms at pp 113-114:*

*"I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellants hope to get decided in their favour without in any way affecting the position between the parties. ... I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue."*

Brooks, L.J., considers some known exceptions:

*"In Ainsbury v Millington [1987] 1 WLR 379, after restating this principle, Lord Bridge of Harwich added at p 318:*

*"Different considerations may arise in relation to what are called 'friendly actions' and conceivably in relation to proceedings instituted specifically as a test case... Again litigation may sometimes be properly continued for the purpose of resolving an issue as to costs when all other matters in dispute have been resolved."*

*In the recent case of R v Home Secretary ex p Salem [1999] 1 AC 450 the House of Lords recognised that different principles applied in cases where there was an issue involving a public authority as to a question of public law. In such a case there was a discretion to hear disputes, but Lord Slynn of Hadley said at p 457A that this discretion had to be exercised with caution. He then explained the circumstances at p 457A-B in which there might be a good reason in the public interest for proceeding to hear an appeal even though it was "academic between the parties".*

Brook, L.J., considered the situation under the Practice Direction:

*It follows that under the new practice the process of delivering judgment is initiated when the judge sends a copy of it to the parties' legal advisers. Provided there is a lis in being at that stage [Emphasis supplied], it will be in the discretion of the judge to decide whether to continue that process by handing down the judgment in open court or to abort it at the parties' request. I agree with the judge that there may well be a public interest in continuing the process, notwithstanding the parties' wishes that he should not do so, and that there can be no question of a judge being deprived of the power to decide whether or not to do so simply because the parties have decided to settle their dispute after reading the judgment which has been sent to them in confidence ...As I have said, although much of his judgment was of*

*interest only to the immediate parties to the dispute, there were three rulings on points of law which were potentially of wider interest, and a judge sitting in a specialist jurisdiction like the Technology and Construction Court is uniquely well placed to judge whether it would be of value if his judgment was a matter of public record.”*

A judgment delivered in such circumstances does not affect the compromise; it is only of value as a public record. Brook, L.J., then proceeded to distinguish this case from *HFC Bank Plc v HSBC Bank Plc* (CAT 10th February 2000), where the judge never wrote the judgment and, therefore, there was nothing to deliver.

*“I should make it clear that the situation I have been considering in this judgment is quite different from the situation which confronted another division of this court recently in *HFC Bank Plc v HSBC Bank Plc* (CAT 10th February 2000). In that case the court had granted an expedited hearing of an appeal at the request of the claimant, and the members of the court then gave priority to preparing their judgments over the preparation of judgments in earlier cases which were not of the same degree of urgency. At the beginning of the third week after the end of the hearing of the appeal counsel's clerks were told that judgment would be given on the Thursday of that week and that copies of the draft judgments would be made available to counsel at midday on the Tuesday. Early on the Tuesday morning, however, the court was told that the parties had come to terms overnight and wished that the appeal should be dismissed. The draft judgments were therefore not made available.*

*The parties had therefore not been shown the judgments which were going to be delivered at the time they settled their dispute, and this, in my judgment, makes all the difference. In the circumstances of that case Nourse LJ said at paragraph 9 that the court wished to make it clear that it would always encourage the parties to settle their differences even at a late stage and nothing the court said was intended to detract from this principle. He went on to express the view of the court that it had been the duty of the parties themselves to inform the court of the possibility of a settlement at any rate on the Thursday of the previous week when arrangements were made for a meeting in the United States in four days' time between representatives of the parties' holding companies with a view to seeing whether the dispute could be compromised even at this very late stage. It was no part of the compromise agreement that the judgments of the Court of Appeal should be suppressed, since neither party had seen the draft judgments at the time they settled their differences.”*

Were it not for want of jurisdiction, this is an appropriate case for granting an injunction restraining the respondent from exercising the power of sale under the mortgage. The compromise recorded by the court settled the dispute. The court below should have entered the consent judgment and still delivered its judgment, if justified. The court below, however, in refusing the application for stay of execution, missed the opportunity to justify delivery of the

judgment which, probably, was already written at the time of the notice. The delivered judgment has no consequences on the compromise.

In this case, it is very clear that the Court below was informed, by an application, before delivering judgment of a settlement between the appellant and the respondent. The Court below did not circulate the judgment under Practice Statement (Supreme Court: Judgments) [1998] 1 WLR 825. The judgment could not, therefore, have influenced the compromise. Even if it did, it matters less, I guess. The court below and indeed this Court are under a duty under section 14 of the Constitution to under section 13 (1) of the Constitution to strive to adopt mechanisms by which differences are settled through negotiation, good offices, mediation, conciliation and arbitration, The court below, under Order 1, rule 1(4) of the High Court (Commercial Division Rules), was obliged to allow the parties to ‘help the Court to further the overriding objectives’ by, under Order 1, rule 3 (2) of the High Court (Commercial Division Rules) , under its duty to manage cases, encourage parties to cooperate with each other in the conduct of proceedings (Order 1, rule 3 (2) (a)), encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate and facilitating the use of such procedure (Order 1, rule 3 (2) (e) and, more importantly, helping the parties to settle the whole or part of the case(Order 1, rule 3 (2) (f)). This court is similarly placed because of Parts 1-3 of the Civil Procedure Rules 1998 because of section 8 (b) of the Supreme Court of Appeal Act and Order 3, rule 34 of the Supreme Court of Appeal Rules.

Consequently, the judgment that remains is a compromise, a judgment by consent which the judge ought, even if he still wanted to deliver the written judgment, to have entered. Order 3, rule 26 of the Supreme Court of Appeal Act provides:

*“The Court shall have power to give any judgment or make any order that ought to have been made, and to make such further or other order as the case may require including any order as to costs. These powers may be exercised by the Court, notwithstanding that the appellant may have asked that part only of a decision may be reversed or varied, and may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision.”*

The court below ought to have entered the consent order, or at least hear the application for the consent order to be entered. It is not necessary though that there should be a consent order after a compromise. The law of compromise does not require a consent order to be drawn. The court below erred in refusing to enter the consent order that the parties applied for. I, therefore, order that the consent order be entered.

Section 104 (2) of the Constitution provides for the appellate jurisdiction of this court. The jurisdiction of this court is to be exercised under the powers conferred on it by an Act of Parliament:

*“The Supreme Court of Appeal shall be the highest appellate court and shall have jurisdiction to hear appeals from the High Court and such other courts and tribunals as an Act of Parliament may prescribe.*

Section 21 of the Supreme Court of Appeal Act provides:

“24 of 1968 An appeal shall lie to the Court from any judgment of the High Court or any judge thereof in any civil cause or matter:

Provided that no appeal shall lie where the judgment (not being a judgment to which section 68 (1) of the Constitution applies) is—

- (a) an order allowing an extension of time for appealing from a judgment;
- (b) an order giving unconditional leave to defend an action;
- (c) a judgment which is stated by any written law to be final;
- (d) an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree nisi on which the order was founded has not appealed from that decree:

And provided further that no appeal shall lie without the leave of a member of the Court or of the High Court or of the judge who made or gave the judgment in question where the judgment (not being a judgment to which section 68 (1) of the Constitution applies) is

- (a) a judgment given by the High Court in exercise of its appellate jurisdiction or on review;
- (b) an order of the High Court or any judge thereof made with the consent of the parties or an order as to costs only which by law is left to the discretion of the High Court;
- (c) an order made in chambers by a judge of the High Court;
- (d) an interlocutory order or an interlocutory judgment made or given by a judge of the High Court, except in the following cases—
  - (i) where the liberty of the subject or the custody of infants is concerned;
  - (ii) where an injunction or the appointment of a receiver is granted or refused;
  - (iii) in the case of a decision determining the claim of any creditor or the liability of any contributor or the liability of any director, or other

officer,  
otherwise; Cap.

under the Companies Act in respect of misfeasance or  
46:03

- (iv) in the case of a decree nisi in a matrimonial cause;
- (v) in the case of an order on a special case stated under any law relating to arbitration;
- (e) an order refusing unconditional leave to defend or granting such leave conditionally.”

The section provides the general jurisdiction of this court and limits its jurisdiction to the extent that in prescribed cases the jurisdiction would not be exercised without the permission of this court or court below.

The appellant completely misunderstood the implication of the compromise and the judgment delivered after it. While the court below could, nevertheless, deliver its written judgment, the compromise brought to an end the lis. The appellant could not appeal against the written judgment; that judgment was inconsequential and, in the words of Brook, LJ, in *Prudential Assurance Company Ltd v McBain Cooper (A firm) and others*, only a ‘matter of public record.’ The compromise remained. The appellant, if it had issues with the consent judgment could do so by a separate action. The appeal, however, to this court could only be by leave. There was no leave given.

This court, as was stated in *Mkandawire v Council for the University of Malawi* (2015) Civil Appeal No 16 (MSCA) (UNREPORTED), cherishes its jurisdiction and can and should raise matters of jurisdiction *suo motu* and *sua ponte*. The question of jurisdiction, even for the Supreme Court is a paramount consideration and can be raised, even after judgment. A court “generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in the suit.” *Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, (2007); *Toeller v. Wis. Dep’t of Corrections*, 461 F.3d 871, 873 (7th Cir. 2006). The court will act on jurisdiction even if parties omit the matter and *sua ponte* (*Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006) 526 U.S. 574, 583 (1999)); *Sharkey v. Quartantillo*, 541 F.3d 75, (2d Cir. 2008), *Da Silva v. Kinsho Int’l Corp.*, 229 F.3d 358, (2d Cir.2000)). “The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, (2006). It can be raised at the appeal stage (*Arbaugh v. Y & H Corp.*, *Levin v. ARDC*, 74 F.3d 763, (7th Cir. 1996) *Detabali v. St. Luke’s Hosp.*, 482 F.3d 1199, (9th Cir. 2007) *Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, (1982); *Galvez v. Kuhn*, 933 F.2d 773, 4 (9th Cir. 1991)). There is, therefore, no competent appeal before this court. The parties must abide by the consent judgment and compromise which, as must be, provides for its own enforcement which, if breached, will apply.

I, under Order 3, rule 26, further order that the appeal be expunged from the records of the court below and this court. I, therefore, dismiss the application for stay of execution pending appeal.

Made this 9th Day of July 2015

D.F. Mwaungulu

**JUSTICE OF APPEAL**