

IN THE MALAWI SUPREME COURT OF APPEAL SITTING AT BLANTYRE
MSCA CIVIL APPEAL NO. 32 OF 2016

[Being High Court, Lilongwe Registry, Civil Cause Number 212 of 2015]



BETWEEN

EVENESS NKHALAMBA

APPLICANT/APPELLANT

AND

ALEX NKHALAMBA

RESPONDENT

CORAM: THE HON. MR JUSTICE L. P. CHIKOPA SC JA
R Mpombeza[Mr.] of Counsel for the Applicant/Appellant
Chipembere[Mr.] of Counsel for the Respondent
Mrs S Chimtande Court Clerk/Recording Officer

RULING/ORDER

Chikopa, JA

INTRODUCTION

At the heart of this matter are distribution of matrimonial property and the custody of children consequent upon a divorce.

The parties appeared before the First Grade Magistrate Court at Lilongwe pursuant to divorce proceedings. That court dissolved their marriage. It also made orders *inter alia* granting custody of the two children of the marriage and, in the view of the applicant, a larger than appropriate share of the 'matrimonial property' especially the real property to the respondent.

The applicant was dissatisfied with the said decision. She appealed to the High Court, Lilongwe Registry. She also obtained an order from that court staying the



execution of the orders of the court of first instance the stay to subsist until the determination of the appeal.

According to the applicant the stay order specifically restrained the respondent, until the determination of the appeal, from evicting the applicant from one of the houses in issue. It also similarly restrained the respondent from disposing of the property in issue.

The appellant alleges that on May 27th, 2016 the respondent asked the High Court to discharge the appeal for want of prosecution. The applicant opposed the application. The High Court declined to grant the application. It however discharged the order of stay herein with the result that the respondent was now at liberty not only to evict the applicant from the 'matrimonial home' but also to dispose of any or all of the property in dispute.

Not being satisfied with such decision the appellant approached this court for further relief. She has appealed against the High Court's decision above. She also applied for a stay of the High Court's decision pending the determination of such appeal. As we understand her she, effectively, is asking that we immediately reinstate the order of stay while her appeal goes through the Supreme Court of Appeal. Or until it completes such journey. On an *ex parte* application we granted the order. We heard the *inter parte* application in respect thereof on June 9th 2016. This is the ruling in respect thereof.

THE PARTIES' ARGUMENTS

The applicant contended that the order setting aside the stay will occasion injustice to the applicant and render the appeal in the Supreme Court, and we daresay in the High Court, nugatory. In her view the justice of the matter demands that the stay order be reinstated until the appeal before the Supreme Court is disposed of. Specifically the applicant contends that not granting the stay will allow the respondent to evict the applicant from the house she is now occupying thereby rendering her homeless. It will also allow the respondent to dispose of the

real property in dispute. That will render any success in the appeals worthless. The applicant therefore asked this court to reinstate the stay order.

For the record we must point out that the respondent did not file any affidavit in opposition. In point of fact Mr Chipembere, who appeared on a brief from the respondent's counsel, informed us that he had come merely to seek an adjournment.

We refused to grant the adjournment. The respondent had clearly been served. He was at liberty to file an affidavit in opposition in the alternative skeleton arguments in support of his case. He chose to do neither. We could also not find any good reason why he did not communicate the request for an adjournment earlier. We allowed the application to proceed. To do otherwise would have been a travesty in our judgment.

In response to the applicant's arguments the respondent contended that the High Court proceeded correctly in vacating the stay. The applicant was dragging her feet in prosecuting the appeal. She was in other words abusing the court process. Her appeal to the Supreme Court against the vacation is thus without merit and only a further abuse of the court process. He prayed that this application be dismissed with costs.

THE ISSUES

We granted a stay of the High Court's order of vacation *ex parte* on June 3, 2016. The question is whether we should extend such grant. We think we should.

The only evidence before us alleges that the court of first instance awarded all real property to the respondent. It granted custody of the children of the marriage to the respondent. It also made no provision for maintenance of the appellant. The questions before the High Court are *inter alia* whether such is indeed the case and also whether there should be a reconsideration of the court of first instance's such order. The High Court found it necessary to grant the stay. That can only be because it found it in the interests of justice that the *status quo* be preserved until the appeal was determined. In vacating the order the High Court did not, in our

judgment, say there was now no need to preserve the *status quo*. Just that the applicant was, in its view, now abusing the court process by not prosecuting the appeal with due speed.

We agree that there is always the need for parties to proceed with speed before the courts. In the instant case however the applicant explained whatever delay there might have been. She said this was due to ongoing negotiations between the parties to try and resolve the matter out of court. This is evidence not disputed by the respondent.

In the premises we think that there was perhaps another way of dealing with the matter. It could have made an order for costs for instance. It could have issued new directions for dealing with the matter complete with time lines and sanctions in case of breaches. It was also possible for the High Court to provide for retrieval measures in case the appeal flopped or the respondent suffered unnecessary loss due to the stay order. To the extent therefore that the High Court went for a vacation of the stay order we are of the view that it did not proceed in the best way possible. It failed to pay sufficient regard to the demands of justice in this case.

More than that we find it more in keeping with the interests of justice, in the circumstances of this case that the applicant continues to stay in one of the houses in dispute than for her to look for alternative accommodation while she prosecutes the appeal. The appellate court can, we are sure, find a way of making good any loss suffered by the respondent if the appeal fails. The process might not, in our view, be so smooth if she has to relocate and only come back upon the appeal succeeding.

CONCLUSION/DISPOSITION

In our judgment the interests of justice in this case require that the stay order be reinstated the same to operate until the appeal before the Supreme Court is disposed of to finality or until a further order of a court of competent jurisdiction. The applicant's undertaking as to damages will similarly subsist. She will further

undertake to strictly abide by all directions given by the High Court in relation to the disposal of the appeal in that court.

We so order.

COSTS

These are in the discretion of the court. They will in this instance be in the cause.

Dated this June 20th, 2016 at Blantyre.



L P CHIKOPA SC

JUSTICE OF APPEAL