IN THE MALAWI SUPREME COURT OF APPEAL

PRINCIPAL REGISTRY

MSCA Civil Appeal No. 44 of 2016

(Being High Court of Malawi, Mzuzu District Registry, Civil Cause No. 44 of 2016)

Between:

Fumu Mdolo.....Appellant/Applicant

And

Bonifacio Mdolo.....1st Respondent

And

Muzipasi Moyo.....2nd Respondent

Coram: Honourable Justice A.C. Chipeta SC, JA
Amidu, of Counsel for the Appellant
Maliwa/ Msungama, of Counsel for the Respondent
Chintande (Mrs), Official Interpreter

RULING

Before me, as a single Judge of the Supreme Court of Appeal, is an application by Fumu Mdolo, to stay the execution of the judgment of the lower Court that distributed the intestate estate of late Efron Robert Mdolo, pending an appeal he

has lodged against the same judgment. This judgment was pronounced on 22nd October, 2014. The appeal was filed on 25th November, 2015 after leave to appeal out of time had been obtained. Initially the application for stay was filed *ex-parte.* I directed that it be set down *inter-partes.* In the course of preparation for, and during the hearing of, the application there arose a few teething problems. They were mainly related to failure by both sides to make return of service to the Court on the various documents they served on each other, and to the sufficiency of notice they gave to each other when so serving each other. All these problems were, however, duly resolved. I can safely say, therefore, that in the end the parties argued the application on what can be called a leveled playing field. As it is each side even managed to give notice to the other to cross-examine the other side's deponent, and indeed each side duly carried out the desired cross-examination. The parties were able to do this because by the time they were arguing the application, they had each fully read and digested all the documentation the other had filed in Court.

The application herein has been seriously contested. It has been opposed at two levels. The first level of opposition mounted by the Respondents, Bonifacio Mdolo and Muzipasi Moyo, comprises of preliminary objections against the hearing of the application by this Court. At the second level, just in case the preliminary objections should fall through, the Respondents have presented substantive arguments against the granting of the stay that has been sought, contending that the application is not merited. I recall at some point the Respondents requesting me to subdivide the hearing of this application into two, by first hearing and determining the arguments on the preliminary objections and then holding a separate hearing of the substantive stay application in the event of it surviving the preliminary stage of hearing. My view was that there was no need to complicate this interlocutory matter in the manner that had been suggested. I thus ruled that I would only have a single hearing of the application, and that in the end I would render an omnibus ruling on all the points the parties will have argued.

Having accordingly proceeded as I had directed, herewith my ruling on all aspects of the application that were argued before me. Of necessity, logic demands that in this ruling I should first attend to the preliminary objections that were raised. This is because if they succeed I shall have to dismiss the application for a stay herein *in limine.* Should that turn out to be the case, the need for me to proceed to a determination of the substantive application will immediately fall away. It is

only if the preliminary objections that have been raised do not succeed that I shall be required to proceed to a determination of the substantive part of this application as well.

As matters stand, in the preliminary objections sector of the arguments the Respondents have proffered, two distinct points have been highlighted. The first point the Respondents make is that in their view the present application has been brought under an inapplicable piece of law. As filed before this Court, the Summons for Stay of Execution cites Order 59 rule 13 of the Rules of Supreme Court and the inherent jurisdiction of the Court as its authority. The piece of law the Respondents object to, as not being applicable, is Order 59 rule 13 of the Rules of Supreme Court. They claim that by virtue of Section 8(b) of the Supreme Court of Appeal Act (Cap. 3:01) of the Laws of Malawi, the Rules of Supreme Court, of which this Order and Rule form part, do not apply to this Court.

The Respondents also contend, since the cited Section 8(b) refers to its parent Act and to the rules made under it as the main source of the practice and procedure of the Supreme Court of Appeal, and since in the case of a void in the said sources that provision points to the law and practice for the time being observed by the Court of Appeal in England for guidance, that the Appellant has in this case gone astray in using a provision of the Rules of Supreme Court as his basis for filing the present application. Citing the Supreme Court decision in **Hetherwick Mbale vs Hissan Maganga** MSCA Civil Appeal No. 21 of 2013, the Respondents have argued that the Applicant should rather have based his application on a provision in the Civil Procedure Rules of England.

Whenever local law fails to make provision on any given point of practice or procedure, they argue, it is the Civil Procedure Rules that are supposed to be used in this Court. Accordingly, they accuse the Applicant of having committed a grave sin when he chose to depend on Order 59 rule 13 of the Rules of Supreme Court in place of a provision within the applicable set of Rules. On that basis they contend that this Court cannot exercise jurisdiction on a law that does not apply to it. They thus pray that the application herein should be dismissed, and in support of this prayer they cite the case of **The State and Others vs Hon. Bazuka Mhango MP and Others** MSCA Civil Appeal No. 17 of 2009.

In my recollection and revision of all the arguments that were presented by the Applicant in this application, he omitted to directly respond to the claim that he in this instance employed an obsolete piece of law. Rather, his focus went to the second arm of the preliminary objections raised by the Respondents. If, therefore, this particular objection had been based on facts, I should probably have used the absence of a response on it to draw conclusions in favour of the objection raised. However, the arguments raised here are on matters of law. Thus, before I can agree or disagree with the line of argument presented by the Respondents on the status of the law, I need to personally revisit and analyze the law so as to come up with a sound decision, one way or the other. To begin with I quite agree with the Respondents that the main source of the rules governing the practice and procedure of the Supreme Court of Appeal in Malawi is the Court's constituting Act and the rules that have been promulgated thereunder. I further agree that in the case of absence of local provision on any aspect in this area, this Court should resort to the rules that are currently applicable to the Court of Appeal in England, and these currently happen to be the Civil Procedure Rules.

Now while this is so, it strikes me all the same that the arguments presented by the Respondents, stopping as they have done at merely identifying the supplement rules that apply to this Court, somewhat fall short of being complete. I say so because these arguments did not extend to a discussion of what law governs the practice and procedure of the High Court from which this case originates, especially in the context of what impact those rules might have on any matters that migrate from that Court to the Supreme Court of Appeal. It is to be borne in mind that the hierarchy of Courts in Malawi basically constitutes one whole judicial regime. Each level of Court in this hierarchy simply complements the others in a rising scale starting from Local or customary Courts on one leg, and from Subordinate Courts on the second leg, up via the High Court of Malawi to the Supreme Court of Appeal. In the prevailing situation, therefore, although each level of Court has its own set of procedural laws, with the way work is meant to fluidly pass from one level of Court to the next, it would not be strange for laws of one level of Court to contain transiting provisions either about the Court above or about the Court below as cases jump from one forum to the other. It is the Respondents' failure to address these linking provisions from the High Court procedure law that worries me in their presentation that condemns Order 59 rule 13 of the rules of Supreme Court as being inapplicable.

Indeed, as an example while the Supreme Court Act and its rules are primarily meant to guide the Supreme Court of Appeal, a look at them will clearly show that they also actively guide the High Court on how it should operate as the first port of call for appeals going to the Supreme Court of Appeal, and on how it should deal with consequential matters that arise from the filing of notice of appeal to the time the appeal is ripe enough for entering into the Supreme Court of Appeal. If, therefore, the law that was meant to guide the Supreme Court on matters of its practice and procedure freely makes it its business to extend guidance to the High Court on additional aspects of its practice and procedure, should it not be expected that in turn the High Court's procedure rules might also themselves have provisions, both for the ears of the High Court and the Supreme Court of Appeal, on matters that move up from the High Court to the Supreme Court of Appeal? It is my considered view, therefore, that if the arguments of the Respondents had gone beyond where they stopped, and if they had extended to the question what impact, if any, the rules governing the practice and procedure of the High Court have on the practice and procedure of this Court, then and only then they would have probably sealed all possible loopholes attending the preliminary objection they have raised to the use of Order 59 rule 13 of the Rules of Supreme Court. To my mind, therefore, the arguments they have raised in support of the objection they have taken up are half-baked.

Turning now to the side of the arguments they have omitted, I expected the Respondents to table, in supplement to the arguments they articulated on the Civil Procedure Rules, arguments identifying the rules of procedure the High Court employs, and to show why such rules should not be obeyed if they happen to provide for matters of appeal to the supreme Court and matters of stay in such instances. I must say I am well aware that at the moment there are two schools of thought in the High Court as to which English rules supplement the locally available rules of practice and procedure in that Court. As far as I know an appropriate occasion has, this far, not yet arisen for the Supreme Court to resolve this dichotomy of opinions. The present application, unfortunately, does not happen to be that awaited occasion, as the point of what rules govern practice and procedure in the High Court has neither been raised nor been argued in it. In this ruling, therefore, I only allude to this issue just because, in part, it has a bearing on the question whether or not, as contended by the Respondents in this application, Order 59 rule 13 of the Rules of Supreme Court is indeed an unacceptable authority for the bringing up of the said application.

Now, since in condemning Order 59 rule 13 of the Rules of Supreme Court the Respondents have not made the rules of practice and procedure of the High Court a part of their argument, the meaning of this is that they have left the two divergent views that are currently held in the High Court standing in competition with each other. One of these stands, whose base is the amendment that was effected by the Courts (Amendment) Act No. 2 of 2004, renders gaps left open in local law and local rules open to being filled in by the High Court making reference to "the Rules of Supreme Court 1999." The said Rules of Supreme Court have, within this stand, been understood to mean the Rules of Supreme Court that appear in the 1999 edition of the White Book that was in use in the High Court of Malawi immediately prior to the enactment of this 2004 Courts (Amendment) Act. As it were, the amendment came about to settle doubts that had emerged in view of England by then having transited to a new set of Civil Procedure Rules. Going therefore by this one of two existing stands of the High Court on the rules of practice and procedure that apply to it, it follows that the Rules of Supreme Court apply and are in use in that Court and, as just seen they include the Order and rule being challenged, yet it clearly provides for the concurrent guidance of both the High Court and the Supreme Court on the application in issue.

Now if the Rules of Supreme Court are up to date thus applicable in the High Court, and if as we see they contain provisions like Order 59 rule 13 that guide not only the High Court but also the Supreme Court of Appeal, was it not important that the Respondents address me on why we should be selective when construing such provision? Is the fact that both the Courts below and Courts above the High Court have their own procedural rules sufficient justification for treating provisions that cater for different levels of Courts for cases in transit between the levels as only applicable to one level of Court and not applicable to the other level of Court which they clearly indicate that they extend to? I see danger of subjectivity in this kind of selective understanding rules our law has blindly or otherwise co-opted into our system. Of course it must be appreciated that a jurisdiction, like Malawi, which makes it its business to borrow from external jurisdictions different sets of rules for different levels of its Courts risks ending up with either multiple or even conflicting provisions on certain aspects of its law as a result of resorting to not fully thought-out schemes of wholesale cutting and pasting of foreign law on local law.

Thus, when double or conflicting provisions emerge, I believe blame should not be placed at the door of the litigant who has been spoilt for choice *vis-à-vis* the over-borrowings and multiple choices his country's laws have availed to him. Likewise, I believe blame ought not to be placed at the door of the Court for accepting use of either of the optional laws or procedures available. I sincerely apprehend that blame for this kind of scenario, if any, should be squarely placed at the door of Malawi as a Country that prefers to cling too long for legal guidance to different segments of its colonial masters' laws, instead of standing on its own feet and promulgating all its laws. It is almost comic that 52 years after gaining its independence from the United Kingdom, English law and English procedures are very much still part of the laws of Malawi. That unfortunately is the price that must be paid, and it will continue to be paid by this Country as long as its dependence on English laws and procedures is not curtailed in favour of a comprehensive regime of local law.

A reading of Order 59 rule 13 of the Rules of Supreme Court makes it plain, I observe, that it is a provision on situations of how litigants should go about applying for stay whenever there is an appeal from a Court those rules guide to the Court of Appeal in England. In so far as those rules have been co-opted for use in the High Court of Malawi, therefore, that provision must be understood in the context of the hierarchy of Courts that exists in Malawi. Knowing as we do that in this hierarchy there is only one Appellate Court above the High Court of Malawi and that the Court in question is the Supreme Court of Appeal, there should be no doubt how the term 'Court of Appeal' should be understood when this provision is being used in Malawi. It necessarily ought to follow, therefore, that when Order 59 rule 13 of the Rules of Supreme Court, 1999 edition is being used in Malawi litigants must construe its reference to 'the Court of Appeal' as a reference to 'the Supreme Court of Appeal.' Thus, if for purposes of a stay this provision gives concurrent jurisdiction to the Court below, to the Court of Appeal, and to a single Justice of Appeal, it must in our context be understood to be respectively conferring coordinate jurisdiction on the High Court of Malawi, on the Supreme Court of Appeal, and on a single Justice of Appeal. To my mind, therefore, it would be sheer hypocrisy, in the light of one of the stands the High Court of Malawi has taken on the 2004 amendment that validated its use of the 1999 edition of the Rules of Supreme Court, to claim that for all other purposes the Rules of Supreme Court are alive, but that only Order 59 rule 13 thereof should be considered dead.

In my judgment, in so far as the High Court of Malawi still uses, or part-uses, the 1999 edition of the Rules of Supreme Court, and also in so far as adapting Order 59 rule 13 thereof to local circumstances entails understanding that provision as also conferring jurisdiction on the Supreme Court on matters of stay pending appeal, then it would be wrong to fault the Applicant's resort to that provision just to find a scapegoat technical reason for avoiding the possibility of a stay order. If as a Country we have chosen one set of foreign procedural laws for our High Court and a different set of foreign procedural laws for our Supreme Court of Appeal, and we are now ending up with these procedural rules crossing into each other's spaces, we must be ready to take the cocktail we have created for ourselves in whole without doing any selective nitpicking in it. Let those responsible for creating such situation, if we find it unpalatable, correct it, but for heaven's sake let us not punish the innocent litigant, who has not made any contribution to the creation of this situation, through subjective selection of what portions of received law will or will not apply. In light of my above observations, I do not find myself persuaded by the argument that the Applicant has erred in resorting to Order 59 rule 13 of the Rules of Supreme Court as a base for tabling this application. It is a piece of law that is applicable in the High Court and it clearly provides guidance both to the High Court and to the Supreme Court on how matters of stay on pending appeals to the Supreme Court of Appeal should be handled. For this reason I do not agree that it is an inapplicable piece of law. Accordingly, I dismiss this arm of the Respondents preliminary objections.

The second point the Respondents make in their preliminary objections to my handling of this application is to the effect that the application in question amounts to an irregular appeal. Specifically to buttress this argument, they rely on Section 21 second proviso (c) of the Supreme Court of Appeal Act, which makes it mandatory for a litigant seeking to appeal against an Order made in Chambers by a High Court Judge to obtain leave either before that Judge, or of the High Court, or of a member of the Supreme Court. On this point the Respondents have amply demonstrated that, regardless of whatever efforts the Applicant may have engaged in, he did not obtain any leave from any of the available Courts to appeal to this Court against the High Court's refusal of the stay he applied for in that Court. On this point I notice that the Applicant as good as admits the point raised and argued by the Respondents. He has however, almost in mitigation of his concession, argued that he virtually concurrently lodged an application for leave

to appeal against the refusal of stay in the High Court with the High Court as filed the present application in this Court. The lower Court not having given him a date to look into his leave application, and this Court having received his application without any qualms, he readily came here and argued his stay application. It was on 29th August, 2016 that he was lamenting that since 4th July, 2016, when he filed his application for leave to appeal, he had not yet been given audience by the High Court to prosecute his said application. He thus pleaded with this Court to bear these efforts of his in mind when deciding on this point, considering that he needed a stay rather urgently.

I intend, if possible not to get too deep into an academic discussion of the problem this objection appears to depict. In fact if this were truly a situation that needed the leave of either the Court below or of this Court before this application could be fielded in this Court, I would have been the first to throw it out without assigning it any date of hearing. In my understanding of the law, however, the present application did not, and does not, require any Court's prior sanction before being filed in this Court. I say so first because an application for stay in this Court, once a like application has been refused by the High Court, does not come by way of appeal. Instead it comes as an application for a rehearing of the refused application in this higher Court. Indeed by paragraph 3 of his affidavit in support, the Applicant made it clear he was approaching this Court with a 're-application' following the High Court's denial of relief when he applied there first.

As already observed above, Order 59 rule 13 of the Rules of Supreme Court, a piece of law among the rules governing the practice and procedure of our High Court, does not give appellate jurisdiction to this Court over applications for stay that have been refused by that Court. Rather it gives concurrent jurisdiction to the Judge that handled the initial stay application, to the High Court in general if that Judge is for some reason not available, and to a single Judge of this Court, to look into such application again if necessity brings it up. Further, as both the Practice Notes under Order 59 rule 13 of the Rules of Supreme Court make clear and as Order 1 rule 18 of the Supreme Court of Appeal Rules provide, in situations where two levels of Court have been given concurrent jurisdiction over a particular application, it is not a matter of multiple choice which Court a litigant takes his application first to. The litigant must in such instance first take his application to the lower of the two Courts, and only when it has been refused should he engage the higher of the two Courts with the same application. To me

this is what has happened in this case. The Applicant rightly took his stay application to the Judge who had pronounced the judgment he is appealing against in the Court below. When that Judge summarily refused to grant him the stay, he correctly re-launched that application in this Court. Can it genuinely be said that he erred in doing so what that is exactly what the law requires him to do?

In this case, apart from benefitting from the arguments both sides have presented on the history and progress of the case from which an appeal and this application for stay have emanated, I called for and have perused through the lower Court's case file. It is plain to me that in compliance with the requirements of the law the Applicant, as prospective Appellant, duly on 4th January, 2016 secured the leave of the High Court to appeal out of time against the judgment it had delivered on 22nd October, 2014. It is also plain to me that on 29th June, 2016 the same said Court on the papers, and not after any hearing, determined the *ex-parte* application of the Applicant for stay of the judgment pending the appeal to this Court by denying it. Matters of stay being within the concurrent jurisdiction of that Court and this Court, and the requirements of Order 1 rule 18 of the Supreme Court of Appeal Rules having been fulfilled in the application having in the first instance been taken to that Court, which refused it, jurisdiction immediately arose in this Court to be receptive to rehear the application if the applicant should choose to bring it here. That is why when that application came on 25th July, 2016 what I found important to change about it was its *ex-parte* nature. I made it *inter partes.* I saw and still see no need that the Applicant should first have sought leave to appeal against the lower Court's refusal of stay on 29th June, 2016 before presenting the same application to this Court for rehearing. I repeat my hearing of this application does not amount to hearing an appeal against the lower Court's refusal of stay that was endorsed by that Court on the *ex-parte* application papers that were filed. My holding, therefore, is that I have jurisdiction to hear and determine this application. On the second arm of the Respondents' preliminary objections too, the Respondents fail, and I dismiss their arguments.

This now leaves me only with the task to determine the substantive application for stay in this matter. It is the Applicant's case that he is the Administrator of the estate of Efron Robert Mdolo, and that after the High Court had delivered its judgment distributing the estate herein, he observed that there were mistakes that would require clarification or correction in the said judgment. An instance he

has cited is one to the effect that the Court pronounced Mbulunga Estate to be 164 hectares big when its correct size is only 132 hectares. This, he claims, led the lower Court into apportioning incorrect and unrealistic numbers of hectares to the various beneficiaries of the deceased's estate. Trusting these were matters that could be mutually resolved among the beneficiaries, he ended up delaying in approaching the Court to rectify the observed errors. He discovered, he said, that by the time he was approaching the Court for this it had already perfected its judgment. Further, the Applicant claims, that when he raised the issue of clarification or correction from the reaction of the Respondents it became a very contentious issue. At this point, he said, he realized that only an appeal could resolve these concerns. He thus obtained leave to appeal out of time, and it is pending the hearing and determination of that appeal that he has lodged the present application for stay.

Now, apart from the above concern relating to the correct size of Mbulunga Estate and realistic distribution of the said Estate, the Applicant as Administrator of this estate is also concerned that while most beneficiaries, including immediate family members, are patiently waiting for the outcome of the appeal before they can claim the lots of the said Estate they were apportioned by the judgment, beneficiary Muzipasi Moyo, whom he considers distant, has in execution of the judgment that has been appealed on already entered upon Mbulunga Estate and claimed the 10 hectares the lower Court gave to him. It is the Appellant's contention, however, that during the life time of the deceased, this particular beneficiary (i.e the 2nd Respondent in this application) together with three brothers of his had permission from the deceased to cultivate only up to a total of 4 hectares of this estate. He thus in the upcoming appeal questions the wisdom of the lower Court's decision in giving 10 hectares of Mbulunga Estate to this man and also 10 hectares thereof to each of his remaining three brothers, when virtually the most all these four could use of Mbulunga Estate with the deceased's leave during his lifetime was a total of four hectares for all four of them.

Execution of the lower Court's judgment by the second Respondent, or by any other beneficiary, before the determination of the pending appeal, the Appellant claims, has the potential to prejudice the more deserving beneficiaries of the estate. Indeed, the Appellant expresses surprise, and it's a point he will take up in the appeal, that in its distribution of Mbulunga Estate the lower Court skipped apportioning any part thereof to one of the biological sons of the deceased, a Dr

Austin Mdolo, who he feels was more entitled to a share than some of the beneficiaries the Court apportioned parts of Mbulunga Estate to. It is on this account that the Applicant prays for an Order staying the execution of the judgment herein, which Order if granted should consequently suspend the Warrant of Possession the 2nd Respondent took out to enable him execute the judgment and get his share, pending the hearing and determination of the appeal.

The Applicant realizes that under Order 59 rule 13 of the Rules of Supreme Court an appeal does not operate as an automatic stay of the proceedings in which it has been taken. He thus concedes that the fact that an appeal has since been lodged in this matter does not bar any of the successful litigants, including the Respondents, from reaping the fruits of their litigation. He cites **Monk vs Bartlam** (1891) 1 Q.B. 346 as affirming the position that unless satisfied that there are good reasons for doing so, a Court does not make it a practice to deprive a successful litigant of the fruits of litigation he is *prima facie* entitled to pending an appeal. He, however, argues and in part leans on **Wilson vs Church (No. 2)** (1879) 12 Ch. D. 454, in contending that a Court is likely to grant a stay of execution where, *inter alia,* the lodged appeal would otherwise be rendered nugatory by such execution. He then points out that per **Becker vs Earl's Court Ltd** (1911) 56 S.J. 206 the granting or not granting of a stay of execution entirely lies in the discretion of the Court, and that it depends on the existence or otherwise of special circumstances. Through citation of a number of Malawian cases, including the Supreme Court decision in **Nyasulu vs Malawi Railways Limited** (1993) 16 (2) MLR 394, the Applicant has sought to demonstrate that what he has articulated represents the stand of the law in Malawi on this subject, and to pray that he be granted the stay he seeks. I in passing need to mention that by his lengthy Affidavit in Reply, the Applicant has taken time to refute the blame the Respondents have by their Affidavit in Response heaped on his head in the administration of this estate in a bid to show that by his conduct the Applicant should not be allowed to access the discretionary remedy he seeks.

In opposing this application, the Respondents first raise the point that applications for stay are equitable in nature, and that as such no one who comes to the Court with unclean hands is entitled to partake of such type of remedy. Persons who are guilty of improper conduct, they contend, even if unfairly treated by their adversaries, are not entitled to benefit from the discretion of the Court while their hands remain dirty. By way of example they cite **Smelter**

Corporation vs O'Driscoll [1977] IR 305 where they say misrepresentations made by the representatives of the plaintiff led to the Court's refusal of an application for a decree of specific performance. *Vis-à-vis* this matter, the Respondents accuse the Applicant of improper conduct. They allege *inter alia* that instead of distributing the deceased's estate since the pronouncement of the judgment in the matter on 22nd October, 2014, the Applicant has been busy harassing fellow beneficiaries and squandering the estate of the deceased. They claim also that the Applicant has suppressed facts. They claim that it is not correct that one of the sons of the deceased was not allocated land from the deceased's estate. On basis of these allegations and many others, they accordingly claim that the Applicant's hands are too dirty for him to be entitled to the discretionary remedy of stay that he has applied for.

In discussing the principles that govern the consideration of stay applications, it is clear that the Respondents have referred to the same principles the Applicant has already highlighted. The only difference I see is that apart from also citing the case of **Church vs Wilson (No. 2)** earlier cited by the Applicant, they have cited and quoted from Malawian cases that are different from those cited by the Applicant. These include cases such as **National Bank of Malawi vs D. Nkhoma t/a Nyala Investments** MSCA Civil Appeal No. 6 of 2005 and **Mike Appel & Gatto vs Saulos Chilima & Guava Internatiional Ltd** MSCA Civil Appeal No. 20 of 2013, which when examined also just expound on the same competing principles a Court must weigh before coming to a decision whether to grant a stay or not in slightly different language. Commenting on the ground of appeal pertaining to the correct size of Mbulunga Estate, the Respondents have trashed it as a non-issue and they have suggested that the estate is even bigger than the 164 hectares that have been distributed. They mention 180 hectares instead. On the issue that one of the deceased's biological sons (i.e. Dr Austin Mdolo) has not benefitted from Mbulunga Estate, the Respondents have countered that complaint by saying he has already benefitted by getting an entire different estate to himself from even before the deceased had died.

Let me at this stage observe that within this application for stay, the parties have raised a lot of issues. The affidavits they have filed in Court, the cross-examinations of each other's dependents which they carried out, and the arguments (written and oral) that they have traded while presenting this application, closely touch on matters the full Court that will sit to hear and

determine the pending appeal will be seized of, apart from even touching on issues that are well outside the scope of the appeal. Candidly speaking, these are certainly matters my Court, which is merely seized of this application for stay, is not mandated to look into at this point in time. Issues, therefore, concerning whether Mbulunga Estate is 132 hectares, or 164 hectares, or 180 hectares big, and whether or not what the lower Court shared out to beneficiaries represents all that could have been parceled out, or it leaves a reasonable balance of the Estate as not to cause any worries about how realistic or correct the distribution is, are issues that squarely lie in the province of the Court that will hear and determine the appeal. It would be a usurpation of that Court's jurisdiction, therefore, if by the backdoor of this stay application I was, so to speak, to anticipate the determination the Appellate Court will make on those points. Equally, I would be going off-tangent my task as set out in this application if, before the appeal has been heard, I was to make it my business to determine concerns such as whether or not the biological son of the deceased, Dr Austin Mdolo, should or should not have a share in Mbulunga Estate for whatever reason, or whether his having been given one or other Estate is or is not a sufficient substitute for his foregoing a portion of Mbulunga Estate. I will thus not succumb to the temptation I have been offered to kind of give a preliminary determination of the appeal that is pending.

I will also say from all the documentation the parties have filed, and from all the evidence they elicited, and from all the arguments they have presented me with, what is very clear is that the appeal that is pending raises issues which it will be worthwhile for the Appellate Court that will be seized of it to look into and conclusively determine. Both sides to that appeal recognize that Mbulunga Estate may be viewed as being 132 hectares or more, depending on which angle one looks at it. Thus for me when the Applicant emphasized 132 hectares instead of the hectares the Respondents would have preferred him to highlight, he was not necessarily either suppressing facts or coming to my Court with unclean hands. Why the lower Court did not distribute 132 hectares of that Estate, and why instead it distributed 164 hectares of it when the Respondents actually claim it is as big as 180 hectares, are matters the Appeal Court will be best placed to look into and pronounce its decision on. In this scenario the question that arises for me then is whether it would represent justice if even before these questions are determined those beneficiaries that are vigilant like the second Respondent should be taking away their apportioned parcels of land from Mbulunga Estate,

when potential exists that the appeal decision could well affect the portions they were given by the judgment of the lower Court.

Further, as regards what Dr Austin Mdolo is or is not entitled to in Mbulunga Estate, it strikes me that it is equally vital for purposes of the stay application that is before me that I tease the justice and fairness of beneficiaries like the second Respondent taking their shares even before the Supreme Court has pronounced its decision on whether that son deserves any portion of Mbulunga Estate, and if so how much of it. Considering, therefore, that by his appeal the Applicant suggests that this biological son has unjustifiably and totally been left out of the Estate in issue, while the Respondents dispute this claiming that his not getting a share in it does not matter because of his having gotten a whole different estate altogether to himself as his share, I would tend to think it best that Mbulunga Estate is left as intact as possible for the period of time before the Supreme Court decision on appeal is known. In the prevailing circumstances, I find my mind visited by questions such as: supposing the Appellate Court decides to redistribute Mbulunga Estate so as to accommodate this biological son that is alleged to have been omitted, what then will happen to the beneficiaries who will already have taken their portions in advance if there is need that they give up all or portions of what the Court below gave them?

In my judgment, even though the Respondents have tried their best to downplay the significance of the appeal that is pending, it is a fact that *vis-à-vis* the distribution of Mbulunga Estate, within the intestate estate of the deceased, this appeal raises pertinent issues, which are worth being looked into before it can be affirmatively said that the lower Court did justice in this case. I am very aware that the Respondents say the main reason the Applicant should not get a stay is that he has unclean hands. I have already said choice by the Applicant to emphasize one hectarage out of the three different sizes of Mbulunga Estate that are available depending on the angle one chooses to view it from is neither a suppression of facts nor a misconduct that makes the Applicant's hands dirty. As regards whether the Applicant has harassed fellow beneficiaries, squandered the estate of the deceased, and done or not done all the other things the Respondents have accused him of, all I can say is that all those issues have been raised in their Affidavit in Opposition, which has been countered by a very long Affidavit in Reply. For Affidavits that are so diametrically opposed, the question I must consider is why I should believe the contents of one affidavit and not the

other when such cross-examination as was carried out by each side was restricted to very limited portions of those affidavits, leaving the balance of accusations and refutals at large. If I may say so, in raising such a long litany of accusations regarding the conduct of the Applicant in the administration of the deceased's estate, the Respondents have gone way outside what this appeal is about and have raised issues that cannot be determined in a simple application for stay of execution. These are matters that would be fit material fit for determination on a full trial, if a matter raising them via pleadings rather than through an affidavit opposing a stay had been commenced. I really, therefore, cannot on this limited application treat all the allegations they have raised as proved and hold that the Applicant has been shown to have dirty hands. Indeed, if there is substance in the allegations, which the Applicant has taken steps to refute by a like affidavit, the Respondents could have searched for and pursued a legal solution for such conduct of the Administrator rather than wait, as they did, to merely raise them as allegations for opposing a stay application. Accordingly, I do not agree that the Applicant has been proven to have dirty hands, and he must, therefore, not benefit from the discretionary remedy he has applied for in this Court. Convinced as I am that the appeal is worth pursuing, and that it will indeed be rendered nugatory if the lower Court judgment is enforced before it has been reviewed as intended by the Appeal Court, I grant the Applicant's prayer herein for stay of the same, and consequently also for stay of the Warrant of Possession the second Respondent obtained from the Court below, and I do so with costs.

Made in Chambers the 6th day of September, 2016 at Blantyre.

A.C. Chipeta SC
JUSTICE OF APPEAL