IN THE MALAWI SUPREME COURT OF APPEAL SITTING AT BLANTYRE

MSCA Civil Appeal No. 68 of 2016

(Being High Court of Malawi, Principal Registry, Civil Cause No. 44 of 2012)

Between:

The State

The Minister of Finance.....Respondent

Ex-parte Steven Majighaheni Gondwe .....Applicant

Coram: Honourable Justice A.C. Chipeta SC, JA

R. Mhone and Mapopa Kumwenda, of Counsel for the Applicant

G. Nkhata, Senior Deputy Chief State Advocate, of Counsel for the Respondent

Minikwa, Official Interpreter

RULING

Before me is a multi-barreled *inter partes* Summons. By the title of the said Summons, the Applicant appears to be seeking three Orders at one go. The Orders in question have been listed as one for leave to appeal, another for the enlargement of time within which to appeal, and the last being for a Stay of Execution pending appeal. However, in the body of the Summons, the Applicant appears to have limited himself to just seeking the leave to appeal and the obtaining of an Order extending time within which to so appeal. As it turns out, at the end of his Affidavit in Support, the Applicant also only prays for two Orders,

and these are the ones that appear in the body of his Summons. I suppose in the circumstances it is safe for me to conclude that at the outset of his mission the Applicant had desired to have a Stay Order in addition to the two other Orders his Summons and Affidavit in Support are advocating for, but that some how in the end he abandoned the desire to obtain the said Stay Order.

In a way, I must say, it strikes me that this sort of abandonment of prayer would make sense in a case like this. I say so because the decision the Applicant wishes to appeal against is one that dismissed his application for judicial review. Assuming, therefore, that the Applicant had persisted in his desire to obtain a Stay Order against the execution of the lower Court's decision, two questions would have immediately arisen for me to consider. First would have been the question whether as *per* Civil Procedure Rules 52.7[1] and 23.2 [1] the Applicant had prior to this Summons attempted to obtain a Stay Order before the Judge that decided his matter in the Court below, because only then would his application have been acceptable in this Court in terms of Order 1rule 18 of the Supreme Court of Appeal Rules. Hereafter my second concern would have been one bordering on logic, the question being whether a person can obtain a Stay Order against the execution of a decision that dismisses his case. If such a Stay Order were obtained, one might ask, would the parties revert to the position where the Court has not even decided their case, or to where the Court has decided the case but the dismissal is of no effect? I really have a hard time contemplating how one can fear the execution of an Order dismissing a case, just as I have difficulties contemplating how one can stay the dismissal of a case. I will, therefore, consider the intent to seek a Stay Order in the title of this Summons either as an unfortunate addition in the Summons, or as an abandoned project on the part of the Applicant, and will no more refer to it.

Focusing, therefore, on the two Orders that have both been raised in the Summons and in the Affidavit in Support, I note that the Summons that seeks them has, for authority, been anchored in Sections 21 and 23(2) of the Supreme Court of Appeal Act (Cap 3:01) of the Laws of Malawi, as read with Order 3 rule 5 of the Rules of Supreme Court. *Vis-a-vis* these authorities, let me outright say that I am willing to check and see how Sections 21 and 23 (2) of the Supreme Court of

Appeal Act help the Applicant in backing up his quest for the Orders he has shown sustained interest in. However, I am reluctant to, and will not check on the Order 3 rule 5 of the Rules of Supreme Court that has also been cited as one of the authorities for bringing up this Summons. This is for the simple reason that the Order and rule in question are not part of the procedural law of this Court. While I a m cognizant of the existence of a debate in the High Court of Malawi about whether its procedure rules come from the 1999 edition of the Rules of Supreme Court 1965 or from the Civil Procedure Rules 1998, and that for that reason I must accept that part of the High Court continues to use the Rules of Supreme Court 1965 as they appear in the 1999 edition of the White Book, I would not go so far as to allow litigants coming from the High Court to, as a matter of course, walk through to this Court with those very rules.

Section 8(b) of the Supreme Court of Appeal Act is crystal clear in spelling out the rules of procedure that apply to this Court. It says that the practice and procedure that is to be followed in this Court is to be found within the Act governing the Supreme Court of Appeal and within the Supreme Court of Appeal Rules that have been promulgated under that Act. It is also very clear when it says that it is only in the event that these two sources of law fail to make provision for any point of practice or procedure that this Court should look elsewhere for guidance. In that event it urges the Court to look at the law and practice *for the time being* observed by the Court of Appeal in England and to adapt the same to its use. Now, there was a time when the Court of Appeal in England was using the Rules of Supreme Court 1965, even as they appear in the 1999 edition of the White Book, as its rules of practice and procedure. At that time this Court, using the same Section 8(b) of the Supreme Court of Appeal Act, had the freedom to supply whatever gaps it experienced in local law by looking up to those rules and adapting them to its use.

However, since the advent of the Civil Procedure Rules 1998, the Court of Appeal in England no longer uses the Rules of Supreme Court 1965 of whatever edition, not even the 1999 edition thereof. Thus, whenever the Supreme Court of Appeal Act and its rules fail to make provision for any particular point of practice or procedure in this Court, we no longer have the liberty to seek guidance from the

Rules of Supreme Court as the Applicant has done by referring to Order 3 rule 5 thereof in the title to his Summons. It follows, therefore, that the Applicant has cited this Order and rule in this Court without proper justification. I do not see what may have mandated him to borrow a piece of procedural law that is only applicable in the High Court and to bring it for application in this Court.

Turning to the facts of the matter, as reflected in the affidavit of the Applicant, I observe that they reveal great resilience on his part in the pursuit of the matter he now seeks to lodge an appeal on. He discloses first that he started as far back as 1993, when he commenced a case in the High Court for da mages for loss of fixed and movable properties and for false imprisonment. He claims that the said case was dismissed on the account that the Forfeiture Act had legalized what he had suffered under its use. He then says that when the Republican Constitution of 1994 created the National Compensation Tribunal to look into problems like he had experienced, he lodged an application for compensation on the same matters with that new institution, and that he managed to get an interim award from it. However, he indicates, that the Tribunal ended up getting dissolved before it had given him his final award. On this basis, he says in May, 2008 he commenced fresh proceedings in the High Court, through which he hoped he could get his remaining compensation, but that an Assistant Registrar dismissed his action. He further claims that at that dismissal it was suggested to him that he could instead, *via* judicial review, pursue the appropriation of funds to the defunct National Compensation Tribunal.

Acting on the suggestion, he said he then duly thereafter filed an application for Judicial Review with the High Court, which he says was heard by a Judge on 14th June, 2013. He complains, however, that the ruling in those proceedings was only delivered on 20th October, 2015, and that he was not present on the occasion because he had not been communicated to. He further claims that he only got to know about the said ruling, which dismissed his judicial review for not having been made promptly, in August, 2016 when he travelled from Rumphi to Blantyre to inquire about it. By then, he laments, he was already outside the time limits the law allows aggrieved parties to appeal against such decisions as of right. As such, he says he in this case not only needs leave to appeal, but he also needs

enlarged time within which to so appeal, should he be granted the leave to appeal. Further still, he says that after discovering that the ruling in his case had already been delivered a year plus ago, it took him time to secure a Lawyer as he claims that he lives in Rumphi and had to travel to Blantyre for that purpose. He, however, believes that he has good grounds for appealing, and that as it is not his fault that he could not appeal in time, he asks for both the leave to appeal and for enlarged time within which to so appeal.

Now, despite having cited it as one of the authorities for his Summons, the Applicant does not anywhere in his Skeleton Arguments mention Section 21 of the Supreme Court of Appeal Act. He thus does not make any effort to manifest why at all he cited that provision, even though it is a provision on Civil Appeals. He, however, does make reference to the Section 23 of the same Act, which he also cited as authority. Indicating that under subsection (1) of that provision litigants only have 14 days to appeal against interlocutory Orders and six weeks only to appeal against final Judgments, the Applicant quoted subsection (2) of the provision to show that it empowers this Court to extend time for giving notice of intention to appeal even where the time for giving such notice has expired.

At this juncture the Applicant then makes a surprise move. He goes to Order Ill rule 4 of the Supreme Court of Appeal Rules to buttress his prayer for enlargement of time, even though he did not feature that provision anywhere either in his Summons or in his Affidavit in Support. Incidentally, however, the Order and rule in question require that an application for enlargement of time should feature good and substantial reasons for the failure to appeal within the prescribed time and that it should also feature grounds of appeal that *prima facie* show a good cause why the appeal should be heard.

Next after this, the Applicant makes reference to a number of cases, which he claims have dealt with the subject of enlargement of time. However, contrary to good practice, he did not attach any copies of the case authorities he so cited to his Skeleton Arguments. Ideally he should have done this, and highlighted the portions of the judgments in question that he was specifically relying upon. The first case was **Tratsel Supplies Ltd vs Mwakalinga** MSCA Civil Appeal No. 119 of

1987 (unreported), which he says held that the reasons for failure to appeal in time must be good, substantial, and satisfactory. He then refers to **A.G.A Karim** & **Sons vs AMI Rennie Press (Malawi) Ltd and Another** MSCA Civil Appeal No. 4 of 1998 (unreported) and **Chikhadzula vs Pearl Insurance Co. PLC** (1992) 15 MLR ... for the proposition that the requirement that grounds of appeal must *prima facie* show a good cause why the appeal should be heard has been construed to mean that such grounds must carry prospects that the appeal might succeed if it is so allowed the enlarged time applied for. The Applicant then expresses the belief that the fact that he only got to know of the existence of a ruling in his case long after the time he could have appealed had elapsed does amount to a good and substantial reason for his failure to appeal in time.

One disadvantage of not making the authorities one seeks to rely on available to the Court is that such party gives the Court the assignment to on its own go to the Library to search for the cited authorities. Now, for reported cases this might be a relatively easy task to perform, but for unreported cases, this clearly amounts to an unnecessary burden for the Court to bear on behalf of Counsel. It is worse if the citations made are incomplete, and therefore offensive to paragraph 2 of Practice Direction No. 1 of 2010. For instance, in this case for the **Chikhadzula** case I had to look for Volume 15 of (1992) Malawi Law Reports, where I discovered that the only reported case bearing that name is to be found at page 92. Reading the report, I see nothing in it resembling a discussion on grounds of appeal that could qualify an Applicant for enlarged time within which to appeal. The authority in question simply deals with an application in the High Court for an interlocutory injunction. Why then it was cited in support of the proposition that if a party seeks enlarged time to appeal he must display grounds of appeal with a chance to succeed is not clear to me. On this discovery, therefore, I felt I would be wasting more time if I went to the Library to look for the unreported cases the Applicant had additionally cited.

Next, the Applicant cautions against Courts being unduly restrictive when called upon to enlarge time to appeal. In this regard, he quotes from **Thusita Perera vs**

Leasing and Finance Co Ltd , M. Kaporo t/a Meks Variety Center and Colombo Agencies, which he cites as being reported in MRL 412. Again here I found myself in some difficulty. I could not tell if MRL was a substitute for MLR. The latter would mean Malawi Law Reports. I cannot say what Law Reports the former represents. In case, however, this was indeed a typing error and what was intended was MLR, then still I did not know where to begin looking for this case as the year and the volume of the report it appears in were not cited. I thus did not even have the opportunity to verify the quotation the Applicant indicates he took from that case.

This aside, the Applicant goes on to insist that his grounds of appeal show a *prima facie* chance that his appeal could succeed. The Applicant does not, however, hereafter make any attempt to discuss the grounds of appeal he has in store for the intended appeal with a view to hint at the *prima facie* prospects they carry. The Applicant merely filed grounds of appeal in Court along with his Skeleton Arguments. I suppose he expected me just to read them on my own and to analyze them without any commentary from him. He, in the end, prayed that he be granted leave to appeal and that he be also given time within which to so appeal.

The Summons herein happens to be opposed. There is on record an Affidavit in Opposition sworn by Senior Deputy Chief State Advocate as well as Skeleton Arguments. I fear I will not be in a position to extensively refer to this affidavit. This is because, in my view, it more addresses the substance of the appeal that the Applicant intends to lodge than the preliminary questions that have been raised by this Summons. Just to recap, the questions before me are whether time for appealing having expired I should still allow the Applicant to appeal, and whether I should then allow him extended time within which to so appeal. Indeed, on presentation the Respondent summarized his arguments against this Summons into three points. The first is that the Applicant is claiming a balance of K 251,000,000.00 plus as balance of his compensation, when the National Compensation did not have capacity to make any award beyond K 10,000,000.00 to any claimant. Certainly if the appeal will come up, time will be ripe for the Respondent to present this kind of argument to the Court. The second is that the

amount claimed was not supported by any evidence in the Court below. Again, in my view, this argument suits the substantive appeal, should it come up. It needs first to be decided if the appeal should be lodged out of time before this argument can be considered. The third point is that the judicial review that was held in the lower Court had neither been instituted with leave nor been instituted within an extension of the time given by any Court within which it could be commenced. Yet again, this is an argument that would better suit the appeal itself, rather than a Summons whether the appeal should at all be allowed to be filed. The way I see it, chances are that if I attempted to tackle the three questions the Respondent raises, I would somehow, in advance, be determining the appeal itself, which is not my province a single Justice of Appeal presiding over the present Summons.

A point I must, however, pay attention to is the observation by learned Counsel for the Respondent to the effect that it is now eleven months since the decision the Applicant intends to appeal against was pronounced in the High Court. It was his additional observation that there is no explanation given by the Applicant for this delay.

I must say that somehow this Summons has given me some anxious moments. When it first came before me I thought it was a very easy application. However, I soon started seeing that some complications were imbedded within it. I have already highlighted some of those complications. On the Applicant's part they include the filing of a three-pronged Summons with prayers that are only two pronged, the inclusion in the application of a request for an Order to stay the execution of a decision that dismissed the Applicant's judicial review, the abandonment of a portion of the filed Summons without explanation, the citation of a piece of law in the Summons that is not followed up in the arguments in its support, the further citing in the Summons of a piece of procedural law that is not applicable in the Supreme Court of Appeal, and the anchoring of prayers in the Skeleton Arguments in pieces of law that were not cited in support of the filling of the Summons. On the part of the Respondent, as just shown, he compounded the Summons through his employment of arguments that largely related to the

substance of the appeal as opposed to presenting arguments addressing the issues of leave to appeal and/or of enlarged time within which to appeal.

Beyond all this, however, the Applicant somewhat puzzled me with the manner in which he presented his application. He merely introduced it as an application for enlargement of time, and he then alluded to the Affidavit in Support as showing a number of things that have led him to file this application. He made no reference to the title of the Summons which seems to be after three different Orders. Apart from referring to the Affidavit in Support as the main source of the background to the Summons, he did not even adopt it. Further, he did not even refer to or adopt his Skeleton Arguments. It is after seeing all this that I realized that the Summons before me is not as easy as I had, at first, summed it up to be.

Be this as it may, from a combination of the presentation I got at the hearing of this Summons, and of my full reading of all the documents the parties have filed in support and in opposition to it, it is clear that the Applicant is desirous of appealing in this case, and that he realizes that he is very much out of time. It is also clear that he has tried to explain why he is seeking to appeal now, as opposed to appealing much earlier on, and why he thinks he deserves to be given enlarged time to do so now. With these questions being so clear, despite the multiple errors the parties have committed as I have pointed out above, I think it still remains my duty to determine the Summons I have been presented with. On the law that is applicable, I am in no doubt that the time within which the Applicant could have appealed as of right in this case expired ages ago in terms of the limits Section 23 of the Supreme Court of Appeal Act sets down. Regardless, therefore, of which way the judicial review he commenced is looked at, both the 14 days as well as the six weeks that provision alludes to expired a long time ago, in fact well before the year 2015 had come to an end if we reckon time from the delivery of the decision meant to be appealed against i.e. 20th October, 2015. For that reason, it makes sense that the Applicant first found it fit to seek leave to appeal, as he is otherwise now legally barred from appealing due to the lapse of the time allowed for appealing.

However, allowing the Applicant to appeal now instead of appealing almost a year ago will entail that he be also allowed enlarged time within which to appeal. To qualify for enlarged time to appeal, however, depends on the extent to which he satisfies the requirements of the law as captured in Order Ill rule 4 of the Supreme Court of Appeal Rules. That Order and rule, which the Applicant included in his Skelton Arguments although without preamble, happens to be the right piece of law to guide me on this issue. It requires *inter alia* that good and substantial reasons for failure to appeal in time be given. Now in this case if, as the Applicant complains, the Court took some two years from the hearing of the Applicant's judicial review to the date it pronounced its ruling on the same, and if, as he further laments, it did not even notify him when it was so delivered its ruling, with the result that it almost took the Applicant another year before he discovered that the decision had been pronounced, then can it really be said that the Applicant is to blame for not appealing within the time limits of the law? I hold here that the Applicant was the victim. He could neither dream when the ruling would come up for delivery, nor could he dream that the ruling had been pronounced. He, therefore, has good and substantial reasons for his failure to appeal within the time the law would have allowed him to appeal as of right in this matter.

However, Order Ill rule 4 of the Supreme Court of Appeal Rules has an additional requirement to the one above before this Court can hold that the Applicant deserves enlarged time to appeal. It further requires that an application like this be also supported by grounds of appeal which *prima facie* show cause why the appeal should be heard. Now, although the Applicant did not make any effort to expound on why he felt he has good grounds of appeal, and although his citation of case authorities was somewhat disastrous, he at least filed his grounds of appeal in the Court along with his Skeleton Arguments. In the circumstances I had no choice but to have a brief look at them. I notice that they show that the Applicant plans to accuse the Judge in the Court below of having committed multiple errors of law and of fact in the decision he rendered. These accusations, *inter alia,* include complaints of wrong shifting of the burden of proof, wrongful refusal of the enforcement of payment of the remaining compensation, self-

contradiction of the Judge in the decision he made, disregard of the evidence of the Applicant, mistaking the Applicant's application for enforcement for a re litigation of the matter, and deciding the case contrary to the weight of the evidence etc...The question I bore in mind, as I went through these grounds of appeal, was whet her they *prima facie* show cause why the appeal should be heard.

As I have earlier indicated the task to tackle grounds of appeal in any meaningful detail lies with the three-member Judge-panel that will be set up to hear the appeal, should I allow this appeal to be lodged. My assessment of the presented grounds of appeal is thus not meant to be as deep as that which the Appellate Court will have to make. Viewing, therefore, the grounds of appeal the Applicant has displayed, which *inter alia* seek to show that the Judge in the Court below committed various errors before ending up with a dismissal of the Applicant's case, all I can say is that the points he so intends to raise from the defined angle I am supposed to view them, appear to me to reach the *prima facie* threshold that has been set down. In my judgment, therefore, this Summons must succeed, and I so allow it to succeed with costs. Accordingly, I grant the Applicant leave to appeal against the judgment of 20th October, 2015 out of time, and I at the same time enlarge his time for so appealing by seven days from today.

Made in Chambers the 9th day of November, 2016 at Blantyre.

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A. C. Chipeta SC

JUSTICE OF APPEAL