



IN THE SUPREME COURT OF APPEAL SITTING AT BLANTYRE

MSCA CIVIL APPEAL NO. 35 OF 2017

(Being High Court of Malawi – (Lilongwe District Registry) – Commercial Case No. 132 of 2016)

BETWEEN

MANICA (MALAWI) LIMITED.....APPELLANT

AND

CHRISTOPHER MALIKENI t/a MPANGANANJI INVESTMENTS ...RESPONDENT

CORAM: Justice Anthony Kamanga, SC, JA  
Katuya of Counsel for the Appellant  
Kalasa of Counsel for the Respondent  
Mrs. Chimtande Recording Officer

#### RULING

Justice Anthony Kamanga, SC, JA

##### 1. Introduction

1.1 On 23<sup>rd</sup> May, 2017, the Appellant issued Summons for an application for a stay of the proceedings in the High Court (Lilongwe District Registry) in Commercial Case No. 132 of 2016) (the “proceedings”), pending the determination of an appeal against a judgment entered by the court below on 1<sup>st</sup> March, 2017. The application for a stay of the proceedings was lodged pursuant to O. 59 r. 13 of the Rules of the Supreme Court which provides as follows-

*“13.- (1) Except so far as the court below or the Court of Appeal or a single judge may otherwise direct-*

- (a) an appeal shall not operate as a stay of execution or of proceedings under a decision of the court below;*
- (b) no intermediate act or proceeding shall be invalidated by an appeal. ... ”.*

2. Background.

2.1 In order to appreciate the basis of the application for stay of the proceedings, it is necessary to outline the relevant facts in this matter.

2.1.1 On 8<sup>th</sup> August, 2016, the Respondent commenced proceedings against the Appellant for damages in the sum of K12,000,000 for loss of goods in the form of hardwood logs (the "goods").

2.1.2 On 17<sup>th</sup> August, 2016, the Appellant filed a defence denying liability. In its defence the Appellant, among other things, asserted that the loss of the goods was caused solely by the Respondent's "negligence and/or wilful conduct", and further that the goods did not belong to the Respondent who, therefore, had no capacity to sue the Appellant.

2.1.3 On 12<sup>th</sup> September, 2016 the Respondent applied to amend the Writ of Summons to reflect that the Respondent was "CHRISTOPHER MALIKENI t/a MPANGANANJI INVESTMENTS".

2.1.4 On 19<sup>th</sup> October, 2016, the Appellant applied to amend its defence. The Appellant's proposed amendments to its defence, among other things, sought to plead a liability exclusion clause in the contract between the parties, and also, plead a counterclaim for storage charges.

2.1.5 On 24<sup>th</sup> October, 2016, the court below granted each party's application to amend the pleadings as stated in paragraphs 2.1.3 and 2.1.4.

2.1.6. On 4<sup>th</sup> November, 2016, the Respondent filed a reply to the Appellant's amended defence and a defence to the Appellant's counter-claim. In the reply to the Appellant's amended defence the Respondent denied that the liability exclusion clause was applicable and, in the defence to the counter-claim, the Respondent denied liability for storage charges; in the alternative, the Respondent pleaded that the claim for storage charges, which the Respondent denied, should be set off against the Respondent's claim K24,000,000 against the Appellant.

3. Mediation

3.1 The case file of the court below indicates that the parties engaged in mediation. However, following representations made on behalf of the parties that they failed to reach a compromise to settle the matter and that the mediation should be terminated, the court below, on 7<sup>th</sup> February, 2017, directed as follows-

*"Directions*

*Since the parties have failed to reach a compromise in settling the matter, I hereby terminate mediation. The matter will proceed to trial before J. Manda accordingly."*

4. Scheduling Conference

4.1 The case file of the court below indicates that the matter was initially set down for a Scheduling Conference on 16<sup>th</sup> February, 2017, but the Scheduling Conference was subsequently adjourned to 1<sup>st</sup> March, 2017.

4.2 The case file of the court below also indicates that during the Scheduling Conference on 1<sup>st</sup> March, 2017-



(a) Counsel for the Respondent stated that the Respondent's claim in this matter was for the sum of K24,000,000 (there is no indication on the case file when the amount of the claim was amended);

(b) Counsel for Appellant disputed that the value of the goods was K24,000,000 and that the Respondent must prove that;

(c) the court below inquired from Counsel of the Appellant whether the loss occurred at the hands of the Appellant, and Counsel for the Appellant stated that the loss occurred at the Appellant's premises, but that the Respondent must prove the quantity of the logs lost;

(d) the court below thereupon concluded that the Appellant had admitted liability for the Respondent's loss and that the only issue in dispute was the quantity or number of the logs involved in the loss; that there was no reason to set down the matter for trial; that the amount being claimed by the Respondent should be assessed by the Registrar; and the court, accordingly, entered judgment for the Respondent; and

(e) the court below entered judgment for the Appellant on its counter-claim relating to storage charges and ordered the Registrar to assess the amount the amount of the counter-claim.

5. The Appellant's appeal against the decision of the court below

5.1 On 15<sup>th</sup> March, 2017, the Appellant filed a Notice of Appeal, pursuant to section 21 of the Supreme Court of Appeal Act and O. III r 2 of the Supreme Court of Appeal Rules, against the decision of the court below. (I note that the Notice of Appeal was file in the "Commercial Division Registry Lilongwe" and not with the Supreme Court of Appeal Registry, Blantyre).

5.2 The grounds of appeal as set out in the Notice of Appeal are as follows-

*"3.1 The learned Judge in the lower court erred in law in entering judgment against the [Appellant] at the scheduling conference when there was no application to that effect by either party;*

*3.2 The learned Judge in the lower court erred in law in entering judgment against the [Appellant] at the scheduling conference without a trial, that is to say, without hearing any evidence from the parties or arguments on points of law arising in the matter;*

*3.3 The learned Judge in the lower court erred in law in ambushing counsel by raising issues and deciding on them without prior notice to the parties and without hearing any evidence and legal arguments on them;*

*3.4 The learned Judge in the lower court erred in law in unjustifiably barring [Appellant] from applying to amend its defence in order to raise further points of defence and threatening to cause the arrest of the [Appellant's] Managing Director if the [Respondent] dared to raise the defence of public policy due to the illegality of the subject matter of the [Respondent's] claim;*

*3.5 The learned Judge in the lower court erred in law in entering judgment for the [Respondent] for the value of timber to be assessed by the Registrar when the [Respondent's] claim was in effect for liquidated damages despite claiming general damages in the prayer section of the statement of claim;*



3.6 *The judgment of the lower court was entered arbitrarily, capriciously and unfairly and is therefore perverse.*”.

6. *The Appellant's application for stay of proceedings*

6.1 On 21<sup>st</sup> April, 2017, the Appellant filed in the court below Summons for an application of stay of the proceedings in this matter, pending the hearing of an appeal against that judgment. The application was heard in court below on 11<sup>th</sup> May, 2017, and was dismissed by the court on the same day.

6.1.1 In dismissing the Appellant's application for a stay of the proceedings the court below, among other things, reiterated its view that there were no triable issues in this matter. The court below also observed that the Appellant never applied for leave to appeal, and stressed that, in any event, such leave to appeal would not have been granted.

6.2 The Appellant now comes to this Court by its application lodged on 23<sup>rd</sup> May, 2017 to stay the proceedings in the court below – essentially to stay the assessment of damages by the Registrar – pending the determination of the appeal against the judgment entered by the court below against the Appellant.

7. *Submissions on behalf of the Appellant*

7.1 During the hearing of this application on 13<sup>th</sup> June, 2017, Counsel for the Appellant adopted the affidavit that had been sworn in support of the application as well as the “Heads of Argument” that had been in support of the application in the court below.

7.2 The gist of the submissions and arguments for the Appellant in support of the application to stay the proceedings are contained in the following paragraphs of the affidavit filed in support of the application-

*“13. ... [That] the proceedings from which the judgment complained of arose are checkered by procedural impropriety; [that] the learned Judge seized the occasion which was meant for scheduling [conference] or giving directions as to the future conduct of the matter up to trial as an occasion to raise issues and be addressed on them when the parties were not prepared for such eventuality; [that] the learned Judge raised issues and made determinations on them without regard to the parties' wish to amend their pleadings and in the absence of evidence given by competent witnesses; [and that] the learned Judge repeatedly assumed what would have been the facts and made findings of fact and other determinations based on what he assumed to have been the facts;*

*14. [That] the judgment of the lower court is simply outrageous, perverse and an affront to rules of natural justice;*

*15. [That] the Appellant [and in fact both parties] will be highly prejudiced and exposed to inconvenience and will incur unnecessary costs if the proceedings on the judgment appealed against were allowed to proceed, pending appeal; [that] the parties will have to go through assessment of damages and incur costs when the judgment appealed against is likely to be set aside on appeal; [that] if the judgment is set aside, the case will have to go for full trial [after which it will then be determined whether or not the matter should go for assessment of damages, a contingent which may or may not occur depending on the outcome of the full trial*



16. [That] it is therefore inexpedient to allow the assessment of damages to proceed while the appeal ..... is outstanding.”.

7.3 During the hearing of this application on 13<sup>th</sup> June, 2017, Counsel for Appellant also made the following further arguments submissions-

- (a) that purpose for which, pursuant to Order 14 of the High Court (Commercial Division) Rules (Cap. 3:02 sub. leg. p.146), the matter was set down for a scheduling conference on 1<sup>st</sup> March, 2017, was for the court below to map the way forward to trial, including giving directions or a timetable for steps to be taken on such matters as admission, exchange and inspection of documents; details of witnesses, and whether the witnesses include expert witnesses, and if so how their testimony will be given; the exchange of witness statements; and the date for trial and date for pre-trial conference;
- (b) that at the scheduling conference a Judge may raise issues, but may not analyse the facts of the case and make findings of fact, or require counsel to give evidence; and
- (c) that our system of justice is adversarial, and the Judge was not entitled to enter judgment for and against the parties unless the parties agreed on liability or made an appropriate application in that regard; and Counsel cited *Malawi Railways Limited v Nyasulu* MSCA Civil Appeal No. 13 of 1992.

8. Respondent's Affidavit in Opposition and Submissions on behalf of the Respondent

8.1 During the hearing of this application on 13<sup>th</sup> June, 2017, Counsel for the Respondent adopted the affidavit in opposition and the skeletal arguments that had been filed on 5<sup>th</sup> June, 2017. The Respondent's response in opposition to the application, may conveniently be summarised as follows-

8.1.1 That the decision of the lower court to enter judgment for the Respondent on the claim and enter judgment for the Appellant on the counter-claim was made after consulting both parties [when it appeared that the parties could not agree on the date the Appellant's servants stole the 3 containers of hardwood which was the subject of the contract of bailment; that the Appellant never expressed the intention to appeal against the judgment at the time; and further that the Appellant should have refused to enter judgment on the counter claim.

8.1.2 That before the court below entered judgment on the claim, Counsel for the Appellant was asked whether it was true that the contents of the three containers were stolen by the Appellant's servants and based on Counsel's affirmative response the court below [rightly] came to conclusion that it would be a waste of the court's time to proceed to trial; that the claim arose from the fact that the Respondent's goods had been stolen by the Appellant's employees and the Appellant had admitted that fact.

8.1.3 That it is not "fair" to fault the court below for entering judgment at the scheduling conference because it is the court's discretion at that stage of the proceedings to give directions as to which issues should go to trial; and that besides the judgment was subject to assessment.

8.2 Counsel for the Respondent also referred this Court to the High Court (Commercial Division) Rules and, in relation to the claim, argued and submitted that, in accordance with Order 1 rr. 2 and 3 of the Rules and in furtherance of the stated overriding objective-

- (a) the court below identified issues which required a full investigation and trial, and was convinced that there were no such issues in view of the admission by the Appellant that the goods missed and the Appellant was vicariously liable, subject to assessment of damages by the Registrar;



(b) the court below disposed of the matter expeditiously with minimum costs to the parties.

8.3 Despite the fact that there was no application for summary judgment in this matter, Counsel for the Respondent referred this Court to Order 7 of the High Court (Commercial Division) Rules and suggested that the decision of the court below was justified in terms Order 7 rr. 2 and 3 of the Rules.

8.4 Counsel for the Respondent further referred this Court to Order 18 of the High Court (Commercial Division) Rules which provides that “*no appeal shall lie against a decision of a Judge in an interlocutory matter unless the decision has the effect of completely disposing of a matter*”. Counsel for the Respondent argued and submitted that the decision of the court below to enter judgment for the Respondent on the claim was “an interlocutory order which is caught up by Order 18 [and] as such no appeal lies against such judgment....”.

8.5 With specific reference to the application for stay of the proceedings, Counsel for the Respondent argued and submitted that there are no “special circumstances” in this matter to justify a stay of the proceedings; that the fact that judgment was entered in the course of a “scheduling conference does not qualify as a special circumstance so as to move this Court to order a stay of assessment proceedings.”.

8.4.2 Counsel for the Respondent also argued and submitted that “the judgment entered was subject to assessment by the Registrar; no assessment has been made; [and], therefore, the present application appears premature”.

8.4.2.1 Counsel for the Respondent further argued and submitted that the judgment of the claim was “acquiesced by both Counsel [and] it does lie with either Counsel to appeal for it to be stayed.”.

#### 9. Whether the proceedings should be stayed pending the determination of the appeal

9.1 I have carefully considered the arguments and submissions on behalf of both parties, as well as the case authorities referred to by both Counsel in their skeleton arguments and cited in the course of their submissions. I am most grateful to both Counsel.

9.2 I bear in mind that the grant or refusal of stay of proceedings is at the discretion of the Court. I also bear in mind that my duty at this stage is not to determine the merits of the appeal. However, I need to be satisfied that the issues raised for or against the granting of a stay of the proceedings are sufficient to justify the exercise of my discretion one way or another. (See: *Attorney General v Sunrise Pharmaceuticals and Chombe Foods Products* MSCA Civil Appeal 11 of 2013.

9.3 The cardinal principle in determining a stay of proceedings pending the determination of an appeal should, in my considered view, be the same as the principle applicable to stay of execution of a judgment, pending the determination of an appeal, namely, that a successful litigant should not be deprived of the fruits of litigation, unless there are sufficient reasons for doing so.

9.3.1 For a long time, until the decision of the Supreme Court of Appeal in *Mike Appel & Gatto Ltd v Saulos Chilima* MSCA Civil Appeal No 20 of 2013, our courts were guided by the following principles-

(a) the court does not make it a practice to deprive a successful litigant of the fruits of litigation;



(b) the court will consider whether there are special circumstances which mitigate in favour of granting the order of stay of execution of judgment, and the onus is on the applicant to prove or show such special circumstances;

(c) the court would likely grant a stay of execution of judgment where the appeal would be otherwise rendered nugatory, or the appellant would suffer loss which would not be compensated in damages;

(d) where an appeal is against an award of damages, stay of execution of a judgment would normally be granted if the applicant satisfies the court that if the damages were paid, there will be no reasonable prospect of recovering the damages in the event of the appeal succeeding; and

(e) whether or not an appeal has a good chance of success is not a ground upon which a court will order a stay of execution of a judgment.

9.4 In *Mike Appel & Gatto Ltd v Saulos Chilima* the Supreme Court of Appeal, while accepting these principles, noted that there was no reason why the discretion of the court should be fettered by the straight jacketed application of special circumstances, and the Court advocated the approach adopted in the English cases of *Hammond Suddards Solicitors v Agrichem International Holdings* 2002 EWCA Civ. 2065 and *Moat Housing Group-South Ltd v Harris* The Times January, 13 2005 CA.

9.4.1 In *Hammond Suddards Solicitors v Agrichem International Holdings* the Court held that-

*".... The court has discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or the other or to both parties if it grants or refuses a stay. In particular, if a stay is refused, what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any moneys paid to the respondent...."*

9.4.2 In *Moat Housing Group-South Ltd v Harris* it was held that in determining whether to grant a stay of execution of judgment, regard must be had, among other things, to the potential prejudice to the parties; the paramount consideration in granting or refusing to grant a stay of execution of judgment is the potential prejudice to either or both of the parties, and the risk of injustice to one or both of the parties.

10. Counsel for the Appellant has submitted that the good prospects of success of the appeal in this matter is a ground for a stay of the proceedings. Indeed, as rightly pointed out by Justice Twea, JA in *Attorney General v Sunrise Pharmaceuticals and Chombe Foods Products* (supra), *"when one takes the broad view of "sufficiency" of reasons or the "frivolity" of [applications] which are argued before this court all the time one can see that such arguments call on the court to assess the strength of the case. ..."*

11. During the hearing of the application to stay proceedings, Counsel for the Respondent argued and submitted that the judgment of the court below was "an interlocutory order", and that in terms of Order 18 of the High Court (Commercial Division) Rules was not appealable. It seems to me that Counsel raised this point as one of the reasons in opposition of the application to stay the proceedings in the court below. Without in any way wishing to determine whether it is competent for the Appellant to pursue the appeal, I wish to observe that



there is an obvious difference between an interlocutory order and an interlocutory judgment; in my view the below court entered an interlocutory judgment not order for the Respondent on the claim; by its nature an interlocutory judgment envisages an assessment of damages. As was stated by Justice Mwaungulu, JA in *Attorney General v Sunrise Pharmaceuticals and Chombe Foods Products* (supra), an interlocutory judgment, including a summary judgment, is final on liability except that certain aspects of the judgment such as value, damages, or interest, require ascertainment or further determination.

12. The issue which arises in this application is, having regard to all the circumstances obtaining in this matter, what is the risk of injustice to one or the other party in these proceedings if a stay of the proceedings, pending the hearing of the appeal, is granted or refused; alternatively, what is the potential prejudice or risk of injustice to either of the parties if a stay of the proceedings, pending the hearing of the appeal, is granted or refused.

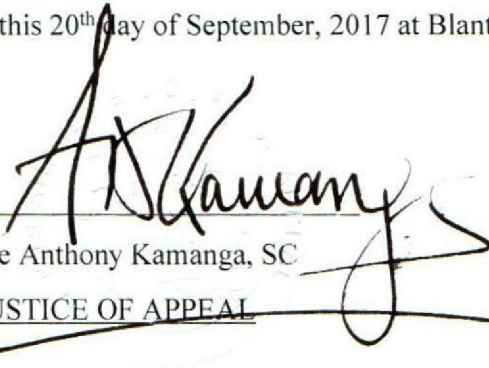
12.1 On the face of it, the proceedings in the court below appear to have been riddled with procedural irregularities; the judgment appears to have been entered during a scheduling conference, and on the basis of an analysis of the pleadings and responses by counsel to questions put to them by the court. There was no application before the court by either party to enter judgment. There certainly were no witness statements filed, and it is doubtful whether there was any evidence for the court below to consider or analyse. Furthermore, it appears that the Respondent's claim, which was for K12,000,000, was increased to K24,000,000 during the scheduling conference without a formal amendment of the pleadings. I see no justice, but grave injustice and prejudice, to the Appellant to enforce against him a judgment seemingly riddled with procedural irregularities, and in respect of which no evidence appears to have been adduced. In my considered view, it would be utterly unjust and unconscionable to enforce against the Appellant a judgment seemingly riddled with procedural irregularities, and in respect of which no evidence appears to have been adduced and considered.

12.2 In any event, to the extent that serious issues of legality, regularity and excess have been raised in appeal in respect of the decision of the court below, I am of the firm view that this is a proper case for granting a stay of proceedings, pending the determination of the Appellant's appeal.

12.3 I, accordingly, grant the Appellant's application for a stay of proceedings, and order the stay of the proceedings, pending the determination of the Appellant's appeal.

12.4 Costs will be in the cause.

Pronounced in Chambers this 20<sup>th</sup> day of September, 2017 at Blantyre.

  
Justice Anthony Kamanga, SC

JUSTICE OF APPEAL