IN THE SUPREME COURT OF APPEAL SITTING AT BLANTYRE

MSCA CIVIL APPEAL NO. 66 OF 2017

(Being High Court of Malawi – Commercial Case No. 187 of 2017)

BETWEEN

LINGTON MASTER PHEKANI.....APPELLANT

AND

NBS BANK LIMITED.....RESPONDENT

CORAM: Justice Anthony Kamanga, SC, JA

Gondwe of Counsel for the Appellant

Mpaka of Counsel for the Respondent

Ms. Masiyano Recording Officer

RULING

Justice Anthony Kamanga, SC, JA

1. *Introduction*

1.1 In this application, Lington Master Phekani, the Appellant, on 14th November, 2017, issued summons for an interim injunction to restrain NBS Bank Limited, the Respondent, from exercising its powers of sale over Property Title No. Blantyre West 412 situated in the City of Blantyre, pending the hearing and determination of an appeal against the decision of the High Court (Commercial Division) in Commercial Case No. 189 of 2017 refusing to vary a consent order, dated 19th July, 2017, entered into between the parties herein and sanctioned by the court below.

2. *Background*

2.1 In order to appreciate the basis of the application for the interim injunction, it is useful to outline the relevant undisputed facts in this matter.

2.2 On 19th July, 2017, the Appellant and the Respondent obtained a consent order in the court below with respect to the rescheduling of a certain debt of K67,282,522.13 owed by the Appellant to the Respondent. The repayment of the debt was secured by the Appellant's residence, Property Title No. Blantyre West 412 situated in the City of Blantyre,

2.3 The consent order was in the following terms-

"CONSENT ORDER

BY CONSENT OF THE PARTIES HEREIN IT IS HEREBY ORDERED as follows-

1. THAT the debt owed by the [Appellant] to the [Respondent] inclusive of interest up to 31st August, 2017, BE and is HEREBY agreed at K67,282,522.13.
2. THAT subject to the remainder of the terms hereof, the [Respondent] SHALL and HEREBY stops charging the interest from 1st September, 2017, provided that in the event of any further default interest shall be charged on the outstanding sum at the commercial rate from 1st October, 2017 until the whole debt is paid in full.
3. THAT the [Appellant] SHALL pay the debt herein on or before 30th September, 2017, failing which the [Respondent] shall be at liberty to proceed with the realization of security over title number Blantyre West 412 and/or any form of execution on the judgment debt without any pre-condition whatsoever.
4. THAT subject to compliance herewith and save for purposes of enforcement as provided herein, the within action SHALL be and IS HEREBY discontinued with costs to be borne by the [Appellant].

Dated this 19th day of July, 2017

GONDWE &PARTNERS
Legal Practitioners for the [Appellant]

DESTONE & CO.
Legal Practitioners for the [Respondent

REGISTRAR".

2.4 The Appellant failed to pay the outstanding debt on 30th September, 2017, in accordance with the terms of the consent order of 19th July, 2017. Consequently, the Respondent, on 4th October, 2017, by letter reference number LEGAL/MCP/phekani – 10/17, informed the Appellant that the Respondent was proceeding to realise the security for the debt. The communication to the Appellant was in the following terms-

"....As you are aware the Bank was served with an injunction restraining it from proceeding with sale. A consent order was entered [into] between you and the bank accepting your request to pay the debt before 30th September, 2017 failing which the bank shall be at liberty to proceed with the realization of security over title number Blantyre West 412.

Since you have failed to pay the debt as per the consent order the Bank is now proceeding with realization of security.

We trust you have been guided accordingly....".

2.5 On 19th October, 2017, the Appellant lodged an application in the court below to "*vary the consent order to allow the Appellant to settle the debt owed to the Respondent by 30th December, 2017*". The court below, on 19th October, 2017 dismissed the application to vary the consent order. The Appellant, on 6th November, 2017 filed a notice of appeal against the decision of the court below dismissing the application to vary the consent order. The grounds of appeal, as set out in the notice of appeal, are as follows-

*"1. The learned Judge erred in law and in fact by declining to grant an order varying the terms of the consent order by extending the period to 30th December, 2017 during which period the Appellant would have redeemed [*his property].

2. The learned Judge erred in law by declining to grant an order of variation of the consent in view of the likelihood of the settlement of the debt by 30th December, 2017.

3. The learned Judge erred in law by failing to consider the Appellant's alternative source of financing confirmed by letter of credit for US$821,340.69 in favour of Lomangudi Poles for the supply of wooden materials.....for the Rural Electrification Program (MAREP) which funds would help the Appellant [redeem] his property.

4. The Ruling by the learned Judge was against the weight of the evidence...".

2.6 On 14th November, 2017, the Appellant filed the present application for an *interim injunction* pending the hearing and determination of the appeal. It is pertinent to observe that no such application or similar process was filed in the court below prior to the filing of the application in this Court.

2.6.1 The application is supported by a sworn statement of the Appellant in which the Appellant, among other things, states that-

(a) his undertaking in consent order dated 19th July, 2017 to pay the debt by 30th September, 2017 was based on assurances by the Malawi Government, under his contract with the Government, which he has exhibited as "LP1", that a part payment would be made to him before 30th September, 2017;

(b) the Government is yet to start paying him, and that because of this he has failed to comply with the repayment terms of consent order;

(c) that he has an alternative source of financing in the form of a confirmed letter of credit in favour of Chitawira Procurement which he has exhibited as "LP2",

and the Appellant, accordingly, prayed for an order of interim injunction to restrain the sale of his property by the Respondent, pending the hearing and determination of the appeal.

3. <u>*Submissions on behalf of the Appellant*</u>

3.1 During the hearing of this application on 23rd November, 2017, Counsel for the Appellant adopted the sworn statement in support of the application as well as the skeleton arguments that had been filed in support of the application for an order of interim injunction, and made arguments and submissions.

3.2 The gist of the arguments and submissions for the Appellant in support of the application for an order for an interim injunction is that, having regard to all the circumstances of this case, namely, the court below having refused to grant an order varying the terms of the consent order of 19th July, 2017 to extend the repayment period thereunder to 30th December, 2017 when he had available alternative financing and when it was possible for him to repay the debt by 30th December, 2017, and further having regard to the fact that the Appellant was liable to lose his residence-

(a) the matter raises a serious issue which needs to be determined;

(b) the Appellant has a legitimate right to protect; and

(c) the interest of justice favour the granting of an interim injunction.

4. *Respondent's affidavit in opposition to the application for an interim injunction*

4.1 The Respondent, on 22nd November, 2017, filed a notice of intention to rely on a sworn statement in opposition to the summons to vary the consent order in the court below, as well as skeleton arguments. During the hearing of this application on 23rd November 2017, Counsel for the Respondent adopted the sworn statement in opposition and the skeleton arguments that had been filed.

4.2 The Respondent's response in opposition to the application for an interim injunction is that, based on the facts of this case-

> "*(i) the Appellant has no arguable claim to the right he seeks to protect because of the consent order he subject[ed] all his rights to; that the proposed appeal and the [application for an interim] injunction completely lack merit in so far as they seek to interfere with the terms of the consent order without bringing up a fresh action questioning that consent order;*
>
> *(ii) the Appellant has no arguable claim to the right he seeks to protect because he seeks by the present application to undo what has already been done; [that] he cannot use an injunction to reverse the implementation of the terms of the consent order;*
>
> *(iii) the Appellant has given any reason or any satisfactory reason at all why he has not asked the court below first for an injunction before coming to the Supreme Court".*

4.2.1 The Respondent also argues and submits that, based on the principles enunciated in *Bhima v Bhima* 7 MLR 165 and *Registered Trustees of Smallholder Farmers Fertilizer Revolving Fund of Malawi v Registered Trustees of Tobacco Association of Malawi* [2001-2007] MLR (Com) 212 a "consent order constituted a new agreement between the parties whose effect was to put an end to the proceedings and thus precluding the parties from taking any further steps in the action; that the consent order could not be set aside/varied except through a fresh action; and that, consequently, neither the application for an interim injunction nor the appeal against the refusal of the court below to vary the terms of the consent order was sustainable.

4.2.2 The Respondent further argues and submits that, based on *New Building Society v Henry Mumba* (MSCA Civil Appeal No 26 0f 2005) [2001-2007] MLR 243, the Appellant is, in any event, on the facts of this case, not entitled to an permanent injunction; and that the present application for an interim injunction is, therefore, not sustainable, and the Respondent cites *Joyce Mlotha v New Building Society* Civil Cause No. 2539 of 2000 (High Court Principal Registry)

4.2.3 Lastly, the Respondent argues and submits that the Appellant has failed to comply with Order I r 18 of the Supreme Court of Appeal Rules (Cap. 3:01 sub. leg. p. 14) which provides that *whenever an application may be made either to the court below or to the Supreme Court of Appeal, it shall be made in the first instance to the court below but if the court below refuses the application, the applicant shall be entitled to have the application determined by the Supreme Court of Appeal.*

5. *Order I r.18 of the Supreme Court of Appeal Rules*

5.1 It is pertinent to emphasise that the Appellant's appeal in this matter is against the refusal of the court below to vary the consent order by extending the repayment date specified therein from 30th September, 2017 to 30th December, 2017. However, the Appellant has come straight to this Court with to seek relief by way of an interim injunction to restrain the enforcement of the terms of the consent order, pending the hearing and determination of the appeal. There is no indication from the documents filed by the Appellant that he had applied for, but was refused, interim relief in the form of an interim injunction [or stay] in court below.

5.1.1 Order I r 18 of the Supreme Court of Appeal Rules clearly states that *whenever an application may be made either to the court below or to the Supreme Court of Appeal, it shall be made in the first instance to the court below but if the court below refuses the application for interim relief, the applicant shall be entitled to have the application determined by the Supreme Court of Appeal.* Thus, ordinarily, an applicant who seeks interim relief should first make an application in the court below. If the court below refuses to grant the application, the applicant is entitled to once again make the application in this Court before a single Justice of Appeal. The single Justice of Appeal may, in effect, vary, discharge or reverse any order that the court below may have made with respect to the applicant's application.

5.1.2 During the hearing of this application, Counsel for the Respondent argued and submitted that in this Court, based on the same information that was before the court below, the Appellant has only changed *the name of the instrument by which he seeks to interfere the consent order*; that the Appellant has not gone to the court below with the new instrument or application, but has come straight to this Court for interim relief.

5.1.2.1 I would myself go much further than Counsel for the Respondent and observe that it seems to me that by coming straight to this Court with an application for an interim injunction the Appellant is also in effect asking this Court, on the same facts as were before the court below, to vary the terms of the consent order of 19th July, 2017, which the court below refused to vary. Indeed, if, for the sake of argument, this Court were minded to grant the interim injunction sought by the Appellant, and having regard to the timeframe for the hearing and determination of the appeal, the Appellant would in effect achieve his quest to vary the terms of the consent order by extending the repayment date of the loan to the Respondent beyond 30th December, 2017. It also seems to me that if, for the sake of argument, this Court were minded to grant the interim injunction sought by the Appellant, the decision of the court below, which is being appealed against, would in effect be overturned by a single Justice of Appeal, rather than a full bench of the Supreme Court of Appeal, and the appeal itself would be rendered nugatory.

5.2 I entirely agree with the views expressed by Counsel for the Respondent. The Appellant should have lodged this application in court below first before coming to this Court. In coming straight to this Court for an interim injunction the Appellant has skipped an important step which cannot be cured by Order V r 1 of the Supreme Court of Appeal Rules. See: *Finance Bank of Malawi Ltd v Nicholas Albertus Heyns and Nedbank Malawi Ltd.* MSCA Civil Appeal No 45 of 2005.

6. *Leave to appeal*

6.1 In accordance with paragraph (b) and (c) of the second proviso to section 21 of the Supreme Court of Appeal Act, the Appellant requires leave of the court below or this Court to appeal against the order of the court below refusing to vary the consent order of 19th July, 2017.

6.2. During the hearing of the application herein Counsel for the Respondent argued and submitted that, in relation to the notice of appeal against the decision of the court below, the Appellant has not sought and obtained leave to appeal, either from the court below or this Court; and consequently, there is no "valid appeal" filed in the Supreme Court of Appeal. In response Counsel for the Appellant argued and submitted that this was a substantive issue to be considered by the Supreme Court of Appeal during the hearing and determination of the appeal.

6.3 While ordinarily, a notice of appeal should be filed after the grant of leave, the proviso to Order III r 3 (2) of the Supreme Court of Appeal Rules does not prohibit the filing of a notice of appeal before the granting of leave to appeal (See: *The Registered Trustees of Thandizane Carpenters Shop v Foletsani Tchawango* MSCA Civil Appeal No 2 of 2012.). There is, in my view, nothing irregular about this because it is permissible to file a notice of appeal before obtaining leave to appeal; the proviso to Order III r 3 (2) of the Supreme Court of Appeal Rules expressly provides that *"..nothing in this subrule shall be deemed to prohibit an appellant from filing a notice of appeal prior to the hearing of the application for leave to appeal."*.

6.4 However, I do not share the view expressed by Counsel for the Appellant that the omission to seek and obtain leave to apply is a substantive matter to be determined during the hearing of the appeal. It is pertinent to observe that not only is there nothing in documents filed by the Appellant to indicate that leave to appeal has been sought and obtained, there is no indication whatsoever that there is pending any such application either before the court below or this Court. The application herein for an interim injunction is, among other things, premised on the fact that an appeal has been filed, and on the high prospects of success of the appeal in respect of which the Appellant has filed grounds of appeal. If, as it must, this Court is required to inquire into the prospects of the success of the appeal for purposes of determining whether to judiciously exercise its discretion to grant or to refuse to grant the sought the interim injunction, then whether there is in fact a valid appeal filed in the Supreme Court of Appeal becomes material. If there is no valid appeal filed because leave to appeal has not been sought and obtained, then it cannot seriously be argued that there is before this Court a proper application for an interim injunction "pending the hearing and determination of an appeal".

7. Whether the application for an interim injunction should be granted pending the hearing and determination of the appeal

7.1 After carefully considering 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 in relation to the issue whether this is a proper case to grant an interim injunction, pending the hearing and determination of the appeal, I am not inclined to grant the application for the reasons set out under paragraphs 5 and 6, namely, the Appellant's failure to first file this application in the court below before coming to this Court, as required by and in accordance with Order I r 18 of the Supreme Court of Appeal Rules, and also, the Appellant's failure to seek and obtain, from the court below or this Court, leave to appeal against the order of the court below refusing to vary the consent order of 19th July, 2017 as required by and in accordance with paragraph (b) and (c) of the proviso to section 21 of the Supreme Court of Appeal Act.

7.2 In any event, on the facts of this case, I would still have refused to grant the application for an interim injunction, pending the hearing and determination of the appeal for the reasons set out below.

7.2.1. I bear in mind that the grant or refusal to grant the application for an interim injunction 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 an interim injunction 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).

7.3 The Appellant in effect argues and submits that the appeal raises serious triable issues, including his legitimate right to protect his property, and further that on the facts of this case, the interest of justice favour the granting of an interim injunction.

Whether there are serious triable issues

7.3.1 With respect to whether there are serious triable issues, it is pertinent to observe that on the face of it, under the consent order, the Appellant did not secure any right to restrain the enforcement by the Respondent to realize the security in the event of failure to pay the debt by 30th September, 2017. Indeed, there is nothing in consent order to support the assertion that the obligation of the Appellant to pay the debt by 30th September, 2017 was subject to receipt of money from Malawi Government, and his contract with the Government which he has exhibited as "LP1" does not provide for a part payment to be made to him before 30th September, 2017; or at all.

7.3.2 Furthermore, the assertion that the Appellant has available an alternative source of financing in the form of a confirmed letter of credit is not supported by the document which the Appellant has exhibited as "LP2". "LP2" indicates that the letter of credit is in favour of "Chitawira Procurement" not the Appellant. Chitawira Procurement is not a party to the consent order.

7.3.3 The question whether a party to consent order is entitled to review or vary a terms of consent order by way of any process, in my view, appears to be well settled. In the absence of a clause permitting either party to seek a review or variation within the consent order itself, neither party may seek a review or variation of the consent order. A consent order may not be set aside by summons, but a fresh action. In the absence of mistake, fraud or duress, the parties are bound by their agreement; and there is no basis for the courts to intervene. Where the parties have settled or compromised pending proceedings, the settlement or compromise constitutes a new and independent agreement whose effect is to put an end to the proceedings, and the parties are precluded from taking further steps in the action. See: *Bhima v Bhima* 7 MLR 165 and *Registered Trustees of Smallholder Farmers Fertilizer Revolving Fund of Malawi v Registered Trustees of Tobacco Association of Malawi* [2001-2007] MLR (Com) 212.

The interests of justice or the balance of justice

7.4 The Appellant contends that, on the facts of this case, the interest of justice favour the granting of an interim injunction. The exercise of determining the interests of justice or the balance of justice in any particular case is not an easy exercise. As pointed out by Mwaungulu, JA in *Mulli Brothers v Malawi Savings Bank Ltd.* MSCA Civil Appeal No. 48 of 2014-

> " *when considering balance of convenience or justice, courts consider what, between allowing or refusing interim relief, results in better or greater justice or convenience or better or greatly ameliorates injustice or [inconvenience] whatever the outcome. In considering balance of justice, one primary consideration is whether, at the end of the appeal, justice is increased or injustice is reduced by maintaining the status quo. The status quo envisaged where a mortgagor desires to prevent, before a hearing, the mortgagee from exercising the power of sale, is that it generally leaves the mortgagor with the benefit of the money and the security.*

The status quo ante would be where, to the detriment of the Bank.... the loan and interest remain unpaid. That interest and principal remain unpaid for a long time is pertinent in balancing convenience and justice. ..... Failure to pay militates against granting an injunction. Interest rates are high.... Granting an injunction escalates financial hardship on the mortgagor and could dissipate the security. It is an unfair outcome, however, where maintaining the status quo, by refusing the injunction, leaves a situation where the mortgagee sells the property at less than a fair price, a fair market price...".

7.4.1 It is, nevertheless, a well settled principle that where, as in this case, a mortgagor agreed with the mortgagee on what should happen when certain specified events take place, the mortgagor should not be allowed to interfere with the exercise of the power sale by obtaining an injunction on the basis that the sale of the charged property is contrary to his interests. Furthermore, it is also well settled that the courts should invariably be slow to interfere with a mortgagee's exercise of the power of sale on the occurrence of the agreed specified events because *justice demands that the mortgagor should not be allowed to keep both the funds and the property charged.*

7.4.2 In *New Building Society v Mumba* [2001-2007] MLR (Com) 243 (MSCA 26 of 2005) at pp. 248-9 the Supreme Court of Appeal succinctly set out the legal position as follows-

"The next question is whether the equitable remedy of injunction restraining the appellant from completing the sale was available the chargor after the chargee had exercised the power of sale. We will consider this issue as if the question is whether the remedy of injunction is available to chargor at all, as it does not seem to make any difference to us whether or not the remedy is sought before or after the chargee has exercised the power of sale.

We have indicated above that it is not in controversy that the appellant exercised its express power of sale, usually inserted in mortgage agreements enabling a mortgagee to sell charged property if certain specified events occurred. Therefore, provided the power is exercised in good faith, we are ourselves disposed to think that a mortgagor having voluntarily agreed with the mortgagee on what should happen when certain specified events take place should not run to the courts to prevent the mortgagee from exercising the power of sale merely because, as will usually be the case, it is contrary to his interests. In other words the courts should be slow to intervene contrary to the express desire of the parties to any lawful agreement, as justice would never be met by the borrower having the benefit of both the funds and the security (the charged property) or, conversely the lender being denied both the funds and the security, even if temporarily. What we are saying here is that the courts should almost invariably be slow to intervene contrary to the express desire or wish of the parties to a lawful agreement as to what should happen when specified events take place. What this means is that the equitable remedy of injunction restraining the appellant from completing the sale should not, in the present case, have been available to the respondent.....".

7.5. It, consequently, does not appear to me that this matter raises serious triable issues on appeal as submitted by the Appellant, or at all. I myself have serious doubts regarding the prospects of success of the appeal. Furthermore, in my considered view, the interest of justice on the facts in this case, militate against restraining the Respondent from enforcing the realisation of the security.

8. I, accordingly, decline to grant the Appellant's application for an interim injunction, pending the hearing and determination of the Appellant's appeal. The application is dismissed with costs for the Respondent.

Pronounced in Chambers this 20th day of December, 2017 at Blantyre.

Justice Anthony Kamanga, SC

JUSTICE OF APPEAL