IN THE MALAWI SUPREME COURT OF APPEAL

MSCA CIVIL APPEAL NO. 19 of 2018
(Being High Court (Lilongwe District Registry) Civil Cause No. 85 of 2017)

BETWEEN

PUMA ENERGY (MALAWI) LIMITED .....APPLICANT
AND
BISHOP ABRAHAM SIMAMA .....1st RESPONDENT

SIMSO OIL AND TRANSPORT COMPANY LIMITED ..... 2nd RESPONDENT

CORAM: Justice Anthony Kamanga, SC, JA
Nkono, SC, of Counsel for the Applicant
Kita of Counsel for the Respondents
Minikwa Official Interpreter

RULING

Justice Anthony Kamanga, SC, JA

1. *Introduction*

1.1 On 12th April, 2018, the Applicant filed *inter-partes* summons for an application for an order of stay of enforcement of the judgment of the High Court (Lilongwe District Registry) in Civil Cause No. 19 of 2017 delivered on 19th March, 2018. The application is lodged pursuant to O. 52. 7 of the CPR and the inherent jurisdiction of this Court. Although the *inter-partes* summons does not expressly indicate that the application is being made, pending the hearing and determination of an appeal against a judgment of the court below, from the context and the skeleton arguments of the parties, it is clear that the application is being made pending the hearing and determination of an appeal in respect of which the Applicant filed a notice of appeal on 22nd March, 2018.

2. *Background*

2.1 In order to appreciate the basis of the application for stay of execution of the judgment of the court below, it is necessary to outline the chronology of events and the relevant facts in this matter.

2.1.1 On 13th June, 2017, the Respondents commenced proceedings in the court below by originating summons against the Applicant for a declaration that the 1st Respondent was the owner of Plot Number KK 104 in Nkhota-Kota, and for an order for possession of the property. On 19th March, 2018, the court below delivered a judgment in favour of the Respondents; the court below declared that the 1st Respondent the owner of Plot Number KK 104 in Nkhota-Kota, and granted the Respondents an order for possession of the property.

2.1.2 After the court below delivered its judgment on 19th March, 2018, the Applicant made an oral application in court below for a stay of execution of the judgment, pending the hearing and determination of an appeal against the judgment. The court below directed the Applicant to make a formal application. The Applicant, apparently recognizing that enforcement of the judgment of the court below was imminent, orally applied for an interim order of stay of enforcement of the judgment of the court below, pending the hearing and determination of the formal application for stay of the execution of the judgment of the court below. The court below refused to grant the interim order of stay of enforcement of its judgment.

2.1.3 On 20th March, 2018, the Respondents applied for and were granted by the court below an order to enforce the judgment of the court below.

2.1.4 On 21st March, 2018, the Applicant filed in this Court an *ex- parte* application for an interim order suspending the enforcement of the judgment of the court below, pending the hearing and determination of the *inter-partes* application for a stay execution by the court below. The Applicant's application in this Court for an interim order suspending the enforcement of the judgment of the court below was not granted principally because there was apparently pending hearing and determination in the court below a substantive application for a stay of the execution of the judgment of the court below.

2.1.5 On 22nd March, 2018, the Applicant 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. The grounds of appeal, as set out in the notice of appeal, are as follows-

> *"(i) The learned Judge erred in fact and in law by holding that at the date that Mtunthama Farming Limited subleased to the Defendant property called Plot No. KK 104 Nkhota-Kota for 30 years, Mtunthama Farming Limited had no right to do so when the evidence showed that by a lease from the Malawi Government dated 28th July, 2013 (Deed No. 86782) prior to the said 30 years sublease dated 3rd October, 2013, (Deed No. 86847) Mtunthama Farming Limited had duly been granted a 99 year lease by the Government and therefore had the right to grant the said sublease to the Defendant.*
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> *(ii) The learned Judge erred in fact and law by holding that the 30 year sublease from Mtunthama Farming Limited to the Defendant was not registered under the Deeds Registration Act when the evidence showed that the copy of Deed No. 86847 duly contained a memorandum of the Deeds Registrar duly evidencing registration under section 24 (1) of the Deeds Registration Act.*
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> *(iii) The learned Judge erred in fact and in law by holding that Mtunthama Farming Limited granted the said sublease to the Defendant out of a 99 year lease assigned to Mr Timothy Kazombo in 2012 when the evidence showed that Mtunthama Farming Limited granted the said sublease out of a 99 year lease dated 28th July, 2013 (Deed No. 86782).*

(iv) The learned Judge in law by holding the question as irrelevant whether the claimants proved that the property that Mtunthama Farming Limited assigned to Mr Timothy Kazombo in 2012 was the same as the one on which the Defendant operated its filling station when it was precisely the property on which the Defendant operated a filling station that the claimant sought possession and ownership.

(v) The learned Judge erred in law to rely in his judgment on the cancellation on 8th May, 2017, by the Land Registrar/Minister of the 99 year lease held by Mtunthama Farming Limited, when the learned Judge knew or ought to have known [that] the High Court, Principal Registry in Judicial Review Case No. 50 of 2017, on 22nd January, 2018, suspended the effectiveness of the cancellation by the Land Registrar/Minister on the 99 year lease held by Mtunthama Farming Limited, pending judicial review.

(vi) The learned Judge erred in fact and in law to find that the Defendant did not challenge the cancellation of by the Minister of the 99 year lease held by Mtunthama Farming Limited in light of the said judicial review proceedings.

(vii) The learned Judge erred in law when ordering ownership and possession of the subject property in favour of the claimants [and] to ignore the effect of the evidence showing that by an offer dated 13th Aril, 2017, while the Mtunthama Farming Limited's 99 year lease subsisted the latter offered the subject property to the Defendant which the Defendant accepted",

and based on the foregoing grounds of appeal, the Applicant seeks the reversal of judgment of the court below, and an order for judgment in favour of the Applicant.

2.1.6 On 23rd March, 2018 the Applicant filed in the court below a formal application for a stay of execution of the judgment of the court below, pending the hearing and determination of the appeal. On 5th April, 2018, the court below dismissed the Applicant's application for a stay of the execution of the judgment of the court below. The Applicant now comes to this Court, by its application lodged on 12th April, 2018, for an order to stay or suspend the execution of the judgment of the court below, pending the hearing and determination of the appeal against the judgment of the court below.

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

3.1 During the hearing of this application on 24th April, 2018, Counsel for the Applicant adopted the sworn statement of Mr McHarven Ngwata in support of the application and filed on 12th April, 2018, (including the sworn statements of Mr Joseph Chafumuka, Mr Happy Jere and Mr Patrice Nkono, SC, (marked "MN5", "MN6" and "MN7") which were filed in the court below in relation to an application in that court to stay the enforcement of an judgment enforcement order issued by the court below on 20th March, 2018), as well as the skeleton arguments that had been filed on 19th April, 2018 in support of the application.

3.1.1 It is important to observe at the outset that the sworn affidavits in support of the Applicant's application for a stay or suspension of the judgment of the court below, pending the hearing and determination of the appeal, appear to premised, to a large extend, on the assertions, on behalf of the Applicant that *"the Applicant has operated a filling station on the property since the 1970s through successive company name changes"*; that *"since 2013 under a 30 year sublease dated 3rd October, 2013 the Applicant has had the possession of the property as a tenant of Mtunthama Farming Limited"*; that *"since August, 2015 the Applicant has operated the filling station on the property through the dealership of Mr Happy Jere"*;

that *"the operation of a filling station on the property ... entailed the construction and installation of [a] purpose-built filling station and equipment including fuel tanks and fuel pumps, and the forecourt";* and that *"the filling station equipment was first constructed by the Applicant's predecessor company Oil Company of Malawi Limited".*

3.2. The gist of the Applicant's arguments and submissions in support of the application to stay the execution of the judgment of the court below are contained in the following paragraphs of the sworn statement of Mr MacHarven Ngwata filed in support of the application-

> *"... ... ...*
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> *4. THAT the matter was heard by the High Court ... The Court delivered its judgment on 19th March, 2018 in favour of the Respondents and declared that the 1st Respondent is the owner of Plot Number KK 104 in Nkhota-Kota District and awarded the Respondents possession of the said property. ...*
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> *5. THAT upon pronouncing its judgment, my firm made an oral application ... for a stay of execution of the judgment pending appeal... the Judge directed that we should make a formal application. Recognizing that enforcement of the judgment was imminent, Counsel Msukwa orally applied for an interim order of stay of the judgment, pending the determination of the formal application for stay of execution of the judgment as per the Judge's direction. The Judge refused to grant the interim order of stay. The Applicant has since filed a notice of appeal against that judgment ... ..."*
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> *6. THAT on 22nd March, 2018, the Applicant was served with an enforcement order by the lawyers for the Respondents. On the same day 22nd March, 2018, the sheriff seized and closed the Applicant's filling station located on the property. Now produced ... are true copies of the Applicant's application for ex-parte and inter-partes orders for suspension of enforcement filed in court below together with the sworn statements of Joseph Chafumuka, Happy Jere and Patrice Nkono, marked "MN5", "MN6" and "MN7". At hearing of the application herein the Applicant will rely, among others, on the sworn statements.*
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> *7. THAT the application for suspension of enforcement of the judgment was before Honourable Justice Mkandawire. Upon hearing both parties, the Judge delivered his ruling on **[5th]** April, 2018, and he refused to grant the order of suspension of enforcement. Now produced ... is a true copy of the ruling exhibited hereto and marked "MN8".*
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> *8. THAT ... the 1st Respondent has commenced an action against the Applicant claiming damages for loss of business and profits due to the latter's possession of the property. Now produced ... is a true copy of the summons filed in Lilongwe District Registry marked "MN9".*
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> *9. THAT I believe that an order for stay of the judgment dated 19th March, 2018 is necessary in the circumstances so that the Applicant does not suffer injustice and prejudice in the event that the Applicant's appeal succeeds. An enforcement of the judgment ... [of] 19th March, 2018, bears the real potential for prejudicing the Applicant in ways that could be irreparable. The Applicant runs a full petroleum filling station on the property, which filling station was, as was in evidence in the within proceedings, constructed by the Applicant's predecessor Oil Company of Malawi Limited in the 1970s. Any avoidable removal of the Applicant from the property would therefore cause untold injustice and prejudice to the applicant, should the appeal succeed.".*

3.2.1 The sworn statement of Mr Joseph Chafumuka, an employee of the Applicant, in so far as it is relevant to this application for a stay of execution of the judgment of the court below, among other things, states that-

> *"6. The Defendant has had ... the possession of the subject property since the 1970s when Oil Company of Malawi Limited, a predecessor of the Defendant, constructed thereon a filling station and first used the subject property to operate thereon the business of a filling station. On the contrary, the claimant's do not operate a business on the said property, let alone a filling station business.*
> *7. The subject property has located thereon, as part of the Defendant's business, moveable property including underground fuel tanks, filling station fore court and the Defendant's or the Defendant's branded fuel dispensing pumps and not forming part of the land nor ever owned by the Defendant's successive landlords on the property.*
> *8. The enforcement of the judgment of the court would therefore necessarily entail the removal by the Defendant of all such moveable property as part of vacating the property. Such removal of the property would not only cost the Defendant in money terms and time, but also fundamentally change the structure of the premises.*
> ... ...
> *10. The business of the Defendant is not uniform in the sense that even though information can be given regarding average annual revenues, the exact annual revenues vary from season to season and year to year depending on the country's GDP performance, product pricing by the Government and other trade area activities including political and economic ones. Where, as in the present case, a filling station is operated by a dealer, sales performance is also affected by the dealer's operational efficiency and working capital capacity.*
> *11. It is therefore difficult to say for sure how much in revenues that the Defendant would lose at any given time in the event of a business disruption. What is for sure is that the enforcement of the judgment would cause considerable loss to the Defendant and the business.*
> ... ...
> *14. If the judgment herein is allowed to be enforced and the Defendant succeeds in its appeal that will have the effect of gravely disrupting the Defendant's long running business of the filling station on the subject property. Further, in view of business variables that account for the generation of revenue the Defendant's business on the subject property, even if the circumstances were such that the claimants would be made liable to compensate the Defendant for loss of revenue in the interim if the appeal succeeds..... it would be practically impossible to assess and calculate the loss that the Defendant would in that eventuality suffer.*
> ... ...
> *16. There is clearly much more inconvenience to be caused to the Defendant if the judgment is enforced and the appeal is later decided in favour of the Defendant than to the claimants if the appeal fails. ... ".*

3.2.2 In his sworn statement which was filed in court below in support of the Applicant's application to stay or suspend the enforcement of the judgment enforcement order issued by the court below on 20th March, 2018, Mr Patrice Nkono, SC depones as follows-

"2. THAT on the morning of 22nd March, 2018, our client, the Defendant herein, forwarded to my firm a copy of the enforcement order that had been issued ... at the instance of the Claimants in these proceedings and informed my firm ... that the enforcement order had just been served on the Defendant then. I attach hereto a copy of the Enforcement Order marked "PN1".

3. THAT within an hour of my firm's receipt of the Enforcement Order from our client, I received a telephone message call from Mr Chafuka. Sales and Marketing for the Defendant, informing me that a sheriff officer had reportedly arrived at the Defendant's filling station in Nkhota-Kota, subject of the proceedings herein, to enforce the Enforcement Order.

4. THAT I immediately called Mr Wapona Kita of the lawyers for the Claimants to query such news with him. When he did not pick my call, I sent him a whatsapp message to his phone number at 10.51 am on 22nd March, 2018 that read "Good morning Wapona. I was calling Re: Simama and Puma. My clients tell me that this morning they were served with an enforcement order but also that apparently there is an attempt to enforce the order of possession at the filling station. If so, that would be highly irregular per Order 28 rule 40 of the High Court CPR that says the enforcement order shall not be enforced until 30 days after the display of the order at the premises and at the latest the date of the service of the enforcement order. So the earliest day for enforcement would be 22nd April, 2018. Please call back and in any event call off the enforcement".

5. While I waited response from Mr Kita, I called and spoke by phone to Mr Peter Mlauzi, the Under Sheriff of Malawi, and informed him of what appeared to me to be an irregular attempt at enforcement of a court order at his office. Mr Mlauzi sent me a message at 11.35 am on 22nd March, 2018 that read "Thanks counsel. I got in touch with Sheriff Mwale. He has told me that he has already closed the premises and has left".

6. THAT indeed Mr Happy Jere, the Defendant's dealer on the subject filling station later called me by phone ... that the Sheriff Officer, Mr E W Mwale, had gone to the subject filling station on the morning of 22nd March, 2018 accompanied by Police Officers, closed the filling station in enforcement of the court order of enforcement.

7. THAT at 11.24 am on 22nd March, 2018, Mr Kita responded to my message by whatsapp and said "my client has not taken possession of the filling station and will only do so after 30 days. The sheriff has simply effected service of the order per the rules. Sorry am in court now".

8. THAT clearly Mr Kita agreed with me that the Claimants have no right to seek to enforce the order until after 30 days from the date of service thereof. However, it appears that the Sheriff Officer Mr E W Mwale, had been given wrong information and instructions as he had clearly enforced the order by shutting down the filling station and throwing the Defendant's agent off it.

9. THAT in view of the fact that the sheriff has enforced the order and closed the filling station (despite the irregularity of such action) it has become urgent that this application be made without notice in order to forestall the fact that each hour that the filling station remains closed, the Defendant is suffering loss of business and revenue.

10. WHEREFORE I pray for an order suspending enforcement of the order of possession until the court determines the Defendant's application at the expiration of 30 days from 22nd April, 2018.

11. FURTHER I pray that now that the Defendant has filed its application for suspension of the enforcement of the judgment of the court dated 19th March, 2018, the court extend the suspension of the judgment until its determination of the Defendant's application for suspension of the enforcement of judgment if the same happens after 22nd April, 2018. ..."

3.2.3 The sworn statement of Mr Happy Jere is to the effect that on 22nd March, 2018, pursuant to an enforcement order of the court below, the sheriff sealed the filling station which remains closed, and the Applicant is suffering loss of business and revenue.

3.3 In the skeleton arguments adopted during the hearing of this application on 24th April, 2014, the Applicant advances the following arguments and submissions-

3.3 1 With respect to the judgment enforcement order issued on 20th March, 2018, for possession of land, the Applicant argues and submits that having regard to Order 28 rule 37 to 40 inclusive of the High Court Civil Procedure Rules, 2017 there was a clear flouting of rule 40 by the Respondents which rendered the enforcement of the judgment enforcement order irregular and unlawful; that the irregular and unlawful enforcement of the judgment enforcement order is an actionable trespass on the part of the Respondents against the Applicant who is losing revenue with every day that this unlawful action of the Respondents continues. The Applicant, accordingly, prays that the enforcement of the judgment enforcement order be set aside and an order be made by this Court ending that unlawful enforcement and ordering the handover of the property back to the Applicant.

3.3.2 With respect to whether the application for a stay or suspension of execution of the judgment of the court below should be granted, the Applicant, in his skeleton arguments, has referred this Court to the principles that govern applications for suspension or stay of enforcement of judgment, pending appeal, and has cited a considerable number of useful case authorities. However, the gist of the Applicant's arguments and submissions are premised on two principal issues, namely, that the appeal raises serious issues to be heard and determined by the Supreme Court of Appeal; and that, unless the judgment of the court below is stayed or suspended, the Applicant would suffer irreparable damage; and that, having regard to the circumstances of this case, the "balance of convenience is in favour of granting a stay or suspension of the judgment of the court below, pending the hearing and determination of the appeal.

3.3.2.1 The Applicant argues and submits it has filed a meritorious set of grounds of appeal against the judgment of the court below for determination by the Supreme Court of Appeal;

that the grounds of appeal show a serious challenge has been set, on principle, against the judgment of the court below; and that there are serious questions to be brought to the appeal.

3.3.2.2 The Applicant also argues and submits that sworn statement of Joseph Chafumuka shows that "*the Applicant has achieved average annual revenues of K1,100,155,158 for the year 2016 and 2017 from the running of the filling station on the property, and upwards of K850,000,000 per annum for the 5 years 2013 to 2017*"; that "*if the enforcement order* [and the judgment of the court below] *is allowed to stand and the Applicant succeeds in its appeal, the Applicant stands to lose such sums of money, and probably more*"; that *"since the Respondents' possession of the property would have been allowed by the judgment of the court below, the Respondents' possession of the property would be lawful and, therefore, not entitle the Applicant to any damages against the Respondents ... , even if the appeal succeeds*"; that, "*even assuming that the Respondents had the capacity to pay such sums of money, the Applicant would have lost such revenues without any right to claim the same from ... the Respondents*"; and that, "*therefore, the Applicant would suffer irreparable damage*". In support of the latter argument and submission the Applicant cites as authority [and by way of analogy] the case of *Thompson v Attorney General of Jamaica and another* Claim No. 2007 HCV 03684 (in the Supreme Court of Judicature of Jamaica) where it was held that once a subject was held in custody pursuant to a court order no action or damages for false imprisonment could be claimed even where the initial custody was attributable to a false imprisonment.

3.3.2.3 The Applicant further argues and submits that "*the Respondents have not even set up a business on the property*"; that "*if the Applicant's appeal fails and in the interim the enforcement order was suspended/stayed, the Respondents' loss, if any, would be much easier to assess and would arguably be claimable from the Applicant";* and that "*although the Applicant would suffer irreparable damage if the enforcement order is allowed to stand and the appeal succeeds, no such problem applies to the Respondents even if the Applicant's appeal failed*".

3.3.2.4 Finally, the Applicant states that, at common law, a tenant is allowed to remove any chattel notwithstanding that it has become a fixture to land, provided that it is a trade fixture, and the Applicant cites as authority: *Elliott v Bishop* (1854) 10 Ex Ch 496, where a tenant was allowed to remove fittings of a public house; *Wardell v Usher* (1841)3 Scott NR 508, where shrubs planted by a market gardener were allowed to be removed; *Smith v City Petroleum Co. Ltd* [1940] 1 All ER 260 where petrol pumps at a filling station were allowed to be removed; and *Young v Dalgety plc* [1987] 1 EGLR 116, where fluorescent light fittings and carpeting secured to the floor by gripping rods were allowed to be removed. Based on the cited case authorities, the Applicant argues and submits that "*the fact that the filling station holds tenant's fixtures and equipment that belongs to the Applicant, the Applicant's vacating the property would entail removal of the moveable property comprising the filling station;* that *"if the appeal succeeds, the Applicant would, in vain, have been put to grave inconvenience of removing property from the filling station to let the Respondents go into possession";* and that *"if the appeal succeeds, the Applicant would be put to the trouble of installing the filling station equipment all over again having removed it in circumstances that would not entitle the Applicant to any compensation...* " from the Respondents. It is argued and submitted that these consequential "*inconveniences and incompensable losses do not apply to the Respondents*".

3.3.2.5 The Applicant argues and submits that "*the enforcement of the judgment ... would pose the risk of injustice and prejudice to the Applicant if the appeal later succeeds in a*

manner that would not apply to the Respondents if the appeal fails and the enforcement of the judgment is suspended in the interim"; and that "*the balance of convenience, therefore, lies in favour of suspending or staying enforcement of the judgment pending appeal*".

3.4 Based on the foregoing arguments and submissions the Applicant prays that an order be made to set aside and/or suspend the Respondents' unlawful and irregular enforcement of the judgment enforcement order against the Applicant on 22nd March, 2018 and, in any event, an order for a stay or suspension of the judgment of the court below, pending the hearing and determination of the appeal.

4. *Respondents' sworn statement in opposition and submissions on behalf of the Respondents*

4.1 During the hearing of this application on 24th April, 2018, Counsel for the Respondents adopted the sworn statement in opposition filed on 18th April, 2018, and the skeleton arguments filed on 23rd April, 2018. The Respondents' response in opposition to the application is contained in the following paragraphs of the sworn affidavit of Mr Kita –

> " 4. *THAT the general or normal rule in this Court when approached with an application for stay is for no stay unless the [Applicant] puts forward a solid ground to show irremediable harm if no stay is granted.*
> *5. THAT ... paragraphs 1 to 8 of McHarven Ngwata sworn statement in support of the application for stay ... give a historical background of the [Applicant] and of this matter and do not show at all any kind irremediable harm that the Appellant will suffer should a stay not be granted in these proceedings.*
> *6. THAT it is only in the last substantive paragraph, i.e paragraph 9 of the McHarven Ngwata sworn statement where he attempts to show that the [Applicant] will suffer injustice because it constructed and has been running the filling station since the 1970s.*
> *7. THAT ... no where in the sworn statement of McHavern Ngwata does it show that the [Applicant] or any of its predecessors constructed the Nkhota-kota Filling Station. Rather, all that the sworn statement shows is the transition the Appellant has gone through, from being Oil Company of Malawi Ltd, to being to BP Malawi Ltd to being Puma Energy (Malawi) Ltd. In fact, Lease Agreement marked JC 7 appearing as part of Exhibit MN 2 shows that the [Applicant's] predecessors were renting from Chayamba Holdings Ltd was the Nkhota-Kota Filling Station itself and not that the same was constructed by the [Applicant's] predecessors.*
> *8. THAT whichever way one looks at it, the issue of who constructed the filling station cannot be a ground for granting a stay. That is an issue of handovers which the [Applicant] has not attempted to reach out to the Respondents during the 30 day window period for gaining possession of the KK 104.*
> *9. THAT ... ... the [Applicant] has not demonstrated anywhere in its affidavit that the Respondents would not be able to compensate them in damages in the event of their appeal succeeding should they give up possession of the Filling Station now as ordered by the Judge in the lower court.*
> *10. THAT the only injustice that the [Applicant] stands to suffer for now with the [Respondents] gaining possession of the Filling Station is the loss of revenue, but this is the kind of loss which reparable as the Supreme Court [of Appeal] would be in a position to order that the [Applicant] be compensated accordingly for his loss if his appeal succeeds.*

11. THAT from the foregoing, it is clear that the [Applicant] has not shown any solid ground why a stay should be granted in this matter and the application should be dismissed accordingly.
12. THAT it is also a fundamental guiding principle of this Court when faced with an application for a stay that the Appellate authorities will not reverse the order of the lower court refusing the grant of a stay merely because they would themselves have exercised the original discretion had it attached to them in a different way. The onus is on the [Applicant] to show how the lower court wrongly exercised its discretion.
13. THAT I refer to paragraph 7 of McHavern Ngwata ['s]sworn statement and aver that in it he exhibits a copy of the Ruling of the lower court that refused to grant it an order of stay marked as Exhibit MN 8.]???
14. THAT nowhere in his sworn statement does the deponent attempt to show how Justice Mkandawire exercised his discretion wrongly in refusing to grant them the order of stay.
15. THAT it was incumbent on the [Applicant] to show how Justice Mkandawire had wrongly exercised his discretion because when they first applied before this Court for an ex parte order of stay, the same was refused, inter alia, on the ground that they had to await the outcome of the decision of Mkandawire J in the lower court.
16. THAT ... ... I have read the Ruling of Justice Mkandawire refusing the Appellant a stay and I find it to be well reasoned and follows the principles of law governing a stay especially where he makes a finding that there is no irreparable harm or injustice to be suffered by the [Applicant] in giving up possession of the Filling Station and that the [Respondents] would be in a position to compensate the [Applicant] in the event of a successful appeal.
17. THAT I am also instructed by the 1st Respondent to depone herein that he undertakes to compensate the [Applicant] in the event of their appeal succeeding but that in the meantime, he wants to enjoy the fruits of his litigation which is to gain possession of Plot No: KK104 in Nkhota-Kota District as ordered by the Court.
18. THAT I further observe that the [Applicant] has failed to comply with the Practice Direction of this Court in that he has failed to file and serve skeleton arguments in support of their application for stay.
19. THAT furthermore, the Notice of Appeal filed by the [Applicant] is irregular in that it is not accompanied by any skeleton arguments as is strictly required by Practice Direction 52PD.21 of the Civil Procedure Rules applicable in this Court. Therefore, the mere filing of a Notice of Appeal should be treated as inconsequential in so far as it relates to application for stay herein.
20. THAT in view of the foregoing, the Respondents pray to the Court to dismiss the [Applicant's] application for stay, having failed to show any solid ground why the same should be granted in the first place. ...".

4.2 The Respondents' skeleton arguments revolve around the issue whether a stay of the execution of the judgment of the court below should be granted, and may summarized as follows-

4.2.1 That it is clear from paragraph 7 of the Applicant's sworn statement in support of the application for stay the application that this is not a fresh application; that the Applicant made

the same application before the court below which was dismissed in its reasoned Ruling of 5th of April, 2018.

4.2.2 That this Court should handle the Applicant's application for a stay of execution of the judgment of the court in the manner stated in the case of *Malawi Communications Regulatory Authority vs Joy Radio* (MSCA No. 59 of 2009) where Mtambo, JA restated the law to be as follows-

> *"... The question whether or not to grant a stay in entirely in the discretion of the court (Attorney General vs Emerson 24 QBD 56 pp. 58-59). And it is not a new principle of law that a superior court will have regard to the discretion of a lower court and will not overrule the order of the lower court unless there has been a disregard of principle or misapprehension of facts- Young vs Thomas (1892) Ch. D 143, per Bowen L.J. Although the application before me is not an appeal, the above principle would, nonetheless, be relevant, mutatis mutandis; I can put it (the principle) no better than was put in the case of Charles Osenton and Co. v Johnston (1941) 2 All ER 245 thus*:
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> > *"The law as to the reversal by a Court of Appeal of an Order made by the judge below in the exercise of his discretion is well established, and any difficult which arises is due only to the application of well settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already by the Judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them a different way. If, however, the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations, ... then the reversal of the order on appeal may be justified."*

4.2.3 That based on the decision in *Malawi Communications Regulatory Authority vs Joy Radio* Counsel for the Respondents urges this Court to have regard to the decision of the court below and not "*overrule the order of the court below unless there has been a disregard of principle or misapprehension of facts*"; and Counsel for the Respondents referred this Court to page 4 to 5 of the ruling of the court below dismissing the Applicant's application for a stay of the execution of the judgment of the court below, where court below stated as follows-

> *"In listening to the defendant, the real fears they have is the loss of revenue that they will incur if judgment is enforced. On the other side the plaintiff is also having the same fears as he has been prevented from using the filling station which he purchased as both parties are in commercial business. The defendant however, thinks that it has more to lose as far as business in concerned and that it may have an uphill task to recoup its loss if suspension is not granted. Having given the case the best of its scrutiny, I am not persuaded to suspend my judgment. I take the view that the plaintiff would be in a position to compensate the defendant in the event that the appeal succeeds. Having considered the risk of injustice or prejudice, I am of the view that the plaintiff who has bought this land unlike the defendant who is a mere tenant is entitled to enjoy the fruits of his litigation".*

4.2.4 Counsel for the Respondents argues and submits that from the sworn statement by the Applicant's legal Counsel, there is no single fact or principle which is faulted to have been

misapprehended by the court below in refusing the application for stay; that there is no attempt to by the Applicant to discuss the content of the Ruling by the court below [and fault the court below; and that based on the principle in *Malawi Communications Regulatory Authority v Joy Radio* there is no material before this Court to exercise its discretion differently than the court below did.

4.3 With respect to the principles which this Court should follow when exercising its discretion whether to grant or not to grant an order of stay of execution of a judgment, Counsel for Respondents argues and submits that the Applicant's application has been made under Part 52.7 of the Civil Procedure Rules which provides the current guiding principles for granting or not granting a stay; that the general approach stated in Practice Note 52.7.1 provides that: the established the principle is that successful litigants should not be deprived of the fruits of their litigation pending appeal, unless there are good reasons for doing so; that "the normal rule is for no stay...", and Counsel for the Respondents cites Potter L.J. in *Leicester Circuits Ltd v Coates Brothers Plc* (2002) EWCA Civ 472 at p13. Counsel for the Respondents also cites *DEFRA v Downs* (2009) EWCA Civ 257 at pp. 8-9 where Sullivan L.J., having noted that a stay is an exception rather than the rule, stated that the "solid ground" which an applicant must put forward is normally "*some form of irremediable harm if no stay is granted*".

4.3.1 Counsel for the Respondent argues and submits that if an applicant puts forward solid grounds for seeking a stay, the court must then consider all the circumstances of the case; and it must weigh up the risks inherent in the granting of the stay and the risks in refusing a stay, and Counsel cites *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* (2001) EWCA Civ 2065, where Clarke L.J. described the correct approach as follows-

> *"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 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 of the respondent being 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 monies paid from the Respondent?*

4.3.2 Counsel for the Respondents thus argues and submits that in the matter at hand, this Court has to ask itself the following question, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the Applicant being able to recover any revenue lost; that the answer to that is a simple one - lost revenue can be computed and the 1st Respondent, who is a man of means, has undertaken to compensate the Applicant for any loss if the appeal succeeds; but that in the meantime, the Respondent wants to enjoy the fruits of his litigation which is gaining possession of Title No: KK 104 in Nkhota-Kota district. In support of this argument and submission Counsel for the Respondents cites the following case authorities-

> *The Minister of Finance and The Secretary to the Treasury - Exparte Hon. Bazuka Mhango MP and Others* (MSCA No: 17 of 2009) where held Mtambo, JA that-
>
> *"... My understating of these principles is that a successful litigant may not be deprived of the fruits of his litigation without a good reason and that normally*

the only good reason to do so is when it appeal to the court that there are no reasonable prospects of recovering the money if the event that the appeal succeeds. The justness of this is in the fact that while it is the duty of the court to see to it that a successful litigant should access the fruits of his litigation as quickly as possible, it is also the court's duty that it does not come about that a successful appeal is (not) rendered nugatory. And in order for the court to be able to determine whether or not an appeal, if successful, would be nugatory by reason that there is no reasonable probability of the appellant, getting the money back, is a matter of a facts which must be presented to the court for assessment... ".

The State v Speaker of National Assembly, Ex parte John Tembo (Civil Appeal No: 27 of 2010) where held by Nyirenda, JA that-

"*Stay of execution pending appeal has become common place in our court and over the years clear principles for consideration have emerged. The guiding principles however are in Order 59 r. 13/1 of the Rules of the Supreme Court. That Order cites a number of cases specifically dealing with stay of execution of judgments. Some of the cases have been referred to by Counsel in this matter from which the following cardinal principles resonate:*

(i) the Court does not make the practice of depriving a successful litigant fruits of his judgment;

(ii) the Court should then consider whether there are special circumstances which militate in favour of granting the order for stay and the onus will be on the applicant to prove or show such special circumstances;

(iii) where the appeal is against an award of damages the established practice is that stay will normally be granted where the appellant satisfies the court that if the damages were paid then there will be no reasonable prospect of recovering them in the event of the appeal succeeding.

Fortunately for me from the skeleton arguments by Counsel it is apparent that we are all conversant with the practical application of these principles. It is emphasized in Ulalo Capital Investment Limited Vs Southern Africa Enterprise Development Funding, MSCA, Civil Appeal No. 45 of 2009 that when determining an application for stay of execution it is important to bear in mind always that there is at the time a binding judgment which even the Court of Appeal must respect until set aside or otherwise modified. In City of Blantyre Vs Manda and Others Civil Cause No. 1131 of 1990 the court summarized the principles in this passage:

> *I think it is always proper for the Court to start from the view point that a successful litigant ought not to be deprived of the fruits of his litigation. The Court should then consider whether there are special circumstances which militate in favour of granting the Order of Stay and the onus will be on the applicant to prove or show such special circumstances.*
>
> *As for special circumstances it is trite that such would vary from case to case and expectedly so. Furthermore the same set of facts could result in different consequences and have different implications in different cases. It has long been acknowledged though that the paramount consideration in applications of this nature is whether the appeal will be rendered nugatory if the application for stay is refused. Once the Court is satisfied that the appeal will not be rendered nugatory by refusing the application to stay the judgment, it would be wrong to deny the successful litigant the fruits of his litigation on any other fanciful land capricious*

considerations, see: Tembo v Industrial Development Group (2) [1993] 16 (2) MLR 878. The justness of this is in the fact that while it is the duty of the court to see to it that a successful litigant should access the fruits of this litigation as quickly as possible, it is also the court's duty to ensure that it does not come about that a successful appeal is rendered nugatory. The Minister of Finance and The Secretary to the Treasury v Hon. Bazuka Mhango and Others, MSCA Civil Appeal No. 17 of 2009.

This Court attempted to explain what could possibly amount to an appeal being nugatory in Auction Holdings Limited v Sangwani Judge Hara and Others MSCA Civil Appeal No. 69 of 2009. It is stated:

According to Bryan Garmer in "A Dictionary of Modern Legal Usage" Second Edition, 'nugatory' is not a legal word per se, but it is learned word favoured by lawyers. It means 'of no force, useless, invalid and so forth. In other words nugatory is a state of affairs. A state of affairs where the appeal will not yield results; where the appellants efforts, even if successful, will be a wasted effort for lack of remedy. Pursuant to these considerations, as the court put it in Circle Plumbing Ltd vs Taulo [1993] (16) 2 MLR 506 an appeal can only be rendered nugatory if for example the subject matter of the appeal is destroyed or ceases to exist or changes substantially or where if the appeal succeeds it would be impossible to recover the damages that would be sought. The real question for the court is whether the appellant will engage is an exercise in futility."".

4.3.3 It is submitted that in the matter at hand, there is no evidence to suggest that the Applicant would not be able to recover from the Respondents its lost revenue if the appeal succeeds; that the court below in refusing the Applicant an order of stay already found that the Respondents are able compensate the Applicant in the event of a successful appeal. In support of this submission Counsel for Respondent cites *Nkhukuti Beach Resort v Patrick Thomas Mwafulirwa and others (*MSCA No. 65 of 2009) where Nyirenda, JA, on the issue of the Respondent being unable to pay back the money if the appeal succeeds, held as follows-

"In Thomson v CGU Insurance Ltd (MSCA No. 17 of 2008) Mtambo JA observed that if the contention is that the appeal, if successful, may be rendered nugatory in that there is no reasonable prospect of recovering the money because the Respondent has no means, it is for the appellant to present to court, facts and evidence for assessment. Indeed, even upon such facts and evidence, the court may still decline stay if that would be utterly unjust to the Respondent: see the case of Stambuli v Admarc, Civil Cause No. 550 of 1981)".

5. *Whether: (i) the judgment enforcement order should be stayed or suspended and (ii) the judgment of the court below should be stayed or suspended, pending the hearing and determination of the appeal*

5.1 Before I proceed to further consider this matter, it is important to resolve the issue of whether the Applicant, in effect, seeks two orders from this Court, namely, an order to set aside and/or suspend the Respondents' alleged unlawful and irregular enforcement of the judgment enforcement order against the Applicant on 22nd March, 2018, and an order for a stay or suspension of the judgment of the court below, pending the hearing and determination of the appeal; and if so, whether this application this Court should consider granting the two orders.

Order to stay or suspend the judgment enforcement order of the court below

5.2 The *inter-partes* summons filed by the Applicant on 12th April, 2018 and the supporting sworn statement of Mr McHarven Ngwata dated 12th April, 2018, both indicate that the Applicant seeks an order for a stay or suspension of the judgment of the court below, pending the hearing and determination of the appeal. However, the Applicant, through the sworn statement of Mr McHarven Ngwata, has also incorporated or introduced in these proceedings the sworn statements of Mr Joseph Chafumuka, Mr Happy Jere Mr Patrice Nkono, SC.

5.2.1 The sworn statements of Mr Joseph Chafumuka dated 23rd March, 2018 (marked "MN5"), Mr Happy Jere dated 27th March, 2018 (marked "MN6") and Mr Patrice Nkono, SC dated 23rd March, 2018 (marked "MN7") were tendered in court below in support of an application in that court to stay or suspend the enforcement of the judgment enforcement order of the court below issued on 20th March, 2018, in respect of which the Applicant argued and submitted that the action of the Sheriff on the 22nd March, 2018, turning the Applicant's agent out of the property as a clear flouting of Order 28 rule 40 Court (Civil Procedure) Rules, 2017 which rendered that action irregular and unlawful and, in respect of which the Applicant prays that the enforcement be set aside and that an order be made by this Court ending that unlawful enforcement and ordering the handover of the property back to the Applicant.

5.2.2 There is yet another dimension to this issue: In paragraph 7 of his sworn statement in support of this application Mr McHarven Ngwata states that "*the application for suspension of enforcement of the judgment was before Honourable Justice Mkandawire. Upon hearing both parties, the Judge delivered his ruling on [5th] April, 2018, and he refused to grant the order of suspension of enforcement. Now produced ... is a true copy of the ruling exhibited hereto and marked "MN8"*. Counsel for the Respondents in paragraphs 13 and 14 of his sworn statement in opposition to the application has taken issue with the substance of paragragh 7 of Mr Ngwata sworn statement and states that *"nowhere in his sworn statement does Mr Ngwata attempt to show how Justice Mkandawire exercised his discretion wrongly in refusing to grant them the order of stay"* in relation to the application for a stay of the enforcement order.

5.2.2.1 The position taken by the court below in relation to the application for a stay of the judgment enforcement order, as reflected on pages 2-3 of the Ruling of the court on 5th April, 2018, is as follows-

> "*... The issue therefore is whether the Sheriff has enforced the enforcement order before the expiry of the 30 days as prescribed by rule 40. According to the Court Order, execution of the enforcement would be deemed done once the Sheriff has delivered possession of the plot to the plaintiffs. The same enforcement order commands the Sheriff to appear to the court immediately after execution thereof. The Sheriff has not yet appeared to the court a sign that the execution has not yet been done. In arguing its case so passionately, the defendant has put heavy reliance on the note that the Sheriff ... had left with the Site Manager at Nkhota-Kota filling station which note they say in the affidavit of Happy Jere is marked HJ2. I note that there is no exhibit attached to the sworn statement of Happy Jere. What I see is a document purportedly written by Mr E W Mwale which has three stamp images of the Sheriff of Malawi. This document with no exhibit identity is a photocopy and it is not even certified by a Commissioner of Oaths as are other documents such as HJ1 and HJ3 attached to the same sworn statement of Happy*

Jere. This unidentified document and uncertified document is the same that the defendant would like this court to rely on. I have serious problems in accepting such a document especially where the contents of the same document are under serious challenge by the plaintiff. I say so because going through the sworn statement of Mr Kita it is vividly clear that the plaintiff is denying the fact that he has taken possession of the property. Whilst the Sheriff might, indeed have closed the filling station, ... I am not satisfied that the plaintiff has taken possession of the filling station therefore the enforcement order is not yet enforced hence we cannot be talking of an irregular enforcement. The defendant has already threatened that there has been trespass to its property and if that is the case, then the defendant is at liberty to pursue that avenue and the plaintiff and the Sheriff will bear responsibility in the event that the defendant succeeds. I therefore have no solid ground on which to pronounce that there has been an irregular enforcement of the court's order.".

5.2.2.2 It should be noted that the concerns raised by the court below regarding the document purportedly written by Mr E W Mwale which has three stamp images of the Sheriff of Malawi; the photocopy document with no exhibit identity and not certified by a Commissioner of Oaths as are other documents such as HJ1 and HJ3 attached to the same sworn statement of Happy Jere, which the Applicant wanted the court below to rely on have not been addressed in this application. The Applicant has filed, in support of this application, the same sworn statement of Mr Happy Jere with the same omissions in relation to the note left by the Sheriff at the filling station in Nkhota-Kota on 22nd March, 2018. Although paragraph 3 of Mr Happy Jere's sworn statement refers "to a note that the sheriff officer left at the filling station ... hereto attached and "HJ2", there is no such document marked "HJ2" and properly authenticated by a Commissioner of Oaths".

5.2.3 It does not appear to me that there is properly before this Court any application for an order for a stay or suspension of the judgment enforcement order of the court below dated 20th March, 2018, and the Applicant's arguments and submissions relating thereto summarized in paragraph 3.3.1 are misconceived. It is clear that the *inter-partes* summons filed on 12th April, 2018, and the supporting sworn statement of Mr McHarven Ngwata both refer only to an order for a stay or suspension of the judgment of the court below, pending the hearing and determination of the appeal; by incorporating wholesale in these proceedings the sworn statements used in the court below in support of the application for a stay or suspension of the judgment enforcement order, the Applicant, perhaps, unwittingly or inadvertently, also introduced in these proceedings an application for an order for the stay or suspension of the judgment enforcement order. The Applicant should not have incorporated wholesale in these proceedings the sworn statements used in the court below in support of the application for a stay or suspension of the judgment enforcement order when in these proceedings the Applicant seeks only an order for the stay or suspension of the execution of the judgment of the court below delivered on 19th March, 2018. These proceedings are not about an appeal against the decision of the court below in relation to its decision to refuse to grant any of the orders of stay sought by the Applicant; these proceedings are a fresh application by the Applicant for a stay of the judgment of the court below, pending the hearing and determination of the appeal.

5.2.4 In any event, in relation to the judgment enforcement order, it does not appear to me that the court below "*refused to grant the order for suspension* " of the judgment enforcement order as asserted in paragraph 7 of the sworn statement of Mr McHarven Ngwata. After

meticulously considering Order 28 rules 37 to 40 of the High Court (Civil Procedure) Rules, 2017, and also, the apparent lapses in the preparation of the sworn statement of Mr Happy Jere, the court below was " ... *not satisfied that the plaintiff has taken possession of the filling station therefore the enforcement order is not yet enforced hence we cannot be talking of an irregular enforcement",* and there was *"... therefore have no solid ground on which to pronounce that there has been an irregular enforcement of the court's order.".* It seems to me that the court below decisively pronounced on the issue relating to the enforcement of the judgment enforcement order; if it accepted that the Respondents had not taken possession of the filling station; and that the enforcement order was not yet enforced and, therefore, there was no irregular enforcement of the order, then perhaps, as suggested by the court below, the Applicant who thinks that there has been trespass to its property, is at liberty to pursue that avenue against the Respondents and/or the Sheriff who will bear responsibility in the event that the Applicant succeeds.

5.2.6 Notwithstanding my determination of the Applicant's application for an order of stay of the execution of the judgment of the court below, pending the hearing and determination of the appeal, I am not inclined to further consider the Applicant's application for an order for a stay or suspension of the judgment enforcement order of the court below.

Order to stay or suspend the judgment of the court below, pending the hearing and determination of the appeal

5.3 With respect to the application for the order to stay or suspend the judgment of the court below, pending the hearing and determination of the appeal, the gist of the Applicant's arguments and submissions are premised on two principal issues, namely, that the appeal raises serious issues to be heard and determined by the Supreme Court of Appeal; and that, unless the judgment of the court below is stayed or suspended, the Applicant would suffer irreparable damage and that, having regard to the facts of this case, the "balance of convenience is in favour of granting a stay or suspension of the judgment of the court below, pending the hearing and determination of the appeal.

5.3.1 With respect to the first issue, the Applicant argues and submits that the seven grounds of appeal set out in the notice of appeal show a serious challenge has been set against the judgment of the court below; and that there are serious questions to be brought to the appeal, As observed in paragraph 3.1.1, the sworn affidavits in support of the Applicant's application appear to premised to a large extend on the assertions, on behalf of the Applicant, that the Applicant has operated a filling station on the property since the 1970s through successive company name changes; that since August, 2015 the Applicant has operated the filling station on the property through the dealership of Mr Happy Jere; that since 2013 under a 30 year sublease dated 3rd October, 2013 the Applicant has had the possession of the property as a tenant of Mtunthama Farming Limited; that the operation of a filling station on the property necessarily entailed the construction and installation of purpose-built filling station and equipment including fuel tanks and fuel pumps, and the forecourt; and that the filling station equipment was first constructed by the Applicant's predecessor company Oil Company of Malawi Limited.

5.3.1.1 The Respondents argue and submit that the notice of appeal filed by the Applicant is irregular because it is not accompanied by any skeleton arguments as required by Practice Direction 52PD.21 of the Civil Procedure Rules applicable in this Court, and that therefore, the filing of the notice of appeal (and presumably the grounds of appeal set out in the notice

of appeal) should be treated as inconsequential in so far as it relates to application for stay herein. The Respondents further argue and submit that *" ... no where in the sworn statement of McHavern Ngwata does it show that the Applicant or any of its predecessors constructed the Nkhota-Kota Filling Station"; that rather, all that the sworn statement shows is the transition the Applicant has gone through, from being Oil Company of Malawi Ltd, to being to BP Malawi Ltd to being Puma Energy (Malawi) Ltd; that in fact, Lease Agreement marked JC 7 appearing as part of Exhibit MN 2 shows that what the Applicant's predecessors were renting from Chayamba Holdings Ltd was the Nkhota-Kota Filling Station itself and not that the same was constructed by the Applicant's predecessors; that "... the issue of who constructed the filling station cannot be a ground for granting a stay".*

5.3.1.2 The Respondents argument and submission that notice of appeal filed by the Applicant is irregular because it is not accompanied by any skeleton arguments is, in my view, an issue to be determined on the hearing and determination of the appeal. However, for purposes only of considering the application of stay herein, it seems to me that it is in interest of justice that the non-compliance, if any, with the requirement to file skeleton arguments at the time of filing of the notice of appeal as pointed out by the Respondents be waived, so that I am able to consider the grounds of appeal set out in the notice of appeal in so far as they relate to application for stay. In this regard it is worth noting that although the issue of who constructed the filling station appears to be in contention between the parties, none of the grounds of appeal highlighted by the Applicant to be determined by the Supreme Court of Appeal seem to relate directly to the construction of the filling station. Indeed, the issue of the construction the filling station does not appear to have been raised in the court below; as far as I have been able to determine the proceedings in the court below was for a declaration that the 1st Respondent was of Plot No. KK 104 in Nkhota-Kota District, and an order of possession by the Respondents of the plot.

5.3.2. With respect to the second issue, the Applicant argues and submits that *"if the judgment of the court below] is allowed to stand and the Applicant succeeds in its appeal, the Applicant stands to lose [huge].... sums of money, ... ";* that *"since the Respondents possession of the property would have been allowed by the judgment of the court below the Respondents possession of the property would be lawful and the Applicant would not be entitled to any damages against the Respondents or anyone else, even if the appeal succeeds*"; that, "*even assuming that the Respondents had the capacity to pay such sums of money, the Applicant would have lost such revenues without any right to claim the same from the Respondents*"; and that, "*therefore, the Applicant would suffer irreparable damage*". In another breathe the Applicant argues and submits that "*the Respondents have not even set up a business on the property*"; that "*if the Applicant's appeal fails and in the interim the enforcement order was suspended/stayed, the Respondents' loss, if any, would be much easier to assess and would arguably be claimable from the Applicant";* that "*although the Applicant would suffer irreparable damage if the enforcement order is allowed to stand and the appeal succeeds, no such problem applies to the Respondents even if the Applicant's appeal failed*". Finally, the Applicant argues and submits that "*the fact that the filling station holds tenant's fixtures and equipment that belongs to the Applicant, the Applicant's vacating the property would entail the Applicant having to remove the moveable property comprising the filling station";* that *"if the appeal succeeds, the Applicant would, in vain, have been put to grave inconvenience in that they would have had to remove property from the filling station to let the Respondents go into possession";* that *"if the appeal succeeds, the Applicant would be put to the trouble of installing the filling station equipment all over again having removed it in circumstances that would not entitle the Applicant to any compensation, ...*"; that the

consequential "*inconveniences and incompensable losses do not apply to the Respondents*"; that "*the enforcement of the judgment in the interim would pose the risk of injustice and prejudice to the Applicant if the appeal later succeeds in a manner that would not apply to the Respondents if the appeal fails and the enforcement of the judgment is suspended in the interim*"; and that "*the balance of convenience therefore lies in favour of suspending or staying enforcement of the judgment pending appeal*".

5.3.2.1 With respect to irreparable harm the Respondents argue and submit that "*the general or normal rule in this Court when approached with an application for stay is for no stay unless the Applicant puts forward a solid ground to show irremediable harm if no stay is granted;* that the " *... sworn statement of Mr McHarven Ngwata in support of the application for stay ... does not show at all any kind irremediable harm that the Applicant will suffer should a stay not be granted in these proceedings*"; that "*the Lease Agreement marked JC 7 appearing as part of Exhibit MN 2 shows that the [Applicant's] predecessors were renting from Chayamba Holdings Ltd was the Nkhota-Kota Filling Station itself and not that the same was constructed by the [Applicant's] predecessors*"; that "*... the Applicant has not demonstrated anywhere in its affidavit that the Respondents would not be able to compensate them in damages in the event of their appeal succeeding should they give up possession of the filling station now as ordered by the Judge in the lower court*"; that "*the only injustice that the [Applicant] stands to suffer with the [Respondents] gaining possession of the Filling Station is the loss of revenue, but this is the kind of loss which reparable as the [Supreme Court of Appeal] would be in a position to order that the Applicant be compensated accordingly for [its] loss if [its]appeal succeeds*"; that, in any event, the Respondents have undertaken to compensate the Applicant in the event of [its] appeal succeeding; and that "... *the Applicant has not shown any solid ground why a stay should be granted in this matter and the application should be dismissed accordingly*".

5.3.2.2 In another breathe, the Respondents argue and submit that it is a fundamental guiding principle of this Court when faced with an application for a stay that it will not reverse an order of the court below refusing the grant of a stay merely because it would itself have exercised the original discretion in a different way; that the onus is on the Applicant to show how court below wrongly exercised its discretion; that nowhere in his sworn statement does Mr McHarven Ngwata attempt to show how the court below exercised its discretion wrongly in refusing to grant them the order of stay; that it was incumbent on the Applicant to show how the court below had wrongly exercised his discretion; that "... *the Ruling of the court below refusing the Applicant a stay [is] ... well-reasoned and follows the principles of law governing a stay especially ... [in relation to the] "finding that there is no irreparable harm or injustice to be suffered by the Applicant in giving up possession of the filling station and that the Respondents would be in a position to compensate the Applicant in the event of a successful appeal*". While the Respondents arguments and submissions appears to be sound, and are certainly appreciated, it must not be forgotten that this application is not before this Court by way of appeal against the determination of the court below, but it is a fresh application and in my view in accordance with Order I r 18 of the Supreme Court of Appeal Rules (Cap. 3:01 sub. leg p.14)]. Consequently, and to the extent that the Applicant's application is strictly not an appeal against the determination of the court below, the Applicant need not show that the court below exercised its discretion wrongly in refusing to grant them the order of stay; nor is it incumbent on the Applicant to show how the court below had wrongly exercised its discretion as argued and submitted by the Respondents. Furthermore, despite the assertion by the Respondents that "... *the Ruling of the court below refusing the*

Applicant a stay [is] ... well-reasoned and follows the principles of law governing a stay especially ... [in relation to] "finding that there is no irreparable harm or injustice to be suffered by the Applicant in giving up possession of the filling station and that the Respondents would be in a position to compensate the Applicant in the event of a successful appeal" this Court is not constrained by the decision of the court below refusing to grant the Applicant's application for a stay of the judgment of the court below, and is entitled to come to its own conclusion based on the merits of the Applicant's application.

5.4 I bear in mind that the grant or refusal of stay of execution of the judgment of the court below, pending the hearing and determination of the appeal, 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.

5.5 The cardinal principle in determining a stay of judgment, pending the hearing and determination of an appeal, is that a successful litigant should not be deprived of the fruits of litigation, unless there are sufficient reasons for doing so; and in this regard the court should certainly consider the risk of injustice or prejudice to either of the parties. In *Mike Appel & Gatto Ltd v Saulos Chilima* MSCA Civil Appeal No.20 of 2013, a full bench of this Court, after adopting the approach advocated *Hammond Suddards Solicitors v Agrichem International Holdings* (supra) and *Moat Housing Group-South Ltd v Harris* The Times January, 13 2005 (CA) observed that-

> *"... a consideration of the risk of injustice or prejudice would encompass the considerations currently and conveniently considered; but it also allows for other considerations relevant in the case. Liberal in that way a court has a wider premise upon which to exercise its discretion in granting or refusing to grant stay of execution".*

5.5.1 The approach advocated *Hammond Suddards Solicitors v Agrichem International Holdings* (supra) and *Moat Housing Group-South Ltd v Harris* (supra) is that -

> *"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....".*

5.5.2 Thus, in determining whether to grant a stay of execution of judgment, pending the hearing and determination of an appeal, regard must be had, among other things, to the potential prejudice to the parties; the principal guiding principle 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.

5.6 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. This issue must, of course, be considered in the context that there is subsisting a binding judgment of the court below which even this Court must respect until set aside or otherwise modified and also that the Respondents are entitled to enjoy the fruits of their litigation.

5.7 Counsel for the Applicant has submitted that the good prospects of success of the appeal in this matter is a ground for a stay of the proceedings. However, as observed in paragraph 5.3.1.1, and without in any way wishing to be seen determining the appeal, none of the grounds of appeal to be determined by the Supreme Court of Appeal seem to relate directly to the construction of the filling station and, in any event, that issue is in contention between the parties.

5.7.1 The Applicant also, in effect, argues and submits that the Applicant that "*if the judgment of the court below] is allowed to stand and the Applicant succeeds in its appeal, the Applicant stands to lose [huge]such sums of money, which Applicant would not be entitled to claim as damages against the Respondents or anyone else*; that, "*even assuming that the Respondents had the capacity to pay such sums of money, the Applicant would have lost such revenues without any right to claim the same from the Respondents [or anyone else]*"; and that, "*therefore, the Applicant would suffer irreparable damage*". I am not sufficiently persuaded by the Applicant's arguments and submissions that "*if the judgment of the court below] is allowed to stand and the Applicant succeeds in its appeal, the Applicant stands to lose [huge] sums of money, which Applicant would not be entitled to claim as damages against the Respondents or anyone else*"; that, "*even assuming that the Respondents had the capacity to pay such sums of money, the Applicant would have lost such revenues without any right to claim the same from the Respondents or any one else*"; and that, "*the Applicant would, therefore, suffer irreparable damage*". It seems to me that the Applicant could if it so wished pursue recover its loss from the person or entity that put the Applicant in the position that the Applicant has found itself. Nor am I persuaded by the arguments and submissions that "*if the Applicant's appeal fails and in the interim the judgment of the court below was suspended or stayed, the Respondents' loss, if any, would be much less and easier to assess*"; and that "*although the Applicant would suffer irreparable damage if the enforcement order is allowed to stand and the appeal succeeds...* ". In my considered view the ease with which the Applicant's a loss may or may not assessed does not negate the fact that the loss to the Applicant, if the appeal succeeds, can be assessed. The Applicant's arguments and submissions that "*the filling station holds tenant's fixtures and equipment that belongs to the Applicant; that the Applicant vacating the filling station would require the Applicant to remove the moveable property comprising the filling station; that if the appeal succeeds, the Applicant would, in vain, have been put to grave inconvenience in having had to remove property from the filling station; that if the appeal succeeds, the Applicant would be put to the trouble of installing the filling station equipment all over again*", are all premised on the on the assertion by the Applicant that its predecessor constructed the filling station. However, as noted earlier in this Ruling that the issue of who constructed the filling station does not appear to have arisen in the court below, but now appears to in contention between the parties. Nevertheless, none of the grounds of appeal highlighted by the Applicant to be determined by the Supreme Court of Appeal seem to relate directly to the construction of the filling station

and, for purposes of this application, it would probably be preferable if this Court avoids making any pronouncement or finding on the issue.

5.7.2 The Respondents argue and submit that the Applicant has not shown any kind irremediable harm that the Applicant will suffer should a stay of enforcement of the judgment of the court below not be granted; that the Applicant has not demonstrated that the Respondents would not be able to compensate the Applicant in damages in the event of its appeal succeeding should they give up possession of the filling station now as ordered by the court below; that the only injustice that the Applicant stands to suffer with the Respondents gaining possession of the filling station is the loss of revenue, but this is the kind of loss which reparable if the Applicant's his appeal succeeds; and in any event, that Respondents have undertaken to compensate the Applicant in the event of its appeal succeeding.

5.7.3 I am not sufficiently persuaded that the Applicant has shown or demonstrated any kind irreparable harm that the Applicant will suffer should a stay or suspension of enforcement of the judgment of the court below not be granted; or that the Respondents would not be able to compensate the Applicant in damages in the event of the appeal succeeding. It seems to me that the only injustice or prejudice that the Applicant argues that it stands to suffer with the Respondents gaining possession of the filling station is the loss of revenue from the operation of the filling station, and such loss is reparable if the Applicant's appeal succeeds; and it is loss that the Respondents have undertaken to compensate the Applicant in the event of the appeal succeeding. Nor am I persuaded, as suggested on behalf of the Applicant, that "*the enforcement of the judgment of the court below would pose a risk of injustice and prejudice to the Applicant if the appeal later succeeds in a manner that would not apply to the Respondents if the appeal fails and the enforcement of the judgment is suspended in the interim*"; and that "*the balance of convenience, therefore, lies in favour of suspending or staying enforcement of the judgment pending appeal*". In my considered view, it would be utterly unconscionable and, therefore, unjust to deprive the Respondents of the fruits of their litigation in circumstances where the Applicant has failed to show that, unless the judgment of the court below is stayed or suspended, it would suffer irreparable loss or damage and, therefore, injustice or prejudice, especially where the basis of the application for stay or suspension of the judgment of the court below is not or has not directly been anchored or premised on any of the grounds of appeal to be heard and determined on appeal.

5.8 I am of the firm view that this is not a proper case in which this Court should exercise its discretion to grant a stay or suspension of the judgment of the court below, pending the hearing and determination of the Applicant's appeal. I, accordingly, refuse to grant the Applicant's application for a stay of the execution of the judgment of the court below, and I dismiss the Applicant's application.

5.9 Costs for the Respondents.

Pronounced in Chambers this 22nd day of May, 2018 at Blantyre.

Justice Anthony Kamanga, SC
JUSTICE OF APPEAL