

IN THE MALAWI SUPREME COURT OF APPEAL

CIVIL APPEAL NO. 88 OF 2019

(Being High Court (Lilongwe District Registry) (Commercial Division) Commercial Cause No. 418 of 2018)

BETWEEN

NORWEGIAN CHURCH AIDAPPLICANT

AND

FUKUMELE BUILDING CONTRACTORSRESPONDENT

CORAM: Justice Anthony Kamanga, SC, JA
Chinula, SC, for the Applicant
Kita, of Counsel, for the Respondent
Minikwa, Recording Officer

RULING

Kamanga, JA

1. Introduction

1.1 This application, filed by Norwegian Church Aid (the “Applicant”), is for an interim order staying the execution of an arbitration award made on 27th November, 2019 (the “arbitration award”) in relation to proceedings in the High Court (Lilongwe District Registry) (Commercial Division), in Commercial Cause No. 418 of 2018, in favour of the Fukumele Building Contractors (the “Respondent”), “pending the hearing and determination of an application by the Applicant to set aside the arbitration award, (the “Applicant’s application herein”).

1.2 The Applicant's application herein follows a previous application which was filed and issued on 18th December, 2019, and heard by this Court on 14th January, 2020, in which the Applicant sought to appeal against an order dated 5th December, 2019 of the court below denying the Applicant's application for a stay of the execution of the arbitration award, pending the hearing and determination of an application by the Applicant to set aside the arbitration award; that application was dismissed by this Court on 22nd January, 2020.

1.3 The Summons for the Applicant's application herein was initially filed as an *ex-parte* application on 24th January, 2020, but this Court ordered that the Applicant should file an *inter partes* application in order to provide the Respondent the opportunity to be heard. The Applicant, accordingly, filed the application herein which was issued on 29th January, 2020, and the application heard on 12th February, 2020.

1.4 The Summons for the Applicant's application herein indicates that it is made under, or pursuant to, section 7 (b) of the Supreme Court of Appeal Act; Order I, rule 18 of the Supreme Court of Appeal Rules; and the inherent jurisdiction of this Court.

2. *The Applicant's arguments and submissions in support of the application herein*

2.1 During the hearing of the Applicant's application herein on 12th February, 2020, Counsel for the Applicant adopted the sworn statement of Senior Counsel Chinula as well as the skeleton arguments filed on 29th January, 2020 in support of the application.

2.2 The sworn statement filed in support of the Applicant's application herein, in so far as it is relevant, states as follows-

“3. *THAT the Respondent commenced the present action in the General Division of the High Court, Lilongwe District Registry, on 23rd August, 2018, by filing an ex parte application for the appointment of an Arbitrator under section 12 (a) of the Arbitration Act, and the ex parte application was supported by a sworn statement of Counsel Kita. ...*

4. *THAT under an order dated 24th August, 2018, the Court ordered that Mr Powell Nkhutabasa be appointed as Arbitrator. ...*

5. *THAT under their letter dated 28th August, 2018, the Legal Practitioners for the Respondent informed Mr Nkhutabasa and the Applicant of the appointment of Mr Nkhutabasa as Arbitrator, and upon receipt of that letter, the Applicant passed on the matter to our firm to represent them. ...*

6. *THAT on 3rd September, 2018, my firm filed and served a Notice of Appointment of Legal Practitioner. ...*

7. *THAT on 3rd September, 2018, the Arbitrator wrote the parties inviting them to a preliminary meeting which the parties attended.*

8. *THAT under our letter dated 6th September, 2018, and addressed to the Arbitrator and copied to the Legal Practitioner of the Respondent, we advised*

the Arbitrator that we are in the process of applying to the High Court, General Division, that this matter be transferred to the High Court, Commercial Division. ...

9. *THAT on 7th September, 2018, we filed Summons for Transfer of Proceedings to the High Court, Commercial Division... and upon following up with the Court, we were told that the Summons could not be traced at the Registry and so on 8th November, 2018 we filed yet another Summons for the Transfer of the Proceedings to the High Court, Commercial Division ... and an order was signed by Justice Nyirenda on 17th December, 2018, and the same was served on the Legal Practitioners of the Respondent on 11th January, 2019.*

...

10. *THAT on 15th August, 2019, we again wrote the Legal Practitioners for the Respondent with a copy to the Arbitrator reiterating that the matter was transferred to the High Court, Commercial Division. ...*

11. *THAT under cover of their letter 16th August, 2019, the Legal Practitioners for the Respondent wrote to us and copied the Arbitrator indicating that at the time the matter was transferred to the High Court, Commercial Division there was already an order referring the matter for arbitration. ...*

12. *THAT on 15th August, 2019, we were served with a Notice of Arbitration Hearing informing us that arbitration had been set down for hearing on 27th August, 2019.*

13. *THAT under his letter dated 19th August, 2019, the Arbitrator wrote to both parties asking them to engage and advise him if arbitration will take place on 27th August, 2019. ...*

14. *THAT under our letter dated 26th August, 2019, we wrote the Arbitrator informing him that since the matter had been transferred to the High Court, Commercial Division, we would not be attending the arbitration and instead we would wait for directions from the High Court, Commercial Division. ...*

15. *THAT under his letter dated 27th August, 2019, the Arbitrator again wrote the parties' Legal Practitioners ordering that if he does not hear from the parties within 14 days he shall proceed to make an Arbitration Award based on the evidence given by the Respondent (Claimant). ...*

16. *THAT in view of the threat to proceed by the Arbitrator, on 7th October, 2019, we filed an Ex-parte Summons for an Application to Set Aside the Court's Order Appointing the Arbitrator, and when we kept following up at the High Court, General Division for a date, we were told by the Registry staff that the file could not be traced and they were unable to assign a date for the application to be heard and the documents were then left in our tray at the said Court and*

we eventually collected them. ... It is worth noting that the Cause Number on the Ex-parte Summons was changed in ink from 701 to 101.

17. THAT on 27th November, 2019, we received a letter from the Arbitrator attaching an Award dated 27th November, 2019, and since I was in Mangochi attending to other business I only saw the letter on 2nd December, 2019.

18. THAT on 3rd December, 2019, I was surprised to get a call from the Applicant that there were Sheriffs at their office to carry out execution and, upon going there, I learnt from the Sheriffs that enforcement of the award was from was from the High Court, Commercial Division, and indeed upon perusing a copy of the Enforcement Order, I noticed that the matter had originally the High Court, General Division cause number 701 which was then cancelled in ink and another cause number 418 endorsed thereon by the High Court, Commercial Division.

19. THAT having dealt with the issue of execution, I went to the High Court, Commercial Division, and was reliably informed that at first there was no file on which the application for an Order Granting Leave to Enforce the Arbitration Award as an Order of the Court could be dealt with by the Court, but later someone brought a file from the High Court, General Division which was re-registered as Civil Cause 418 of 2018 and this was the very same file which we were told could not be traced at the High Court, General Division, to enable us process our application as stated in paragraph 16 above. We also noticed that the Arbitration Award had "Civil Cause NO. 701 of 2018, Lilongwe District Registry (Before Honourable Justice Mkandawire)". We wonder why it was taken to the High Court, General Division for an enforcement Order.

20. THAT it is clear ... that the relevant filing fees were not paid by the Respondent in the court below as required by Order 26 and the second Schedule to the Courts (High Court) (Civil Procedure) Rules. 2017.

21. THAT we then applied for a Stay of Execution at the High Court, Commercial Division and the said application was dismissed and the Applicant is now desirous of having the application determined by this Court under Order I rule 18 of the Supreme Court of Appeal Rules. ...

22. THAT the Respondent made an application to the court below for an interim attachment order and the same is coming up in the High Court, Commercial Division. Lilongwe District Registry on 12th February, 2020 to be made absolute.

23. THAT should an order staying enforcement of the Arbitration award not be granted in this matter, great injustice will be suffered by the Applicant in that they will be made to pay a huge sum of money in a matter that was not properly before the [court] below.

24. THAT ...

25. WHEREFORE the Applicant prays to this ... Court for the following reliefs-

(1) an order staying enforcement of the Arbitration award dated 27th Novemeber, 2019, pending an application to set it aside;

(2) an order that the goods seized in the execution be released to the Applicant; and

(3) an order that the Applicant should file an application to set aside the Arbitration award within 7/14 days. ... ”.

2.3 In the skeleton arguments filed on 29th January 2020, in support of the application herein, the Applicant has cited a wealth of case authorities with respect to the principles that govern applications for the stay of enforcement of judgments, pending the hearing and determination of appeals, including *Mike Appel and Gatto v Saulos Chilima* MSCA Civil Appeal No. 20 of 2013; *Malawi Cotton Ginners Company Limited v Foster Namitembo and Fred Masauli t/a Olive Oil Industries* MSCA Civil Appeal No. 74 of 2015; *City of Blantyre v Manda* Civil Cause 1131 of 1990; *FDH Bank Limited v Maranatha Girls Academy* MSCA Civil Appeal 22 of 2016; *V. D Chidzakufa t/a V & C Distributors v Nedbank Malawi Limited*, MSCA Civil Appeal No. 70 of 2009; *Mulli Brothers Limited v Malawi Savings Bank*, MSCA Civil Appeal Number 48 of 2014; *Press Corporation Ltd and Press Cane Ltd v Rolf Patel and Others* MSCA Civil Appeal No. 26 of 2014; *Great Lake Cotton v Amanita (Africa) Limited* MSCA Civil appeal No. 11 of 2015; and *Frank Jailosi Chisakalimi v Cassium James et al* MSCA Civil Appeal No. 212 of 2016.

2.3.1 In relation to the principles that govern applications for stay of enforcement of judgments, pending the hearing and determination of appeals, the Applicant cites-

(a) *Mike Appel & Gatto v Saulos Chilima* (supra) in which Nyirenda, CJ, made the following observation -

“The Annot Lyle generally remains good authority in that courts should not willy-nilly make the practice of depriving a successful litigant of the fruits of litigation, and locking up funds to which, prima facie, he is entitled, pending appeal” ;

(b) *Malawi Cotton Ginners Company Limited v Foster Namitembo and Fred Masuli t/a Olive Oil Industries* (supra) in which the court stated as follows-

“Stay of execution is a practice well established. It is also well established that neither the court below nor the court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. Courts do not make a practice of depriving a successful litigant the fruits of his litigation. See Monk v Bartram (1891) 1QB 346. The question whether or not to grant a stay is entirely in the discretion of the court (Becker v Earl’s Court Ltd (1911) 56 S.J. 206. In the exercise of the discretion, a court

should endeavor as far as possible to maintain a fair and proper balance between the needs of the successful litigant and those of the applicant.”;

- (c) *City of Blantyre v Manda* (supra), in which Unyolo J, as he then was, observed as follows-

“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 and withholding monies, which, prima facie he is entitled. The court should then consider whether there are special circumstances which militate in favor of stay and the onus will be on the applicant to show or prove such special circumstances. The case of Baker v Lavery, which I have cited above, seems to suggest that evidence showing that there was no probability of getting the damages back if the appeal succeeded, would constitute special circumstances. Broadly, I would agree with this statement but it is not a closed rule. The total facts must be considered fully and carefully. I would in this context agree with the learned judge in Stambuli case that even where the respondent would not be able to pay back the money, the court could still refuse to grant an order of stay, if on the total facts, it would be utterly unjust to make such an order.”

- (d) *FDH Bank Limited v Maranatha Girls Academy* (supra) and *V. D Chidzakufa t/a V & C Distributors v Nedbank Malawi Limited*(supra), and submits that upon an application being made, the question whether or not to grant the order suspending or staying enforcement remains entirely in the discretion of the court, and that such application will be granted upon consideration of the circumstances laid out to the court that necessitate the granting of the stay; and further that when considering the evidence before it the court must exercise its discretion judicially;

- (e) *Mulli Brothers Limited v Malawi Savings Bank* (supra) in which this Court set out a three tier test to be applied in exercising the discretion whether or not to grant a stay of execution pending appeal, and stated as follows-

*“It is well to add that we understand the law to be that the test whether a stay should be granted is the three-part test from *RJR-MacDonald Inc.* (1994) 1 SCR 311 that also governs an interlocutory injunction: a serious issue to be tried, irreparable harm, and the balance of convenience. ...*

*The Court in the Canadian Federal Court of Appeal held that each of these tests is a separate threshold, so that each must be answered in the affirmative in order for a stay to be granted. Stratas J.A. pointed out that “[e]ach branch of the test adds something important”. While that is true, it does not follow that each must be satisfied individually. The alternative is that all are balanced together. That balancing approach has been endorsed by Sask CA in *Mosaic v PCS* 2011 SKCA 120 and by Hoffmann J in *Films Rover International Ltd v Cannon Film Sales Ltd*. [1986] 3 All ER 772 at 780 (Ch), who was explaining about the principal dilemma*

about the grant of interlocutory injunctions but his views equally apply to stay of executions.

... In Trad v Harbour Radio Pty Ltd [2010] NSWCA 41 Tobias JA said the following which is instructive respecting the relevant principles applicable to a stay of execution application:

Secondly, although courts approaching applications for a stay will not generally speculate about the appellant's prospects of success, given that argument concerning the substance of the appeal is typically and necessarily attenuated, this does not prevent them considering the specific terms of a stay that will be appropriate fairly to adjust the interest of the parties, from making some preliminary assessment about whether the appellant has an arguable case. This consideration is protective of the position of a judgment creditor where it may be plain that an appeal, which does not require leave, has been lodged without any real prospect of success and simply in the hope of gaining a respite against immediate execution upon the judgment.

It is our judgment that the above dictum ably captures what should inform an appellate court when considering an application for stay of execution from a court below it. We have seen that the appellant thinks that the court erred in not taking into account the payments that were made in satisfaction of the debt. However, it has been understood that the respondent's claim took into account all the payments made by the appellant. Thus, it is doubtful that the appeal has been lodged with any real prospect of success. In our judgement it has been lodged merely in the hope of gaining a break against immediate execution upon the judgment.

We must add and put it here by way of observation that the comment by the Court in the passage which we have recorded above is illuminating. It indicates that there is no necessary requirement that the Court determines whether there is an arguable case on the appeal although it may be relevant in determining whether it is appropriate to grant a stay.”;
and

(f) *FDH Bank Limited v Maranatha Girls Academy (supra)* in which this Court considered the earlier position on the test and drew its conclusion in line with the recent approach to the test, and stated thus-

“Recently, in the Malawi Cotton Ginners Company Limited v Foster Namitembo and Fred Masuli t/a Olive oil industries case I observed thus concerning the issue of prospects of success on appeal as factor to consider whether or not to stay the execution of the judgment:

according to the case of Nyirenda v AR Osman (1993) MLR 400 it is not the chances of successful appeal that can form a ground

ordering stay of execution. Rather it is the consideration that a successful litigant will be unable to repay the amount granted by the judgment and executed if the appeal succeeds that informs an adjudicator whether or not there are sufficient grounds for ordering a stay of execution. In part of fact, if the issue whether or not a successful litigant will be able to repay the amount granted by the judgment and executed should the appeal succeed is answered in the affirmative then stay will not be granted.

The law has since moved on. Thus, that the appeal may be rendered nugatory is only but one of the considerations. As it were, the current philosophy of law is that what matters is the risk of injustice to either of the parties. This means that the issue is not always whether damage or loss the subject matter of the execution before determination of the appeal can be made good by the party that has lost the appeal. But rather the question is the risk of injustice to either of the parties.

The shift in the theory of law, respecting issue that an applicant for stay of execution should disclose reasons why not staying execution will later render successful appeal nugatory, is noticeable in Mike Appel and Gatto Limited v Saulos Chilima where the court accepted that the 'nugatory' principle may be out-dated and has outlived its useful purpose and has been over relied upon. Indeed, in Mike Appel and Gatto Limited v Saulos Chilima (supra) the Supreme Court unanimously held that an application for stay pending appeal should be resolved on the basis of the risk of doing injustice or prejudice in the circumstances of a particular case".

2.3.2 It is contended on behalf of the Applicant that what comes out clearly from the above exposition of case authorities is that in totality of all the applicable principles, for an order for suspension of enforcement pending determination of an application to set aside enforcement of order to be granted, an applicant must demonstrate that there are good reasons for so doing and that it is in the interest of justice for the sought order to be granted; that this entails that the court must consider all the circumstances of the case and see from the same whether or not good reasons for suspending enforcement do exist and whether or not the same is in the interest of justice. In this regard the applicant cites the case of *Mulli Brothers Limited v Malawi Savings Bank* (supra), and argues and submits that this is a proper a case for granting an order suspending enforcement of the arbitration award.

2.3.3 It is further contended on behalf of the Applicant that the earlier jurisprudence on prospects of the application succeeding was to the effect that courts faced with applications for stay of execution pending an application to set aside an award were not supposed to bother delving into the merits of the application itself as that was a duty reserved for the court to hear the application and, in this regard, the Applicant cites the case of *Press Corporation Ltd and Press Cane Ltd v Rolf Patel and Others* (supra) in which Chipeta, JA, stated as follows-

"...I have thus throughout to bear in mind that determining the appeal is not a task that is within my jurisdiction as a single judge of this court. It is very clear in my mind that the question whether the trial court was right or wrong in

extending its worries in this case to matters that appear to have gone beyond the issues it had initially identified as due for determination of the pleading is a matter the full bench of the Supreme Court that will be empaneled will contend with and determine when the appeal herein comes to maturity”.

2.3.4 It is further contended on behalf of the Applicant that the courts have since adopted a flexible approach in dealing with the aspects to do with the appeal itself and the position is now that although courts slow to comment on the prospects of success of an appeal, the same will still be taken into account where necessary; and in this regard the Applicant cites the case of *Frank Jailosi Chisakalimi v Cassium James et al* (supra) in which this Court granted a stay pending the hearing and determination of an appeal on the basis that the applicant’s appeal had a very high chance of success.

2.3.5 It is contended on behalf of the Applicant that the Applicant’s application herein hinges on two points –

(a) whether the arbitration proceedings should have been continued when the matter had been transferred to the Commercial Division of the High Court; and

(b) whether proceedings were properly before two courts below, namely, the High Court, General Division and the High Court, Commercial Division considering that the appropriate filing fees as prescribed under Order 26 of the Courts (High Court) (Civil Procedure) Rules, 2017 and as more fully particularized in the Second Schedule to the said Rules were never paid by the Respondent.

2.3.6 The Applicant contends that, having demonstrated that the application to set aside the arbitration award has high prospects of success, the balance of the risk of justice demand that the enforcement of the Arbitration Award be suspended because not doing so would be to let the Respondent go away with sums of money which it is unlikely to pay back in the event of the application succeeding; that in essence suspending enforcement ensures that the Respondent does not get sums of money it is unlikely to pay back after the application, and which sums the Applicant is financially sound to pay if in the unlikely event of an adverse outcome from the application. This approach, the Applicant contends is consistent with the approach taken by this Court in the *Jailosi Chisakalimi v Cassium James et al* (supra).

2.3.7 It is contended on behalf of the Applicant that the considerations that the court ought to take into account when considering the risk of injustice or prejudice are not any different from what the court considers when taking into account which way the balance of convenience tilts when making a determination on an application for injunctions or stay of execution, and that this was duly acknowledged by the Supreme Court of Appeal in *Mulli Brothers Limited v Malawi Savings Bank* (supra); and that in this case the solvency of the Respondent, being a contractor who depends on being awarded building contracts, cannot be guaranteed where as that of the Applicant is guaranteed. The Applicant, accordingly, argues and submits that in this case balance of convenience tilts towards granting the order of stay prayed for.

2.4 During the hearing of the Applicant’s application herein on 12th February, 2020, Counsel for Applicant referred this Court to paragraph 22 of the sworn statement filed in support of the Applicant’s application herein with respect to the Respondent’s application in the court below to

make absolute the interim attachment order which was scheduled be heard by the court below on 12th February, 2020. Counsel for the Applicant prayed that, in the event that this Court grants the Applicant's application herein, the stay of enforcement should also apply to the interim attachment order.

3. *The Respondent's arguments and submissions in opposition to the Applicant's application herein*

3.1 During the hearing of the Applicant's application herein on 12th February, 2020, Counsel for the Respondent adopted the sworn statement of Counsel Kita as well as the skeleton arguments filed on 10th February, 2020, in opposition to the application.

3.2 The sworn statement in opposition to the Applicant's application herein, in so far as it is relevant, states as follows-

"3 *THAT I have read the Applicant's inter partes summons for Stay of Execution and aver that the same is misconceived and ought to be dismissed summarily without even delving in the merits of the application itself.*

4. *THAT the application itself is being made "pending the hearing and determination of an application to set aside the Arbitration Award."*

5. *THAT this Court being the Supreme Court of Appeal only gets seized of the matter by virtue of an appeal pending to it.*

6. *THAT the Applicant's application is not anchored on any appeal pending to this Court and nowhere in the sworn statement is the Applicant making any reference to it.*

7. *THAT such being the case, this Court has got no jurisdiction to hear and determine an application for stay that is not premised on appeal pending to it.*

8. *THAT this Court has got no business with the Applicant's intended application to set aside the Arbitration Award as the same ought to be made in the lower court and as is clear from paragraph 25 (3) of Allan Chinula SC Sworn Statement, the same has not yet even been made but is asking this Court for an order that the same be filed within 7/14 days.*

9. *THAT such being the case, there is no material before this Court based on which it could hear and determine an application for stay and the same ought to be dismissed outright.*

10. *THAT the [Respondent] being a successful party in the lower court is entitled to fruits of his litigation and that is by having the [Applicant] pay him the sum of K105,855,583.92 as ordered by the lower court.*

WHEREFORE, I humbly pray to the ... Court to dismiss the [Applicant's] application with costs."

3.4 The Respondent's arguments and submissions in opposition to the Applicant's application herein, as set out in the skeleton arguments filed on 10th February, 2020, are as follows-

- (a) That the background facts in opposition to the application for stay by the Respondent are as contained in the sworn statement in opposition of Wapona Kita;
- (b) That the Applicant is making the application for stay based on section 7 (b) of the Supreme Court of Appeal Act and Order I, rule 18 and Order II, rule 1 of the Supreme Court of Appeal Rules;
- (c) That the principal issue in this matter is whether this Court has jurisdiction to hear and determine the Applicant's application herein for stay that is not anchored on an appeal;
- (d) That in its Ruling dated 22nd January, 2020 in this very same case (*Norwegian Church Aid v Fukumele Building Contractors* Misc Civil Appeal No. 88 of 2019) this Court (in paragraph 6.1.5) held as follows-

"... ... where in proceedings the High Court has refused to grant a stay of execution, pending the hearing and determination of an appeal by the full bench of this Court, a party aggrieved by the decision of the High Court in that regard may, pursuant to Order 1 rule 18 of the Supreme Court of Appeal Rules, apply to this Court sitting as a single member, for a stay of execution, pending the hearing and determination of the appeal.

However, every such application is typically not an appeal against the decision of the High Court refusing a stay of execution, but is a fresh or new application, and is typically headed "Application for stay of execution ... pending the hearing and determination of appeal". Every such application for stay of execution, pending the hearing and determination of an appeal, will also typically be supported by an affidavit to confirm that a notice of appeal, including the grounds of appeal, has properly been filed, that an appeal is pending hearing and determination by the full bench of this Court, and that there are sufficient grounds to grant the application."

- (e) That the Applicant's application herein for stay of execution herein goes totally against the holding of this Court in its Ruling dated 22nd January, 2020; that the sworn statement filed in support of the Applicant's application herein does not anywhere confirm that a notice of appeal has been filed together with the grounds of appeal, and the application has not been made pending the hearing and determination of appeal; and
- (f) That the Applicant's application herein is, therefore, grossly irregular and cannot be granted as it has not satisfied the conditions precedent to the making of such an application,

and the Respondent, accordingly, prays that this Court should dismiss the Applicant's application herein with costs.

3.5 In a nutshell, the Respondent contends that the Applicant's application herein is grossly irregular and cannot be granted because the application does not satisfy the conditions precedent to the making of such an application, namely, that the application is not predicated on an appeal, pending the hearing and determination by a full bench of this Court; that the application herein is not recognizable or supported by any law; that this Court has no jurisdiction to hear and determine the application herein; and that, in any event, the application herein has no merit; and should, accordingly, be dismissed.

3.5.1 The Counsel for the Respondent strongly opposed the Applicant's prayer that, in the event that this Court grants the Applicant's application herein, the stay of enforcement should also apply to the interim attachment order issued by the court. Counsel for the Respondent argued and submitted that, in relation to the interim attachment order in court below, this Court, in its Ruling of 22nd January, 2020 was of the firm view that it would be inappropriate for this Court to make any order in relation the release and payment to the Respondent of the sum of K68,977,113.00 held at National Bank of Malawi Plc while that application was yet to be heard and determined by the court below, and in that regard, this Court was not inclined to entertain and grant the Respondent's prayer, which was dismissed. Counsel for the Respondent thus contended that it would be grossly unfair for this Court to grant the Applicant's prayer that, in the event that this Court grants the Applicant's application herein, the stay of enforcement should also apply to the interim attachment order.

Applicant's response to the Respondent's arguments and submissions in opposition to the Applicant's application herein

3.6 It is pertinent to note that the Applicant did not file any response to the Respondent's sworn statement in opposition to the Applicant's application herein, and during the hearing of the application on 12th February, 2020, Counsel for the Applicant opted not to reply specifically to the arguments and submissions made on behalf of the Respondent in opposition to the Applicant's application herein. Counsel for Applicant did, however, reiterate and emphasize the contention that the Applicant's application herein is made under, or pursuant to, section 7 (b) of the Supreme Court of Appeal Act; Order I, rule 18 of the Supreme Court of Appeal Rules; and the inherent jurisdiction of this Court. Counsel for the Applicant strongly argued and submitted that Order I, rule 18 of the Supreme Court of Appeal Rules entitles the Applicant to make the application herein, and strongly suggested that the Applicant's application herein need not be predicated on the hearing and determination of an appeal by the full bench of this Court, and left it to this Court to determine the Applicant's application herein based on the arguments and submissions made on behalf of the parties.

4. *Observations*

4.1 Before this Court considers and determines the Applicant's application herein, it is pertinent to make the following observations with respect the arguments and submissions made on behalf of both the Respondent and the Applicant during the hearing of the application.

Case file of the court below

4.2 As previously observed by this Court in its Ruling dated 22nd January, 2020, with the agreement of Counsel for both parties herein, this Court had the opportunity to browse the case file of the court below to better appreciate the genesis of the Applicant's application for a stay of the execution of the Arbitrator's award herein. In so far as it is relevant to the Applicant's application herein, the case file of the court below indicates that the Respondent, on 3rd December, 2019, made an application in the court below for an order to enforce the arbitration award as a judgment of the court and the court below on the same date granted the Respondent's application (the "order of 3rd December, 2019"); in that order, the court below also granted the Respondent leave to enforce the arbitration award as a judgment of the court and a seizure and sale order directing the Sherriff of Malawi to enforce the order.

4.2.1 On 5th December, 2019, the Applicant made an application in the court below for an order of stay of execution of the order of 3rd December, 2019, pending the hearing and determination of an application to set aside the arbitration award; in that application the Applicant also prayed that the goods seized in the execution of the order of 3rd December, 2019 be released to the Applicant upon the payment of relevant execution charges which should be reimbursed by the Respondent should it be found that the seizure of the goods was unlawful. The court below, on 5th December, 2019, dismissed the Applicant's application for a stay of execution of the order of 3rd December, 2019 (the "order of 5th December, 2019").

4.2.2 The Applicant, being dissatisfied with the order of 5th December, 2019, on 9th December, 2019, sought and was granted by the court below leave to appeal against that order, and the Applicant, on 10th December, 2019, filed a notice of appeal. In its notice of appeal, the Applicant faulted the court below on the following grounds and seeks the following reliefs-

"2. GROUNDS OF APPEAL

(1) The Learned Judge erred in law in dismissing the application for an order of staying execution without considering whether the matter was properly before the court for the court to order enforcement of the Arbitrator's award.

(2) The Learned Judge erred in law in dismissing the application prematurely without allowing the action to proceed to an inter partes stage to fully hear both parties.

(3) The Learned Judge erred in law in not considering the sworn statement attached to the application.

3. RELIEF SOUGHT

(1) An order setting aside the whole order of the Learned Judge.

(2) An order that –

(1) the execution of the arbitrator's award entered herein be stayed;

- (2) *the Appellant do pay Sheriff's fees to be reimbursed by the Claimant should it be determined that the seizure/execution was wrongful/illegal/irregular;*
- (3) *the goods seized in the execution be released to the Applicant*
- (4) *the Appellant shall file an inter partes application for stay within 7/14 days.”.*

The Applicant's application for an appeal against the order of the court below dated 5th December, 2019

4.3 Before the hearing and determination of the appeal filed on 10th December, 2019, by the full bench of this Court, the Applicant on 18th December, 2019, filed for Summons in this Court for an appeal against an order of 5th December, 2019. In its Ruling dated 22nd January, 2020, this Court dismissed the Applicant's application without considering and determining the merits of the application, principally because this Court, sitting as a single member, did not have jurisdiction to hear and determine the Applicant's appeal. This Court observed that where in proceedings the High Court has refused to grant a stay of execution, pending the hearing and determination of an appeal by the full bench of this Court, a party aggrieved by the decision of the High Court in that regard may, pursuant to Order I rule 18 of Supreme Court of Appeal Rules (Cap. 3:01 *sub. leg. p. 11*), apply to this Court, sitting as a single member, for a stay of execution, pending the hearing and determination of the appeal; that every such application for a stay of execution will typically be supported by an affidavit or sworn statement confirming that a notice of appeal, including grounds of appeal, has properly been filed; that an appeal is pending hearing and determination by the full bench of this Court; and that there are sufficient grounds to grant the application.

The Applicant's current application for a stay of execution of the arbitration award

4.4 In the current proceedings the Applicant does NOT seek a stay of execution of the arbitration award, pending the hearing and determination of the appeal filed on 10th December, 2019 BUT an interim order staying the execution of the arbitration award, pending the hearing and determination of an application by the Applicant to set aside the arbitration award. The Applicant also seeks “*an order that the Applicant should file an application to set aside the Arbitration award within 7/14 days. ...*”.

4.4.1 With respect to the stay of execution, the Applicant contends that the Applicant's application herein is made under, or pursuant to, section 7 (b) of the Supreme Court of Appeal Act; Order I, rule 18 of the Supreme Court of Appeal Rules; and the inherent jurisdiction of this Court. During the hearing of the Applicant's application herein on 12th February, 2020, Counsel for Applicant reiterated and emphasized the contention that the Applicant's application herein is made under, or pursuant to, Order I, rule 18 of the Supreme Court of Appeal Rules; Counsel for the Applicant strongly argued and submitted that Order I, rule 18 of the Supreme Court of Appeal Rules entitles the Applicant to make the application herein, and strongly suggested that the Applicant's application herein need not be predicated on the hearing and determination of an appeal by the full bench of this Court. Counsel for the Applicant also conceded that no application

for an interim order staying the execution of the arbitration award, pending the hearing and determination of an application by the Applicant to set aside the arbitration award, has been made in court below and denied by the court below. In this regard Counsel for the Applicant referred this Court to paragraph 25 (3) of the sworn statement filed in support of the Applicant's application herein in which the Applicant seeks from this Court "*an order that the Applicant should file an application to set aside the Arbitration award within 7/14 days. ...*".

4.4.2 This Court does not share the view expressed on behalf of the Applicant that an application of stay of enforcement may be made in this Court under, or pursuant to, section 7 (b) of the Supreme Court of Appeal Act, Order I, rule 18 of the Supreme Court of Appeal Rules, and the inherent jurisdiction of this Court, without it being predicated on the hearing or determination of an appeal by the full bench of this Court; and without such application having been made first in court below and refused by the court below. In this regard this Court is of the view that the jurisdiction of this Court, sitting as a single, to hear and determine applications for stay is based, and must be based, on the hearing and determination of proceedings, usually a hearing and determination of an appeal, by the full bench of this Court.

4.4.3 This Court also does not share the view expressed on behalf of the Applicant that this Court may, pursuant to Order I, rule 18 of the Supreme Court of Appeal Rules entertain an application for an interim order staying the execution of the arbitration award, pending the hearing and determination of an application by the Applicant to set aside the arbitration award, when no such application has been made in court below, and denied by the court below, or that it would be appropriate for this Court to make an order "*that the Applicant should file an application to set aside the Arbitration award within 7/14 days. ...*". In this regard it seems to this Court that the Applicant's application herein which is for an interim order staying the execution of an arbitration award, pending the hearing and determination of an application by the Applicant to set aside the arbitration award is, to say the least, most unusual and misconceived.

5. Determination

The interim attachment order in the court below

5.1 Counsel for the Applicant prayed that in the event that this Court grants the Applicant's application herein, the stay of enforcement should also apply to the interim attachment order of the court below.

5.1.1 The Counsel for the Respondent strongly opposed the Applicant's prayer and argued and submitted that, in relation to the interim attachment order in court below, in its Ruling of 22nd January, 2020 this Court was of the firm view that it would be inappropriate for this Court to make any order in relation the release and payment to the Respondent of the sum of K68,977,113.00 held at National Bank of Malawi Plc while that issue is yet to be finally determined by the court below, and in that regard, this Court was not inclined to entertain and grant the Respondent's prayer, which was dismissed. Counsel for the Respondent thus contended that it would be grossly unfair for this Court to grant the Applicant's prayer that, in the event that this Court grants the Applicant's application herein, the stay of enforcement should also apply to the interim attachment order.

5.1.2 This Court wishes to reiterate the views expressed on this issue in its Ruling dated 22nd January, 2020, namely, that it would be inappropriate for this Court to make any order in relation to the interim order of attachment in the court below while an application to make the interim attachment order absolute is yet to be heard and determined by the court below. In any event, this Court sustains the objection raised on behalf of the Respondent that it would be grossly unfair to Respondent for this Court to grant the Applicant's prayer that, in the event that this Court grants the Applicant's application herein, the stay of enforcement should also apply to the interim attachment order when this Court in its Ruling of 22nd January, 2020 refused to make any order in relation the release and payment to the Respondent of the sum of K68,977,113.00 held at National Bank of Malawi Plc while that application is yet to be finally determined by the court below. This Court is, therefore, not inclined to grant the Applicant's prayer that, in the event that this Court grants the Applicant's application herein, the stay of enforcement should also apply to the interim attachment order, and the Applicant's prayer is dismissed.

The status or nature of the Applicant application herein

5.2 This Court observes that the Summons for the Applicant's application herein, which was filed and issued on 29th January, 2020, is most unusual; the Summons is headed "*INTER-PARTES SUMMONS FOR STAY OF EXECUTION*" and states "*LET COUNSEL for the Applicant and the Respondent attend the Judge on the 12th day of February, 2020, at 8.30 o'clock in the forenoon on the hearing of an application is for an interim order staying the execution of the arbitration award made on 27th November, 2019, pending the hearing and determination of an application to set aside the arbitration award*". It is clear that the Applicant's application herein is not an application for a stay of execution of the arbitration award, pending the hearing and determination of the appeal filed by the Applicant on 10th December, 2019.

5.2.1 This Court observes that paragraph 21 of the sworn statement filed in support of the Applicant's application herein states as follows-

"21. THAT we then applied for a Stay of Execution at the High Court, Commercial Division and the said application was dismissed and the Applicant is now desirous of having the application determined by this Court under Order I rule 18 of the Supreme Court of Appeal Rules."

It is quite clear from paragraph 21 of the sworn statement that the Applicant "*applied for a stay of execution in the court below and the said application was dismissed and the Applicant is now desirous of having the application determined by this Court under Order I rule 18 of the Supreme Court of Appeal Rules*". It is also quite clear that the Applicant has not sought in the court below an interim order staying the execution of the arbitration award, pending the hearing and determination of an application to set aside the arbitration award, but has come straight to this Court with an application for such an order.

5.2.2 This Court observes that the reliefs sought by the Applicant, as stated in paragraph 25 of the sworn statement filed in support of the Applicant's application herein, are as follows: "*(1) an order staying enforcement of the Arbitration award dated 27th November, 2019, pending an application to set it aside; (2) an order that the goods seized in the execution be released to the Applicant; and (3) an order that the Applicant should file an application to set aside the Arbitration award within 7/14 days. ...*"; and in this regard, some of the reliefs sought by the Applicant in the application herein are the same, or substantially the same, as the reliefs sought by the Applicant in

paragraph 3 of the notice of appeal filed by the Applicant on 10th December, 2019, with respect to the appeal now pending hearing and determination by the full bench of this Court, namely, “(1) *An order setting aside the whole order of the Learned Judge*; and “(2) *An order that - (1) the execution of the arbitrator’s award entered herein be stayed; (2) the [Applicant] do pay Sheriff’s fees to be reimbursed by the Claimant should it be determined that the seizure/execution was wrongful/illegal/irregular; (3) the goods seized in the execution be released to the Applicant; and (4) the Applicant shall file an inter partes application for stay within 7/14 days.*”.

5.2.3 This Court observes that in relation to the specific relief sought in this Court by the Applicant, namely, “*an order that the Applicant should file an application to set aside the Arbitration award within 7/14 days. ...*”, there is no indication that the Applicant has commenced any legal process to set aside the arbitration award. The Applicant requests this Court to make an order “*that the Applicant should file an application to set aside the Arbitration award within 7/14 days*”, but has not justified that request. Indeed, if the truth be told, there is no valid reason why the Applicant cannot make the application herein in the court below. In this regard this Court is of the firm view that this specific relief sought by the Applicant in this Court could, and should, be sought in the court below.

5.2.4 This Court observes that in the skeleton arguments filed in support of its application herein, and adopted during the hearing of the application on 12th February, 2020, the Applicant cited a number of cases in support of a stay of execution, pending the hearing and determination of appeals and, in this regard, it seems to this Court that the Applicant may have conflated the principles applicable to appeals and those applicable to setting aside of judgments/awards.

5.2.5 Indeed, as already observed earlier in this Ruling, where in proceedings the High Court has refused to grant a stay of execution, pending the hearing and determination of an appeal by the full bench of this Court, a party aggrieved by the decision of the High Court in that regard may, pursuant to Order I, rule 18 of Supreme Court of Appeal Rules, apply to this Court, sitting as a single member, for a stay of execution, pending the hearing and determination of the appeal. Every such application for stay of execution, pending the hearing and determination of an appeal, will typically be supported by an affidavit to confirm that a notice of appeal, including grounds of appeal, has properly been filed; that an appeal is pending hearing and determination by the full bench of this Court; and that there are sufficient grounds to grant the application.

5.2.6 In this case the Applicant, both in the documents filed in relation to the application herein and in oral submissions, has clearly indicated that the Applicant’s application herein is NOT for a stay of execution, pending the hearing and determination of the appeal filed on 10th December, 2019. Indeed, despite the fact that paragraph 21 of the sworn statement filed in support of the Applicant’s application herein expressly states “*THAT we then applied for a Stay of Execution at the High Court, Commercial Division and the said application was dismissed and the Applicant is now desirous of having the application determined by this Court under Order I rule 18 of the Supreme Court of Appeal Rules ...*”, the Summons for the Applicant’s application herein and the sworn statement filed in support of the Applicant’s application herein do not anywhere state that the Applicant’s application herein is for a stay of execution, pending the hearing and determination of the appeal filed on 10th December, 2019. Furthermore, the sworn statement filed in support of the Applicant’s application herein does not confirm that a notice of appeal has been filed together with the grounds of appeal, and that the Appellant’s application herein has been made, pending the hearing and determination of appeal; the Summons for the Applicant’s application herein filed by the Applicant on 29th January, 2020, expressly states that the Applicant’s application herein is for

“an order staying enforcement of the Arbitration award dated 27th November, 2019, pending an application to set it aside”.

Whether this Court has jurisdiction to hear and determine the Applicant's application

5.3 As already observed earlier in this Ruling, the Summons for the Applicant's application herein, which was filed and issued on 29th January, 2020, is an application for an interim order staying the execution of the arbitration award, pending the hearing and determination of an application to set aside the arbitration award. The Applicant's application herein is not an application for a stay of execution of the arbitration award, pending the hearing and determination of the appeal filed by the Applicant on 10th December, 2019.

5.3.1 There is no indication whatsoever that the Applicant sought in the court below an interim order staying the execution of the arbitration award, pending the hearing and determination of an application to set aside the arbitration award, and that the court below has declined to grant such application to entitle the Applicant, pursuant to Order I rule 18 of the Supreme Court of Appeal Rules, to file the application herein in this Court. Order I, rule 18 of the Supreme Court of Appeal Rules is quite clear and provides as follows-

“Whenever an application may be made either to the court below or the Court, 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 Court.”.

In this regard this Court is of the firm view that the Applicant should exhaust its remedies in court below first before coming to this Court.

5.3.2 Indeed, as already states earlier in this Ruling, Counsel for the Applicant concedes that no application for an interim order staying the execution of the arbitration award, pending the hearing and determination of an application by the Applicant to set aside the arbitration award, has been made in court below and denied by the court below; and in this regard Counsel for the Applicant referred this Court to paragraph 25 (3) of the sworn statement filed in support of the Applicant's application herein in which the Applicant seeks *“an order that the Applicant should file an application to set aside the Arbitration award within 7/14 days. ...”*. There is no valid reason why the Applicant cannot make the application herein in the court below. The Applicant certainly does not need an order of this Court *“that the Applicant should file an application to set aside the Arbitration award within 7/14 days.”*. In this regard this Court is of the firm view that the relief sought by the Applicant in this Court could, and should, be sought in the court below;

5.3.3 Furthermore, this Court does share view expressed on behalf of the Applicant that Order I, rule 18 of the Supreme Court of Appeal Rules entitles the Applicant to make the application herein, and that the Applicant's application herein need not be predicated on the hearing and determination of an appeal by the full bench of this Court. An application for stay of execution of a judgment or order in this Court must be predicated on the hearing and determination of an appeal in this Court.

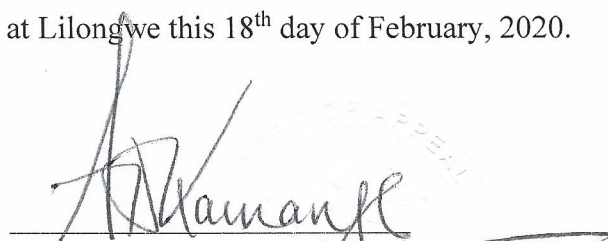
5.3.4 This Court is of the firm view that the Applicant's application herein is misconceived; and that this Court has no jurisdiction to hear and determine the Applicant's application herein. This Court is, accordingly, not inclined to grant the Applicant's application herein, but to dismiss the

application outright, without considering and determining the merits of the application AND IT IS SO ORDERED.

6. Costs

6.1 Costs for the Respondent.

Pronounced at Lilongwe this 18th day of February, 2020.


Justice Anthony Kamanga, SC
JUSTICE OF APPEAL