REPUBLIC OF MALAWI

IN THE SUPREME COURT OF APPEAL

MSCA CIVIL APPEAL NUMBER 10 OF 2021

BETWEEN

TELEKOM NETWORKS MALAWI PLC .....APPELLANT

AND

GLOBE TELESERVICES PTE LIMITED ..... RESPONDENT

CORAM: THE HON. MR JUSTICE FE KAPANDA SC, JA

Msisha SC , Counsel for the Appellant

E Theu , Counsel for the Respondent

Ms C Masiyano, Court Clerk

Dates of Hearing: 30 March 2021; 9 April 2021; 16 April 2021

Date of Ruling: 3 November 2021

ANNOTATIONS

Cases cited

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Nash v Stevenson Transport Ltd (1935) 2 KB

Mogul Steamship Co v McGregor, Gow and Co. (1892) AC at 25

American Cynamid Company v Ethicon Limited, [1975] AC 396

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Coppee-Lavalin SA/NV-v-Ken-Ren Chemicals and Fertilizers Ltd [1994] 2 All ER 465

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Pamela Akora Imenje-v-Akora ITC Intenational Ltd & Another HCCC (Milimani) No. 368 of 2005

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Don-wood Co. Ltd-v-Kenya Pipeline Ltd *HCCC No. 104 of 2004*

Statutes and Rules

Supreme Court of Appeal Act

Legal Education and Legal Practitioners Act, 2017

Arbitration Act, Cap 6:03 of the Laws of Malawi

Courts (High Court) (Civil Procedure) Rules, 2017

Supreme Court of Appeal Rules

RULING

Kapanda SC, JA:

Introduction

Procedural Posture

The Respondent (claimant in the court below) commenced an action by summons against the Appellant (defendant in the court below) in the High Court Commercial Division. The action was based on an agreement between the Respondent and the Appellant. The court below issued the summons and initial directions. However, before service of the summons, the statement of claim, the list of documents and requisite sworn statements the Respondent obtained an injunction *ex parte* restraining the Appellant from not performing the terms of the agreement. The Respondent filed an application without notice for an interim injunction and the hearing of the application was set down for 26 January 2021 at 2:30 hours before Justice Manda.

The application was heard and the court below granted the Respondent an interim interlocutory injunction order. The injunction restrained the Appellant and its agents from terminating a contract dated 20 July 2020. Further, the injunction provided for variation of discharge of the order by the Appellant with the requirement of 48 hours' notice to the Respondent's legal practitioners. The Appellant was served with the summons, list of documents, sworn statements together with the *ex parte* application by the Respondent and an *ex parte* injunction on 29 January, 2021. The Appellant completed and returned to the High Court the response of its intention to contest the entire action.

The Appellant presented its statement of defence, list of documents and attendant sworn statements together with an application on 48 hours' notice to vacate the *ex parte* injunction for filing on 18 February 2021. However, without hearing the Appellant, the court below made as ruling as follows:

> "The injunction herein was agreed on the basis that the Contract between the parties had an arbitration clause. This includes whether or not the claimant is guilty of fraud which would entitle the defendant to terminate the contract.

The injunction was granted as a stay of any proceeding and a reference of this matter to arbitration as per clause 13.3 of the agreement between the parties. The parties having expressly agreed to arbitrate a dispute, the court does not have jurisdiction over the matter.

Now if the defendant is of a strong view that the Claimant has been engaging in criminal conduct and the same is not a matter of arbitration, then they should follow the criminal route by reporting the matter to the police. This of course being a case where it has not been ascertained that the contract was *void ab initio* on account of illegality which ascertained would have also made the arbitration clause *void ab initio*."

Thus, the ruling declined to consider on its merit the application by the Respondent and to all intents and purposes maintained the operation of the injunction. The Appellant was dissatisfied with the ruling and accordingly applied for leave to appeal to the Supreme Court of Appeal and filed Notice of Appeal with the grounds of appeal.

The Application by the Appellant

As stated earlier, the court below granted the Respondent an interim interlocutory injunction order. The injunction restrained the Appellant and its agents from terminating a contract dated 20 July 2020. The Appellant later applied to this Court for the discharge of the injunction on the ground that there was non-disclosure of relevant information *viz.* : that the Respondent stood to benefit from its own fraudulent actions by virtue of the Appellant's application being denied; that the Respondent was in effect being allowed to realize the fruits of an equitable remedy obtained fraudulently without adhering to the rule on full and frank disclosure which is unjust; and that the effect of the ruling is that it denies the Appellant the right to terminate the contract vitiated by fraud, illegality and misrepresentation.

This Court on 5 March 2021 duly discharged the *ex parte* injunction granted to the Respondent on 26 January 2020. Further, the ruling of the court below of 18 February 2021 was also set aside by this Court.

The Application by the Respondent

On 15 March 2021, Counsel for the Respondent filed an *ex parte* application for an order to strike out the notice of appeal; an *ex parte* motion to vacate injunction and an *ex parte* application for an order to strike out all subsequent court documents filed by the Appellant. This Court after hearing the Respondent discharged the *ex parte* order granted to the Appellant on 5 March 2021. It was discharged on the ground that there was suppression of material facts as well as that there were serious issues concerning the irregularity of the documents filed by the Appellant. Consequently, the *ex parte* interim injunction issued by the court below in favour of Respondent against the Appellant dated 26 January 2021 still subsisted until a further order court below or this Court. The Court further ordered that should the Appellant or the Respondent be minded to still apply to this Court on their respective *ex parte* motions filed in this Court then the same were to come for hearing *inter partes.*

On the same day of 15 March 2021, the Respondent filed a notice of appointment of additional Legal Practitioners, Mrs. Violet Jumbe, a Legal Practitioner of Messrs Maganga & Co., to act as its legal practitioner in this matter.

***Inter partes* Application**

On 18 March 2021, the Appellant brought an *inter parte* application to set aside ruling of the court below dated 18 February 2021. This is the ruling that denied the Appellant's application to discharge an interim interlocutory injunction granted *ex parte* on 26 January 2021 ~~and discharge the said *ex parte* injunction~~. The Appellant filed an affidavit in support of the application and skeleton arguments. The application was set down for hearing on 30 March 2021. Neither the Respondent nor its Counsel appeared on the said date of the hearing. Having noticed and verified that the Respondent's Counsel was duly served with the application on 23 March 2021, this Court proceeded to hear the Appellant on the inter partes application.

The Appellant's case

The affidavit in support of the application was sworn by Christina Mwansa the Chief Legal and Regulatory Officer of Telekom Networks Malawi Plc. It is the Appellant's case that the Respondent commenced these proceedings in the court below against where the Respondent was seeking to uphold the International Services Agreement which was entered into between it and the Appellant. Consequently to compel the Appellant to uphold the agreement and, pursuant to an arbitration clause, have any dispute between the parties referred to arbitration.

The Chief Legal and Regulatory Officer then told the Court that the Appellant's position as set out in its defence is that the agreement is null and void for misrepresentations. She continued to aver that, notwithstanding the position of the Appellant, it complied with the order of injunction and performed obligations assigned to it under the agreement. She further stated that the Respondent was supposed to pay the Appellant fixed guaranteed revenue at the beginning of February and at the beginning of March. The Chief Legal and Regulatory Officer referred the Court to the agreement between the parties herein and has drawn this Court's attention to schedule 1 of the International Services Agreement which provides, inter alia, are as follows:

"

1. Invoicing shall be done on a monthly basis.
2. For invoicing GTS follows GMT zone and TNM follows CAT zone
3. Settlement period: GTS shall pay in advance monthly equated amount of Fixed Guaranteed Revenue after Antifraud System is considered commercially live. After expiry of each month each party shall raise monthly invoice based on the usage. In case of Bilateral traffic exchange, the difference between the invoice amount of each party for each period ("Settlement Payment") is to be adjusted from the monthly equated amount which is to be paid in advance every month. …

6. The fixed guaranteed revenue to TNM under this Agreement is $4,300,000 USD (four million three hundred thousand USD) ("the Fixed Guaranteed revenue") irrespective

of the traffic volumes sent to TNM for both international voice and international A2P messaging. The fixed guaranteed revenue shall be applicable for the period of one year after Passive Monitoring Period finishes. This shall be reviewed annually depending upon the performance and reporting of the previous year. Notwithstanding above, fixed guaranteed revenue are subject to change in case there are regulatory & major market changes."

It is the further averment of the Chief Legal and Regulatory Officer for the Appellant that the Respondents have not made any payments and that it ignored an invoice sent to it by the Appellant a copy of which is exhibited and marked as "CM 1". She further stated that on the one hand the Respondent seeks to uphold the agreement while on the other hand does not honour its obligations under the agreement. She added that during February and March before the order of injunction of the Supreme Court of Appeal, the Respondent was collecting charges for all international traffic terminating in the TNM network as each call was being made.

The Respondent, apart from not appearing on the day of hearing, also did not file any documentation in answer to the *inter parte* summons. As stated earlier, this Court proceeded to only hear the Appellant on the *inter parte* summons. Senior Counsel Msisha, appearing for the Appellant, adopted the affidavit in support of the application and the skeleton arguments. He submitted that the agreement between the parties was not binding and is null and void for misrepresentation, fraud and illegality. Further, he contended that where a contract is illegal as formed or it is intended that it should be performed in a legally prohibited manner, the courts will not enforce the contract, or provide other remedies arising out the contract. Senior Counsel Msisha further submitted that a contract may be illegal when entered into because it cannot be performed in accordance with its terms without the commission of an illegal act. If the performance of a contract necessarily and to the knowledge of the claimant involves or has its object the commission by one or both parties of an act known be legally objectionable, the claimant cannot sue on the contract. The cases of ***Edler v Auerbach***[1] and ***Nash v Stevenson Transport Ltd***[2] were cited in support of the preceeding argument. It was further submitted by Senior Counsel that a contract which is illegal ab initio is treated by law as if it had not been made at all it is totally void and no

[1] [1950] 1 KB 359
[2] [1935] 2 KB 128

remedy is available to either party. Further, that no action lies for damages for an account of profits or for share of the expenses.

Respecting issue of the arbitration clause, it was further argued by the Appellants that an arbitration jurisdiction is grounded in the agreement between the parties. Thus, where there is no agreement, the arbitrator has no jurisdiction to arbitrate. Further, it is the contention of the Appellants, that the issue in this matter is not the legal effect of a valid arbitration agreement but rather whether or not there is a valid arbitration clause and if so which party would be entitled to avail the clause to seek a stay of proceedings. The Appellants further argued that the Respondent is the party that went to the High Court to uphold the agreement and to seek injunction. Thus, if the court was of the view that the matter should have gone to arbitration then it should have declined to become seized of the matter. It added that since the court below accepted jurisdiction over the matter and issued a remedy in favour of the Respondent, it should have decided the Appellant's application to vacate the *ex parte* injunction on its merits.

The Appellants further contended that the arbitration clause in the agreement, if valid in spite of the agreement being null and void ought to have led the court below to decline getting seized of the matter. It was the argument of counsel that the arbitration clause cannot survive a contract that is null and void for illegality fraud and misrepresentation.

Lastly, the Appellant submitted that from all viewpoints the injunction which is effectively a permanent injunction ought to be discharged ought to be vacated as it is damaging the business of the Appellant, denying the Malawi Communications Regulatory Authority of levies on international telephone traffic while delivering illegal benefits to the Respondent.

The Respondent's Application in opposition

On 8 April 2020, after this Court had heard from the Appellant on the *inter parte* application to discharge the interim interlocutory injunction, the Respondent then filed an *ex parte* application for permission to file submissions in opposition to the application to discharge the interim order of injunction issued by the court below. The application was supported by an affidavit sworn by Mrs Violet Jumbe of Counsel. She deponed that the Appellant took out a notice of motion seeking an order of this Court to vacate the injunction herein and the same was served on the Respondent

legal practitioners. She then told the Court that she had thought that her co-counsel, Mr. Manuel Theu, would file the necessary skeleton arguments and attend to the hearing of the said notice of motion.

This Court duly granted permission to the Respondent to file written submissions in opposition to the Appellant's notice of motion for an order to discharge the *ex parte* interim injunction granted by the court below. Further, this Court allowed the Appellants to respond to the Respondent's written submissions which they did on 8 April 2021.

Counsel for the Respondent began by submitting that the Appellant's notice of motion must be thrown out as all its originating documents are a nullity in that they were neither signed and filed by the Appellant nor a person who is a Legal Practitioner or a legal representative of the Appellant. It is argued that the response, defence and defendant's list of documents were signed by Nyirenda & Msisha on behalf of the Appellant. It is common knowledge Nyirenda & Msisha is a legal firm and not a Legal Practitioner. It is the further submission of the Respondent that in terms of both the Courts (High Court) (Civil Procedure) Rules and the Supreme Court of Appeal Rules all documents are to be signed by the defendant/appellant or its Legal Practitioner. The Respondent added that when one reads the response, defence and defendant's list of documents there is no mention of any Legal Practitioner or legal representative from Nyirenda & Msisha.

Further, the Respondent argues that under both the Supreme Court of Appeal Act in section 10 and the Supreme Court of Appeal Rules in Order I rule 2 there is no mention of a legal firm. It was the further submission of the Respondent that under Legal Education and Legal Practitioners Act, 2017 a legal practitioner is a person who has been admitted to practice the profession of the law before a court; and whose name has been inscribed on the Roll. The Respondent went on to argue that Section 31 of the said Legal Education and Legal Practitioners Act, which is worded almost identical to section 4 of the Courts Act, makes it an offence for someone who is not a legal practitioner to do anything in court on behalf of someone when that thing can only be done by a Legal Practitioner. Counsel further submitted that the rationale for the court's insistence on Legal Practitioners signing court process is to ensure responsibility, transparency and accountability on the part of the Legal Practitioner who signs a court process. In support of thr foregoing argument

Counsel cited and quoted extensively the Nigerian cases of ***Ibrahim v Barde***[3]; ***U.A. Ventures v Femb***[4] ***Ibwa v Imano (Nig.) Ltd & Anor***[5] and ***Guaranty Trust Bank PLC v Innoson Nigeria Limited***[6].

Lastly, Respondent's Counsel argued that the question whether a court should grant or refuse an injunction is a matter of law. He added that the first issue that the court decides is whether there is a triable issue. Counsel further argued that there can only be a triable issue when there is a defence and it is served on the claimant. Thus, owing to the fact that the response, defence, defendant's list of documents and notice of appeal were signed and/or filed by someone not a party to the action nor its legal representative, it means that the claimant's/respondent's contention are unchallenged. Accordingly, there is no contention to the claimant's case. Put in another way, the Respondent added, all the allegations that the agreement is vitiated by fraud and/or misrepresentation is not supported by any document before the court. Consequently, the Respondent surmises, the court below was entitled to grant it an injunction based on the evidence and claimant's statement of case. The Respondent added that in any event the claimant's and defendant' statement of case clearly demonstrate that there are serious dispute of facts and that there that there are triable issues. Further, the Respondent submitted that. as it stated in the documents before the court below, in the matter at hand damages would not be adequate. It then added that the reasonable position is to have the injunction in place till the issue is settled by ADR or litigation.

Appellant's Response to the Respondent's submissions

In its response to the issues raised by the Respondents, the Appellant's Counsel began by submitting that section 35 of the Legal Education and Legal Practitioners Act, 2017 provides for setting up of a legal practice as either a sole practitioner or in partnership with other legal practitioners. He further argued that all documents filed and served by Nyirenda and Msisha were signed by practitioners practicing under Nyirenda and Msisha with valid practicing licenses whose names appear on the current Malawi Law Society list of licensed practitioners. Counsel further

[3] (1996) 9 NWLR (Pt 474) 513
[4] (1998) 4 NWLR (Pt.547) 546
[5] (1988) 7 S.C. (Reprint) (Pt.III) 114
[6] (SC.694/2014) [2017 NGSC 25 (12 May 2017)

submitted that Legal Education and Legal Practitioners Act, 2017 does not require that the name of the Legal Practitioner be affixed before the name of the law firm representing the client in question. He added that Civil Forms 1 and 2 under the Supreme Court of Appeal Rules provides for an applicant or his legal representative to sign the said forms. In this appeal, the Appellant is represented by Nyirenda & Msisha. Thus, there can be no doubt as to the capacity in which Nyirenda & Msisha is acting.

In conclusion, Senior Counsel submitted that there is no reason why the Notice of Appeal should be struck out as it was properly filed and the Appellant followed the proper procedure in the filing the notice. He added that, as the law does not specify that a name be attached, the documents filed with the notice of appeal contained the signature of a Legal Practitioner. Thus, he continued, a notice should then not be struck out because a list of documents contained a curable error. Senior Counsel countered that the arguments raised in the Respondent's skeleton arguments were tackled at the hearing that took place on 30 March 2021 where the Respondent, without a valid or any reason, was not in attendance. In the further view of the Respondent, the injunction ought to be vacated.

The *inter partes* hearing

Lastly, when the matter came for *inter parte* hearing for the second time on 9 April 2021, , after the Court had allowed the Respondent to file its documents, Senior Counsel raised yet another issue that the Respondent's Counsel was appearing before the Court without a practice licence. Counsel Jumbe asked for an adjournment in order to resolve the issue of her licence. She informed the Court that she had satisfied all the requirements only that the practice licence was not issued then. It was argued by Senior Counsel that if she at all had the audience to address the Court. The Court had to adjourn the matter for seven (7) days in order to allow the Respondent's Counsel to address the issue of her practice licence. Apparently, after 7 days Counsel Jumbe had not yet resolved the issue of the licence thus she sent Counsel Majamanda on brief, who essentially adopted the Respondent's submissions in the present matter. Senior Counsel for the Appellant had issues with the submissions filed by a counsel who is not licensed. He contended that all documents by the Respondent must be ignored as they were filed by Mrs Jumbe who had no practice licence.

LAW AND DISCUSSION

Issues for Determination

What are the issues that arise and fall to be decided in the application under consideration by this Court? As this Court understand it, this matter raises quite a number of issues coupled with the main issue of injunction that the Court must eventually determine. As it were, the parties are desirous of wanting the following issues determined in this application viz: the first issue concerns Counsel Jumbe's filing of documents and appearing in this Court without a practice licence. This Court raises this as the first issue because the Appellant argues that if this Court is to agree with it, then all the submissions by the Respondent must be expunged and struck out. Consequently, the Court would have to determine the inter parte summons as if the Respondent did not file its submissions. Secondly, this Court has to consider the issue that was raised by the Respondent that the Appellant's originating documents are a nullity in that they were not signed and filed by the Appellant nor a person that is a Legal Practitioner or legal representative of the Appellant. The third and last issue that arises and falls to de decided is whether or not the interim interlocutory injunction granted to the Respondent on 26 January 2020 ought to be vacated. The first and second issue will be dealt with together as they are intertwined.

Analysis of the law and Determination

At the outset, this Court is alive to the fact that there was documentation from Counsel Manuel Theu pertaining to validity of documents filed by the Appellant. This is the same argument that was raised taken by Counsel Jumbe earlier on in the matter. When Counsel Theu brought his application, it was to do with both striking out the whole notice of appeal and discharging the *ex parte* order by this Court vacating the interim injunction issued by the court below. As indicated earlier, this Court only discharged the *ex parte* order vacating the interim injunction issued by the court below but it did not strike out the notice of appeal. Notably, this Court directed that should either party be inclined to apply to Court on their respective *ex parte* motions filed earlier the applications were to be brought *inter partes* before this Court.

It will be noted that it is the Appellant that took that initiative to bring the application *inter parte* and the matter was heard on 30 March 2021. It was so heard in the absence of the Respondent. It

was later on that the Respondent then applied for permission to file its documentation against the *inter parte* application brought by the Appellant. This time around it was no longer Counsel Theu filing it was rather Counsel Jumbe under Maganga & Co. who filed and appeared on behalf of the Respondent. It cannot therefore be contended that Counsel Theu raised the issue of striking out the notice of appeal for being a nullity. The issue of nullity of the notice of appeal was raised during an *ex parte* application. As it were, the Court did not resolve this issue but only vacated the order it granted the Appellant for suppression of material facts. However, when the matter came for *inter parte* hearing, the same issue of striking out the Appellant's originating documents on grounds of a nullity in that they were not signed and filed by the Appellant nor a person that is a Legal Practitioner or legal representative of the Appellant was raised by counsel who at the time was unlicensed.

What then are the Court's view on the prayer that the notice of appeal be struck out for being a nullity in that they were not signed and filed by the Appellant nor a person that is a Legal Practitioner or legal representative of the Appellant? First, it is well to note that had Counsel Jumbe not raised this issue again, the Court would still have been enjoined to resolve it as Counsel Theu, who was co-counsel, raised it in the *ex parte* application. But before resolving this issue of expunging the Appellant's documents let me address the issue of Counsel Jumbe appearing without a practicing licence. What should be the consequence? It is not disputed that when Counsel Jumbe appeared before this Court and filed documents on behalf of the Respondent she had no practising licence. Unfortunately, when he appeared on a brief, after being ware of the issue of a practicing licence Counsel Majamanda did not address this Court on what should be the consequence.

The starting point resolving the issue concerning the practice licence ought to be the Legal Education and Legal Practitioners Act, 2017. Section 30 (4) of the Legal Education and Legal Practitioners Act, 2017 provides that:

> *"(4) A legal practitioner shall not be entitled to practice unless he has had issued to him a valid licence to practice."*

The wording of section 30 (4) is clearly in mandatory terms and expressly precludes a Legal Practitioner to practice without a valid licence. This section Section is clear in what it provides i.e. a Legal Practitioner is not entitled to practice if he has no licence. There is no any other way around

it. Practice in the context of this matter includes appearing and filing documents in courts. This Court find the next provision, particularly section 31 of the Legal Education and Legal Practitioners Act, 2017 instructive. It spells out the consequences against persons who practice i.e., appear and file documents in courts who are not Legal Practitioners or have ceased to be Legal Practitioners. A question this Court is grappling with is whether the wording of section 31(1) of the Legal Education and Legal Practitioners Act, 2017 extends or includes persons who are admitted to practice but do not have a licence or have not renewed their licenses. Section 31 states:

> "(1) A person who is not, or as ceased to be, entitled to practice as a legal practitioner by virtue of this Act or any other written law, and who, does any of the following acts–
>
> (a) commences, carries on or defends any action, suit or other proceedings in the name of any other person or in his own name, or does any act required by law to be done by a legal practitioner in a court;
>
> (b) draw or prepares any instrument relating to real or personal property or any proceeding in law or draws or prepares any document or caveat relating to land registration; or
>
> (c) does any work in respect of which scale or minimum charges are laid down by the Legal Practitioners (Scale and Minimum Charges) rules, or any other rules for the time being in force prescribing or relating to charges for any services to be performed by a legal practitioner, commits an offence and shall, upon conviction, be liable to a fine of five million kwacha (K5,000,000) and imprisonment for ten 10 years." (Emphasis supplied)

From the statutory provision above, it is well to make a distinction between, on the one hand, a person who purports to be a Legal Practitioner when he is not (unqualified persons, such as non-legal practitioners, or legal practitioners whose names have been struck off the roll of legal practitioners) and, on the other hand, a person who is a Legal Practitioner but has no valid licence. It might be argued that having no licence entails that one cannot practice as a Legal Practitioner and that therefore, section 31 must also apply to persons that are legal practitioners but have no licence. It is the understanding of this Court that the above provision is intended to proscribe a Legal Practitioner who is unlicensed or a person who is not qualified at all (not admitted as a Legal

Practitioner under sections 22, 23 and 24 of the Legal Education and Legal Practitioners Act, 2017) to practice in the legal profession. The long and short of it shoit of it is that section 31 of the Legal Education and Legal Practitioners Act, 2017 precludes such persons from drawing or filing any documents including pleadings. This Section prohibits unqualified persons from preparing certain documents. It prescribes clear sanctions against those who transgress the prohibition. The sanctions prescribed are mainly criminal in nature. But the law is silent as to the effect of documents prepared by Legal Practitioners not holding current practicing licence.

However, this Court's understanding of the Legal Education and Legal Practitioners Act, 2017 is that for one to qualify to practice as a Legal Practitioner he or she must first be admitted as a Legal Practitioner, the name must appear on the Roll of Legal Practitioners and the person must have a valid practicing licence. These requirements are couched in mandatory terms and they must all be met. In terms of section 31 of the Legal Education and Legal Practitioners Act, 2017, once a Legal Practitioner ceases to be a Legal Practitioner (is suspended from practice or disbarred, the practicing licence which is in force at the time of suspension is automatically suspended) or the Legal Practitioner is not entitled to practice by virtue of section 30 of the Legal Education and Legal Practitioners Act, 2017. So, the section does not only target non-legal practitioners but also Legal Practitioners because under section 2 of the Legal Education and Legal Practitioners Act, 2017 a person becomes or remains a Legal Practitioner even without a practicing licence. However, without the licence he or she is not entitled to practice in the profession. Put another way, an admission to practice entitles a person to become a Legal Practitioner while the practicing licence entitles a Legal Practitioner to practice in courts.

The above notwithstanding, how does this affect the client's position? If he or she were to walk into a Legal Practitioner's office, would there be an initial obligation resting on him or her to demand The Legal Practitioner's practicing licence? Would he or she be in breach of the law if after the Legal Practitioner's service, it turned out that the Legal Practitioner lacked a practicing licence? The transgressor, obviously from section 30 of the Legal Education and Legal Practitioners Act, 2017, is the Legal Practitioner, and not the client. A similar situation presented itself in Kenya, a common law jurisdiction like ours, where the legal profession is regulated by a statute that has provisions similar to what obtains here. In ***National Bank of Kenya Limited v Anaj***

Warehousing Limited [2015] eKLR[7], the Supreme Court of Kenya instructively put it thus at paragraphs 58-59, 64:

> "The illegality is the assumption of the task of preparing the conveyancing document, by the advocate, and not the seeking and receiving of services from that advocate. Likewise, a financial institution that calls upon any advocate from among its established panel to execute a conveyance, commits no offence if it turns out that the advocate did not possess a current practicing certificate at the time he or she prepared the conveyance documents. The spectre of illegality lies squarely upon the advocate, and ought not to be apportioned to the client.
>
> Is such reasoning in keeping with a perception that Section 34 of the Advocates Act, invalidates all documents prepared by an advocate who lacks a current practising certificate? We do not think so...The Appellate Court made the assumption that, since the Law Society of Kenya did publish annually a list of names of duly-licensed advocates, the public would know if a particular advocate had not taken out a practising certificate. How far does this assumption represent the reality, for the typical client seeking a particular service, and finds a well-known advocate conducting his work from decent chambers" We would take judicial notice that even the Judges in Court, can hardly keep up with the records of advocates who have duly renewed their practice certificates. It is the Law Society of Kenya which is best placed to know which advocate has or has not taken out a practising certificate." (Emphasis supplied)

The Supreme Court at paragraph 68 added the following which is illuminating:

> "**[68]** The facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or

[7] Petition 36 of 2014 - Kenya Law"Petition 36 of 2014 - Kenya Law."http://kenyalaw.org/caselaw/cases/view/116468/. Accessed 30 August 2021

advocates whose names have been struck off the roll of advocates, shall be void for all purposes."

In the end, the Supreme Court took the position that there is a difference in the application of the law on the effect of documents prepared by a Legal Practitioner who at the time was not holding a current practising certificate and those prepared by one whose name have been struck off the roll of Legal Practitioners or documents prepared by other categories of unqualified persons, such as non- Legal Practitioners. This Court has been persuaded by the position taken by the Supreme Court of Kenya. Thus, it is of the considered view that a distinction must be drawn between a Legal Practitioner who has been suspended from the Roll of Legal Practitioners subject to disciplinary hearing, which automatically suspends his practicing licence and a person who had a practicing licence but delayed in renewing it or is in the process of renewing one. In the case at hand, counsel for the Respondent simply failed to renew her licence in time be it at the time of filing and hearing the *inter parte* application. In the two scenarios, the former (a Legal Practitioner who has been suspended from the Roll of Legal Practitioners) is too extreme and should not be equated to the latter (a Legal Practitioner who had a practicing licence but delayed in renewing it or is in the process of renewing it) and should not invalidate the documentation drawn and prepared by such counsel.

Therefore, it is the finding of this Court that the documents prepared and filed by Counsel Jumbe shall remain valid although counsel had not renewed her licence then. Furthermore, from this Court's knowledge and understanding, a law firm does not cease to operate as a result of disqualification of an individual Legal Practitioner in that firm by virtue of being struck off or removed from the Roll of Legal Practitioner, or as is the case here for counsel failing to renew a licence. The act of striking off a person from the Roll of Legal Practitioners applies to the individual and not his or her business. This reasoning should be able to determine again the issue raised by the Respondent that the Appellant's documents must be expunged from the record given that they were not signed by counsel. This Court finds as a fact that there was nothing that disqualified the firm of Nyirenda & Msisha from drawing or filing any documents or attending court through its qualified Legal Practitioners. There was no evidence showing that any other person other than those qualified to practice as Legal Practitioners at Nyirenda & Msisha were responsible for drawing, signing and or filing the documents relating to the appeal in their capacity.

Furthermore, it has not been shown that the Appellant's counsel contravened the provisions of the Legal Education and Legal Practitioners Act, 2017 in the course of this appeal, so as to require the striking out of such documents. It is not like the legal firm of Nyirenda & Msisha is owned and operated by non-legal practitioner or that Senior Counsel who appeared and took charge of the appeal and applications herein is not a Legal Practitioner. This Court is of the view that, if Senior Counsel had denied having drafted the documents that could have been a different case. But where counsel is admitted to practice and has a valid licence takes responsibility of the documentation, as he has happened here, Court should allow the documents as duly filed. It is so found and concluded.

By reason of the following discussion and findings, it follows that the Respondent's application seeking to strike out the notice of appeal and originating documents on the ground that they were neither signed and filed by the Appellant nor a person who is a Legal Practitioner or legal representative of the Appellant has no merit. It is accordingly dismissed.

The final issue that this Court has to consider is whether or not, having heard the parties in the *inter parte* application, the order of the court below granting the Respondent an interim interlocutory injunction must be vacated. In the court below, the application for an interim interlocutory injunction should have been covered under Order 10 rule 1 as read with rule 27 of the Courts (High Court) (Civil Procedure), 2017 which provides as follows:

> "1. A party may apply during a proceeding for an interlocutory order or direction of the Court by filing an application in a proceeding in Form 4.
>
> 27. The Court may, on application, grant an injunction by an interlocutory order where it appears to the Court that-
>
> (a) there is a serious question to be tried;
>
> (b) damages may not be an adequate remedy; and
>
> (c) it shall be just to do so,
>
> and the order may be made unconditionally or on such terms or conditions as the Court considers just."

This Court is well aware of the applicable law on interim interlocutory injunctions. The court will grant an interim injunction where the applicant discloses a good arguable claim to the right he seeks to protect. The court will not try to determine the issues on sworn statement evidence but it will be enough if the claimant shows that there is a serious question to be tried.

The first issue it had to resolve was whether there were serious or triable issues to be determined at trial. This should have been the case as it is common place that the aim of an interlocutory injunction is to preserve the status quo until the rights of the parties have been determined in an action. The principles to be applied should have been those explained in Order 10 rule 27 of the Courts (High Court) (Civil Procedure) Rules, 2017 and the oft-cited case of ***American Cynamid Company v Ethicon Limited***[8]. Further, after having granted the interlocutory injunction to the Respondent *ex parte*, the court below should have known that the aim ought to have been to preserve the status quo until the rights of the parties was determined in the action. The law permits the intervention of the court. However, when the Appellant came with its application to vacate the interim interlocutory injunction, the court below refused the application ordering that the matter should go for arbitration. Further, since the two parties had entered into an arbitration agreement, the court below should have addressed its mind to an ancillary question i.e. whether it was proper to order such an injunction in the circumstance. In saying this Court is alive to the fact that the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest. The law therefore permits the intervention of the court. However, the object of intervention of the court should be to guarantee fair and impartial resolution of disputes. Even more importantly, it is inferable that parties' autonomy is not to be restricted unnecessarily by courts except in public interest. Thus, the court's intervention is to be restricted as far as it may result in unnecessary delay and expense in the arbitration.

The main issue for determination now is whether this Court should discharge the order of the interlocutory injunction, as was argued by the Appellant, or continue with order of the interlocutory injunction, as was argued by the Respondent. This Court would like to look at the position of the law on stay of proceedings or injunctive relief where there an arbitration agreement or clause. Put differently, this Court shall consider whether it was proper for the court below to

[8] [1975] AC 396

intervene in the agreement between the parties herein and order stay of proceedings (issue an injunction in the circumstances)

In the England case of ***Coppee-Lavalin SA/NV-v-Ken-Ren Chemicals and Fertilizers Ltd***[9] the House of Lords drew a distinction, which is relevant to the instant case, between measures or interventions that involve courts in arbitration. First are such measures as involving purely procedural steps such as stay of legal proceedings commenced in breach of the arbitration agreement. Second are measures meant to maintain the status quo like granting of interim injunction or orders for preservation of the subject matter of the arbitration. Lastly are such measures as give the award the intended effect by providing means for enforcement of the award or challenging the same.

There is no doubt that the three measures engender differing degrees of encroachment on the arbitral proceedings and by extension party autonomy. Indeed, sometimes the measures result in court"s direct or indirect interference in the arbitral tribunal's task of deciding on merits of the dispute. Hence the need to ensure that such intrusion is kept to the bare minimum and only be exercised when the occasion merit it[10]. Further, in the Kenya ***Epco Builders Limited v Adam S. Marjan-Arbitrator & Another***[11] instructively pointed out that:

> "If it were allowed to become common practice for parties dissatisfied with the procedure adopted by the arbitrator(s) to make constitutional applications during the currency of the arbitration hearing, resulting in lengthy delays in the arbitration process, the use of alternative dispute resolution, whether arbitration or mediation would dwindle with adverse effects on the pressure on the courts. This does not mean that recourse to a constitutional court during an arbitration will never be appropriate. Equally it does not mean that a party wishing to delay an arbitration (and there is usually one side that is not in a hurry) should be able to achieve this too easily by raising a constitutional issue as to fairness of the "trial" when the Arbitration Act 1995 itself has a specific provision in section 19 stipulating that "the parties shall be treated with equality and each party shall be

[9] [1994] 2 All ER 465
[10] See Lord Mustill"s dicta in Coppee Levalin NV v Ken Ben Fertilizers and Chemicals, 2 Lloyd's Rep 109 (116 (HL) (1994).
[11] Civil Appeal No. 248 of 2005 High Court (Constitutional Court) of Kenya. Civil Appeal No. 248 of 2005 High Court (Constitutional Court) of Kenya http://www.kenyalaw.org/kl/index.php?id=1923.

given full opportunity of presenting his case," in order to secure substantial delay. If it were to become common, commercial parties would be discouraged from using ADR."

The above dicta shows that largely Courts loathe the staying of proceedings or issuance of injunctive relief where there is an arbitration agreement or clause entered into by parties. Further, as this Court understands it, an order for stay of proceedings has the effect that if an aggrieved party desires to pursue a claim, the party can only do so by arbitration. As it were, the reasoning behind this is that agreements to refer disputes to arbitration are mainly a contractual undertaking by parties to settle disputes out of the court. Thus, the courts will only intervene so as to enforce and give force of law what parties, exercising their freedom to contract, choose to agree to be bound by.

It is well to note that the necessity of stay of proceedings arises where the parties have a valid arbitration agreement and upon a dispute arising on a matter covered by the same, one party goes to the court in breach of the Arbitration agreement. Thus, an arbitration clause or arbitration agreement in a contract is not an impediment to resolving disputes in court until a party objects. As it were, an arbitration agreement does not limit or oust the jurisdiction of the court to grant reliefs sought by way of an action.[12] Put differently, the parties can choose to ignore the arbitration agreement and file the proceedings in a court. However, as this Court understands it, where one of the parties is desirous of effectuating the arbitration agreement when the other has gone to court, then the former party may seek an order of the court staying the court proceedings[13]. It is the further understanding of this Court that the grant of the order of stay of legal proceedings leaves the initiator of the court proceedings with no option but to follow the provisions of the arbitration agreement if he wishes the dispute to be resolved. Before granting stay of proceedings, it is advisable for the courts to have to, *inter alia*, the following conditions : The applicant must prove the existence of an arbitration agreement which is valid and enforceable. The rationale here is that to stay proceeding where there is no valid Arbitration Agreement would otherwise amount to driving the claimant to the seat of justice as s/he cannot get redress by enforcing the arbitration agreement. The doctrine of separability is important as it enables the arbitration clause to survive

[12] ***Rawal v The Mombassa Hardware Ltd*** [1968] E.A. 398; see also ***Peter Muema Kahoro & Another v Benson Maina Githethuki***
[2006] HCCC (Nairobi) No. 1295 of 2005." http://kenyalaw.org/caselaw/cases/view/15945/ accesed 30 August 2021

[13] Section 6 of the Arbitration Act

the termination by breach of any contract. The arbitration agreement survives even where the underlying contract is void as the parties are presumed to have intended their disputes to be resolved by arbitration.

On addressing the issue of arbitration clause, Senior Counsel Msisha submitted that an arbitration cannot be used to benefit the Respondent as a suing party. He continued to argue that a valid arbitration clause can be relied upon by the party sued to obtain a stay of proceedings and reference of the matter to arbitration. Further, the Appellants submitted that in this matter it did not sue. It is instead the Respondent which sued and obtained a remedy under the High Court proceedings. The Appellants take the view that had the Respondent applied for the court case to be stayed pending referral to arbitration, the court below would not have granted such an order to the Respondent. It is further argued by the Appellants that the Respondent should not be allowed to blow hot and cold by commencing an action, obtaining a remedy and the seeking to stay the action. Further, it was argued on behalf of the Appellants that the High Court could not of its own motion stay the High Court proceedings while maintaining injunctive remedy it granted *ex parte* as that is inconsistent with the provisions of section 6 (1) of the Arbitration Act which provides:

> "If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

As can be seen from the above provision, the courts have wide powers to make orders relating to interim orders for the purpose of preserving the status quo pending and during arbitration. The courts have jurisdiction to make such orders as preserve the status quo of the subject matter of the arbitration. The powers could include those of making orders for preservation of the subject matter

of the reference[14]. The jurisdiction to grant the injunctive relief and all stay proceedings under section 6 of the Arbitration Act was meant to preserve the subject matter of the suit pending determination of the issues between the parties. However, it is important to note that the law discourages the parties from making parallel applications before the arbitral tribunal and/or the High Court.

This Court agrees with the Appellants that an arbitration clause cannot be used to benefit the Respondent as a suing party. A proper reading of section 6 of the Arbitration Act shows that it is only the Defendant who is permitted to apply for stay of proceedings[15]. There are no local cases on point on how section 6 of the Arbitration Act operates in practice but in the comparable jurisdictions of England and Kenya with similar provision. How does this section then operate in practice? It is like this: The sued party, the party making the application for stay, must not have taken steps in the proceedings to answer the substantive claim. For instance, the party must not have served defence or taken another step in the proceedings to answer the substantive claim. The rationale of this requirement is to ensure that stay of proceedings for reference to arbitration is not used as a delay tactic by the defence. The reasoning is that by taking steps to answer the substantive claim, the party submits or is at least taken to be submitting to the jurisdiction of the court and electing to have court deal with the matter rather than insisting on the right to arbitration. Under section 6 of the Arbitration Act, a party wishing to enforce the arbitration agreement in a situation where the other party has initiated court proceedings must apply to the court not later than the time when that party enters appearance or takes the appropriate procedural step to acknowledge the legal proceedings against that party. Further, in ***Eagle Star Insurance Company Limited-v-Yuval Insurance Company Limited***[16], Lord Denning MR instructively put it that to merit refusal of stay, the step in the proceedings must be one which "impliedly affirms the correctness of the [Court"s] proceedings and the willingness of the defendant to go along with the determination by the courts instead of arbitration". In other words, the conduct of the applicant must be such as demonstrates election to abandon the right to stay in favour of the court action proceeding. Another enlightening

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[14] see ***Forster-v-Hastings Corporation*** (1903) 87 LT 736 ; ***Don-wood Co. Ltd-v-Kenya Pipeline Ltd*** http://www.kenyalaw.org/kl/index.php?id=1923. Accessed 30 August 2021

[15] There is some instructive case from Kenya on this point. See ***Pamela Akora Imenje-v-Akora ITC International Ltd & Another*** [2007] eKLR. http://kenyalaw.org/caselaw/cases/view/43775. Accessed 30 August 2021

[16] [1978] Lloyds Rep. 357

case on the stipulation in section 6(1) of the Arbitration Act is ***Victoria Furniture Limited-v-African Heritage Limited & Another.***[17] The Court opined that the clear position was that if a party wishes to take advantage of an arbitration agreement under section 6(1) of the Arbitration Act, he was obliged to apply for a stay not later than the time when he (a) enters appearance; or (b) files any pleadings; or (c) takes any other steps in the proceedings." In the court's further view, which opinion is adopted as this Court's, the above means that if a party takes any of the three steps above without at the same time applying for a stay of proceedings, then s/he losses the right to subsequently make the application.

Respecting the time an application for stay must be lodged, the case of ***Kenya Seed Co. Limited-v-Kenya Farmers Association Limited***[18] is instructive The court observed that section 6 was not clear cut about the time within which an applicant must lodge an application but concluded that the correct position on the time to lodge an application was that:

> "A party wishing for the proceedings to be stayed and the matter referred to arbitration under an arbitration agreement must apply not later than the time he enters appearance (if indeed he enters appearance) or not later than the time he files any pleadings (if he does not enter appearance) or not later than the time he takes any other steps in the proceedings (if he does not enter appearance or file any pleadings)."

Further, the court noted that an action to resist interim injunction is not a step in proceedings. Applications for interim applications are interlocutory proceedings whereas the steps proscribed have to taken in substantive proceedings.

What does this Court make of the present matter? This Court finds that it would be a miscarriage of justice to parties if it allows that the proceedings continue to be stayed and the matter referred to arbitration. The Appellant raised a question of law respecting the legality and validity of the arbitration agreement. It argued that the agreement was vitiated by fraud, illegality and misrepresentation. These issues are matters of law. As this Court understands it, a court is enjoined

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[17] https://lawyer-kenya.blogspot.com/2008/06/grounds-for-refusal-of-stay-under-s-6.html. Accessed on 30 August 2021

[18] Civil Case 1218 of 2006 - Kenya Law. http://kenyalaw.org/caselaw/cases/view/39265/index.php.Accessed on 30 August 2021

to refuse stay of proceedings where, *inter alia*, there are questions of law involved. The court below should have therefore refused to grant stay of proceedings.

Further, the judge's order of 18 February 2021 to the effect that the injunction was granted to the Respondent (the Plaintiff in the court below) as a stay of any proceeding and a reference of the matter to arbitration in terms of clause 13.3 of the agreement between the parties was misconceived as the Appellant having chosen to file the suit could not later indirectly have recourse to section 6 (1) of the Arbitration Act either directly or implicitly as it happened here. This is the plain and obvious impression of the wording of subsection 6(1) of the Arbitration Act. Therefore, the Appellants having made its, as it were, it was bound to lie on it. It chose to file a legal suit; it had to stand or fall by it.

This Court finds and concludes that at law an arbitration clause or agreement cannot be used to benefit the Respondent as a suing party. The court below, in making the order it made on 18 February, assumed that the arbitration clause was valid. It should have followed therefore that a valid arbitration clause could only be relied upon by the party sued to obtain a stay of proceedings and reference of the matter to arbitration. In this matter the Appellant did not sue. It is the Respondent which sued and obtained a remedy in the proceedings in the High Court. If the Respondent had applied for the court case to be stayed pending referral to arbitration, the court below should not have granted such an order to the Respondent. Furthermore, once the claimant/Respondent herein sued and obtained the interlocutory injunction, it denied itself the right to rely on the arbitration clause. Since it had obtained the order of injunction, the court below could not then have relied on arbitration clause. The court below should have denied hearing the application in the first place than to stay proceedings in favour of the suing party. Section 6 of the Arbitration Act is clear that that once a party delivers a pleading or takes a step in the proceedings, he denies himself the right to rely on the arbitration clause[19]. In ***Pitchers Ltd v Plaza (Queensway) Ltd*** the defendants had not delivered any pleadings but filed an affidavit to oppose an application filed in the suit. The affidavit deposed, *inter alia*, that the defendant had a defence to the plaintiff's claim. This was held to be a step taken in the proceedings as to preclude the defendant from relying on the arbitration clause.

[19] ***Pitchers Ltd vs Plaza (Queensway) Ltd*** [1940] 1 All ER 151

Now, the question that arises and falls to be decided is : if the sued party is denied to stay proceedings after having taken a step, the question this Court is asking itself is how about the suing party? The position should be the same denial of stay of proceedings.

Turning to the case at hand, it is common cause that in the court below the Respondent/claimant filed summons, with the statement of claim, the list of documents and sworn statements together with the *ex parte* application for an *ex parte* injunction while the Appellant/defendant in the court below filed its written statement of defence, list of documents and attendant sworn statements together with an application on 48 hours' notice to vacate the *ex parte* injunction. The parties were therefore precluded from relying on the arbitration clause. Therefore, the court below had the jurisdiction to handle this case, especially after having already granted the Respondent the interim interlocutory injunction. In sum, this Court finds that the interim injunction granted to the Respondent, was not for preserving the status quo pending final determination of the substantive claim. It was rather granted as a final relief as later on the court refused to litigate the matter for want of jurisdiction. Further, this Court finds that the applicant sought to get a remedy that was permanent in nature in the guise of seeking an interlocutory injunction. This Court therefore vacates the interim interlocutory injunction granted to the Respondent on 26 January 2020. Further, the order of the court below made on 18 February 2021 where an injunction was granted as a stay of proceeding and the reference of this matter to arbitration is set aside. The matter is referred back to the court below, before another judge, for the further prosecution of the proceedings as they stood before 26 January 2020.

Costs

Costs to the Appellant both in this Court and the court below.

Made in Chambers at the Supreme Court of Appeal, Blantyre this 3rd day of November 2021.

JUSTICE F.E. KAPANDA SC

JUSTICE OF APPEAL