IN THE MALAWI SUPREME COURT OF APPEAL

SITTING AT BLANTYRE

MISC CIVIL APPLICATION NO 74 OF 2019

ON THE 15TH DAY OF SEPTEMBER 2021

BETWEEN

Puma Energy Limited.....Appellant

AND

Bishop Abraham Simama.....1st Respondent

CORAM: HONOURALE CHIEF JUSTICE, R. R. MZIKAMANDA, SC

Nkhono SC	Counsel for the Appellant
Kita	Counsel for the Respondent
Shaibu	Judicial Research Officer
Minikwa	Recording Officers

RULING

The appellant filed a notice of motion for leave to amend Notice and Grounds of Appeal. A further application was filed for leave to allow new evidence in the event the first application to amend was granted. Both applications were supported by sworn statements and skeleton arguments. The respondents opposed both applications and filed sworn statements and skeleton argument in opposition.

The sworn statement in support of the motion for leave to amend notice and grounds of appeal show that the appellant was dissatisfied with a judgment rendered by Honourable Justice M.C.C. Mkandawire (as he then was) dated 19th March 2018 when the matter was in the High Court, Lilongwe District Registry as Civil Cause No. 85 of 2017. The appellant filed a Notice and Grounds of Appeal on 23rd March 2018 and served them on the respondents on 26th March 2018. On 11th May 2018, Counsel for the appellant got information that at all times Honourable Justice M.C.C. Mkandawire presided over, heard and determined the proceedings in the High Court, the subject of the appeal, his Lordship was a client for the respondent's lawyer being Messrs Kita & Company, in proceedings that His Lordship had instituted at the High Court Mzuzu Registry in Civil Cause No 104 of 2017, Mankhambera Charles Ching'ani Mkandawire v ESCOM Limited. It was further deponed that those proceedings in Mzuzu High Court Registry were ultimately settled through Alternative Dispute Resolution Settlement Agreement dated 1st March, 2018 where Messrs Kita & Company obtained a total sum of K108,000,000

from ESCOM Limited on behalf of Honourable Justice M.C.C. Mkandawire (as he then was).

It is in the above circumstances that the appellant deposes that it verily believes that Honourable Justice Mkandawire's handling of Civil Cause No 85 of 2017 in the Court below and now appealed against, raises the real likelihood of bias or potential bias and conflict of interest in favour of the respondents in that His Lordship might reasonably be perceived to have been influenced in his judgment by virtue of his relationship with the respondent's lawyers. According to the appellant, His Lordship M.C.C. Mkandawire (as he then was) should have in all propriety and judicial probity recused himself in those circumstances.

The sworn statement further shown that the appellant intends to amend the Notice and Grounds of Appeal to include the above aspects of the case in the appeal which the appellant would have already made part of the appeal had it been aware of the facts. According to the sworn statement, the interests of justice require that the appellant be granted leave to amend its Notice and Grounds of Appeal to accommodate the issues now raised and such an amendment would not prejudice the respondents in any way.

The appellant's sworn statement on the notice of motion for leave to adduce new evidence on appeal shows in the matter the judgment of which is now appealed against His Lordship Justice MCC

Mkandawire (as he then was) made some orders including the judgment, which the appellant consider in-explicable and most difficult to understand on an objective basis. It also shows that matters now raised go to the propriety of the proceedings in the Court below, calling into question the fairness of the trial in the Court below, the evidence on the hearing of the appeal, considering that the appellant only got to know the facts complained of after the judgment and after the filing of the Notice of Appeal and Grounds of Appeal now on record. According to the sworn statement, the appellant intends to adduce new evidence by way of affidavit with all relevant exhibits on the hearing of the appeal as proof that at all material times, Honourable Justice MCC Mkandawire was in a position of conflict of interest and/or real or perceived impartiality. It also shows that the further evidence to be adduced would go to prove the amended grounds of appeal, if leave to amend is granted.

The appellant's skeleton argument in support refer to Order III Rule 2 (5) of the Supreme Court of Appeal Rules which provides that:

"The appellant shall not without the leave of the Court argue or be heard in support of any ground of appeal not mentioned in the notice of appeal, but the Court may in its discretion allow the appellant to amend the grounds of appeal upon such terms as the Court may deem just"

It was argued that unless the Court gives permission a party cannot be allowed to argue any ground that is not included in the Notice of Appeal and that any amendment to the Notice and Grounds of Appeal must be preceded by or sanctioned by the Court's permission. It was

further argued that under the rules there is no time limitation within which an amendment to the Notice and Grounds of Appeal can be made, such that leave to amend can be granted at any time by the Court. According to the applicant, the circumstances of this case are such that leave to amend Notice and Grounds of Appeal is requires.

It was argued that there will be no prejudice to the respondent if leave to amend Notice and Grounds of Appeal is granted at this point, and that it is in the interest of justice that leave be granted to the applicant. Once leave to amend Notice and Grounds of Appeal is granted, then it is argued that the Court should further grant leave to adduce new evidence to prove the additional grounds of appeal.

The sworn statement in opposition to the two applications, shows that both applications go to the root of the hearing of the appeal itself and can only be heard by a full bench and not a single member of this Court. It was averred that this has ordinarily been the practice in this Court. It was observed that both applications are belated as the allegations were first made far back as May 2018 during an application for stay of execution of the appealed judgment, but the applicant never bothered to make the formal application.

It was averred that the new ground of appeal and the fresh evidence to be adduced are peripheral to the issues that were before the Court below. Crucially, it was averred that granting the amendment sought and allowing fresh evidence on appeal on allegations which have

nothing to do with the merits of the judgment but the conduct of the Judge in the Court below would be tantamount to putting Justice Mkandawire on trial on allegations which will be heard by the Court but without giving Justice Mkandawire an opportunity to be heard or the right of reply, and that would be a fundamental breach of the rules of natural justice against a fellow judicial officer.

It was sworn that the appellant's remedy lied with lodging a complaint with the Judicial Service Commission and it is only after Justice Mkandawire was found guilty by the said Judicial Service Commission would the appellant be entitled to have judgment set aside on that basis.

It was argued in the skeleton arguments in opposition that the applications should be made to the full bench of the Supreme Court of Appeal citing the limitations of section 7 of the Supreme Court of Appeal Act. Counsel for the respondent also cited Order III rule 4 and Order III rule 24 of Supreme Court of Appeal Rules as support of the argument that such applications should be made before a full bench of the Supreme Court of Appeal because they go to the of the hearing of the appeal itself. I suppose Counsel meant to refer to Rules of the Supreme Court. Counsel also cited the case of Celcom Ltd v American Palace Cizano and Attorney General MSCA Civil Case No 14 of 2013 where an order to adduce fresh evidence had to be made before a full bench and not a single member Judge of the Supreme Court of Appeal. According to Counsel, there is a good

reason for the practice of making such application before a full bench, since the new evidence will go to decide the appeal and each Justice of Appeal must be allowed to put his mind to whether to allow the new evidence or not.

Counsel vehemently argued that the applications are belated and tantamount to bringing Honourable Justice Mkandawire on trial before this Court without hearing his side. According to counsel, these applications are made three years after the allegations were first made in an application for stay of execution of judgment, yet during the three years, the appellant did nothing to make the present applications. According to counsel, the allegations have nothing to do with the merits of the judgment of the Court below, but are peripheral thereto and call for fresh investigations into the matters which are nowhere in the judgment of the Court below. Counsel cited the case of Al-Koronky v Time Lite Entertainment Group (2006) EWCA Civil 1123 for the proposition that it would be wrong and contrary to the interests of justice to admit evidence at a late stage as that would, in effect, be conducting a new and very different hearing from that which occurred at first instance, and such a departure from the well-established principles is not justified. Counsel was of the view that the appellant is calling upon the Court to conduct a new and very different hearing of bringing a fellow member of this Court on trial over his alleged ethical misconduct in the Court to conduct below. In his view, Honourable Justice MCC Mkandawire will not be called to defend his conduct before this Court

and that the appellant is inviting this Court to make a judicial determination over a judicial officers' conduct of a matter without affording that judicial officer a right to be heard.

On the argument that the appellant's complaint should have been raised to the Judicial Service Commission, Counsel concluded that it is obvious that the appellant is lodging a misconduct complaint against Honourable Justice MCC Mkandawire in the manner he handled the proceedings in the Court below, to wit, that he misconducted himself in presiding over a case where he had a lawyer-client relationship with the lawyer representing the respondent. Counsel cited section 118(6) of the Constitution of the Republic of Malawi in support of this argument, arguing further that it is only at a disciplinary hearing conducted by the Judicial Service Commission that His Lordship Justice Mkandawire would be able to know what statute he has breached that should lead to finding him guilty. Counsel suggested that the Supreme Court of Appeal should be very slow to entertain applications such as the ones the appellant has made lest it usurps the powers of the Judicial Service Commission.

Whether to grant or refuse leave is a matter of judicial discretion to be exercised by the Court to which an application for leave has been made. In the present matter, there is an appeal pending in this Court. It has been pending for sometime for various reasons which may not be recounted at this point. Suffice to say that there is now renewed determination to have the appeal heard by the full panel in

the coming session of our settings. The two applications for leave to amend Notice and Grounds of Appeal as well as to adduce, fresh evidence are in made in readiness for the hearing of the appeal. It was argued before me as a single member of the Court that it was against established practice for such applications to be heard by a single member of the Court. I am unable t appreciate this argument and how it can be said that there is an established practice that a single member of this Court should not entertain applications of the present nature. Section 7 of the Supreme Court of Appeal Act provides that:

"A single member of the Court may exercise any power vested in the Court not involving the hearing or determination of an appeal:
Provided that:-

a) *In criminal matters.....*
b) *In civil matters any order direction or decision made or give in pursuance of the powers conferred by this section may be varied, discharged or reversed by the Court."*

I do not see the kind of restriction in the above provision as counsel for the respondents would like this Court to believe. I also do not appreciate why restriction should be made on a single member beyond that spelt out in section 7 of the Supreme Court of Appeal Act. Both applications are about leave and they do not constitute the hearing or determination of the appeal. They are about leave to amend the grounds of appeal and to adduce further evidence that will prove the grounds of appeal at the hearing and determination of

the appeal. I am not able to appreciate the circumstances of Celcom Ltd v American Palace Cizano and Attorney General as cited by counsel for respondent. Counsel did not provide a copy of the said judgment.

Regarding the timing of making the applications, it is settled law that an amendment can be made at any time in the discretion of the Court and on conditions the Court may deem fit. It was said in Clarapede v Commercials Association (1883) 32 WR 262 at 263 that:

"However, negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is not injustice if the other side can be compensated by costs."

The above dictum rings true even within the current state of the law.

In respect of the application to adduce fresh evidence, I wish to note that Tambala SC JA sitting as a single member of this Court, dealt with a similar application and allowed it, in Auction Holdings v Sangwani Jude Hara and others [2010] MLR 1. The application had been resisted on the grounds that the new evidence had always been available and if the applicants had carried out reasonable and diligent enquiries at the time the case was pending, they would have easily discovered it. Likewise, in the present matter, the respondents resist the application on the ground that the applicants sat on the information for three years without taking action. That argument is

not on sound legal footing. As Tambala SC JA observed in the above case, the Court has wide discretion to allow or even require new evidence to be adduced if in the view of the Court that was necessary for the furtherance of justice. The test is that the evidence must be such that it could not have been accessed after reasonable diligence and that the evidence would have had an important influence to the present case, the evidence sought to be adduced is documentary in support of the proposed new ground of appeal. I see no difficulty with that.

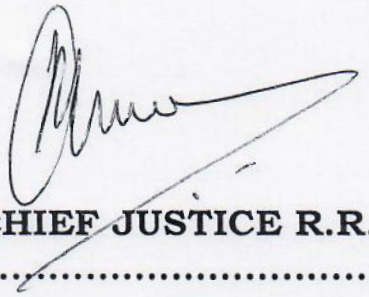
Counsel vehemently argued that the applications tantamount to bringing Honourable Justice MCC Mkandawire on trail before his peers without hearing his side. Counsel further argued that the new ground of appeal is a complaint of misconduct against Honourable Justice Mkandawire which can only be raised with the Judicial Service Commission under section 118 (b) of the Constitution of the Republic of Malawi. With greatest respect to counsel, these arguments represent a misapprehension of the ground of appeal proposed in the amendment. To begin with, it is stretching matters to suggest that Honourable Justice Mkandawire is placed on trial for alleged misconduct when the proposed amendment suggest likelihood of bias or perceived bias in the circumstances of trial. Likelihood of bias or perception of bias does not necessarily mean there is misconduct on the part of the judicial officer determining the matter. The two must be viewed separately and distinctly. It would be too restrictive for litigants to say that each time they raise a

likelihood of bias on the part of a judicial officer, they are accusing the judicial officer of misconduct. Of course, allegations of bias on the part of a judicial officer must never be made casually or on flimsy grounds. There must be reasonable grounds for raising the concern. Judicial officers are engendered to deliver justice to all manner of people in accordance with the law and legally relevant facts in an independent and impartial manner. This is what litigants are entitled to (see section 9 of the Constitution). It is not the case every time a litigant raises concerns about bias or likelihood of bias on the part of a judicial officer that it amounts to accusation of misconduct.

I have weighed all the sworn statements and skeleton arguments, both in support of the two applications and in opposition to them. I have come to the conclusion that justice will best be served without causing an injustice or prejudice to the respondents, if I grant the applications herein. I grant the application to amend Notice and Grounds of Appeal as proposed in the exhibit attached to the application and to adduce fresh evidence limited to the documentary evidence proposed by the applicant. The applicants must file and serve these on the respondents within 7 days and the respondents to file response seven days after service on them.

Costs for these applications shall be in the Cause.

Made this 26th day of September 2022 at Blantyre.



HONOURABLE CHIEF JUSTICE R.R. MZIKAMANDA, SC

.....