



REPUBLIC OF MALAWI

IN THE MALAWI SUPREME COURT OF APPEAL
MISCELLANEOUS CIVIL APPLICATION No. 34 OF 2023
(from the High Court of Malawi, Lilongwe District Registry,
Commercial Cause No. 515 of 2022)

BETWEEN:

SALIM SARDAR

APPLICANT

AND

EBRAHIM BHAYYAT

RESPONDENT

R U L I N G

1. Salim Sardar, the applicant in this case, filed two *ex parte* notices of motion on 16th June 2023, seeking the following reliefs: first, an order staying enforcement and/or execution of the order of the court below discharging an interlocutory injunction pending appeal, taken under section 7 of the Supreme Court of Appeal Act, Order I rule 18 of the Supreme Court of Appeal Rules and the inherent jurisdiction of the court; second, an order for leave to appeal; and third, an order of the court granting an extension of time within which to appeal against the ruling of the High Court which was made on 21st April 2023, taken under subsection (c) of the second proviso to section 21 of the Supreme Court of Appeal Act and section 23(2) of the Supreme Court of Appeal Act. After perusing the applications, the Court directed that an *inter partes* hearing be held on 30th June 2023. This decision is rendered after hearing both parties on the said applications.

The application for an order staying the order discharging the order of interlocutory injunction

2. The Applicant has approached this Court for a decision on the application for an order staying the order of the High Court Commercial Division discharging the order of interlocutory injunction obtained by the Applicant restraining the Respondent from selling a house which is located in Area 2, in the City of Lilongwe, or from evicting the Applicant from the premises. The Applicant claims that this Court has jurisdiction to hear and decide this matter under Order I rule 18 of the Supreme Court of Appeal Rules. The Applicant has filed an affidavit in support of the application, which was sworn by the Applicant's legal practitioner, Mr. Louis Mwale, and he also relies on skeleton arguments. According to paragraph 24 of the said affidavit, the Applicant filed an application for a stay before the High Court Commercial Division, which was denied. It is noted that no copies of the application or ruling were produced before this Court, and there are no further or better particulars to verify the validity of the statement. It is also worth noting, as the legal practitioner for the Respondent correctly observed, that Mr. Mwale's affidavit is incompetent and inappropriate because it violates rules applicable to affidavits by containing hearsay, contentious factual issues, opinions, and legal arguments. The principles underlying competent and admissible affidavit evidence were discussed in the case of *The State, The Inspector General of Police, and The Attorney General v A J (a minor), ex parte Shaba on behalf of T.S. (a minor)*, Misc. Civil Appeal 5 of 2022/ [2022] MWSC 6.
3. The Applicant has cited several authorities, such as *Hammond Suddard Solicitors v Agrichem* [2001] CP Rep 21, *City of Blantyre v Manda and others* [1992] 15 MLR 114, *Press Corporation Limited and another v Cane Products Limited* [2005] MLR 377 which hold that an appeal does not operate as a stay of execution and that courts must not necessarily deprive a successful litigant of the fruits of his litigation. He contends that courts must exercise judicial discretion and ensure that, in the event of a successful appeal, the appeal is not rendered nugatory or academic. The Applicant relies on the cases of *Vosebe Pty Limited t/a Batemans Bay Window and Glass v Bakavgas* [2008] NSWCA 55 and *Nyasulu v Malawi Railways Limited* [1999] 16(1) MLR 394 for this assertion. The Applicant argues that the cited cases illustrate the need of considering all the relevant facts and being circumspect before making a decision one way or the

other. The Applicant notes that in *Department for Environment, Food and Rural Affairs v Downs* [2009] EWCA Civ 257 it was held that a stay is an exception rather than the rule and that substantial grounds must be shown by the party requesting a stay, allowing the court to conduct a balancing exercise, weighing the risks of injustice if a stay is granted or not. The abovementioned case highlighted such reasons as to normally be some form of irremediable harm that the applicant is likely to suffer if the stay is not granted. The Applicant argues that the subject matter is a dwelling house that the Applicant has been renting from the Respondent since 1998 and for which the Applicant paid the Respondent a total purchase price of K55 million in 2022.

4. The Applicant contends that based on the finalised transaction, he embarked on extensive development of the property and that allegedly the consequence of the February 2022 agreement was that the Applicant gained ownership and beneficial rights of the property. The Respondent, however, allegedly refused to furnish the lease documents and threatened to re-sell the property and refund the Applicant's purchase fee. The Applicant contends that the Respondent misled the court when he stated that he first offered the house for K630 million. According to the Applicant, the irremediable damage is that the Applicant has used the money and has not returned it to the Applicant, and if he is allowed to evict the Applicant from the house and sell it, the Applicant will suffer irreparable harm because damages are not an adequate remedy in land matters.
5. The Applicant refers to the case of *Civil Service Co-operative Society Limited v The General Steam Navigation Company Limited* [1903] 2 KB 756 and recognizes that the court must exercise judiciously its discretion in deciding whether or not to grant the requested stay order based on sufficient grounds and specific information. It is contended that courts cannot order a stay of execution based only on unverified assertions of incapacity to repay the judgment debt if the appeal is successful. It is an established principle that a court's judgment is legitimate and enforceable until it is overturned. In the present matter, such materials are referred to in the Applicant's affidavit, which states that it will be unjust to allow the Respondent to evict the Applicant and sell the property before the disposal of this action, while he is retaining the Applicant's money that was paid to purchase the house.

6. The Applicant concedes that, while there is no written sale agreement, there is a written memorandum proving the payment for the purchase of the house. The Applicant argues that the payment raises equity in his favour, justifying the Applicant's request for a stay order and an interim injunction, which the Applicant intends to pursue at the appeal level. The Applicant believes that if the stay order is granted and the appeal later fails, the Respondent will suffer no harm since any rentals accrued will be incorporated into the purchase sum paid by the Applicant to the Respondent. However, if the stay order is not granted and the Respondent is permitted to sell the house, the Applicant will suffer irreparable loss. The Applicant contends that an interlocutory order of injunction will be granted where there are serious questions raised by the facts that should be tried at trial, where damages will not be an adequate remedy in the circumstances, and where the interests of justice favour granting the order. The Applicant requests that this Court orders a stay of the judgment of 21st April 2023, which discharged the order of injunction previously obtained in favour of the Applicant, pending the hearing and determination of the Applicant's appeal.
7. The Respondent, on the other hand, opposes the motion and has filed an affidavit in opposition to the stay application sworn by the Respondent himself, Ebrahim Bhayyat, and there are also skeleton arguments. A nephew of the Respondent, Iqbal Bhana, has sworn an affidavit in opposition to the application for leave to appeal which also touches on the issue of stay. Both deponents deny that the Respondent offered the Applicant land for sale and that there was no land sale agreement and the deponents have produced exhibits marked *EB 1*, *EB 2*, *EB 3*, *IB 2*, and *IB 5* to disprove that the Applicant made any improvements to the property pursuant to the purported verbal agreement for the sale of land.
8. Mr. Bhayyat avers that he only indicated to the Applicant that he intended to sell the land for an indicative price of K630 million and that if the Applicant was interested, he should show commitment by making a security deposit of USD50,000.00, and that the agreement would be executed after the Applicant raised the entire purchase price of K630 million. Which sum the Applicant was unable to raise by April 2022, and the Respondent refused to receive the purchase price in installments.

9. The Respondent claims that the Applicant refused to accept the security deposit money when he tried to refund it. The Respondent further disputes the wording of the document marked as exhibit *LM2*, alleging fraud and emphasizing the lack of adequate signatures. The Respondent also notes that the Applicant's fears that the property might be sold to another person are unfounded, and he claims that the Applicant, who has no title to the land, has used the judicial process to severely limit and impinge on the Respondent's rights as the owner of the property in question. The Respondent argues that the Applicant is seeking a shortcut to the desired remedy and that this court lacks jurisdiction to hear and determine the application for a stay of enforcement because the appeal has not been entered, as required under Order III rule 19 of the Supreme Court of Appeal Rules. The Respondent contends that the interests of justice and the balance of convenience militate against granting the Applicant's motion for a stay of enforcement and that the application should be dismissed with costs.
10. In reply, the Applicant contends that the Respondent's claim that the sum of K55 million was a security deposit amount is unsupported by evidence and is a fundamental issue that should be interrogated at full trial given the contradicting views. The Applicant's legal practitioner stated in the oral arguments that they did not find it convenient to file the application in the court below.
11. In considering whether this Court can grant the application in the circumstances, the Court must first determine whether the rules of practice and procedure to hear the application have been complied with. This Court finds that the Applicant's assertion that he filed an application for stay in the court below which was declined is not supported by any evidence and is of course disputed by the Respondent. According to Order I rule 18 of the Supreme Court of Appeal Rules and *The State, The Inspector General of Police, and The Attorney General v A J (a minor), ex parte Shaba on behalf of T.S. (a minor)*, Misc. Civil Appeal 5 of 2022 an application for stay can only be appropriate before this Court if it was brought in the first instance to the Court below and was declined. Noting that there is no record of appeal that has been entered in this Court in accordance with Order III rules 10 and 11 of the Supreme Court of Appeal Rules, it follows that this Court is not seized with the appeal and cannot entertain the application for a stay under Order III rule 9 of the Supreme Court of Appeal Rules. Further noting, that the Applicant has failed to show that it sought a stay in the High Court which was declined indicates that the Applicant "deliberately defied and sidestepped the

clear rules of procedure as it rushed the motion herein to the Supreme Court of Appeal”: *Parliamentary Service Commission v SJR Catering Services* [2018] MLR 198. The cases of *Khamalatha & Ors v Secretary General of Malawi Congress Party & Ors*, MSCA Civil Appeal no. 67 of 2016; *Electoral Commission and Another v Mkandawire*, MSCA Civil Appeal no. 67 of 2009; *Malawi Housing Corporation v Western Construction Company Ltd*, [2013] MLR 195 (SCA) and *Moto v Sabadia* (No. 2), MSCA Civil Appeal no. 2 of 2014 that have been cited by Respondent are also pertinent on this issue. Although the Applicant's legal counsel was aware that bringing the application before this Court was premature, he attempted to downplay the procedural requirement by claiming that he did not want to have to go back and forth between this Court and the court below. The argument for circumventing the process when the case is emerging from the same High Court and filing the application in a court higher on the hierarchical structure is illogical. The case of *State and others; ex parte: Right Honourable Dr. Cassim Chilumpha, SC* [2006] MLR 433 (SCA) which is cited by the Applicant himself, demonstrates that when the High Court has been by-passed, any application before a single Judge of Appeal is premature and not properly before the court.

12. After finding that the filing of the motion for a stay of execution and/or execution of an order discharging an order of injunction in this Court is irregular there is no need for the Court to consider the merits of the motion by determining whether an enforceable order susceptible of being stayed exists, as established in the case of *NBS Bank plc v Dean Lungu t/a Deans Engineering Co. Ltd*, MSCA Civil Appeal no. 83 of 2019 and whether the Applicant has satisfied the three tier test for the grant of an order of stay and shown the existence of circumstances and proved through cogent evidence that refusal of a stay would risk injustice and stifling the appeal, as discussed in the cases of *Contract Facilities Limited v Estate of Rees (Deceased) and others* [2003] EWCA Civ 465; *Chitawira Shopping Centre v HMS Foods & Grains Limited* MSCA Civil Appeal no. 30 of 2015; *Attorney General v Sunrise Pharmaceutical and Another* [2013] MLR 1 (SCA); *Mulli Brothers Ltd v Malawi Savings Bank Ltd*, MSCA Civil Appeal no. 48 of 2014 (3 July 2015) and *Anglia Books Distributors Ltd v Trustees of Kalibu Ministries t/a Kalibu Academy* MSCA Misc. Civil Application no. 54 of 2015. The position taken by this Court is supported by the Supreme Court of Appeal's recent adoption of the dissenting opinion in *Ngwira & Chiumia v Ngwira*, MSCA Civil Appeal No. 16 of 2020 which states that procedure prescriptions are part of

the merits of a case and “failure to comply with procedural prescriptions is an abuse of court process.” The summary of the outcome is that the application for a stay of an order is denied for the reasons stated above.

The application for leave to appeal and for an extension of time within which to appeal

13. The Applicant seeks leave to appeal out of time, after missing the deadline to appeal by two weeks, purportedly due to the prior counsel's tardiness to appeal on time. The Applicant asserts that the Respondent, who is holding the Applicant's K55 million, would suffer no prejudice and that his right to access justice should not be treated lightly in the circumstances of this case. The Applicant relies on paragraph (c) of the second proviso to section 21 of the Supreme Court of Appeal Act and the case of the *State and others; ex parte: Right Honourable Dr. Cassim Chilumpha, SC* [2006] MLR 433 (SCA) in applying for leave to appeal out time against the chamber ruling made on 21st April 2023. The Applicant states that a notice and grounds of appeal have already been filed with the court. The Applicant has filed an affidavit in support of the application and in the skeleton arguments he notes the legal requirement that an order in chambers by a judge of the High Court cannot be appealed without the leave of either the Judge of the High Court who made the order or of a single member of the Supreme Court.
14. The Applicant also cites section 23(1)(b) of the Supreme Court of Appeal Act which stipulates that if a person desires to appeal from the High Court to the Supreme Court, he must notify the Registrar of the High Court of his intention to appeal within six weeks of the judgment from which he wishes to appeal in the case of a final order. The Respondent submits that Supreme Court, not the High Court, may extend the period for giving notice of intention to appeal under Section 23(2) of the Act, even if the deadline for giving such notice has elapsed. On the issue of the application for an extension of time to appeal, the Applicant has referred to the case of *Chombe Foods Limited v Botha*, MSCA Civil Appeal no. 3 of 2020. In the aforementioned case, it was held that the court considers “if there are good reasons advanced for failure to comply with the timelines, if no injustice will be occasioned to the opposing party and if any adversity thereby occasioned is the one that can be made good by an award of costs” when exercising discretion.

15. In the Respondent's affidavit in opposition to both the application for leave to appeal and the application for an extension of time within which to appeal against the ruling of the High Court, the Respondent states that when his legal practitioners were served with the application on 27th June 27, they inspected the record of the case and noted that the application was procedurally incompetent because the Applicant had only filed a notice of appeal but did not make an application for leave to appeal or an application for stay before the High Court. In support of this argument, they cite Order I rule 18 of the Supreme Court of Appeal Rules and the case of *Parliamentary Service Commission v SJR Catering Services* [2018] MLR 198. Furthermore, it is argued that the application is severely lacking on the merits because the grounds of appeal introduce novel issues involving equitable principles rather than the issue of suppressing material facts, which was addressed in the High Court's ruling.
16. The Respondent contends that the applications should be dismissed on the grounds that the application for leave to appeal is wrongly and prematurely in this Court; that the applicant failed to demonstrate good and substantial grounds for the delay in filing the notice of appeal. As the case of *Chitawo & Anor v MPICO* MSCA Civil Appeal no. 5 of 2010 explains that tardiness of counsel does not suffice as a good and substantial reason for the delay. Further, the delay in filing the application for an extension of time within which to appeal is inordinate. Furthermore, as noted in the cases of *Mutharika & Anor. v. Chilima & Anor.* MSCA Constitutional Appeal no. 1 of 2020 and *Chingwalu and DHL International v Chabuka and Magwirani* [2007] MLR 382, the Applicant has failed to demonstrate *prima facie* good grounds why the appeal should be heard.
17. Section 21 of the Supreme Court of Appeal Act, under paragraph (c) of the second proviso, provides for an established legal principle that an order made in chambers by the High Court can only be appealed against with leave obtained from either the High Court or the Supreme Court of Appeal. The case of *Parliamentary Service Commission v SJR Catering Services* [2018] MLR 198 is clear that on a matter concerning leave to appeal, the High Court and Supreme Court of Appeal have concurrent jurisdiction. The provisions of Order I Rule 18 of the Supreme Court of Appeal Rules, on the other hand, require that applications on which the High Court and the Supreme Court of Appeal have concurrent jurisdiction be brought in the first instance before the High Court and can be escalated to this Court if the High Court declines to grant it. The principle that an "applicant must first have his application determined by the court below before he can come to this Court" was recently highlighted in the case of *The State v The Minister of Homeland Security and The Chief Immigration Officer*,

ex parte Joseph Nsabimana, MSCA Miscellaneous Civil Application no. 38 of 2023 (4th July 2023). In the present matter, it is undisputed that the Applicant did not file an application for leave to appeal before the High Court Commercial Division, as a result of this irregularity, it can be stated that the Supreme Court of Appeal's jurisdiction to hear the application has not yet been triggered in accordance with Order I Rule 18 of the Supreme Court of Appeal Rules and as explained in *Parliamentary Service Commission v SJR Catering Services* [2018] MLR 198. While the case of *Parliamentary Service Commission v SJR Catering Services* [2018] MLR 198 holds that such a breach occasion a curable irregularity, the point of departure in this decision is based on the dissenting opinion in *Ngwira & Chiumia v Ngwira*, MSCA Civil Appeal No. 16 of 2020, which holds that the of flouting of procedural prescriptions cannot be waived because it is a fatal error. Accordingly, the application for leave to appeal is dismissed as incompetent since it was presented before the Supreme Court of Appeal erroneously and prematurely. Similar to the position taken in the prior application for stay, this Court will not proceed to hear and determine the application for permission to appeal, nor will it consider the merits of the motion or, for that matter, the application for an extension of time within which to appeal, because the procedural steps have been breached and are not curable.

18. All the applications and orders sought having been declined, the costs of and incidental to these applications are awarded to the Respondent. Any aggrieved party can take up the matter before the full bench of this Court.

Delivered and dated this 10th day of July 2023 at Chichiri, Blantyre.



Dorothy nyaKaunda Kamanga
JUDGE

Mr. Mazambani & Mr. Mponda:	Legal practitioners for the Applicant.
Mr. Sikwese & Mr. Chaponda :	Legal practitioners for the Respondent.
Mr. Minikwa & Mrs. Mthunzi :	Recording Officers.