



IN THE MALAWI SUPREME COURT OF APPEAL
MISCELLANEOUS CIVIL APPLICATION No. **36 OF 2023**
(being Civil Cause No. 104 of 2021, High Court, Commercial Division, Blantyre Registry)

In the matter between:

MAHOMED FARUK YUSUF

ABDUL KARIM YUSUF

AND

MUSTAQ AHMED YUSUF

T/A MF & AK YUSUF INVESTMENTS (A FIRM)

1ST APPLICANT

MAHOMED FARUK YUSUF

2ND APPLICANT

MUSTAQ AHMED YUSUF

3RD APPLICANT

AND

ABDUL HAMEED KASMANY

AND

MUHAMMAD ZAKARIA KASMANY

T/A PLUMBING AND HARDWARE CENTRE (A FIRM)

RESPONDENT

RULING

1. The three applicants, Mahomed Faruk Yusuf, Abdul Karim Yusuf, and Mustaq Ahmed Yusuf T/A MF & AK Yusuf Investments (a firm), filed a notice of motion on 28th June, 2023, invoking the inherent jurisdiction of the court and section 7 of the Supreme Court of Appeal Act to seek for a stay or suspension of the High Court's Commercial Division's 17th March 2023 order, pending an appeal hearing and determination. The notice of appeal and grounds appear as an exhibit marked HWM 5. The full bench has yet to hear and determine the appeal. In its summary judgment, the Commercial Court entered payment of the sum of K57,400,783.19, interest, collection charges and costs. The application was initially filed in the court below, where following an *inter partes* hearing the court decided not to

continue the order staying execution pending appeal. As a result, the applicants decided to file this application with this Court, as permitted by procedure. The court appreciates the skeleton arguments presented by the legal practitioners for both parties in this application, which are referred to in this ruling.

The arguments and submissions on behalf of the Applicants

2. Mr. Mwangomba, the applicants' legal practitioner, has sworn an affidavit in support of the application to stay an execution which he adopted during the hearing. According to the deponent, the second applicant died in August 2022. The deponent explains the respondent's claim, and the reasons why the applicants' are dissatisfied with the summary judgment, and outlines the appeal's serious issues that require the full Court's decision.
3. The applicants argue that the respondent, in a letter marked HWM 6, stated that they are financially incapable of running their business due to the dispute and that there is no evidence that this situation has changed. They argue that if the money is paid and the appeal succeeds, the applicants cannot recover their money from the respondent. According to the applicants, one of the partners of the respondent was reported in one of the local media outlets on 3rd July 2022, that he is involved in suspected criminal activities, as evidenced in exhibit marked HWM7. That Mr. Abdul Kasmany is answering serious criminal charges bordering on forgery before the Resident Magistrate Court sitting at Blantyre, as evidenced by the charge sheet, bail bond, demand letter and the DPP's consent for private prosecution marked exhibits HWM 8, HWM 8b and HWM 8c. It is argued that this raises serious questions about the respondent's willingness to fulfill his contractual and other obligations as he is a flight risk and that if convicted he would be imprisoned and unable to continue the business under which he commenced the civil action. This buttresses the applicants' assertion that there is a real risk that they may not get back their money if the money is paid now and the judgment is later reversed on appeal.
4. Based on the applicable legal principles, enunciated in the case of *Nyasulu v Malawi Railways Ltd* [1993] 16(1)1 MLR 394, *Central East African Railways Limited v Chithila and others* Civil Appeal no. 13 of 2021, *Malawi Revenue Authority v Munshi* Civil Appeal no. 67 of 2013, *Mike Appel & Gatto Limited v Saulos Chilima* [2014] MLR 231 (SCA) the applicants assert that an order for

stay of execution of a judgment pending the hearing and final determination of an appeal will be granted at the Court's discretion. The applicants contend that there is no one-size-fits-all formula, and discretion should be exercised judiciously after considering the unique facts of each case and what is “just” and “expedient” given all of the circumstances of the case. As mentioned in *Malawi Housing Corporation v Banda* MSCA Civil Appeal no 73 of 2018, *The State v Inspector General of Police & Others* MSCA Miscellaneous Civil Appeal No. 5 of 2022, the rights of parties must be adequately balanced in order to avoid injustice.

5. The applicant argues that the affidavit in support demonstrates that there is a real risk in this matter that once the money is paid in full and the appeal is successful, it will be impossible to recover the money that may be paid to the respondent, rendering the appeal nugatory and futile. It is contended that the court has an obligation to consider the applicants’ right to appeal and give effect to this right while deciding whether or not to grant a stay. According to the applicants, if the stay is granted, the applicants risk being subjected to injustice and prejudice in the following ways: first, they will be subject to enforcement and seizure of their assets by the Sheriff of Malawi; secondly, the enforcement would be against parties who never in fact purchased these goods and never benefited from them; and thirdly, they will suffer an irrevocable loss because the respondent confessed to being financially incapable of running their business; fourthly, they will be subjected to great expense and inconvenience in order to recover the judgment sum awarded if the appeal succeeds; and fifthly, if the stay is granted, the respondent will suffer no permanent harm since the appeal will be considered and they get the money if the appeal fails.

The arguments and submissions on behalf of the Respondent

6. The respondent filed an affidavit as well as skeletal arguments in opposition to the motion to stay enforcement of the judgment pending appeal. According to the affidavit of Mr. Abdul Hameed Kasmany, who is a partner in the respondent’s firm with his brother, the applicants filed a statement marked AHK1 at the High Court stating that the death of one of the partners dissolved the partnership. He further states that the letter identified as exhibit HWM6 was sent three years ago when they were inquiring about payment since the sum owed was substantial and was affecting their cash flow position. Despite this, the respondent company is

still open for business and in good financial standing. Mr. Kasmany admits that he is an accused person in a criminal case following his arrest in April 2022. He has been reporting for bail for almost a year and has not breached his bail conditions or fled. That the criminal allegations pertain to his other firm, Memon Investments, which is unrelated to Plumbing and Hardware Centre, and that he plans to plead not guilty and contest the charges when arraigned. That the concerns addressed in exhibits HWM8a-b are the subject of a commercial case between Team Mettalic Building Materials LLC and Memon Investments, and that he is defending the claim. The deponent claims that the applicants are not involved in either criminal or commercial cases. That his partner, who manages the Plumbing and Hardware Centre, is not facing criminal charges. The deponent disputes that the respondent will be unable to repay the judgment debt to the applicants if ordered to do so. As their firm is still operating, he has a second business, Memon Investments, which is in a good financial position, and he has a property in Limbe, as indicated in exhibit marked AHK2. In paragraph 16 of the affidavit, the deponent alleges that the applicants and their children jointly operate many identified enterprises as a family that are experiencing financial difficulties, requiring them to sell some of their assets, which are shown in exhibit marked AHK3.

7. Regarding the legal principles on the application for stay the respondent also refers to some of the principles discussed in the cases that have been cited by the applicants, including the following: that an appeal and the probability of success do not operate as an automatic stay and the basis of exercising discretion discussed in *Mike Appel & Gatto Ltd v Chilima*, the role of the court's discretion in granting or refusing an order of stay and the requirement of assessing the circumstances of each case discussed in *Nyasulu v Malawi Railways Ltd* [1993] 16(1) MLR 394 (SCA) and *Attorney General v Sunrise Pharmaceuticals and another* [2013] MLR 1 (SCA), the need to properly balance the rights of the parties as discussed in *Malawi Housing Corporation v Banda* MSCA Civil Appeal no. 73 of 2018. The respondent relies on the case of *Otkritie International Investment Management Ltd v Urumov* [2014] EWHC 755 to argue that, while an order of stay is the exception rather than the rule, the Court must grant a stay where real prejudice (in the sense of irremediable harm) to a defendant is probable if the judgment is enforced and the defendant later wins the appeal. The case of *Hammond Suddard Solicitors v Agrichem International Holdings Ltd*

[2001] EWCA Civ 2065 has been cited to guide the court on factors to consider in determining the essential question of whether there is a real risk of injustice to one or both parties if the court grants or refuses a stay of execution.

8. The respondent contends that the main reason the applicants are seeking the court to grant an order to stay the judgment is that Mr. Abdul Kasmany would be able to repay the judgment debt if their appeal is successful. It is submitted that the law's starting point is that the respondent should not be deprived of the fruits of their litigation arising from invoices that were due more than 6 years ago. It is argued that there is no evidence before the court that the respondent is impecunious or that their current financial position is such that they would be unable to repay the debt and that exhibit marked HWM 6 does not prove an inability to repay the debt. It is argued that assuming that HWM6 is evidence of impecuniosity, the letter itself shows that the applicants would have placed the respondent in this position by failing to pay their debts to the respondent and cannot benefit from their wrong. The cases of *Stambuli v ADMARC* civil cause no. 550 of 198 and *City of Blantyre v Manda and other* [1992] MLR 114 make it clear that a court would refuse to grant a stay when the applicant is responsible for the respondent's impecuniosity. It is maintained that the applicants have failed to meet the legal requirement of demonstrating that the respondent lacks the means/capacity to repay the debt if their appeal is successful: *Mathanga v FDH Bank Ltd*, HC Civil appeal no. 7 of 2017; *National Bank of Malawi v Nkhoma t/a Nyala Investments* MSCA Civil Appeal no. 6 of 2005. The respondent also contends that the applicants have not demonstrated any ability to pay the judgment debt. The respondent points out that there is no evidence of the applicants' means or even a commitment to pay the judgment debt, and the motion is simply aimed at further delaying payment of the judgment debt.
9. The respondent argues and submits that Mr. Abdul's criminal proceedings are irrelevant since he is simply one of the respondent's partners and has a constitutional right to the presumption of innocence. However, this court is of the view that the respondent's contention that he is eligible for an automatic discharge because 12 months have lapsed without prosecution, is merely an assertion that is not backed by any law. The respondent contends that the applicants' inference that Mr. Kasmany will be found guilty and imprisoned or subject to substantial penalties by the Malawi Revenue Authority is speculative at best and ought not to be condoned by the Court because both the applicants

and their lawyer are incompetent to testify as to the merits of the positions they seek to put forward in support of their positions. The respondent further argues that there is no correlation between conviction and ability to repay. It is also submitted that, while not required, Mr. Abdul Kasmany has demonstrated his ability to repay the judgment debt. Furthermore, there is no evidence that Mr. Muhammad Kasmany would fail to repay the judgment debt because he is jointly and severally liable for the partnership debts as a partner. It is argued and submitted that the applicants' argument that the respondent would be unable to repay the judgment debt is without merit and must be dismissed with contempt. And that the applicants' confidence in having strong and meritorious grounds of appeal is misplaced, as the court below dismissed their defence summarily. The respondent prays that the motion be dismissed because there are no grounds to justify the granting of a stay order and that the balance of justice favours allowing the respondent to enjoy the fruits of their litigation without further hindrance.

The issue and the applicable law

10. The issue for determination before this Court is whether or not the Court should grant an order staying execution of the judgment pending the hearing and determination of an appeal. Basically what the applicants are requesting from the Court is that payment of the damages awarded to the respondent be suspended. From the summary judgment, there is a liquidated sum of more than K57 million which can be enforced immediately, while interest is yet to be assessed.
11. In terms of section 7 of the Supreme Court of Appeal Act as read together with Order 1 rule 18 of the Supreme Court of Appeal Act and the case of *The Inspector General of Police and Attorney General v A.J (a minor) and ex parte Standford Siliro Shaba on behalf of T.S (a minor)* (Misc. Civil Appeal 5 of 2022) [2022] MWSC 6 (2 December 2022) this court has jurisdiction to preside over the motion of the applicants since a similar application was made and dismissed in the court below, as shown in exhibit marked HWM 9. A reading of that ruling shows that the arguments in support and opposition to the present application are the same as the ones which were raised in the commercial court. However, this is a fresh hearing and this court is not constrained by the decision of the court below, refusing the stay, it is supposed to come to its own conclusion after assessing the merits of the application.

12. This superior Court may stay execution when certain conditions are meant. As upheld in the cases of *Osman v Nyirenda* [1993] 16(1) MLR 400; *Nyasulu v Malawi Railways Ltd* [1993] 16(1) 394; *Ulalo Investments Ltd and another v Southern Africa Enterprise Development Funding* [2009] MLR 479 (SCA), *Minister of Justice v Limbe* [1993] 16(1) MLR 317 (HC) and recently in *Registrar of Financial Institutions v Mpinganjira and Others* (MISC Civil Appeal 4 of 2023) [2023] MWSC 13 (28 March 2023), the cardinal principle, which is well settled, is that an appeal does not operate as a stay of execution of the judgment of the court below, therefore a successful party should not be denied the fruits of his litigation, The question is whether the applicant has demonstrated that there is a proper basis for the order of stay. *The Inspector General of Police and Attorney General v A.J (a minor) and ex parte Standford Siliro Shaba on behalf of T.S (a minor)* (Misc. Civil Appeal 5 of 2022) [2022] MWSC 6 (2 December 2022) held that in applications for stay “the critical consideration by the Court should basically be where the interest of justice tilts between granting and refusing a stay” so that after considering the circumstances of the case the Court arrives at a decision that is “just” and “expedient” as held in *Mike Appel & Gatto Ltd v Chilima and another* [2013] MLR 231 (SCA).
13. The cases of *PUMA Energy (Malawi) Limited v Simama and Simso Oil and Transportation Company Ltd* (MSCA Civil Appeal 19 of 2018) [2018] MWSC 12 (22 May 2018), *Electricity Supply Corporation of Malawi Ltd. v Samson Evance Kondowe t/a Saveman Investment* (MSCA Civil Appeal 67 of 2017) [2017] MWHC 145 (20 December 2017) and *Limbe v Development Aid from People to People* (Civil Appeal 70 of 2017) [2018] MWSC 8 (9 January 2018) are significant in that they analyse the case of *Mike Appel & Gatto Ltd v Chilima* and reveal that while accepting the established principles, the Supreme Court of Appeal in the case of *Mike Appel & Gatto Ltd v Chilima* held that there was no reason why the Court's discretion should be fettered by the "straight-jacketed" application of special circumstances, and the Court advocated the approach taken in the English case of *Hammond Suddards Solicitors v Agrichem International Holdings* 2002 EWCA Civ. 2065, which has been cited by the respondent. What comes from the legal principles and the applicable law is that an order for stay must be founded on the presence of three tests: a serious issue to be tried; irreparable harm; and a balance of convenience/justice. The most important is the balance of justice and the applicants must demonstrate that if the judgment is allowed to be executed the appeal will be rendered meaningless and nugatory.

14. The main arguments and submissions raised by the applicants, when summarized, are premised on the following five issues: first, their belief that their appeal will be successful; second, the respondent admitted that they are financially incapable of running their business; third, one of the respondent firm's partners is facing serious criminal prosecution if convicted and sentenced to imprisonment, he will be unable to repay the money if the appeal is successful and he is a flight risk; fourth, the alleged criminal conduct is likely to result in hefty tax penalties from Malawi Revenue Authority which would likely affect the respondent's ability to conduct any business; and fifth, any criminal prosecution may result in the partnership's dissolution.

Does the appeal raise serious issues?

15. The applicants' claim that the appeal has a high prospect of success is not enough to warrant a stay order. While the strength of the appeal has to be assessed, as stated in *Electricity Supply Corporation of Malawi Ltd. v Samson Evance Kondowe t/a Saveman Investment* (MSCA Civil Appeal 67 of 2017) [2017] MWHC 145 (20 December 2017) it "is not and cannot be the only consideration." The question of whether the applicants' firm exists, who had the authority to act for the applicants, and allegations of fraud are substantive issues that will undoubtedly be resolved during the hearing and determination of the appeal. The merits of the appeal are always reserved for the entire bench and will be considered after the record of appeal is entered in this Court, as a single judge has no mandate to decide the issues in the appeal: *Press Corporation LTD and Press Cane Ltd vs Rolf Patel and Others* MSCA Civil Appeal No. 26 of 2014. Subject to what the full bench says on the grounds of appeal, this Court finds that denying the application for a stay would cause no injustice to the applicants because the Commercial Court determined that their defense was a sham because they had previously settled part of the invoice and what was claimed was the balance. If the appeal is successful and the Commercial Court's ruling is reversed, the respondent will simply refund the money, using the same money or other resources, and the applicants can obtain a warrant to enforce execution.

Does the Respondent lack financial capacity to operate a business?

16. The applicants contend that because the respondent conceded that they are financially unable of maintaining their firm, then they will not be able to repay the money if the appeal is successful. In its ruling on a similar application, the Commercial Court found that the letter marked HWM6 was normal in business when creditors pleaded for payment from their debtors and was not evidence of impecuniosity; however, even if it were, a stay would be refused because the applicants' delay in paying the debt was a contributing factor to the respondent's position, as was held in the cases of *Stambuli v ADMARC* and *City of Blantyre v Manda*. The applicants have not provided further pertinent proof, such as the "income" and "expenditures" reports alluded to in *Mathanga v FDH Bank Limited* (Civil Appeal 7 of 2017) [2018] MWHC 1111 (24 September 2018). The applicants' argument is rejected because they have failed on a balance of probabilities to discharge the burden of demonstrating that the respondent lacks the financial capacity to reimburse the money if the appeal is successful. This Court agrees with the respondent and finds that because the respondent has been deprived of their money for more than 6 years, granting the stay based on the applicants' fears of impecuniosity would be unjust and unfair. In reality, the applicants cannot profit from their misconduct. In general, if there is a concern that the successful party will be unable to repay the damages, the scales tip in favour of the successful party.

Will the criminal prosecution affect the civil matter?

17. The applicants argue and submit that Mr. Abdul Kasmany's prosecution renders him a flight risk, and that if convicted, he would be imprisoned and unable to continue the company for which he commenced the civil case. In response it is, argued and submitted, on behalf of the respondent, that Mr. Kasmany has not breached his bail terms or fled and that the criminal allegations are unrelated to Plumbing and Hardware Centre, and that he intends to defend the charges.
18. Regarding the criminal proceedings this court agrees with the respondent's argument that the suspect is entitled to the presumption of innocence, which is a constitutional right. Further, the evidence advanced to prove the respondent's impecuniosity is unconscionable as it is speculative and has not been substantiated, and the criminal case does not seem to concern the applicants or

the judgment herein. If the criminal proceedings were pertinent to the civil proceedings herein, the case of *Chiumia v Southern Bottlers Ltd* [1990] 13 MLR 114 (HC) is the authority that the applicants could seek a stay of the civil proceedings before judgment is pronounced, which they did not do. The applicants' evidence and assertions are mere inferences because there is a possibility of acquittal or that the suspect would not be prosecuted at all. The magistrates' court and the revenue authority would be better able to pronounce the speculative issues; it would be illegal and overreaching for this court to pre-empt and try to influence their findings. As stated in the case of *Registrar of Financial Institutions v Mpinganjira and Others* (Misc Civil Appeal 4 of 2023) [2023] MWSC 13 (28 March 2023) "this Court deals with facts as they are existing and not academic future undertakings which have not happened." Further, the criminal prosecution for the type of offence that the applicants allege is not enough to deprive the respondent of the fruits of their litigation. In any case, the relevant provisions of the law can be invoked for the restriction, preservation, and recovery of assets involving criminal suspects: *In the matter of Dr. Bakili Muluzi and Section 23A of the Corrupt Practices Act* [2009] MLR 242 (HC); *Director of Public Prosecution and Attorney General v Chisale and Others* (MSCA Misc. Application 56 of 2022) [2023] MWSC 4 (8 February 2023) and *S (On application of Xelite Strips Limited, Orion Investment Limited and Ocean Industries Limited) v Director General of Anti-Corruption Bureau* (Judicial Review Cause 1 of 2023) [2023] HM 13 (14 February 2023).

19. Furthermore, as the court below found the applicants have failed to meet their burden of establishing that one of the respondent partners is a flight risk since he had not departed the country after being granted bail 14 months earlier. Moreover, there is no proof that if he fled from the country, the respondent would be unable to repay the judgment debt.

What of the negative impact of allegations of tax evasion?

20. The respondent contends that the applicants' inference that Mr. Kasmany will be subject to substantial penalties by the Malawi Revenue Authority is speculative at best and ought not to be condoned by the Court because both the applicants and their lawyer are incompetent to testify as to the merits of the positions they seek to put forward in support of their positions. Indeed, including such inferences/statements in the affidavit would render it defective since it did not meet the criterion for contents of affidavits. The allegations of tax evasion against

one of the respondent's partners are better left to investigation and in any case, he is entitled to the presumption of innocence.

What of the allegation that the prosecution may result in the partnership's dissolution?

21. The claim that the prosecution will result in the dissolution of the partnership, is based on conjecture and negative inferences, and it also touches on the substantial issues raised in the appeal. The argument about the negative impact of the criminal case is premised on the assumption that the respondent will be convicted and sentenced to imprisonment. This court is persuaded by the respondent's arguments that there is no evidence that the other partner Mr. Muhammad Kasmany would fail to repay the judgment debt because in principle he is jointly and severally liable for the partnership debts as a partner.

Whether the appeal will be rendered nugatory

22. The case of *Auction Holdings Limited vs Sangwani Judge Hara and Others* MSCA Civil Appeal No. 69 of 2009 holds that an appeal will be considered nugatory if it will be impossible to recover the damages and the court engages in an "exercise in futility." This court is of the considered view that, if the judgment is immediately executed, the appeal herein will not be stifled or rendered nugatory for the reason that the applicants have failed to meet the legal requirement of demonstrating that the respondent lacks the means/capacity to repay the debt if their appeal is successful, as noted in *Mathanga v FDH Bank Ltd* and *National Bank of Malawi v Nkhoma t/a Nyala Investments*.
23. If the order for stay is denied, none of the applicants would suffer irreparable harm, as they have not even shown that they are unable to pay the debt. The same cannot be true for the respondent, whose funds have been withheld for more than 6 years since raising the invoices. Accordingly, the balance of justice favours the respondent and the order of stay is refused.

Conclusion

24. The applicants have failed to satisfy the requirement stated in *Electricity Supply Corporation of Malawi Ltd. v Samson Evance Kondowe t/a Saveman Investment* that "where an appeal is against an award of damages, stay of execution of a judgment would normally be granted if the applicant satisfies the court that if the

damages were paid, there will no reasonable prospect of recovering the damages in the event of the appeal succeeding.” In relation to the applicants’ arguments and submissions, as already noted, the pertinent observation to make is similar to what was stated *PUMA Energy (Malawi) Limited v Simama and Simso Oil and Transportation Company Ltd* that “there is no material before this Court to exercise its discretion differently than the court below did”. The facts relied on by the applicants to demonstrate that the respondent would be unable to repay the money are outdated and speculative. On the other hand, this Court is persuaded by the respondent’s argument that there is a reasonable probability of the applicants getting the money back for two reasons: first, the applicants have failed to demonstrate that the respondent would be unable to repay the money, while the respondent has shown that his business is operational despite exhibit HWM6 and secondly, the respondent has an asset in Limbe, a fact that has not been refuted by the applicants. Under the circumstances, it is proper for this court to uphold the general principle that a successful party should not be denied the fruits of his litigation, as affirmed in the cases of *Osman v Nyirenda*; *Nyasulu v Malawi Railways Ltd*; *Ulalo Investments Ltd and another v Southern Africa Enterprise Development Funding*; *Minister of Justice v Limbe* and *Registrar of Financial Institutions v Mpinganjira and Other*.

25. In light of the reasons given above, the Court declines to exercise its discretion to grant the motion for a stay of execution/enforcement of the judgment pending the hearing and determination of the applicants’ appeal. The application for an order of stay of execution is dismissed. The costs of the application are awarded to the respondent. Any aggrieved party may petition the Court’s full bench for a review of this decision.

Delivered and dated this 18th day of July 2023 at Chichiri, Blantyre.



Dorothy nyaKaunda Kamanga
JUDGE

Case information:

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| Mr. Mwangomba | : | Legal practitioner for the Applicants. |
| Mr. Bhana | : | Legal practitioner for the Respondent. |
| Mrs. Mthunzi | : | Law Clerk. |