IN THE SUPREME COURT OF APPEAL

MISCELINEOUS CIVIL APPLICATION NUMBER 38 OF 2023

(Being High Court of Malawi, Civil Division, Lilongwe District Registry, Civil Case Number 33 of 2023)

THE STATE

Versus

THE MINISTER OF HOMELAND SECURITY.....1ST RESPONDENT

THE CHIEF IMMIGRATION OFFICER ..... 2ND RESPONDENT

(***Ex Parte*** JOSEPH NSABIMANA)

CORAM: HON. JUSTICE J. KATSALA, JA
K. B. Soko, of counsel for the Applicant
C. Masiyano, Court Clerk

RULING

By this application, Joseph Nsabimana, a national of Rwanda (hereinafter "the applicant") seeks an order of this Court granting him leave to commence judicial review proceedings in the High Court and an interim injunction restraining the respondents from deporting or removing him from Malawi. The application is brought *ex parte* and is supported by a statement of grounds for judicial review and an affidavit sworn by Mr Khumbo Bonzoe Soko, the applicant's counsel.

The brief facts are that the applicant resides and carries out business in Malawi under a Business Residence Permit issued to him by the 1st respondent on 23 August 2019. It is valid for a period of five years; hence it will expire on 22 August 2024. It is alleged that on Saturday, 24 June 2023 he was arrested by the police at his residence on suspicion that he is committing the offence of money laundering. The police searched his house and premises allegedly for fire arms, foreign currency and an "underground

bunker". But none of these was found. He was taken into custody where he has been interviewed by different state agents before being handed over to agents of the 2nd respondents. The applicant says that he is informed that the respondents intend to drive him to one of the borders of Malawi and deport him from the country. It is also alleged by the applicant that this is the practice that the respondents have adopted since the 1st respondent announced an operation to relocate refugees to Dzaleka purportedly to rid the country of "warlords" who have escaped from other countries and have sought refuge in Malawi.

The applicant argues that since his Business Residence Permit is still valid, the respondents do not have the liberty to conduct themselves in a manner that is inconsistent with the rights he has under the Permit. Further, the conduct of the respondents if not restrained by this Court, will amount to a de facto revocation or cancellation of the Permit which conduct would violate his right to administrative justice under section 43 of the Constitution. He has a family and investments in the country as such he would need adequate time to arrange his affairs before he can be deported. The conduct of the respondents contravenes the provisions of both the Immigration Act and the Constitution and is irrational and unreasonable that no reasonable public functionary, properly guiding himself on the facts and the applicable law, could ever arrive at it.

On the foregoing, the applicant is praying to this Court for leave to move for judicial review proceedings in the High Court and an interim injunction restraining the respondents from deporting or removing him from Malawi.

At this juncture, it is important to mention that on 29 June 2023, the applicant filed a similar application *ex parte* in the Civil Division of the High Court at the Lilongwe District Registry before the Honourable Justice Msiska. Having looked at the application and orders sought, the Judge directed that the application must come inter partes on Monday, 10 July 2023 at 8:30 o'clock in the forenoon. It would appear this did not go down well with the applicant. In the applicant's mind, this amounted to a refusal of the application. Thus, he decided to come to this Court to make the present application. It is alleged that officers of the 2nd respondents are in the course of transporting the applicant to the airport with the intention of deporting him from the country. Consequently, the hearing scheduled on Monday, 10 July 2023 will be moot and academic.

Having considered the matter thoroughly and the arguments filed by the applicant's counsel, for which I am very grateful, I wish to say that I find no fault with the judge's decision that the issues raised by the application can best be dealt with after the Court has heard both sides. It is clear to me that the most important thing that the applicant is looking for from the Court is the order of injunction restraining the respondents from removing

him from the jurisdiction. It is also clear that the respondents want him removed from the jurisdiction because they believe that he is engaging in criminal activities. The offences envisioned are not misdemeanors. They are serious offences. It is most likely that the State may want to present to the court their side of the story and the reasons for the alleged decision to deport the applicant and why the injunction should not be granted. At this stage of the proceedings, I cannot and am not supposed to say whether the respondents are justified or not in their belief and or in the action they are alleged to be taking or contemplating to take. That will be the task for the court below in the event that the leave to commence judicial review proceedings is granted.

All I wish to say is that the decision by the Judge to hear both sides before he can decide whether to grant the orders sought by the applicant or not is a case management issue which lies in his discretion. It must be remembered that under the High Court (Civil Procedure Rules) 2017 (the CPR) a judge seized of a matter has very wide discretionary powers in terms of case management. This is in line with the overriding objective of the CPR which prescribes active case management by the court. (See Order 1, rule 5(4) of CPR).

Though this matter is not before this Court on appeal, it is my view that the approach of this Court should be the same as that adopted when this Court is exercising its appellate jurisdiction. It is a well settled principle that an appellate court will not interfere with a judge's exercise of discretion unless it is shown that the trial judge has incorrectly applied a legal principle or the decision is so clearly wrong that it amounts to an injustice. (See *Mutharika and another v Chilima and another* MSCA Constitutional Appeal No. 1 of 2020 (unreported)). In *Patrick Ngwira and another v Francis Ngwira* MSCA Civil Appeal No. 16 of 2020 (unreported), commenting on the approach of appellate courts in instances of exercise of discretion by lower courts this Court stated as follows: -

> "The role of an appellate court is not to rush and replace its own discretion for that of the lower court. The appellate court will generally be slow in doing that; but it will not abdicate its responsibility to do so when it is appropriate so to do".

Therefore, there is need on the part of an appellant or an applicant, as in the present case, to demonstrate that the judge in the court below exercised his discretionary case management powers erroneously.

Order 1, rule 5 (2) of CPR enjoins the Court to seek to give effect to the overriding objective whenever it exercises any power conferred on it by the CPR or interprets any written law, rules and regulations. In my view, it is logical and necessary that when dealing with cases where there is

concurrent jurisdiction, as in the present instance, this Court must also seek to give effect to the overriding objective of the CPR - more especially bearing in mind that the matter will be heard in the court below if it is to proceed. In this respect, I would wish to quote the dissenting opinion in the *Ngwira v Ngwira* case (supra) where it says: -

> "Thus, in my opinion, it is also necessary and imperative that when dealing with appeals against decisions of judges made after the introduction of the CPR, this Court must always endeavour to promote and enhance the overriding objective. We must acknowledge that the judge now has much wider case management powers than previously and that the circumstances in which those powers will be exercised are also much wider. At no point in time should this Court, as an appellate court, under the guise of promoting access to justice or whatsoever, make statements, decisions or orders whose effect will be to undermine, limit or take away the judge's case management discretion conferred by the CPR. We must allow the judge to have the full discretion to conduct, manage, regulate and control proceedings before him or her because that is the scheme under the CPR. As an appellate court we must be slow in interfering with the exercise of discretion on case management issues. The judge handling the matter in real time is best suited to assess and judge the gravity or lightness of the situation before him than us who see the matter and the issues on review. Therefore, we need to resist the temptation of being too judgmental, fault finding, sceptical and critical of the manner in which the judge handled the situation before him. This Court should not frustrate the case management scheme under the CPR but rather promote it."

The value of this statement has enhanced since it is now apparent that this Court has adopted the reasoning in the dissenting opinion in its recent decisions. As I have already stated, I would espouse that the approach should be the same when this Court is dealing with matters where there is concurrent jurisdiction with the court below.

Coming to the present application, it has been stated that the fact that the Judge in the court below refused to determine the application *ex parte* and ordered that it comes inter partes on Monday, 10 July 2023 amounted to a refusal of the application by the judge. I wish to say that, with the greatest respect, I do not think so. It has always been my understanding that where an application is made *ex parte*, the judge before whom it is made has the discretion to decide how best the application should be handled. Experience has shown that most times that a matter is dealt with *ex parte*, immediately thereafter comes an application by the affected party to discharge or vary the *ex parte* order. This tends to increase the work load of judges. As such,

good case management practice demands that where it is possible, it is more efficient to deal with such applications inter partes. This tends to eliminate the need for an application to discharge or vary the order granted since all the parties to the proceedings will have been heard on the application before the order is made.

In any case, *ex parte* applications are an exception. They are not the norm. As a matter of general principle, applications must be on notice except where the circumstances cannot permit or it would be contrary to the interests of justice to proceed on notice. (Also see Order 10, rule 5 of CPR). I do not think there is a right to have an application heard *ex parte* except where the law provides so.

How matters are conducted in court is an issue within the discretion of the judges seized of the matters. And as I have stated hereinbefore, the judge's discretion under the CPR is very wide and no one should seek to undermine, limit or restrict it. Any such attempts are bound to run afoul of the overriding objective of the CPR.

So, to say that the Judge in the present case had declined the application simply because he ordered that it must come inter partes is completely erroneous and an unwarranted stretching of things and a manifestation of lack of appreciation of good case management practices as prescribed in the CPR and case law. The direction was within his case management powers. I do not find anything wrong with his decision on how best to deal with the application.

I have considered whether the decision to hear the application inter partes can be said to have occasioned some injustice to the applicant bearing in mind the alleged urgency of the matter so as to warrant this Court's interference with the Judge's exercise of his discretionary case management powers. As already said, clearly, the primary objective of the application before this Court and the court below is to obtain an order of injunction restraining the respondents from deporting the applicant from the country. In the matter of *State v Director of Anti-Corruption Bureau ex parte Madalitso Njirika* Miscellaneous Civil Application No. 6 or 2022 (unreported) this Court stated as follows: -

> "In cases like the present, where there is application for leave to move for judicial review which also includes a request for an order of stay or injunction, it is necessary that judges must assess whether indeed the stay or injunction should be granted or not. It should not be granted as a matter of course. I say this because it has been seen that sometimes the applicant's interest is more in the stay or injunction than in the determination of the judicial review. Hence, an applicant tends to slow down or indeed grind to a halt once the stay

or injunction is granted. In my opinion, this should never be allowed to happen and it must be guarded against at all times.

In the Australian case of *New Ackland Coal Pty Ltd v Smith* [2017] QSC 216 Applegarth J stated:

> "In circumstances in which I proceed on the basis that the application for judicial review does raise questions to be tried, I turn to the balance of convenience. The exercise of the power to grant a stay or to suspend an administrative decision of the present kind - like the power to grant an interlocutory injunction - is designed to minimise irreparable harm until at least the parties' rights and interests can be determined more fully at a final hearing. In deciding where the balance of convenience lies, a court has to consider competing rights and interests and also has to consider the interests of affected third parties and broader interests concerning the public interest, including the proper administration of the law."

I totally agree with this approach and I would encourage all judges to take cognizant of it and proceed likewise. The grant of a stay or injunction should never be treated as a matter of course. There is need to assess the application for injunction or stay in the same way we assess it when it is made in its own right. Gone are the days when you could grant a stay or injunction as a matter of course saying that if the other party is aggrieved then they will apply to set it aside. Such approach has led to an increase in applications to set aside the stays or injunctions which, inevitably, has added to the ever-increasing case load before the judges. So, as part and parcel of active case management, judges need to be meticulous, as always, in the way they handle such applications."

I have considered the circumstances of this case as presented by the applicant and the grounds on which the order of injunction is being sought and have come to the conclusion that the Judge in the court below was within his case management powers when he decided that the issues raised can best be resolved after hearing both sides. It is only after hearing both sides that the judge will be able to determine whether there are good reasons for granting the leave to commence judicial review proceedings and especially the order of injunction. In my opinion, following the guidance offered above, the fact that the applicant also wants an order of injunction makes the case for the Judge's decision to hear both parties before determining the issue well founded. Though the Judge had the easier option of either declining or granting the injunction without hearing both sides, he chose to be fair to both sides and decided to hear them before making his

decision. This must be commended. It is unfortunate, I would dare say, that such an approach, prudent as it is under the CPR, is being unappreciated. But sometimes that is what justice is all about – a party may not be happy with a court's decision not because it is wrong but because it does not advance his self-centered interests. All the same, courts are there to administer justice without fear or favour, ill will or affection. Hence, we soldier on.

The applicant alleges that he is a businessman and that he has a family and investments in Malawi. Whether the loss or damage, if any, the applicant may suffer consequent to his intended deportation may not be adequately compensated by way of damages, or that damages would be impossible to assess is an issue for consideration in this application. (See the *Madalitso Njirika* case (supra)). I would leave this issue and all the other issues raised in this application to the Judge in the court below for consideration when determining the application.

In the premises, I find that since the court below has not yet heard and determined the applicant's application, it is incompetent for the applicant to come to this Court with a similar application. As per the established practice of this Court, the applicant must first have his application determined by the court below before he can come to this Court. The rush to this Court before the application is determined by the Judge in the court below was unwarranted and erroneous. It is something that this Court cannot applaud. The applicant should wait for his appointment before the Judge in the court below scheduled for Monday, 10 July 2023 or any other date that may be set for the hearing of his application.

I do not agree that the hearing before the Judge will be moot and academic. In my view, even if by that time the applicant may be out of the country, he can still prosecute the proceedings and be free to return to Malawi in the event that the court finds in his favour and makes the declarations he seeks in his intended judicial review proceedings.

I refuse to grant the application and the orders sought. And order accordingly.

Made at Blantyre this 4th day of July, 2023.

J N Katsala
JUSTICE OF APPEAL