REPUBLIC OF MALAWI
IN THE MALAWI SUPREME COURT OF APPEAL
MISCELLANEOUS CIVIL APPLICATION No. 7 OF 2023

BETWEEN:

LIMBANI MSOSA & OTHERS APPLICANTS

AND

FDH BANK LIMITED RESPONDENT

RULING

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1. The applicants filed a motion seeking an order enlarging the time for appealing against the High Court's decision, under section 23 (2) of the Supreme Court of Appeal Act as read with Order III rule 4 of the Supreme Court of Appeal Rules. The application is supported by grounds stated in an affidavit in support sworn by Shepher Mumba, the legal practitioner for the applicants. The respondent opposes the applicants' motion through an affidavit in opposition which is sworn by Ulemu Kambwiri, the Legal Manager of FDH Bank plc. The parties also filed skeleton arguments in support and in opposition to the application which were relied upon by counsel for both parties at the hearing. The application was initially made *ex parte* but having examined the matter on 20th February 2023, it was ordered that the motion be brought by way of *inter partes* hearing to afford the respondent opportunity to be heard on the application.

The Applicants' Case

2. In the applicants' affidavit supporting an extension of the appeal period against the High Court's decision, the legal practitioner depones that the applicants were employees of the respondent who were declared redundant in

2016. They commenced a legal action in the Industrial Relations Court alleging unfair dismissal due to lack of consultation. Their action was successful. In turn the respondent lodged an appeal in the High Court and in a judgment dated 3rd September 2021 the High Court overturned the subordinate court's decision.

3. The affidavit evidence shows that on 1st October 2021, which was a period within the six weeks as is required by law, the applicants lodged a notice of appeal. A copy of the notice of appeal is marked and exhibited as "SMI". On the same day, the applicants filed an *ex parte* application for leave to appeal and retained a dummy copy of the said application that was duly stamped as evidence of the filing process. A copy of the application is marked and exhibited as "SM2".

4. The documents in support of the appeal having been processed, the appeal was entered and set down for hearing in the Malawi Supreme Court of Appeal on 24th January 2023. The applicant's legal practitioner avers that as he was preparing for the hearing of the appeal, he noted that there was no order for leave to appeal. When he checked on the court's file he noticed that the documents of the *ex parte* application that he had prepared were not on the case file. He states that he prepared a new set of documents for the application for leave by making a few changes to the original application and presented it for consideration before the Judge of the court below, who proceed to make an order granting leave to appeal. A copy of the application and the order for leave were marked and exhibited as "SM3" and "SM4", respectively.

5. The legal practitioner avers that, at that stage, he took the documents of the application for leave before the High Court because after considering the relevant rules he formed the wrong impression that the High Court was a competent court where the applicants could seek leave to appeal. The legal practitioner contends that his reasoning was based on the following authorities:

    i. Order III r 3 of the Supreme Court of Appeal Rules provides that leave to appeal can be granted by the court below or the Supreme Court of Appeal. Based on this provision counsel believed that the High Court had jurisdiction.

ii. Order I r 18 of the Supreme Court of Appeal Rules provides that where the Court and the High Court have concurrent jurisdiction, then the application should first be taken to the High Court, led counsel to think that the High Court was a proper forum.

iii. Order III r 19 of the Supreme Court of Appeal Rules provides that where an appeal has been entered, all applications lie to the Court. Counsel states that he formed the erroneous view that an appeal had not been entered because there was no leave to appeal and that the High Court still retained the jurisdiction on the question of leave.

6. However, it is not disputed that the Court found counsel's reasoning erroneous and clearly pointed to the fact that the application for leave at that late hour should have been made before the Supreme Court of Appeal in line with Order III rule 19 of the Supreme Court of Appeal Rules. On 24th January 2023 the full bench of the Court held that there was no competent appeal before it and dismissed the matter as shown in exhibit marked "SM5".

7. The applicants concede that no appeal was made due to their failure to seek proper leave in accordance with the law. However, the applicants are still aggrieved with the High Court's decision of 3rd September 2021 and intend to appeal against the judgment. The applicants submit that the six weeks' time limit for bringing appeals under section 23(1)(a) and (b) of the Supreme Court of Appeal Act long expired and are crying for the leniency of the Court that they should be granted an order enlarging time within which they can appeal so that they can be heard on the question of their redundancy. They submit that the appeal raises very important issues which if determined will give an opportunity to the Malawi Supreme Court of Appeal to guide the nation regarding how mass terminations must be conducted in volatile economic conditions. The applicants assert that the Court in examining this application should also consider the interests of justice for the wider good of the applicants, the nation and industrial justice and must bear in mind that they did not deliberately flout procedures and annoy the Court.

8. In support of their arguments the applicants rely on the cases of *Mwaungulu v Malawi News and others* [1995] 2 MLR 549, *Chiume v The Attorney General* 2000-2001 MLR 102 (MSCA), *Barnet Nansongole v National Bank of Malawi plc,* MSCA Miscellaneous Civil Application No. 1 of 2020 and *The State v The Minister of Finance, ex parte Steven Majighaheni Gondwe*, MSCA Civil Appeal No. 68 of 2016, where Chipeta, JA, stated that applicants seeking enlarged time to appeal must meet the requirements in Order III Rule 4 of the Supreme Court of Appeal Rules. In short, the applicants request the Court to extend the deadline for filing an appeal against the High Court's decision dated 3 September 2021. The applicants assert that they have good and substantive reasons for not filing an appeal within the stipulated time limit and that there are also good grounds to justify an appeal.

The Respondent's Case

9. The respondent opposes the application for an order for enlargement of the time for appealing. The legal manager stated in the affidavit in opposition that the Supreme Court of Appeal dismissed the appeal for being incompetent on 24 January 2023, and the respondent was informed so by their lawyers. The respondent argues that the applicants admitted this position in paragraph 12 of their affidavit and that exhibit "SM 5" also confirmed it.

10. The respondent asserts that seeking enlargement of time for appealing under such circumstances and have the matter re-litigated was an abuse of the process of the court. They argue that the appeal having been dismissed, the case came to an end and the court is *functus officio*. Additionally, the respondent states that the applicants had not demonstrated good and substantial reasons for the alleged failure to appeal within the prescribed time. The respondent cites *Hunter v Chief Constable of West Midlands* [1982] AC 529/0981) 3 All ER 727 at 729 (HL) where Lord Diplock explained the principle of abuse of court process in this manner:

> "It is an inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring administration of justice into disrepute among right-thinking people."

The respondent also refers to the case of *Longwe v Council of University of Malawi*, MSCA Civil Appeal No. 35 of 2000 where the Supreme Court of Appeal ruled that:

> "The court will prevent the improper use of its machinery and will in a proper case summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation."

The respondent argues that allowing the application would violate practice rules and effectively re-open the case, despite its dismissal. They refer to Katsala JA's dissenting opinion in *Ngwira & Chiumia v Ngwira*, MSCA Civil Appeal No.16 of 2020 where His Lordship emphasized that procedural justice is essential to substantive justice and that failure to comply with procedural prescriptions is an abuse of court process.

11. The respondent in their affidavit note that the notice of appeal was filed within the requisite time and find it perplexing that the applicants seek to enlarge time for appealing against the High Court judgment. It is contended that the application is a desperate attempt to revive the appeal which was dismissed by the full bench of the Supreme Court of Appeal. The respondent believes the final ruling on 24 January 2023 ended the applicants' case. Thus, the current application violates the *functus officio* rule by trying to reopen the matter in the same court. The respondent relies on two cases: *Charles Mwasi & others v Malawi Revenue Authority*, Civil Appeal No. 13 of 2015 and *Chandler v Alberta Association of Architects* (1989) 2 S.C.R 848. The latter case set out the general principle that a court's final decision cannot be reopened once a formal judgment is drawn up and entered. The respondent urges the court to dismiss the application as it is *functus officio* and should not tolerate the tactics devised by the applicants.

12. The respondent contends that, unless the court dismisses the application for the above grounds, the court must find that the reasons for seeking an extension of the appeal period are not good and substantial. The respondent argues that the applicants' affidavit evidence reveals that the major reason for the present application was the mistake of their lawyer who failed to obtain leave to appeal, which could not be a substantial reason for the Court to

consider the application. The respondent states that it was confused as to why the applicants' counsel did not check if the leave to appeal was granted after filing the *ex-parte* application mentioned in paragraph 6 of the applicant's affidavit. The respondent doubts the applicants' allegation that they filed an application for leave to appeal on 1st October 2021, given the speed at which the appeal was prepared and ready for hearing in December 2022. They suspect the application was wrongfully made on 19th January 2023 in the High Court.

13. The respondent argues that the applicants' counsel was negligent for not checking if the leave to appeal application was processed and the respondent should not be prejudiced as a result. The respondent claims that if the applicants' counsel had dummy copies of the application for leave to appeal, they should have mentioned it during the Supreme Court of Appeal hearing on 24th January 2023. It is also submitted that counsel for the applicants would have referred to the dummy copies of such an application when he was erroneously seeking leave to appeal in the High Court on 19th January 2023 (as shown in "Exhibit "SM 3" of the affidavit in support). The respondent cites *Mwaungulu v Malawi News and others* [1995] 2 MLR 549 and *Mbewe v ADMARC* [1993] 16 (1) MLR 301 as precedent on this issue. In *Mbewe v ADMARC* it was stated that:

> "In the instant application, I am not satisfied that the plaintiff's affidavit and his evidence during cross-examination disclose good, substantial and or satisfactory reasons for failure to appeal within the prescribed period. It seems to me that it was simply due to negligence on the part of both the plaintiff and his counsel that they did not give notice of intention to appeal within the statutory period."

The respondent submits that the claim of filing the leave to appeal in October 2021 is an afterthought and granting the application would contradict the principle of finality in litigation.

14. The respondent argues that even if the reasons given in the application are valid, the delay is inordinate. The respondent emphasizes that past cases have shown that even with good and substantial reasons and arguable grounds for appeal, an application for enlargement of time may be declined due to inordinate delay. They refer to *Mbewe v ADMARC*, where a three-month delay

was found to be inordinate. The respondent notes that in this case, the application is being made more than a year and five months after the High Court's judgment on 3rd September 2021. Citing *Star FM v Celtel Malawi Limited* (2012) MLR 380 (SCA) and *Thusita Perera v Leasing and Finance Company Ltd, M. Kaporo t/a Meks Variety Centre and Colombo Agencies* [2007] MLR 412 (SCA) the respondent argues that if the applicant could not explain why they didn't appeal within the time limit, the court doesn't need to verify if the grounds in the notice of appeal are arguable. The respondent prays for dismissal of the applicants' application with costs as it is in the interest of justice to end the legal proceedings.

Analysis and Determination

15. The applicants seek a court order to enlarge time to enable them to appeal against the judgment of the High Court out of time: *National Bank of Malawi v Khoswe* [2005] MLR 320 (SCA). As noted by the respondent, the applicants seek an extension of time to appeal the High Court judgment based on two reasons. First, the applicants claim to have filed an application for leave in a timely manner, but it was not attended to, and the documents could not be located. The respondent argues that this argument is flawed because it was the legal practitioner's duty to follow the progress of the application. The respondent contends that, at the time of hearing the appeal, the applicants failed to inform the Supreme Court of Appeal of a dummy copy of their application and failed to exhibit it. The respondent doubts the existence of dummy copies of the application for leave to appeal and states that the events presented were chronologically questionable. Additionally, the respondent asserts that in the applicants' erroneous application for leave to appeal, which was filed in the High Court five days before the scheduled appeal hearing on 19th January 2023, the applicants failed to mention their previous application.

16. On the second ground, the respondent note that the applicants admitted their mistake of filing the application for leave to appeal in the High Court instead of the Supreme Court of Appeal, which was seized with the appeal at the time. The respondent maintains that this ground is unfounded and does not constitute good and substantial reasons but demonstrates that the applicants did not act within their rights and asserts that the maxim "*vigilantibus non dormientibus jura subveniunt*" applies.

17. The gist of the respondent's argument is that the appeal having been duly dismissed due the applicants' failure to follow the applicable rules of procedure, re-opening the case by allowing the instant application will offend the public policy that litigation must come to an end (*interest rei publicae us sit finis litium*) hence being an abuse of court process. They contend that the instant application is a calculated move to circumvent the order of the Supreme Court of Appeal dismissing the applicants' appeal on the 24th January 2023. They argue that allowing the applicants' motion is tantamount to setting aside the order dismissing the appeal which was granted by the full bench, which clearly constitutes an abuse of the process of the court because a single member of the Supreme Court of Appeal bench does not have such power.

18. Indeed, when the case was called for hearing on 24th January 2023 the full bench of the Malawi Supreme Court of Appeal found that there was "no competent appeal" and proceeded to dismiss the matter. The order was as follows:

> "Having carefully listened to the arguments advanced by both the legal practitioners for the Appellants and the respondent, the Court notes that since the matter had already been entered in this Court, in terms of Order III rule 19 of the Supreme Court of Appeal Rules, the application for leave to appeal ought to have been brought to this Court. Therefore, the Court below did not have jurisdiction to grant the leave which was obtained by the Appellants and the order made was a nullity.
>
> In the circumstances, we do not have a competent appeal before us and the matter is dismissed."

19. From the standpoint of the respondent the application herein raises two preliminary inter-related issues. If they are decided in favour of the respondent, the need for an order for enlargement of time to appeal becomes moot. The issues are whether this Court is *functus officio* having already

allegedly dismissed the appeal and that the application herein is an abuse of the process of the court.

20. In the context of this argument, it is important that the doctrine of *functus officio* be distinguished with the doctrine of *res judicata* (particularly issue estoppel). A court is *functus officio* when proceedings in a particular case are fully concluded and an order perfected: *Telkom Kenya Limited vs. John Ochanda (Suing on his Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR. As has been argued by the respondent, it is an important principle of law that supports the maxim of finality of litigation by barring the re-opening of a matter before a court that rendered the final decision. The Kenyan supreme court decisions in *Raila Odinga & Others v Independent Electoral & Boundaries Commission & Others* [2013] eKLR and *Dodhia Motors Limited* v *Mule & Kilonzo* Civil Appeal No. 34 of 2015 [2021] eKLR extensively discuss the doctrine of *functus officio.*

21. Connected to the principles of abuse of process of the court and *functus officio* advanced by the respondent is the doctrine of *res judicata*. A judgment is *res judicata* if a court in the exercise of its jurisdiction delivers a judgment which is final and conclusive in nature: *The Malawi Revenue Authority v Azam Transways* [2008] MLR 382 (SCA). If the same or another court questions any previously determined fact or right, except in appeals, the doctrine of *res judicata* can be invoked: Halsbury's Laws of England (2nd Edn.) Vol. 13, p. 399 and *Malawi Communications Regulatory Authority (MACRA) v Joy Radio Limited* [2012] MLR 256 (SCA). This effectively meant that if the respondent's assertions were true, they could have invoked the principle, which he did not.

22. As can be noted from the order of the Court, in the present matter the Court only dismissed what it found to be a matter before it. The Court never determined the appeal. The term "matter" must be distinguished from the word "appeal". According to *Black's Law Dictionary,* Fourth Edition an appeal is defined as "the complaint to a superior court of an injustice done or error committed by an inferior one, whose judgment or decision the court above is called upon to correct or reverse" while a matter is "substantial facts

forming basis of claim or defense; facts material to issue." Basically an appeal is a process whereby an aggrieved party requests a higher court to reverse the decision of a court below after final judgment.

23. The Court found there was no competent appeal, thus it could not dismiss it. It also did not rule on any application for enlargement of time. The Court's full bench having decided that there was no competent appeal before them informed the parties that an application for leave to appeal under the second proviso of section 21 of the Supreme Court of Appeal Act ought to have been made to the Court, as it was already seized with the purported appeal under Order III rule 19.

24. The respondent's argument that the Court is *functus officio* or this application is an abuse of the process of the court due to the dismissal of an appeal on 24 January 2023 misconstrues the order of the Court, as the Court found that no appeal existed and there is no final decision on the appeal. The cases of *Bauman, Hinde and Co Ltd v David Whitehead and Sons Ltd* [1998] MLR 24 (HC) and *Rep v Mphande*[1995] 2 MLR 586 (HC) explains when a decision would be *functus officio*.

25. That notwithstanding, a question still arises as to whether the applicants could file a motion before this Court for enlargement of time within which to appeal after the matter was dismissed? In the present application it is misplaced to argue that the appeal was dismissed or that an application for enlargement of time was determined. Nor can it be effectively argued that an application for leave to appeal was made and determined. The decisive factor is whether the order finally settles the parties' rights. If it does, then the Court is *functus officio*; otherwise, the applicants can appeal.

26. The dismissal in question pertains to the matter, not the appeal, and determining its *functus officio* status affects the appeal itself. In terms of section 7 of the Supreme Court Appeal Act a single member of the Court cannot exercise powers that will result in determining an appeal. However, as a single member of the Supreme Court of Appeal, this Court has jurisdiction to regularize the proceedings by hearing and determining the application for enlargement of time to appeal under Order III rule 4 of the Supreme Court of

Appeal Rules. Order III rule 4 of the Supreme Court of Appeal Rules provides that:

> "Every application for an enlargement of time in which to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal within the prescribed period, and by grounds of appeal which prima facie show a good cause why the appeal should be heard. When time is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal."

27. As noted above, the application is brought under section 23 of the Supreme Court of Appeal Act as read with Order III rule 4 of the Supreme Court of Appeal Rules. The counsel for the applicants is aware that under section 23(1)(a) and (b) of the Supreme Court of Appeal Act, an aggrieved party must give notice of their intention to appeal within 14 days if the judgment is an interlocutory order, and within six weeks in any other case. However, section 23(2) of the Supreme Court of Appeal Act provides that:

> *"The Court may extend the time for giving notice of intention to appeal under this Part, notwithstanding that the time for giving such notice has expired."*

28. The guiding principles on application for an order of enlargement of time within which to appeal are contained in Order III rule 4 of the Supreme Court of Appeal Rules. As equitable reliefs, they rely on established principles guiding the Court's discretion to grant or deny extension of time for filing an appeal, as consistently detailed in cases of *Star FM v Celtel Malawi Limited* [2012] MLR 380 at 382 SCA, *Mwaungulu v Malawi News and others* [1995] 2 MLR 549 (SCA), *Chitawo and another v Malawi Property Investment Company Limited* [2010] MLR 197 (SCA) and *Fincom Ltd v Nu-Tread Ltd* [2010] MLR 101 (SCA). In *Star FM v Celtel Malawi Limited* [2012] MLR 380 at 382 (SCA) the court noted that

> "Where an appeal lies only by leave of the Court or of the Court below, an application shall be made *ex parte* by motion. Every application for an enlargement of time in which to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal within the prescribed period, and grounds of appeal which prima

facie show a good cause why the appeal should be heard: Order 3, rules 3 and 4 of the Supreme Court of Appeal Rules."

In summary the guidelines taken in consideration in such applications are as summarized and expounded on in the cases appearing below:

i. The party seeking an extension of time bears the burden of providing grounds to the satisfaction of the court: *Mwaungulu v Malawi News and others* [1995] 2 MLR 549 (SCA);
ii. Whether the court should exercise its discretion to extend the time limit depends on the circumstances of the case as noted in *Proprietary Engineering Co Ltd v Dwangwa Cane Growers Trust and another* [2008] MLR 249 (SCA) and *Fincom Ltd v Nu-Tread Ltd* [2010] MLR 101 (SCA);
iii. If there is a reasonable cause for the delay, it must be explained to the satisfaction of the court as noted in *Hon. Chief Justice of Malawi v Darren Jameson and another* [2010] MLR 167 (SCA) and *Mzuzu City Assembly v Phiri* [2008] MLR 206 (SCA);
iv. Whether there would be any prejudice or injustice suffered by the respondent if the extension was granted: *Mwaungulu v Malawi News and others* [1995] 2 MLR 549 (SCA); and
v. Whether the application had been made without undue delay: *Allensandro Nigrissoli and another v Illomba Granite Co. Ltd and others* [2009] MLR 1 (SCA).

29. In the matter at hand, it is not in dispute that there was practically no delay as envisaged under Order III rule 4 of the Supreme Court of Appeal Rules, as the notice of appeal was filed on time. Legally the appeal was incompetent because leave to appeal was not obtained from a court of competent jurisdiction before the matter was set down for hearing. It is a well-established principle that jurisdictional issues are not matters that fall in the category of procedural technicalities and without jurisdiction the Court could do nothing. The mistake in filing the application for leave to appeal in the wrong forum is not arguable as ignorance of the law is not a defence. Therefore, the delay was partly due to the inadvertence of the applicants' counsel.

The challenges of manual record keeping

30. The case law highlights the need to strike a balance between the reasons for delay and the possible prejudice to the other party when considering an application for extension of time. The court must determine the reason for the delay and assess if there is a good and substantial reason for the alleged failure to appeal within the prescribed time. The applicants contended that they complied with the legal requirements of filing the document for leave to appeal. They attributed the reason for the delay as mainly due to the court's tardiness in considering the application that was filed on 1st October 2021. The applicants produced documents in the form of exhibit marked "SM2" which appears that, despite being filed, it was somehow not attended to by the court and obviously did not form part of the case record before this Court. This is a serious case management allegation that is difficult to refute because the Registrar, who the heads of the registry, is not a party to the proceedings. Although the respondents argued that the applicants' allegations about filing an application in October 2021 were an afterthought and that litigation must come to an end, they have not shown how they will be harmed if the application is granted.

31. Of course, the Court agrees with the respondent's argument that the applicants, having brought the appeal, should have followed up with the registry and ensured that leave to appeal was granted. As stated in rule 9(1) of Order III of the Supreme Court of Appeal Rules and explained in *Fincom Ltd v Nu-Tread Ltd* [2010] MLR 101 (SCA), *Nico General Insurance Co. Ltd v Thomas Munyimbiri* [2010] MLR 262 (SCA) and *Malawi Housing Corporation v Western Construction Company Limited* [2014] MLR 209 (SCA), the applicant sets the agenda of the appeal and is primarily responsible for the preparation of the record of appeal. An order for leave to appeal should be part of the record of appeal because it confirms the jurisdiction of this Court: *Portland Cement Company (1974) Ltd v Gilton Chakhaza* [2010] MLR 272 (SCA). The order granting leave to appeal is important in determining whether an intended appeal is arguable and in establishing the Supreme Court of Appeal's jurisdiction. Under section 21 of the Supreme Court of Appeal Act and as explained in the cases of *State and 5 others, ex parte Right Honourable Dr Cassim Chilumpha, SC* [2006] MLR 433 (SCA) and *State v Director of State Residences and others, ex parte Banda* [2011] MLR 403 at 405 (SCA) no appeal can lie to the Supreme Court of Appeal without leave, as such the purported appeal by the applicant herein is without legal effect. When the

parties were settling the record of appeal, the applicant must have verified the documents that constituted the record of appeal or at least pursued the issue of leave to appeal. In fact, the applicants made a late decision to follow up with the court below and obtain leave to appeal a few days before the appeal hearing. Although the respondent rightly argued that the applicants' counsel could have followed up with the court to ascertain whether leave to appeal had been granted, this does not override the duty of the registry to "keep in safe custody" filed documents. This Court has also considered the fact that an application for leave is not a complex motion that could have perplexed the applicants to the point of making it impossible to apply. A motion for leave to appeal is straight forward and does not usually require notice to the respondent. Since there is no need to serve the order on the respondent, the applicants can be given the benefit of doubt in failing to timely check if the documents had been dealt with. Despite the registry's flaws, the applicants' lawyers overlooked the procedure of preparing a competent appeal to this Court when settling the record and in applying for leave to the High Court.

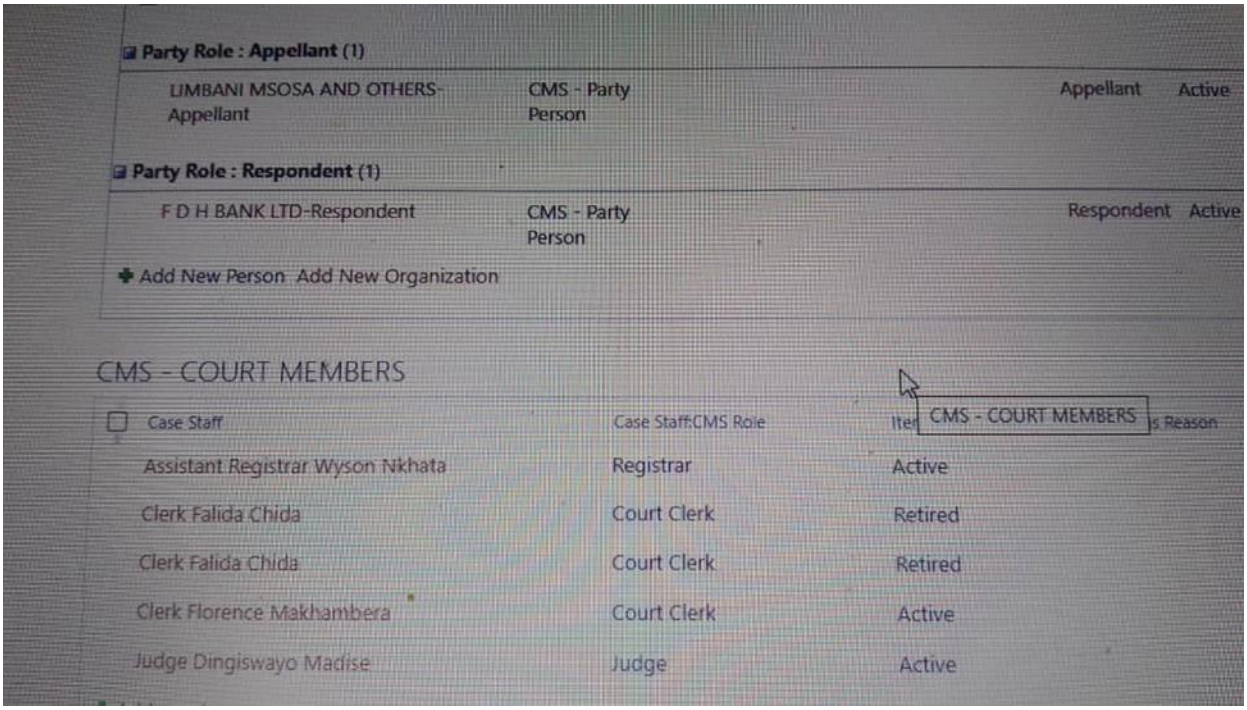
32. Are the applicants justified in shifting the blame to the court for losing their documents and not being able to trace them, which compelled them to prepare a new set of documents that appear in exhibit marked "SM3"? A perusal of the case file shows that there is no record of whether or not the application was set down for hearing and what the outcome was. The index of the purported appeal does not include an order granting leave to appeal. If documents prepared by the applicants are missing from the case file, it is difficult to determine whether they were indeed filed by the applicants. How can the court decide if the applicants' explanation is satisfactory? The crux is whether the court believes the statements of applicants' lawyer as to the date of filing. *In the matter of Citizen Insurance Company Limited v In the matter of The Registrar of Financial Institutions* [2014] MLR 131 at 145 (SCA) the court explained the main purpose of filing as "for safe custody or enrolment." In practice the filing of documents is verified by producing a receipt for payment of fees and/or by the endorsement or court stamp on the document. The applicants have attempted to prove this process through a dummy of the documents which is exhibit labelled "SM2". The dummy is endorsed and bears a rubberstamp of the High court, which appears genuine and authenticates that it was duly filed within the prescribed time. The applicants' allegation that the registry did not attend to their application and the documents went missing is supported by this evidence.

33. After the documents are lodged with the court, it becomes the duty of the registry staff to ensure that the documents are kept safely and disposed of in the correct manner. As mentioned earlier, the Registrar who manages the records registry has no mouthpiece through which to respond as he is not a party to these proceedings. In line with its strategic mission and to address the challenges of manual record keeping, the Judiciary implemented a digital records management system in the High Court more than a decade ago, which required that all court records to be scanned and entered into a database. The electronic case management system (eCMS) allows users to check and verify the documents that have been filed in a particular case. The use of eCMS was critical during the COVID-19 pandemic, when this matter was also registered, as most court cases had to be virtual. Therefore, the eCMS is one of the tools that can be used to objectively check whether documents have been filed, the status and progress of a case. The eCMS portal could reveal some truth about this case by showing when the applicants' motion was filed and uploaded.

34. A search in the eCMS database reveals that this matter was registered as an appeal in the High Court under IRC civil appeal number 21 of 2020. The eCMS case number on registration on 30 October 2020 was HCBT-CVAPPL-1991-2020. The eCMS image below depicts the names of the parties, judicial officers and court personnel assigned the case at the time of registration. It has been dormant since the case was registered more than two years ago, as none of the documents have been scanned from the voluminous physical file and uploaded to the database. The case status in the database shows that the clerk registered the case but neither scanned the documents, nor uploaded them to the database, and generally the eCMS was not used effectively in this case. This suggests that the officers tasked with scanning and uploading documents as they were filed were neglecting their duties, a situation that must have been made worse by lack of supervision and the general reluctance to use the digital system. The database check only proves laxity in the registry, and this status can only reinforce the applicants' claim that the registry was responsible for the failure to facilitate processing of their application. The eCMS has failed to exonerate the registry, and in the circumstances of this case it will be appropriate to find that paper-based record keeping was

inadequate and that the eCMS was not used to provide a good fallback in terms of secure document storage.

Image of the case in eCMS data base



35. Should the applicants who took a step to file the application for leave to appeal be penalized if a clerk misplaced it or failed to forward it to a judge for consideration? This Court agrees with *Thusita Perera v Leasing and Finance Company Ltd, M. Kaporo t/a Meks Variety Centre and Colombo Agencies* [2007] MLR 412 (SCA) that it would be wrong and unfair to hold an applicant at fault where the court below itself substantially contributed to the procedural fault. The fact that the filed document marked "SM2" is neither in the record of the case nor in the electronic database is significant, which persuades this Court to exercise its discretion and take the view that the document that was filed was handled negligently. The registry staff neither kept it in safe custody nor acted upon it as the practice required. The registry's failure to keep proper records indicates incompetence, as they did not follow standard practices of the court and government offices making it challenging to refute the claim

that the relevant documents were lost. Under the circumstances of this case, the respondent's argument of inordinate delay is untenable.

36. The case of *Gala Estate Ltd v Cheseborough Ponds (Mal) Ltd* [1991] 14 MLR 81 (HC) is applicable as it was stated that:

> "admittedly, the tardiness on the part of the Court cannot be a reason for denying justice to the defendant. On the other hand it was incumbent on the plaintiff, before entering the judgement mentioned, to search thoroughly into the record of the court to ensure that nothing had been lodged with the Court. Equally, the defendant knowing that he had to serve particulars within 14 days, could not just stand by without checking with the court to ensure that the document which he had filed had been processed by the court to ensure that it was served within the time of the order."

37. The need to keep accurate records in criminal cases as discussed in *Rep v Banda* [1995] 1 MLR 202 at 205 also applies in civil cases. The applicants have demonstrated through exhibit marked "SM2" that they filed an application for leave to appeal on 1st October 2022, but the documents were lost due to possible negligence by the registry personnel who failed to keep the documents safe and neglected to scan and upload them into the eCMS. The applicants' legal practitioner has persuaded the court that although they were prompt in dealing with the application they must have been let down by the registry. The applicants' claim constitutes an acceptable explanation for the delay. This Court has also shown that the registry did not utilize the digital system which would have easily assisted in disposing of this application without such a lengthy hearing. This court finds that it will be in the interests of justice to give the applicants the benefit of the doubt.

38. So, did the applicants have good and substantial reason for failing to timely file the appeal with the Court? From what this court has found, the applicants have shown good and substantial reason for not filing the application for leave to appeal within the prescribed period which has the result of making the notice of appeal void. The notice and grounds of appeal, *prima facie*, shows a good cause why the appeal should be heard on merits. The assertion by the

respondent that this Court is *functus officio* on account of the appeal in question having been determined, therefore fails as there is no material to support it. If anything, the impugned appeal appears to be live and pending hearing and determination. The Court has already found that the legal principles of abuse of the process of the court and *functus officio* which have been advanced by the respondent do not apply to this application. This is a proper case where this court should exercise its discretion in favour of the applicants. In the circumstances, the application for enlargement of time to appeal is hereby allowed to afford the applicants an opportunity to prosecute the appeal to its logical conclusion.

39. The appropriate orders to make are to grant the applicants leave to appeal against the judgment of the High Court out of time and that the time for so appealing is enlarged by seven days from today. The Court makes no order for costs, as the application pertains to a labour matter.

Delivered this 8th day of March 2023 at Chichiri, Blantyre.

Dorothy nyaKaunda Kamanga
JUSTICE OF APPEAL

Mr. Mumba : Legal practitioner for the applicants
Mr. Majamanda : Legal practitioner for the respondent
Mr. Shaibu : Senior Judicial Research Officer
Mr. Minikwa/Mrs. Chimtande/Mrs. Mthunzi : Recording officers/Law clerks.