



REPUBLIC OF MALAWI

IN THE SUPREME COURT OF APPEAL

BLANTYRE REGISTRY

MSCA MISC. APPLICATION NUMBER 56 OF 2022

(Being Civil Cause Number 75 of 2021)

IN THE MATTER OF SECTION 72 OF THE FINANCIAL CRIMES ACT

AND

IN THE MATTER OF THE APPLICATION FOR FORFEITURE ORDER

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS-----1ST CLAIMANT

THE ATTORNEY GENERAL-----2ND CLAIMANT

AND

NORMAN PAULOSI CHISALE-----1ST DEFENDANT

CHIMWEMWE PAULOSI t/a NAMAUYA INVESTMENT--2ND DEFENDANT

DEBORAH ZIMATHA CHISALE-----3RD DEFENDANT

ESNART GUGA-----4TH DEFENDANT

FLONY GUGA-----5TH DEFENDANT

JANET FATCH KAMANGA-----6TH DEFENDANT

CHRISTINA MVULA-----7TH DEFENDANT

CORAM: HON. JUSTICE M.C.C. MKANDAWIRE JA

P. Masanjala/Chitsime/Mtonga, Counsel for the 1st Claimant

T. Nyirenda(AG), Counsel for the 2nd Claimant

C. Gondwe, Counsel for the 1st Defendant

Minikwa, Recording Officer

RULING

1. This is the 1st Defendant's application for an order of the variation of the Preservation Order brought under section 7 of the Supreme Court of Appeal Act and under Order 1 Rule 18 of the Supreme Court of Appeal Rules. The application is supported by an affidavit made by Norman Paulosi Chisale the 1st Defendant and skeleton arguments filed by counsel.

2. The affidavit of the 1st Defendant discloses that on 25th February 2021, the Court below made a Preservation Order under section 65(1) of the Financial Crimes Act-preserving the property held by the 1st Defendant. The 1st Defendant made an application for the variation of the Preservation Order to access his bank account domiciled at First Capital Bank of Malawi being Account Number 0004501004744 for him to be able to meet his reasonable living expenses which he pegged at MK3, 175, 000.00 per month and for legal costs payable to Messrs Gondwe & Attorneys his retained lawyers in relation to the constitutional proceedings that were determined by a panel of three Judges. The 1st Defendant also included the issue of school fees for his dependants. The application in the Court below was made under Order 10 Rule 1 of the Courts (High Court) (Civil Procedure) Rules and under section 71(1)(a) of the Financial Crimes Act.

3. The Court below declined to vary the preservation order. The 1st Defendant said that he is aggrieved with the order declining to vary the Preservation Order. As such the 1st Defendant made an application without notice for permission to appeal and for an order of stay of the decision of the Court below declining to vary the Preservation Order to enable access to MK50,000,000.00 to be used in the settlement of the accrued legal costs in relation to this matter.

4. On 10th of November 2022 the Court below granted leave to appeal but declined to order staying the order declining to vary the Preservation Order only in relation to the legal costs payable to his lawyers and the copy of the order is marked as NPC1.

5. The first Defendant says that failure to access his money from his bank accounts to settle his outstanding legal costs will affect his constitutional right of legal representation and access to justice as he will not be able to be represented by the calibre and competence of the present lawyers who are already representing him in this matter and in some other cases.

6. The 1st Defendant therefore prays to the court to consider varying the Preservation Order so that he is granted access to the account maintained at First Capital Bank (FCB) so that he can pay his legal costs.

7. The 1st Claimant opposed this application and filed an affidavit in opposition together with skeleton arguments. The affidavit of Pililani Masanjala discloses that the 1st Defendant made applications for variation of the Preservation Order first before the Constitutional Court in 2021 and then before the Court below in 2022. The court below having rejected the application for variation of the Preservation Order on 3rd November 2022, the 1st Defendant applied before this court under section 7 of the Supreme Court of Appeal Act as read with Order 1 Rule 18 of the Supreme Court of Appeal Rules.

8. The present application it is said cannot be brought under Order 1 Rule 18 of the Supreme Court of Appeal Rules because the application in the court below was different from the present application. The 1st Claimant says that this is not a fresh application but rather an appeal through the back door.

9. The 1st Claimant says that the figure of MK50,000,000.00 has no evidential backup and nothing to support its veracity. The 1st Claimant says that going through paragraphs 21 and 22 of the affidavit of the 1nd Defendant, it shows that this was not the same application that was before the Court below as the 1st Defendant now only wants access of the MK50,000,000.00 in one bank account for payment of legal costs yet in the Court below he sought that both his bank accounts be unfrozen and that he be allowed access in order to pay for his reasonable living expenses and of legal costs; the present application is contrary to Order 1 Rule 18 of the Supreme Court of Appeal Rules.

10. The 1st Claimant submits that as this is a fresh application, the 1st Defendant should have brought evidence and not relying on what happened in the Court below. The 1st Defendant has not brought any evidence to demonstrate that he cannot meet the expenses concerned out of his property which is not subjected to the Preservation Order.

11. The 1st Claimant therefore prays to this court that the application herein should be dismissed with costs as it does not meet the threshold.

12. The 2nd Claimant also opposed this application. They also filed an affidavit in opposition made by Innocent Sophie Kazembe Chirwa together with skeleton arguments. Most of the issues covered in this affidavit were already covered in the affidavit of Mr Masanjala. The 2nd Claimant also attached the ruling of Justice M.A. Tembo dated 3rd of November 2022 in which he declined the variation of the Preservation Order.

13. The 2nd Claimant says that the 1st Defendant has strangely applied in this Court for an order to vary the Preservation Order which was denied in the Court below. As there is an appeal against the decision of the Court below dismissing the application to vary the Preservation Order, the order sought by the 1st Defendant has the effect of disposing the entire appeal. The 2nd Claimant also submitted that this court has got no concurrent jurisdiction with the Court below in as far as applications for variation of Preservation Orders are concerned.

14. The 2nd Claimant therefore prays that this application should be dismissed with costs.

15. Our starting point here is whether the Court has got concurrent jurisdiction with the Court below to entertain such an application. The commencement documents have cited section 7 of the Supreme Court of Appeal Act. This section provides as follows:

“A single member of the court may exercise any power vested in the court not involving the hearing or determination of an appeal provided that-

(b) in civil matters any order or direction or decision made or given in pursuance of the powers conferred by this section may be varied, discharged or reversed by the court.”

16. Looking at what has transpired in this case, it is my view that the 1st Defendant having sought leave to appeal against the order of Justice Tembo, and such leave having been granted by the Court below, it is inappropriate for the same 1st Defendant to seek a single Judge herein to entertain this application yet there is an appeal pending on the same issues. Doing that would be tempting the single Judge to pre-empt the appeal and in the process facilitating judicial chaos. This would also lead to the breach of section 7 of the Supreme Court of Appeal Act.

17. In relation to Order 1 Rule 18 of the Supreme Court of Appeal Rules on which the 1st Defendant had also anchored this application, it is imperative to appreciate what this Rule says and I hereby reproduce it:

“Whenever an application may be made either to the court below or to the court, it shall be made in the first instance to the court below, but if the court below refuses the application, the applicant shall be entitled to have the application determined by the court.”

18. Order 1 Rule 18 of the Supreme Court of Appeal Rules refers to a situation where there is concurrent jurisdiction between the Court and the Court below. There has been a lot of jurisprudence in this area and it is now settled that the applicant only comes to the Court after the Court below has declined to grant the relief sought- see the cases of **Malawi Communication Regulatory Authority vs Daniel Datching, Godfrey Itaye and Others MSCA MISC Application 39 of 2021** and the case of **Fumu Mdolo v Bonifacio Mdolo and Muzipasi Moyo; MSCA Civil Appeal No 41 of 2016**.

19. In the present case, the issue of concurrent jurisdiction which was raised by the Honourable Attorney General has really teased my mind. I am also mindful of the fact that the Financial Crimes Act is a recent legal instrument in our legal system. It is undergoing a lot of legal metamorphosis and it is up to this Court to cultivate proper guidelines to the courts below and other court users.

20. In order to appreciate the issue of concurrent jurisdiction and whether it applies to the Financial Crimes Act, I have deliberately taken a meandering legal roadmap. I have first looked at section 104 of the constitution. This is the section which establishes the Supreme Court of Appeal for Malawi. The jurisdiction of this Court may be conferred by the constitution or any other law. This Court is a superior Court of record which is vested with constitutional mandate to hear appeals from

the High Court(Court below) and such other Courts and Tribunals as an Act of Parliament may prescribe.

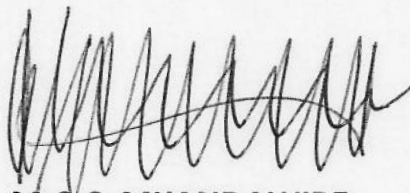
21. The application before me emanates from a legal scheme that has been well fathomed in the Financial Crimes Act. This is a recent scheme never implemented in our jurisdiction. The legal architecture that has been formulated has to be carefully appreciated or else we may be engaged into a deliberate misunderstanding. In section 2 of the Financial Crimes Act, the term "Court" has been defined as follows; 'has the meaning ascribed to it under the Courts Act.' In the Courts Act, the term Court is defined as 'means the High Court and any Subordinate Court.' It is therefore very clear that any reference to the word Court in the Financial Crimes Act refers to the High Court or a Subordinate Court such as a Magistrate Court. The Supreme Court is therefore out of the picture. Proceeding from here, it therefore means that a Preservation Order that is issued by the Court under section 65 of the Financial Crimes Act can only be issued by the High Court or a Subordinate Court. Section 71 of the Financial Crimes Act further specifically gives the Court which made the Preservation Order to vary or rescind the Preservation Order. This section also stipulates conditions which have to be satisfied by the applicant before the Court can exercise its discretion. My understanding of the scheme as far as the Financial Crimes Act is concerned is that the Court in this case the High Court or Subordinate Court that issued the Preservation Order is the same Court that has powers vested in it to entertain an application to vary or rescind the order. In as far as the Supreme Court is concerned, the Act has deliberately left it like that so that the Court only comes in using its appellate jurisdiction as bestowed on it under section 104 of the constitution.

22. The Court below was therefore competent to entertain the application by the 1st defendant to vary the Preservation Order which it issued on 25th February 2021. The Court below was also competent to entertain an application by the 1st Defendant to vary its order. This was in compliance with section 71 of the Financial Crimes Act. The Court below declined to vary the order and a comprehensive ruling was issued dated 3rd November 2022. After getting aggrieved the 1st defendant went back to the Court below applying for leave to appeal and for an Order for stay of the decision of the Court below dated 10th November 2022 declining to vary the Preservation Order to enable access to Mk50,000,000.00 to be used in the settlement of accrued legal costs in relation to this matter.

22. Let me categorically and emphatically put it on record that in as far Part VI sections 54, 65, 71 and other provisions of the Financial Crimes Act are concerned, I do not see any legal mandate for the Supreme Court to entertain applications for variation of Preservation Orders. That is the domain of the Court below or where applicable, a Subordinate court. In a nutshell, there is no concurrent jurisdiction between the High Court and the Supreme Court in as far as an application of variation of a Preservation Order is concerned. It was therefore a futile exercise for the 1st Defendant to have invoked Order 1 Rule 18 of the Supreme Court of Appeal Rules. The 1st Defendant's counsel should concentrate on the appeal that has already been filed.

23. This application is therefore misconceived and I accordingly dismiss it with costs.

MADE IN CHAMBERS THIS 8TH OF FEBRUARY 2023 AT BLANTYRE

A handwritten signature in black ink, appearing to be 'M.C.C. Mkandawire', written in a cursive, stylized script.

M.C.C. MKANDAWIRE

JUSTICE OF APPEAL