REPUBLIC OF MALAWI

IN THE SUPREME COURT OF APPEAL

MSCA MISC. APPLICATION NO 19 OF 2023

(Being High Court Commercial Cause No. 467 Of 2022, Lilongwe)

BETWEEN

DALITSO GENERAL SUPPLIES LTD ……..……..APPLICANT

AND

NATIONAL BANK OF MALAWI……...……...……...…...……RESPONDENT

CORAM: Hon. Justice F.E. Kapanda SC, JA

Gondwe of Counsel for the Applicant

Kapinda of Counsel for the Respondent

Minikwa, Court Clerk

RULING

Kapanda SC, JA:

INTRODUCTION

This is an application by the Applicant for an order that the ruling of the Court below dated on 20 April, 2023 be stayed/suspended pending the determination of the Appeal on ground that enforcing the Ruling will render the appeal by the Claimant nugatory and cause prejudice to it. The application has been brought under section 7 of the Supreme Court Act read with Order 1 Rule 18 of the Supreme Court of Appeal Rules and the Court's Inherent Jurisdiction.

The Applicant brought an Application for leave to appeal and for stay of execution of the Ruling before the Court below 22 April, 2023 but the Court below granted the Order for leave to appeal but declined the Application for the stay. The application is being brought as a fresh Application, the Court below having declined to grant an Order for stay of execution.

The Applicant filed an affidavit and skeleton arguments in support of the application. The Respondent opposes the application, it has also filed an affidavit and skeleton arguments in opposition to the application.

FACTUAL BACKGROUND

The loan facility and securities

It is commonplace that on 2 June 2021, the Respondent granted the Applicant banking facilities. These were an overdraft facility for K700, 000, 000.00, commodity seasonal facility for K2, 000, 000, 000.00, continuation of finance lease facility of K61, 055, 698.85, and sale and lease back facility for K100, 000, 000.00. There is no denying of the fact these banking facilities were granted as a result of an agreement between the parties herein. In terms of the said agreement, amongst other others, the notable terms of which were that: -

The overdraft facility would run for a period of 12 months (see clause 3.1.2.1 of the facilities agreement);

The Applicant's exposure under the commodity seasonal facility would be fully settled by 31 March 2022 (see clause 3.2.2.3 of the facilities agreement);

The sale and lease back facility for K100, 000, 000.00 would run for a period of 12 months and would be serviced with equal monthly interest payments of K1, 525, 000.00 and a bullet payment of K101, 525, 000.00 on the 12th month from the date of disbursement (see clause 3.4.2.1 of the facilities agreement); and

The facilities were severally and jointly secured with real estate and vehicles, in particular, Toyota Prado Reg No. LL 7334, Toyota Lexus Reg No. LL6110, Ford Ranger Reg No MN 7945, Toyota Fortuner Reg No BU 5896, and Toyota Landcruiser Reg No MN 5391 (vide clause 4 of the facilities agreement).

Further, in terms of clause 10.1 it was a further term of the said facilities agreement, that in the event of the Applicant failing to make any payment by the due date of any amount due in terms of the facility, or in the event of failure to make deposits to reduce an overdraft facility so that it becomes hard-core, or if he made a default in the performance of any term or condition of the agreement, the full amount of the facilities, then outstanding, and all charges accrued thereon, together with default interest would immediately become due and payable. It is in evidence that the facilities agreement was varied on or about 30 September 2021. The variation converted the seasonal commodity finance facility into a short-term loan for the same sum of K2, 000, 000, 000.00. This short-term loan was repayable in 24 equal monthly instalments effective 31 October 2021 and was expected to be repaid by 30 September 2023.

Furthermore, it is in evince that in order for the Respondent to secure the property pledged by the Applicant, the parties executed charges and surety charges in regard to the real estate. Respecting the vehicles, the parties executed two agreements, sale and leaseback agreement and master lease agreement. The two agreements (sale and leaseback agreement and master lease agreement) transferred ownership of the vehicles from the Applicant to the Respondent.

It is common ground that the Applicant fully serviced the finance lease facility of K61, 055, 698.85, one of the four facilities granted to him by the Respondent on 2 June 2021. However, the Applicant failed to fully service the other three facilities when they became due. These other three facilities are the overdraft facility short term loan (previously commodity seasonal facility before

variation), and sale and lease back facility. Thus, on 22 March 2022, the Respondent gave the Applicant formal notice that the Applicant's liability to the bank was K2, 730, 972, 142.22 and that the Applicant had to pay the said the sum of K2, 730, 972, 142.22 within 21 days from 22 March 2022. As it were, the Applicant's liabilities to the bank was as follows: in regard to the short-term loan the sum of K1, 928, 972, 142.22; as regards the overdraft facility the sum of K700, 000, 000.00; and respecting the sale and lease back facility in the sum of K102, 000, 000.00. There is undeniable evidence that the Applicant wrote the Respondent on 24 March 2022 not contesting the indebtedness but sought the indulgence of the Respondent to give it more time to settle the debt.

Further, on 23 May 2022 the Respondent wrote the Applicant again notifying it that its liability to the Bank stood at K2, 725, 682, 373.00 arising out of the facilities. The Respondent demanded the Applicant to clear the said liability of K2, 725, 682, 373.00 within 21 days from 23 May 2022 failure which the Bank would sell the real estate and repossess the vehicles upon expiry of 14 days from 23 May 2022. Then on 12 August 2022, the Respondent wrote the Applicant notifying it that it had failed to clear the debt of K2, 725, 682, 373.00. As a result of the failure to clear the debt of K2, 725, 682, 373.00, the Respondent demanded immediate surrender of the vehicles failure which the Respondent would use other means appropriate to repossess the vehicle. The Applicant then made the following payments to the Respondent, the sums of K20, 000, 000.00, K50, 000, 000.00, K20, 000, 000.00 and K11, 000, 000.00. It would appear that the last payment was paid when the case below had commenced. Further, it is well to note that these payments when applied to the whole outstanding debt of K2, 725, 682, 373.00 as of 12 August 2022, the Applicant still remained debt over K 2 billion.

Commencement of Action

On 19 September 2022 the Respondent instructed Dortar Debt Collection Services to repossess vehicles from the Applicant due to the Applicant's failure to honour its obligations under the overdraft facility, short term loan facility and the sale and lease back facility which had matured for full repayment. In response, the Applicant commenced the present action in the High Court, Commercial Division, Lilongwe Registry. It sought a permanent injunction restraining the Respondent from selling or offering for sale motor-vehicles namely; 2015 Toyota Prado LL 7334,

a 2016 Toyota Lexus LL 6110, a 2016 Ford Ranger MN 7945, a 2015 Toyota Fortuner BU 5896 and a 2015 Toyota Land Cruiser MN 5391.

The Court below granted the Applicant an injunction, ex parte, restraining the Respondent from repossessing the vehicles. The continuation of the injunction was on conditional on of hearing and determining an inter parte application for an injunction. The Court a quo heard the inter parte application for continuation of the injunction. In its ruling it vacated the injunction it granted ex parte, in effect, removing the restraint on the Respondent to exercise its powers of repossession and sale of the vehicles. It is this ruling that the Applicant has sought leave to appeal and this appeal forms the basis of seeking the present application for stay pending appeal. The main action is yet to be tried by the High Court. There is thus no final judgment of the High Court determining the rights of the parties.

It is well to note that after the injunction was vacated, the Respondent proceeded with its intention to repossess the vehicles but when it was tracing the vehicles constituting the security of the loan facilities it transpired that: the Applicant admitted that the 2016 Toyota Lexus LL 6110 was no longer in its possession as it was sold by the Applicant without the Respondent's knowledge of the same despite the Respondent being the legal owner of the vehicle and the Applicant knowing fully well that the vehicle was a subject matter of security for loan facilities. Further, that the 2015 Toyota Fortuner BU 5896 was also sold without the Respondent's knowledge of the same despite the Respondent being the legal owner of the vehicle and the Applicant knowing full well that the vehicle was a subject matter of security of loan facilities. It is in evidence that the vehicle registration details of these two vehicles were changed and the current owner has resisted to surrender possession of the vehicles to the Respondent. However, the Respondent only managed to repossess one vehicle namely Ford Ranger MN 7945. Further, the Applicant informed the Respondent that one vehicle was in Democratic Republic of Congo and the other in Republic of South Africa.

The above are the salient facts of the matter before me. I will now proceed to set out the issues for determination in this application.

ISSUES FOR DETERMINATION

What are the issues that arise and fall to be decided in the application under consideration by this Court? As I understand it, the main question raised by the application is whether or not an order staying/suspending the enforcement of the ruling of the Court below dated 20 April, 2023 be granted or not pending the determination of the appeal. Put differently, the parties want the following issue determined in this application viz.: whether the execution or enforcement of ruling of the High Court vacating the injunction pending determination of the main action be stayed or not.

It is now necessary that this Court should look at the arguments that have been raised by the parties in response to these questions. We shall start with the applicant' arguments then move on to deliberate those put forward by the respondents.

It is my understanding, as will be observed from the issues enumerated above, that the parties are for all intents and purposes in agreement as to what questions arise for determination by this Court. I will now proceed to do so by way of giving the position of the law as well as make findings on the issues. But before that, it is important that each party's respective salient arguments be set out.

PARTIES' ARGUMENTS

It is argument of the Applicant that it obtained a number of loan facilities from the Respondent bank including the sale and lease back facility which was executed on 2 June, 2021. Further, according to the sale and lease back facility, the same was to run for a period of 12 months with equal monthly instalments of K 1.525 million and a bullet payment of K 101 525 000 on the 12th month from the date of disbursement. This meant that the bullet payment had to be made by 6 June, 2022.

The Applicant alleges that it made payments towards the Sale and Lease back facility and the liability on the facility was greatly reduced to the extent that the balance remained at MK 11 000 000.00/ It is further averred by the Applicant that this arrangement was clearly made by the Applicant to the Respondent but instead of applying the repayments to the Sale and Lease back facility, the Respondent on its own and without informing the Applicant applied the repayments

to other liabilities owing by the lessee to the lessor. The Applicant states that by applying the repayments on the sale and lease back facility on other liabilities that the Applicant had with the Respondent the conduct of the Respondent is unfair and unconscionable.

Further, there was an attempt by the Applicant to put in evidence that the Respondent bank did not acknowledge the sum of K 20 Million that was paid by the Applicant on 19 September, 2022 through Messrs Dortar Debt Collection Services. On the contrary, there is evidence on record showing that the Respondent actually acknowledged receipt of this money. It is further alleged by the Applicant that it paid K 11,000,000 on 2 March, 2023 when the Court below was already seized of the application for an injunction, and that this was the last payment towards the liquidation of the debt under the Sale and Lease back facility. It is the view of the Applicant that had the Court below been made aware of this fact that the debt under the Sale and Lease back facility had been settled, the Court would not have discharged the Interlocutory Order of injunction. Accordingly, the Applicant contends that the ruling by the Court below delivered on 20 April, 2023 will render the appeal to be lodged by the Applicant nugatory.

The Applicant avers that it is desirous of appealing against the ruling of the Court a quo of 20 April, 2023 and to this end has already filed an application seeking leave to appeal. It adds that if the stay is not granted and the Respondent proceeds to sell the Applicant's motor-vehicles the Applicant its appeal will be rendered nugatory and that it will suffer much prejudice in its business considering that the motor-vehicles are the Applicant's tools of trade and also considering that the banking facilities are also secured by landed properties. It is further averred by the Applicant that on other hand, if the execution of the judgment is stayed pending the determination of the appeal, the Respondent will suffer no harm and prejudice, and if any, it is the least compared to the prejudice and loss that may be suffered by the Applicant if the stay is not granted. The Applicant further contends that its intended appeal has merits and raises serious questions of both law and fact that ought to be determined by the highest court of the land. It is further submitted that from the foregoing, it is clear that this Court has jurisdiction to entertain the present application as per section 7 of the Supreme Court of Appeal Act and under Order 1 Rule 18 of the Supreme Court of Appeal Rules.

Respondent's

Counsel for Respondent argues and submits that the application is erroneous and misconceived. It is argued that since the Applicant was denied an interim relief, namely, continuation of the injunction which it obtained ex parte, pending determination of the main action, it should have made a fresh application before this Court for the injunction pending determination of the main action in the High Court. It is the view of the Respondent that this approach is consistent with this Court's earlier decisions and what is provided for under Order 1 Rule 18 and Order 2 Rule 1 of the Supreme Court of Appeal Rules. It is also argued that such an approach is in conformity with this Court's stance on inchoate decisions of the High Court which this Court has on numerous occasions held that they are incapable of being appealed to this Court. Further, the Respondent submitted that the Applicant has appealed against the decision of the High Court refusing continuation of the injunction. It is the view of the Respondent the said appeal on the ruling vacating the injunction is thus erroneous and misconceived as the High Court's ruling vacating the injunction is incapable of being appealed to this Court.

It is the further submission and argument of the Respondent that even if the intended appeal were to be heard, there is no denying of the fact that the Applicant owes the Respondent huge sums in excess of K2 billion which are due and payable. Thus, it is contended, the Respondent should be allowed to have recourse to the securities pledged on the debt as there are no triable issues since the Applicant is in debt and the debt is due and payable.

Further, it is the argument and submission of the Respondent that, contrary to what the Applicant is arguing, the appeal will not be rendered nugatory. In addition, the Respondent contends that the balance of justice lies in favour of refusing the stay. The Respondent therefor prays that the application for stay be dismissed with costs.

THE LAW AND DISCUSSION (Analysis of the law and determination)

It is now necessary that this Court should look at the relevant law in this application and apply it to the matter at hand. As this Court does so it will likewise make findings and conclusions on the evidence on record.

Analysis of the law

The position at law is that where an applicant desires to make an application after being denied by a Court quo the person will do well to be be guided by Order 1 Rule 18 of the Supreme Court of Appeal Rules which provides that:

> "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".

Further, Order 2 Rule 1 of the Supreme Court of Appeal Rules is instructive on the procedure to be followed where a party is not satisfied with the decision of a Court a quo and desires to make a fresh application for the interim relief in this Court. The said Order 2 Rule 1 of the Supreme Court of Appeal Rules provides for the original jurisdiction of this Court. It reads:

> "In the exercise of the original jurisdiction of the Court the practice and procedure of the Court shall be conducted in substantial conformity with the practice and procedure for the time being observed in the High Court".

Therefore, as this Court understands it, where the High Court has denied an interim relief, a party who is not satisfied with the decision of the Court a quo ought to make a fresh application for the interim relief in the Supreme Court of Appeal and not to appeal the decision denying the interim relief[1].

Further, this Court understands the position at law to be that High Court decisions on interlocutory reliefs are inchoate and not appealable to this Court. Only final judgments are appealable to this Court[2]. Furthermore, the purpose for granting an interim order of stay of execution is to help the parties to preserve the status quo and have the main issues between them determined by the full

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[1] The State (on the application of the MRA) v Chairperson of the Industrial Relations Court and another MSCA Case No. 56 of 2021 ; The State (on the application of Flatland Timbers Ltd v Department of Forestry (Director of Forestry) MSCA Civil Cause no. 25 of 2021 ; and The State (on application of Gertrude Hiwa) v Office of the President & Cabinet & Secretary to the President and Cabinet MSCA Civil Appeal Case Number 1 of 2021.

[2] Aon Malawi Ltd v Garry Tamani Makolo MSCA Civil Appeal No. 16 of 2016; and Toyota Malawi Ltd v Jacques Mariette MSCA Civil Appeal No. 62 of 2016.

court as per the Rules of this Court. The principles of law governing the grant of application for stay of execution pending appeal have been stated in a long line of cases.[3] It is again well to observe that the principles set in these cases are to the following effect: First, the court's discretion to grant a stay of execution must be exercised judiciously and it should be so exercised where it is shown that the appeal involves substantial points of law. Secondly, that issues being contested be in status quo until the legal issues are resolved. Thirdly, that a court will consider granting a stay of execution where the grounds of appeal filed do raise vital issues of law and there are substantial issues to be argued on them as they are. Further, it is settled law that where grounds exist suggesting that a substantial issue of law is to be decided on appeal in an area in which the law is to some extent recondite, and where either side could have a decision in his favour, a stay ought to be granted.

Moreover, this Court is in full agreement with the principle that in order to obtain a stay of execution of judgment against a successful party an applicant must show substantial reasons to warrant a deprivation of the successful party of the fruits of litigation by any court. Thus, this Court is in no doubt that where grounds exist on the motion suggesting a substantial issue of law to be decided on the appeal in an area in which the law is to some extent obscure and where either side may have a decision in their favour such substantial grounds as would warrant an interference clearly exist.

The above exposition of the law gives the false impression that once an applicant raises a serious and recondite issue of law in the grounds of appeal, then the appellant is *ipso facto* entitled to a stay of execution. But it has long been recognised that it is not every point of law raised in an

[3] Ulalo Capital Investments Ltd and Ulalo Telecom Ltd v Southern Africa Enterprise Development Fund MSCA Civil Appeal No. 70 of 2009 (unreported); V.D. Chidzakufa t/a V&C Distributors v Nedbank Malawi Ltd MSCA Civil Appeal No. 12 of 2005 (unreported); Press Corporation Ltd and Press Cane Ltd v Cane Products Ltd [1993] 16 (1) MLR 394; Nyasulu v Malawi Railways Ltd [1998] MWSC 3; Malawi Cotton Company Ltd v Foster Namitembo and Fred Masuli t/a Olive Oil Industries ; Mike Appel & Gatto Ltd v Saulosi Klaus Chilima [2016] MWSC 138 ; The State v Council for the university of Malawi ex parte Patrick O'Phade Phiri and others ; Great Lake Cotton Ltd v Amanita [Africa] Ltd; Press Corporation Ltd and PressCane Ltd v Rolf Patel and Others; Thomson v CGU Insurance Ltd [2008] MWSC 244 ; and Phillip Msindo v Dairiboard Malawi Ltd MSCA Civil Appeal No. 31 of 2009 (unreported)

appeal that will constitute a special circumstance for purposes of a stay of execution pending an appeal. As it were, justice and fairness demands more than this. Indeed, it also demands that this principle of should not be pulled in by the hair of the head and made of necessity to apply to cases where the surrounding circumstances are different. Therefore, this Court has usually taken the view that the grant of a stay of execution, involving as it does the exercise of the court's discretion, the court, without pre-empting the main appeal by deciding the issue of law raised in the appeal, ought always to take into account the chances of the point of law so raised succeeding on appeal. However, where the chances of success in the appeal are virtually nil, such a ground of law will be pointless.

The Supreme Court of Uganda in ***Ssekikubo and Others vs Attorney General***[4] rightly observed that the rules of court respecting stay of execution of judgment gives courts very wide discretion to make such orders with conditions as may be necessary to achieve the ends of justice. One of the ends of justice is to preserve the right of appeal. As it were, the granting of interim orders is meant to help the parties preserve the status quo and then have the main issues between them determined by the full Court. Further, it is well to point out that in Malawi there is a plethora of authorities on stay of execution pending appeal. In ***Wilma Ann Roscoe Losacco v Ricardo Losacc***[5]Nyirenda J, said:

> "Stay of execution is a practice well established. It is also well established that neither the court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. An appeal does not per se operate as a stay of execution. Courts do not make a practice of depriving a successful litigant the fruits of his litigation see Monk v Bartram [1 891] 1QB 346. The question whether or not to grant a stay is entirely in the discretion of the court (Becker v Earl's Court Ltd (1911) 56 S.J. 206. In the exercise of the discretion. a court should endeavour as far as possible to maintain a fair and proper balance between the needs of the successful litigant and those of the applicant." (Underscoring supplied)

[4] [2013] UGSC 21

5 Matrimonial Cause No. 7 of 2005 (High Court decision) (unreported)

Thus, as earlier observed, the courts in Malawi retain the discretion to stay execution of judgment or ruling or order. We are now all aware of the principles that regulate applications for stay of execution of judgment or ruling or order pending appeal. This is actually well articulated by Justice Mtambo SC, JA in ***Ulalo Capital Investments Ltd and Ulalo Telecom Ltd v Southern Africa Enterprise Development Fund***[6] where he aptly summarized them as follows:

> "The Court does not make a practice of depriving a successful litigant of the fruits of his litigation. and locking up funds to which prima facie he is entitled pending an appeal. But the Court is likely to grant a stay where the appeal would otherwise be rendered nugatory or the Applicant would suffer loss which could not be compensated in damages. Where the appeal is against an award of damages, the long established practice is that a stay will normally be granted only where the Applicant satisfies the Court that if the damages are paid. then there will be no reasonable prospect of his recovering them in the event of the appeal succeeding." (Underscoring supplied)

It is settled law that a Court may consider granting an Order of stay of execution where it could be probably difficult to recover the money from the successful litigant in the event that the appeal succeeds. This was well captured in the Malawian cases of ***Thomson v CGU Insurance Ltd***[7] ***; Mary Woodworth v Chitakale Plantations Ltd***[8] as well as in ***Nyasulu v Malawi Railways Ltd***[9]**.** In the ***Nyasulu v Malawi Railways Ltd*** case the Supreme Court instructively said:

> "In Barker -Vs- Lavery (1885) 14 QB 769 it was held that the evidence showing that there was no probability of getting back the money awarded under the judgment would constitute special circumstances which would influence a court to grant stay of execution. But again, that is not a closed rule. All the facts must be considered, for even in such situation the court would, in its discretion, still refuse to grant a stay if on the total facts of the particular case, it would be utterly unjust or unconscionable to make such an order. Equally, the fact that a successful litigant would be able to pay back the damages awarded to him, would constitute special circumstances. But here again, when in such a situation, the court would

[6] [2009] MWSC 16

[7] MSCA Civil Appeal 17 of 2008) [2008] MWSC 244 (15 April 2008)

[8] [2010] MWSC 27

[9] MSCA CIVIL APPEAL NO. 13 OF 1992

properly grant a stay if it was of the view it is expedient to do so, regard being had to all the facts."

In ***The State v The Speaker of The National Assembly, Ex-parte J.Z.U. Tembo*** the court stated that circumstances of granting stay may include where there is a real risk that the appeal will prove nugatory or pointless if the applicant were not granted stay. Further, I have it on good authority that the court would not hesitate to grant stay if an appeal is bona fide and that if successful would be nugatory in the absence of stay. However, it must be emphasised that according to the case of ***Nyirenda v A.R Osman & Co***[10] it is not the chances of successful appeal that can form a ground for ordering a stay of execution. Rather, it is the consideration that a successful litigant will be unable to repay the amount granted by the judgment and executed if the appeal succeeds that informs an adjudicator whether or not there are sufficient grounds for ordering a stay of execution. In point of fact, if the issue whether or not a successful litigant will be able to repay the amount granted by the judgment and executed should the appeal succeed is answered in the affirmative then stay will not be granted.

In sum, the general law on stay of execution pending appeal may be summarized as was done in ***Alexander v Cambridge Credit Corp Ltd***[11] where the Court enumerates a number of other relevant principles on stay of execution of judgment as follows: First, that the onus is upon the applicant to demonstrate a proper basis for a stay which will be fair to all parties. Secondly, that the mere filing of an appeal does not demonstrate an appropriate case or discharge the onus. Thirdly, that the court has a discretion involving the weighing of considerations such as balance of convenience and the competing rights of the parties. Fourthly, that where there is a risk that if a stay is granted, the assets of the applicant will be disposed of, the court may refuse a stay. Fifthly, that where there is a risk that the appeal will prove abortive if the Applicant succeeds and a stay is not granted, courts will normally exercise their discretion in favour of granting a stay. Lastly, that the court will not generally speculate upon the Applicant's prospect of success, but may make some preliminary assessment about whether the Applicant has an arguable case, in order to exclude an appeal lodged without any real prospect of success simply to gain time. It must be added that as a condition of a

[10] [1993] 16(1) MLR 400

[11] (1987) 9 NSWLR 310

stay the court may require payment of the whole or part of the judgment sum or the provision of security.

Furthermore, this Court's attention has been drawn to what Supreme C ourt of Uganda said in ***Editor-in-Chief of the New Vision Newspaper v Jeremiah Ntabgoba***[12] when it instructively set out the criteria for the grant of an interim order for stay of execution and said the following words which are adopted:

> "For an application for an interim order of stay, it suffices to show that a substantive application is pending and that there is a serious threat of execution before the hearing of the pending substantive application. It is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay." (sic) (Underlining is added for emphasis)

As regards the general law on stay pending appeal, it must be emphasised that our courts are replete with Orders and Rulings on stay of execution pending appeal. Therefore, the principles of law arising from them are now common knowledge. Thus, in ***Ulalo Capital Investments Ltd and Ulalo Telecom Ltd v Southern Africa Enterprise Development Fund***[13] Justice Mtambo SC, JA said that in as much as the court does not make a practice of depriving a successful litigant of the fruits of litigation, and thereby locking up funds to which prima facie a litigant is entitled pending an appeal:

> "But the Court is likely to grant a stay where the appeal would otherwise be rendered nugatory or the appellant would suffer loss which could not be compensated in damages. The Justice of Appeal continued to instructively advise as follows where, as is the case in the matter before me, there is actually an appeal against damages:
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> Where the appeal is against an award of damages, the long established practice is that a stay will normally be granted only where the appellant satisfies the Court that if the damages are paid, then there will be no reasonable prospect of his recovering them in the event of the appeal succeeding."

[12] Misc. Application No. 13 of 2017: https://media.ulii.org/files/judgments/ugsc/2017/25/2017-ugsc-25_0.pdf

[13] (45 of 2009) [2009] MWSC 16 (19 July 2009)

As observed earlier, the general law on stay of execution pending appeal is that the court has a discretion in determining whether or not to grant a stay. It must be emphasized that in Malawi the question whether or not to grant a stay is also entirely in the discretion of the court, and the court will grant it where the circumstances so require Indeed, in ***Press Corporation Ltd and Press Cane Ltd v Cane Products Ltd*** the Supreme Court of Appeal equally underscored the fact that the decision whether to grant or refuse a stay of execution is discretionary. The court went on further to state that as is the case with judicial discretion, it is not left to the caprice of the judge but ought to be exercised in accordance with the accepted principles of law and justice.

It is clear from a reading of both local and foreign decisions above, that a court is enjoined to take into account several considerations when granting or refusing to grant stay.

Chances of success

The courts in Malawi have always considered the chances of success on appeal as one of the factors in deciding whether or not to grant a litigant a stay of execution of judgment. In examination of the question whether the appeal will succeed, Justice Chatsika in ***Nyirenda v AR Osman and Co***[14] said the following which is enlightening:

> "This application is supported by the affidavit sworn by Mr. Paul Jones Maulidi. The Affidavit emphasizes two points. The first point is that there are good chances that the appeal will be successful and the second...I would like to say what I have said in other cases of this naturel that whether or not an appeal has good chances of success is not a ground upon which a court may order a stay of execution of a judgment. A Judgment of a Court of competent jurisdiction remains enforceable regardless of the fact that there are good grounds that an appeal against the judgment will be successful. Mr. Maulidi's affidavit in so far as it purports to assert that the appeal will be successful, does not assist his application..."

However, Justice Singini SC JA in ***The State v Council for the University of Malawi ex parte Patrick O'Phade Phiri and others***[15] was moderate in his approach. Thus, while he shares the view of Justice Chatsika, that an appeal should not be made to operate as a stay of execution, Justice

[14] [1993] 16(1) MLR 400

[15] MSCA Civil Appeal No. 47 of 2011

Singini SC JA was of the view that where necessary the Court must advert to the grounds of appeal and consider them when granting or refusing a stay Order. Hence, in his Ruling of 28 September 2011 in ***The State v Council for the University of Malawi ex parte Patrick O'Phade Phiri***[16] case he opined:

> "l can quickly comment on the factor of prospects of the appeal succeeding and draw from the wisdom evinced in the decision of Chatsika, J, that great legal mind we have had on the Malawi Bench, in the case of Nyirenda vs. AR Osman and Co. [1993] 16 (1) MLR 400.... The Judge there was clearly talking of grounds of appeal by themselves. While I agree that good grounds of appeal are not of their own a factor for granting a stay. In a proper case, they could inform the decision of the court. as part of the special circumstances, whether or not to grant a stay." (Emphasis supplied by me)

As I understand it, this case suggested that good grounds of appeal can inform the decision of the court, as part of the special circumstances, whether or not to grant a stay. But recent jurisprudence does not stop there. Thus, it does not come as a surprise that more recently in ***Mike Appel & Gatto Ltd v Saulosi Klaus Chilima*** [17] a single member this Court instructively observed thus:

> "The indicators I get from the various case authorities I have read, is that I need not toil with an assessment of the viability of the nine Grounds of Appeal the Appellant has highly praised as likely to succeed. This includes the lamentations the Appellant has raised about the lower Court's attitude to its Third Party proceedings. Per the Nyirenda v A R Osman case, the city of Blantyre vs Manda and Others Case, and the Chidzankufa v Nedbank Malawi Limited (No. 2) case, among others, the fact that I could find prospects of the appeal succeeding would not be a ground upon which to grant a Stay. I need not, therefore waste time engaging in a futile exercise."

It is unmistakable that the Courts have consistently drudged their feet when commenting on the grounds of appeal. Indeed, this is also seen in ***Great Lake Cotton Ltd v Amanita [Africa] Ltd*** [18]where Justice EB Twea SC JA observed that "It is not my duty, at this point in time, to analyse

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[16] Ibid

[17] [2016] MWSC 138

[18] MSCA Civil Appeal No. 11 of 2015

the merits or demerits of the appeal." Further, in ***Press Corporation Ltd and PressCane Ltd v Rolf Patel and Others***[19] Justice of Appeal Chipeta said the following which is also instructive respecting the chances of success of appeal as a factor in determining whether to order stay of execution:

> "I have thus throughout to bear in mind that determining the appeal is not a task that is within my jurisdiction as a single Judge of this court. It is very clear in my mind that the question whether the Trial Court was right or wrong in extending its worries in this case to matters that appear to have gone beyond the issues it had initially identified as due for determination of the pleading is a matter the full Bench of the Supreme Court that will be empanelled will contend with and determine when the appeal herein comes to maturity..."

Recently, in the ***Malawi Cotton Company Ltd v Foster Namitembo and Fred Masuli Lia Olive Oil Industries***[20] case I observed thus concerning the issue of prospects of success on appeal as factor to consider whether or not to stay execution of judgment:

> "According to the case of Nyirenda vs AR Osman [1993] MLR 400 it is not the chances of successful appeal that can firm aground ordering stay of execution. Rather it is the consideration that successful litigant will be unable to repay the amount granted by the judgment and executed if the appeal succeeds that informs an adjudicator whether or not there are sufficient grounds for ordering a stay of execution. In part of fact, if the issue whether or not a successful litigant will be able to repay the amount granted by the judgment and executed should the appeal success is answered in the affirmative then stay will not be granted."

I see no reason why I should depart from these interpretations of the law on stay of execution. They are accordingly adopted in this matter and will inform the decision herein.

As established from the case authorities referred to above, the mere fact that an appellant's ground of appeal bears a chance of success is no ground in itself for granting a stay. Similarly, the absence of good grounds does not automatically militate against the granting of a stay of execution of

[19] MSCA Civil Appeal No. 26 of 2014

[20] MSCA Civil Appeal No. 74 of 2015

judgment. There are other considerations to be taken into account before a court can render a decision on whether or not an order of stay of execution should issue.

Thus, the question that will have to exercise this Court's mind is whether or not in the matter under consideration there is an arguable appeal or not necessitating the issuance of a stay order. This Court is aware that even though it is not necessary to demonstrate the same, the Court should make sure that such an arguable appeal is not rendered nugatory. The Court can only ensure that by granting a stay of execution pending appeal. The Court doe not stop at asking itself whether or not an appeal is arguable. It has to further inquire whether such an an appeal will be will it be rendered nugatory? Thus, in ***Minister of Justice v Limbe***[21] Justice Mkandawire aptly remarked that an Applicant for stay of execution should disclose reasons why not staying execution will later render successful appeal nugatory. This is what has guided the courts in Malawi for a long time but there is now change in jurisprudence in the Supreme Court of Appeal. The law has moved on. Thus, that the appeal may be rendered nugatory is only but one of the considerations. As it were, the current philosophy of law is that what matters is the risk of injustice to either of the parties. This means that the issue is not always whether damage or loss of the subject matter of execution before determination of appeal can be made good by the party that has lost the appeal. But rather the question is the risk of injustice to either of the parties.

The shift in the theory of law, respecting the issue that an Applicant for stay of execution should disclose reasons why not staying execution will later render successful appeal nugatory, is evident in ***Mike Appel & Gatto Ltd v Saulosi Klaus Chilima***[22] where the Court accepted that the 'nugatory' principle may be out-dated and has outlived its useful purpose and has been over relied upon. Indeed, in ***Mike Appel & Gatto Ltd v Saulosi Chilima*** (supra) the Supreme Court of Appeal unanimously held that an application for stay pending appeal should be resolved on the basis of the risk of injustice or prejudice in the circumstances of a particular case. Justice Nyirenda SC JA (as he was then), writing for the full Court, said the following which is instructive:

> "A consideration of "risk of injustice and 'prejudice' would encompass the considerations currently and conventionally considered; but is also allows for other consideration relevant

[21] [1993] 16(1) MLR 317

[22] [2016] MWSC 138

in the case. Liberal in that way, a court has a wider premise upon which to exercise its discretion in granting or refusing to grant stay of execution."

Discretion to grant stay pending appeal

The general rule is that the successful litigant will not be deprived of the fruits of his litigation. Therefore, the power to grant or refuse a stay pending appeal is discretionally which, of course must be exercised judicially. However, there are instances where a stay of Judgment will be granted pending the hearing of an appeal. Thus, one of the widely accepted principle is that the applicant must demonstrate that if the judgment is allowed to be implemented the appeal will be rendered meaningless and nugatory[23]. However, in ***Mike Appel and Gatto Ltd v Saulos K Chilima***[24], the Supreme Court of Appeal, guided by the reasoning of the English decisions in ***Moat Housing Group-South Ltd v. Harris***[25], and ***Hammond Suddards Solicitors v. Agrichem International Holdings Ltd***[26], while accepting that the principle above as a good starting point for the exercise of the court's discretion in stay applications, observed that there was no reason why the court's discretion should be fettered by the strict application of 'special circumstances' test. Justice of Appeal AKC Nyirenda, SC, (as he then was) in the ***Chilima case*** had this to say which is instructive:

> "…the approach should be to look at all the facts of the case and base the decision on what is 'just' and 'expedient' in all circumstances of the case. This approach is in line with what is advocated by the Hammond case. We do not find any reason why we should shy away and continue to cage ourselves and resist adopting what is propounded in the Hammond case. A consideration of risk of injustice and prejudice would encompass the considerations currently and conventionally considered; but it also allows for other considerations relevant in the case. Liberal in that way, a court has got a wider premise upon which to exercise its discretion in granting or refusing to grant stay of execution."

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[23] Minister of Justice v Limbe (1) [1993] 16(1) MLR 317 at 319 (HC); Circle Plumbing Ltd v Taulo [1993] 16(2) MLR 506 at 508 (SCA)

[24] MSCA Civil Appeal Case No. 20 of 2013

[25] The Times, January 13, 2005

[26] [2001] EWCA Civ 2065, December 18, 2001, unrep.

The above exposition of the law is correct. This Court adopts the principles set out in the dictum above as its own.

In the case of ***Moat Housing Group-South Ltd v. Harris***, Brooke L.J. (with whom Dyson L.J. agreed) said that, in determining whether to grant a stay pending appeal, regard is to be had, amongst other things, to the potential prejudice to the parties. Further, in ***Hammond Suddards Solicitors v. Agrichem International Holdings Ltd***, the Court (Clarke L.J. and Wall J.) referred to rule 52.7 of the Civil Procedure Rules 1998 and said as follows at para. 22:

> "By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?" [Emphasis supplied.]

Finally, the Court would like to observe that the above constitutes what it found and generally concluded to be the law that is relevant to the application before it. The Court associates itself with the above principles of law in the cases cited above. However, the discussion of the law does not dispose of the matter before me i.e. the application for stay of execution or continuation of stay or suspension of the execution of the ruling of the Court below dated on 20 April, 2023. What then is the conclusion that I make on the issue for determination in the proceedings herein? In other words, should this Court exercise its discretion in favour of or against the grant of stay of execution or continuation of stay or suspension of the execution of the ruling of the Court below dated on 20 April, 2023? In order to answer this question, it will be inescapable that the Court applies the law discussed above to the facts of this case. The dispute for determination will be considered from the affidavit evidence, skeleton arguments and list of authorities submitted by both parties. This the Court will now do below by reference to the law that this Court has discussed above.

DETERMINATION

This Court finds and concludes that in terms of the law this application is erroneous as well as misconceived and must therefore fail. Why do we say so? It is well to note that the Applicant was denied an interim relief, namely, continuation of the injunction which it obtained ex parte, pending determination of the main action. As this Court understands it, the right approach should have been for the Applicant to make a fresh application before this Court for an injunction pending determination of the main action in the High Court. This approach is consistent with this Court's earlier decisions and Order 1 Rule 18 and Order 2 Rule 1 of the Supreme Court of Appeal Rules. It is further in conformity with this Court's stance on "inchoate decisions" of the High Court which this Court has on numerous occasions held that they are incapable of being appealed to this Court. The Applicant has appealed the decision of the High Court refusing continuation of the injunction. This intended appeal on the ruling vacating the injunction is thus erroneous and misconceived. The High Court's ruling vacating the injunction is incapable of being appealed to this Court.

Further, this Court observes that the application for stay seeks to restore the injunction restraining the Respondent from repossessing the vehicles pending determination and hearing of the appeal. This application for stay is misconceived and erroneous. It is misguided and mistaken for it seeks to achieve that which the Applicant could have obtained by merely making a fresh application for the injunction before this Court. In any event, it should have been an application for stay pending fresh application for the injunction. This Court therefore finds and concludes that on this score alone the application would be dismissed for being misconceived and erroneous. The Applicant should have made a fresh application for the injunction. It is so found and concluded. More to the point, the High Court did not issue a positive order capable of execution nor did it order any party to do anything or refrain from doing anything. It simply vacated the interlocutory injunction. As such, there is no order capable of being stayed. Besides, to grant or continue the stay or suspend the execution of the ruling of the Court below dated on 20 April, 2023 pending the determination of the yet to be entered appeal, would mean reversing or undoing the order of the Court below that was made in an interlocutory matter that has not been finalised in the Court a quo and is yet to come on appeal to this Court.

Furthermore, this Court finds and concludes that there is no real prospect of success of the appeal. In saying this the Court is alive to the fact that the intended appeal is an appeal on an inchoate

decision incapable of being appealed to this Court. The chances of that appeal succeeding are nought. It would not even be heard by this Court as it will be dead on arrival at the door steps of this Court. There is therefore no prospect of the appeal upon which the stay is being sought being heard at all. Hence, the application for stay would be refused. It is so found and concluded. Additionally, even if the intended appeal were to be heard, it is clear that the Applicant owes the Respondent huge sums of money in excess of K2 billion which are due and payable. The vehicles sought to be repossessed by the Respondent were pledged as security to this whole outstanding debt, not just part of it. This Court doubts that the Applicant would be allowed to have both the securities pledged on the debt and the money it owes the bank. There are therefore no triable issues that should go on appeal. The Applicant is in debt and the debt is due and payable. The Respondent should be allowed to have recourse to the securities pledged on the debt.

This Court notes that the Applicant has raised an issue on some sums which it alleges were misapplied towards an overdraft facility. The issue of the sums of K20, 000, 000.00; K50, 000, 000.00; K20, 000, 000.00; and K11, 000, 000.00 being applied towards the overdraft facility as opposed to the sale and lease back facility as the Applicant would want it to be is neither here nor there. It is worth noting that, in terms of clause 10.1 of the facilities agreement, once the Applicant defaulted on the facilities, the whole debt crystallized into one debt amount which became due and payable in accordance with the said facilities agreement. Thus, the payments made by the Applicant were for all intents and purposes a payment in reduction of the whole debt. As the payments did not clear the whole outstanding debt and the vehicles were security for the whole debt, evidently the Respondent was and is at liberty to repossess the vehicles. It is so found and concluded. Further, even if the Court were to entertain the issue of application of the monies to a particular loan facility, the Respondent had the power under clause 1.4 of the master lease agreement to apply monies received from the Applicant to any other facility apart from the sale and lease back facility. Obviously this was what was done. It is in evidence that the monies received were applied towards the overdraft facility. It is well to note that if the Applicant's assertion were to be accepted what it would mean will be that the Applicant would still be in debt in excess of K2.5 billion in regard to the overdraft facility and short-term loan facility which facilities were also secured by the vehicles. The Court takes the position that whoever secures a loan from a bank under agreed terms is obliged by law to pay the same and the lender is mandated

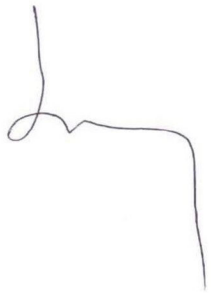
to recover the same in the event of default. The Respondent would thus still have the right to repossess the vehicles.

It is the finding of this Court that, contrary to the argument by the Applicant, the appeal would not be rendered nugatory. In the event the appeal is heard, which as we have found and concluded is doubtful as it is inchoate, all this Court could do if the Applicant were successful, is order a replacement of the vehicles by ordering the Respondent to buy vehicles of the same make and year as those the Respondent would repossess and sale.

Further, it is a fact that the Applicant is in debt in excess of K2.5 billion Kwacha. It is noted that on 23 May 2022 the Respondent wrote the Applicant notifying it that its liability to the Bank stood at K2, 725, 682, 373.00 arising out of the facilities. The Respondent demanded the Applicant to clear the said liability of K2, 725, 682, 373.00 within 21 days from 23 May 2022 failing which the Bank would sell the real estate and repossess the vehicles upon expiry of 14 days from 23 May 2022. Then on 12 August 2022, the Respondent wrote the Applicant notifying it that it had failed to clear the debt of K2, 725, 682, 373.00. As a result of failure to clear the debt of K2, 725, 682, 373.00, the Respondent demanded immediate surrender of the vehicles or else the Respondent threatened to use other means appropriate to repossess the vehicle. The Applicant then made the following payments to the Respondent, the sums of K20, 000, 000.00; K50, 000, 000.00; K20, 000, 000.00 and K11, 000, 000.00. It would appear that the last payment was paid when the case below had commenced. Further, it is well to note that these payments when applied to the whole outstanding debt of K2, 725, 682, 373.00 as of 12 August 2022, the Applicant still remained in debt of over K 2 billion. The debt had crystallized into one debt in accordance with the facilities agreement. The payments were applied to the overdraft facility in exercise of the Respondent's powers in accordance with clause 1.4 of the master lease agreement. The vehicles were security for the whole outstanding debt, not just one facility. The Applicant obtained this money from the Respondent and used to it but has failed to honour its obligations to repay it. The money is due and payable. The Respondent is suffering loss of use of the money. It could have reinvested the money and earned more profits. On the other hand, the Applicant would not suffer any prejudice. It used the money and enjoyed use of the same. By failing to surrender the pledged securities, the Applicant is benefiting from its default of repaying the loan. The stay would favour a party in default against an innocent party trying to get its money back whilst the opportunity is still there.

As has been put in evidence, the Applicant is selling the pledged securities and there is a risk that the Respondent would be prejudiced as there will not be any security to repossess at the end of all this litigation. In fact, by selling the pledged securities the Applicant has effectively had the security as well as the money whereas the Respondent has lost both the money and the securities. It is therefore the finding of this Court that the balance of justice lies in favour of refusing the stay as it will perpetuate the scenario where the Applicant will have both the money and the security. Accordingly, this Court refuses to grant or continue the stay or to suspend the ruling of the Court below dated on 20 April, 2023 pending the determination of the yet to be entered appeal. The application is dismissed with costs.

Pronounced in Chambers the 7th day of August, 2023 at Blantyre.



HONOURABLE JUSTICE F.E. KAPANDA SC, JA

JUSTICE OF APPEAL