



REPUBLIC OF MALAWI

IN THE MALAWI SUPREME COURT OF APPEAL

MISCELLANEOUS CIVILCAUE NO. 50 OF 2022

(Being High Court Commercial Court Lilongwe Registry Cause Number 242 of 2022)

BETWEEN:

STANDARD BANK PLC-----INTENDED APPELLANT

AND

CASSIDY CHALIMBA t/a KRISKEN

GENERAL DEALERS-----RESPONDENT

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

Misanjo/Njobvu, Counsel for the Appellant

Kadzipatike, Counsel for the Respondent

Minikwa, Recording Officer

RULING

1. This matter came by way of inter-parties notice of motion for leave to appeal and for extension of time within which to appeal. The application is made pursuant to section 7 of the Supreme Court of Appeal Act as read with section 21 and 23(1)(a) and (2) of the Supreme Court of Appeal Act as well as Order 111 rule 4 of the Supreme Court of Appeal Rules. The application is supported by an affidavit together with skeleton arguments.

2. The affidavit of Noel Misanjo has all the narration as to why this application is now before the court. The respondent commenced this matter in the High Court (Commercial Division) on 24th June 2022. The commencement summons is exhibit NM1 and the defence is exhibit NM2.
3. By the time the intended appellant filed defence, the respondent had already obtained a default judgment because the intended appellant had not filed a response within the prescribed time. The default judgment is dated 12th July 2022.
4. The intended appellant made an application to set aside the default judgment but the Assistant Registrar dismissed the application through a ruling dated 9th September 2022 which is exhibit NM4.
5. The appellant aggrieved with the ruling of the Assistant Registrar intends to appeal and the notice of appeal is exhibit NM5. The intended appellant believes that it had a defence on merit touching on a matter of law as the action in the court below is statute barred.
6. The intended appellant had filed an application challenging the ruling of the Assistant Registrar in the court below which application was dismissed by the Assistant Registrar for want of jurisdiction. The intended appellant later realized that the application before the Assistant Registrar was indeed misconceived and by the time they were intending to apply to the Supreme Court of Appeal the time for appeal had expired. The intended appellant had also applied for stay on an application for suspension of enforcement on 30th September 2022 pending the determination of the application for referral/review.
7. It is deponed that a perfected ruling by the Assistant Registrar on the application for stay is not yet issued. That assessment of damages already took place but the ruling is not yet out.
8. The intended appellant believes that the delays herein are not deliberate, taking into account the steps taken by the intended appellant.
9. The respondent opposed this application. In support of this opposition the respondent filed an affidavit made by Mr Geore Kadzipatike together with skeleton arguments.

10. The respondent says that as the intended appellant did not contest the action, a default judgment was entered in the court below. The court below dismissed an application by the respondent to set aside the default judgment and proceeded to assess damages and the ruling/order is still pending.
11. The respondent says that these applications are premature since the court below has not yet delivered its ruling on assessment of damages and interest. The respondent further says that the application for leave to appeal should have been made in the court below before coming to this court.
12. In the present case, I do not want to be deliberately winding. This case is a very straight forward one. Order 1 rule 18 of the Supreme Court of Appeal Rules is very clear. It 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. The Court has a litany of cases which have confirmed this position. Our jurisprudence is very clear on this. The cases of **Chifundo Kamwani and Others vs Illovo Sugar Malawi Ltd MSCA Civil Appeal Case Number 5 of 2022** and **Premium Tama vs F. Mambala & Others, Kanengo Tobacco Processors Ltd and P. Mphongozidana & Others MSCA Civil Appeal NO. 72 of 2016** are very clear on the issues before me. It therefore comes to my mind with a sense of great surprise, to see counsel for the intended appellant harnessing a lot of zeal and energy to convince me that I should entertain their applications herein. That I shall not accept.
13. The only honourable route for the intended appellant is to go back to the Court below and apply for leave to appeal. As the ruling for assessment of damages and interest is not yet out, the intended appellant has an opportunity to make their application for enlargement of time once the whole process in the Court below is finalized. It would indeed be pre-mature at this point in time to entertain such an application.
14. I therefore dismiss both applications with costs.

MADE IN CHAMBERS THIS 8TH DAY OF FEBRUARY 2023 AT BLANTYRE



M.C.C. MKANDAWIRE

JUSTICE OF APPEAL