



**IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
LILONGWE REGISTRY
Commercial Case No. 05 of 2019**

Between:

ALLIED FREIGHT AGENCIES CLAIMANT/RESPONDENT

-And-

ROSELYN MANDALA DEFENDANT/APPELLANT

Coram: Hon. Justice Charlotte Wezi Mesikano Malonda

Mr. Khumbo B Soko ,Counsel for the Defendant

Mr. Mike Nanga, Court Clerk

Mesikano-Malonda, J

**RULING ON APPLICATION TO SET ASIDE ORDER AND RESTORE
STAY PENDING APPEAL**

1. The Defendant commenced these proceedings ex-parte to restore a Stay of Enforcement Order which was granted on 8th October 2020 and extended by the court on 3rd November 2020.
2. The Supreme Court of Appeal granted permission for the Appellant to appeal out of time and for leave to appeal on the condition, amongst others, that the Appellant pays costs to the Respondent within 60 days

of the Order which was made on 18th September 2020. The Order was granted by JA Chikopa SC.

3. Looking at the Record on file, the Defendant failed to pay the sum MK250,000.00 within the 60 days' period to comply as ordered by the Supreme Court and the Claimant filed a 'Certificate of Non-compliance' with the Supreme Court which was exhibited as '**FK2**' in the Sworn state of Francis Kaduya, Counsel for the Claimant. In their application to set aside the Order for Stay of Execution pending Appeal, the application was made on 14th December 2020, and the Court granted it on 22nd January 2021.
4. The current Application is to restore the Stay of Execution after the Defendant has obtained another extension within which to comply with the payment of cost, which was a condition for the granting of the extension of time within which to appeal. The extension was granted on 28th January 2021 with effect from 22nd December 2020. This is now produced to me and exhibited hereto marked **KBS 1** in the sworn statement of Counsel for the Defendant, a copy of the Order of Justice of Appeal Chikopa dated 28th January 2021 granting the extension.
5. In the Sworn Statement filed in support of the Application, Counsel Soko deposed that the Defendant seeks to stay enforcement of the Judgment, on the grounds that by the time the application for extension was being made to the Supreme Court, the Appellant had already finished paying the Respondent's costs. No further information has been exhibited to prove this.
6. He further depones that there is still a valid appeal in the Supreme Court of Appeal, and more importantly, the Order should be set aside

because it was granted ex parte when the Respondent actually wanted it to be heard inter parties. The Appellant was, therefore, not heard.

7. He finally deposed that No circumstance has changed from the last time when the Court deemed it appropriate to grant a stay on an inter parties hearing. The stay order should, therefore, be restored.
8. In exercising discretion whether to suspend enforcement of a judgment under the Rules, the court will start from the premise that courts do not make it a practice to deprive a successful litigant the fruits of his litigation and that where a party appeals the court ought to see to it that the appeal, if successful, is not rendered nugatory. In determining this the court has to consider all the relevant circumstances of the case to determine the risk of injustice and prejudice to one or both parties, should an order of suspension be granted or not granted - *Mike Appel & Gatto Ltd v Saulosi Chilima [2014] MLR 231 (MSCA)*. Further, Section 23 of the Courts Act , provides that :

' In civil matters , an appeal shall not operate as a stay of execution or of proceedings under the judgement appealed from , except so far as the subordinate court or the High court may otherwise order ; an no intermediate act of proceeding shall be invalidated , except in so far as the High Court may direct '.

9. Having been adjudged successful in the proceedings, the Claimant is entitled to enjoy the fruits of his litigation. I observe that the Defendant had not complied with the Order of the Supreme court of 10th September 2020, and was hence standing in the way for the Claimant to execute the judgement.

10. In order to move the Court to lift the suspension Order, the Claimant demonstrated this non-compliance and that the Appeal had fallen off because of the failure to pay the costs as directed by the Supreme court and the filing of the Certificate of Non-compliance of 11th November 2020.
11. Having filed the Certificate of Non-compliance in the Supreme Court on 11th November 2020, it is therefore vexing that the Defendant would file an application for extension of the same Order they had not complied with, if they had already paid the costs as deponed by Counsel. The court record herein shows that at the time the Order for extension was being granted by the Supreme Court, the Defendant had not yet complied with the Order, that is why they sought the indulgence of the Court to extend time, more so the Certificate for non-compliance was already filed on 11th December 2020.
12. The Defendant has referred to the issue of the right to be heard when the Application to remove the suspension Order was granted. The Court believes the Inter-parties application would likely have not much effect faced with the fact that Non-compliance order was exhibited. Hence there was full disclosure by the Claimant of the true status of affairs at that particular time. The ex-parte application therefore did not occasion any injustice on the Respondent. It would have undermined the Supreme court for a contrary order to be made when there is a Certificate of non-compliance with an Order of a higher court, in the same case, is being presented in an inferior court.
13. However, the extension of time to comply with the Order for costs as granted by the Supreme court on 28th January 2021, negates the Certificate of non-compliance of 11th November 2020 as this restored

the leave to appeal which had lapsed when the Defendant was out of time and the 22nd January 2021 Order was granted by this court. Simply put the irregularity of the 22nd January 2021 Order only arises from the Order of the 28th of January 2021 of the Supreme Court which created a material change in the circumstances of the case.

14. Ultimately, it is apparent that the Defendant has advanced grounds to show that the suspension Order should be restored. I therefore grant the order.

Made in Chambers this 19th February 2021



Charlotte Wezi Mesikano Malonda

JUDGE