IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL APPLICATION NO. 21 OF 2023

(Being Commercial Case No. 159 of 2019 at the High Court of Malawi Commercial Division, Blantyre Registry)

BETWEEN:

CFAO MOTORS LIMITED (Formerly Known as CFAO Malawi Limited).....APPELLANT

AND

NBS BANK PLC.....RESPONDENT

CORAM: THE HON. JUSTICE MR S.A. KALEMBERA JA

Mr Maziko Sauti-Phiri, of Counsel for the Applicant

Mr P. Mpaka, of Counsel for the Respondent

Mrs M. Mthunzi, Recording Officer

RULING

Kalembera JA

This is the Court's Ruling on the Appellant's Inter-Partes Application for Stay of Execution Pending Appeal, following the Ruling of Alide, J in the High Court, Commercial Division, Blantyre Registry, Commercial Case No.159 of 2019 dismissing an application for stay pending appeal. The application brought Order I rule 18 of the Supreme Court of Appeal Rules (SCAR). It is supported by a Sworn Statement of Maziko Sauti-Phiri, of counsel for the Appellant dated 27th April 2023, as well as skeletal arguments. The Respondent opposes the Application, The Respodent has thus, filed an Affidavit in Opposition sworn by Patrick Gray Mpaka, of counsel for the Respondent, as well as skeletal arguments.

It is important to mention that, in the Court below, the Appellant was not only seeking for stay of execution pending appeal. The Appellant also applied for an order for leave to appeal against the summary judgment of the Court below dated 9 November 2020 finalized with the ruling of the Assistant Registrar in assessment of interest or any other such terms as the Court deems appropriate; and consequential orders, namely; setting aside the seizure and sale order dated 22 December 2021 *ex debito justitiae*; and refund by the claimant to the defendant sheriff fees of K259 million.

It is further important to note, that the application for leave to appeal against the summary judgment was duly granted to the Appellant. However, the application for stay pending appeal, was not granted. Thus, the Appellant brings an application for stay pending appeal pursuant to Order I rule 18. Against the refusal to grant the said consequential orders, the Appellant has now filed what he terms an amended notice of appeal dated 28 April 2023.

It has been deponed by counsel for the Appellant that On 26 November 2021, the Registrar of the Court below finalized by assessment of interest a summary judgment dated 9 November 2020. The Judgment is in respect of interest arising out or in in respect of a forward contract made between NBS Bank plc (NBS) and CFAO Motors Ltd (CFAO). On or about 24 December 2021, CFAO paid into court the assessed interest sum of Kl .6 billion pending an application to stay. On 21 April 2023, the learned trial Judge refused to grant a stay, and also ruled that the sum of Kl .6 billion, which was in court, should be paid over to NBS.

Counsel further deponed that CFAO has been granted leave to appeal, and has appealed against the ruling of 21 April 2023 as per attached copy leave to appeal and notice of appeal marked "MSPI". On 12 December 2022, the Supreme Court delivered a landmark ruling in ***NBS Bank plc v Capital Oil Refining Industries,*** MSCA Civil Appeal No. 48 of 2017 (unreported). This case, is also about a forward contract entered into March 2012 or thereabouts. The case, like here, also involved a question of refund of money paid in advance of the forward contract, and interest. The Supreme Court has ruled that the forward contract transaction contravened Exchange Control regulations and as such that the whole transaction is illegal. The Supreme Court has also said that any money paid in respect thereof is refundable,

but without interest, as it is against public policy and interest for a court to award interest where the contract is tainted with illegality.

Counsel then informed the Court that he represents CFAO in a separate, but related case, which is a claim by CFAO against NBS for a refund or return of money CFAO paid to NBS in advance of a forward contract, which failed. On 2 February 2023, NBS served an amended defense in that action. In this amended defense, NBS has admitted that the forward contract it entered into on or about March 2012 is illegal as per attached copy of the amended defense containing the admission marked as "MSP2".

Finally, Counsel told the Court that on 27 April 2023, the learned trial judge refused stay of his judgment being appealed against. In terms of security for costs, CFAO applies that the money paid into court, which is a substantial one, acts as security to NBS. Even if this is not so, in the event the appeal is not favorable to CFAO. He further requested the Court to take judicial notice that the former CFAO Malawi Ltd has been merged with the former Toyota Malawi Ltd into one company called CFAO Motors Limited. The combined company has much larger balance sheet than the former CFAO Malawi Limited, and therefore would be able to pay back in the unlikely event that the appeal is unsuccessful.

As already stated, the application herein is opposed. The Respondent, through coumsel, averred that full history of the present matter is well articulated in the Ruling of the High Court dated 21 April 2023. I will now proceed to lay the background as laid in the Ruling of the High Court.

The Respondent (claimant in the Court below) commenced this matter against the Appellant (defendant in the Court below) for two declarations, namely; that the CFAO had been unjustly enriched with the use and possession of the sum of MK566, 5 16,764.51, from around 25 October 2013 to around 14 March 2019; and that the NBS Bank was entitled to restitution of all the proceeds derived from the defendant's possession and use of the said sum by way of compound interest calculated across the period that the Appellant had the use and possession of the said sum.

After the exchange of the statement of case and the defense, the Respondent took out an application for summary judgment in respect of the matter. The Appellant on the other hand took out an application for consolidation of this matter

with Commercial Case No. 134 of 2013 involving the same parties. Both applications were called for hearing on the same day. On the date set down for the hearing of the applications, the court declined to consolidate the matter with Commercial Case number 134 of 2013, and proceeded to hear the application for summary judgement.

On 9 November 2020, the Court below delivered a summary judgement in favor of the Respondent. At that point, the Appellant did not file any appeal against both the summary judgment and the court's order declining consolidation of the matters. The matter proceeded for assessment of interest. On 26 November 2021, the Assistant Registrar awarded the Respondent the sum of K 1,665,148,855.97 upon assessment of the interest.

On 10 December 2021, the Appellant appeared before the Court below and obtained two orders, without notice. First, an order staying the execution of the order on assessment of interest pending the hearing and determination of the Appellant's appeal or the trial of Commercial Case No. 134 of 2013, and second, an order pending final determination of the appeal the Appellant lodged against the judgment of the Court below in this matter.

On the same day, the Appellant served the Respondent with a notice of appeal against the summary judgment of 9 November 2020, and the Assistant Registrar's ruling on assessment of interest. It must be stated that the said notice of appeal has not been attached to the present application. The Appellant only attached the purported amended notice of appeal. However, it is quite evident then that the grounds of appeal in the original notice of appeal, as filed on 10 December 2021 were against the summary judgment and the ruling on assessment of interest.

On 17 December 2021, the Court below set aside the orders made on 10 December 2021 upon a without notice application by the Respondent. The Court below further directed that in the event the Appellant was desirous of making any further application in respect of the two orders, the same were to be filed with notice to the other party. On the same day, the Respondent took out further processes in order to enforce the judgement debt, Accordingly, interim third-party debt orders were issued against the Appellant's bankers.

Lastly, on 23 December 2021, a seizure and sale order was issued by the Court below, and on the same day, the Sheriff proceeded and seized eight motor vehicles and furniture at the Appellant's premises, and closed the premises accordingly. The following day, 24 December 2021, the Appellant, issued two cheques in the sum of MK1,665,148,855.97 being the judgement sum, and MK259,184,328.40, being Sheriffs fees and expenses. The Appellant directly paid the fees and expenses to the Sheriff, and instructed the Sheriff to deposit the other cheque into court. The Appellant then proceeded and filed the present application to restore the stay order of 10 December 2021, and in the process seeking the reliefs outlined above.

The Court below proceeded to hear the application and refused to grant the application for stay pending appeal.

The following issues arise for determination:

1. Whether Order I rule 18 can be used as the basis or the enabling provision for the present application; and

2. Whether the Appellant has competently appealed against the Ruling of the Court below made on 21 April 2023, for the Court to grant the application for stay pending appeal

I must state from the outset that, Order I rule 18 of the Supreme Court of Appeal Rules, does not afford Appellant the right to make the application herein. Order I 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",

Thus this rule cannot be used as a basis for the Appellant to lodge its application herein in this Court. Order I, rule 18 of the Supreme Court of Appeal Rules does not provide for the making of an application for stay before this Court; but it is a general provision which guides the Court when to entertain an application that has been refused before the court below; that, all the provision says is that this Court will only assume jurisdiction to hear an application which is provided for under the appropriate rules that may be heard by this Court after the court below has heard the application and declined to grant it; and that the Appellant, therefore, must file the

application under a rule or provision which provides that one may apply for stay in this Court.

Just as an application for leave to appeal, a party intending to appeal in terms of Order I rule 18 may be required to make an application before the court below, and if the court below refuses the application, that is when he or she should bring an application before this Court. Nonetheless, the party intending to appeal cannot rely on Order I rule 18 as the enabling provision, he or she is required to bring such an application for leave to appeal under Order III rule 3 of the Supreme Court of Appeal Rules.

In accordance with proviso (b) to section 8 of the Supreme Court of Appeal Act, the application herein should have been made under Part 52.16 of the Civil Procedure Rules of England, and not under section 7 of the Supreme Court of Appeal Act as read with Order I, rule 18 of the Supreme Court of Appeal Rules. See ***Prof. Arthur Peter Mutharika and The Electoral Commission v Dr. Saulosi Klaus Chilima and Dr. Lazarus McCarthy Chakwera***, MSCA Civil Appeal No. 7 of 2020.

In ***NBS Bank PLC v Dean Lungu t/a Deans Engineering co Ltd*** (Commercial Cause 14 of 2015; MSCA Civil Appeal 83 of 2019) [2019] MWSC 11 (7 November 2019), the single member of the Court held:

> "With respect to the Respondent's preliminary objection that the Appellant's application herein was wrongly made pursuant to Order I rule 18 of the Supreme Court of Appeal Rules, it is pertinent to observe that Order 1 rule 18 merely provides that "*whenever an application may be made either to the court below or this 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 this Court*". In accordance with proviso (b) to section 8 of the Supreme Court of Appeal Act, the Appellant's application herein should have been made under Part 52.16 of the Civil Procedure Rules, and not under Order I, rule 18 of the Supreme Court of Appeal Rules. <u>While this Court sustains the Respondent's preliminary objection, this Court is, nevertheless, not inclined to dismiss the Appellant's application herein on the basis of the anomaly correctly identified by</u>

the Respondent because the Respondent does not appear to have been misled or prejudiced in any material respect, and the anomaly is easily rectifiable." [Emphasis supplied]

In the matter at hand, the Respondent has not been prejudiced by the failure to cite the correct enabling provision as it has competently responded and opposed to the application. Thus this finds no reason to dismiss the Appellant's application on the basis of the said anomaly.

As regards the second emerging issue, it touches on the competency or validity of the appeal. In this regard, I have to remind myself that, in accordance with section 7 of the Supreme Court of Appeal Act, the general jurisdiction of the single member of this Court is hear applications that do not dispose of the appeal so that this Court does not end up actually determining the appeal filed by the Appellant. However, it is imperative that section 7 be understood in its context, that is, that the single member of the Court ought not to determine an appeal on its merits. Thus, it is unsurprising that the law allows a single member to dismiss appeals for want of prosecution; as the same is not considered as determining an appeal on its merits as envisaged by section 7 of the Supreme Court of Appeal Act. Thus, in the matter at hand, the Court must first, be satisfied that the Appellant has exercised their right of appeal by filing a Notice of Appeal. Consequently, without in any way wishing to be understood or seen to be determining the appeal, the Court should consider and determine only the several pertinent issues that have arisen in the arguments and submissions in this matter.

At the same time as seen above and decided elsewhere the application of stay of execution pending appeal invokes the discretionary powers of the court and by nature discretionary powers must be exercised fairly and judiciously see ***Airtel Malawi Limited v SS Rent a Car***, MSCA Civil Appeal No. 24 of 2016 (unreported). The enabling provision under Part 52.16 of the Civil Procedure Rules, 1998 empowers this Court to stay execution, of a judgment being appealed against pending appeal. I must emphasize that the very first condition why the stay would be granted is that there must be an appeal pending which is in my view the legal basis for the application. Further, the conditions for granting a stay are provided through several case laws both locally and internationally. In ***Chitawira Shopping***

Centre v HMS foods & Grain Ltd, MSCA Civil Appeal No. 30 of 2015, it was stated as follows:

> "The normal rule is neatly summarised in paragraph 21 of the judgment in **Hammond Suddards Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 1915**:
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> "By CPR rule 52.7, unless the appeal court or the court below orders otherwise, an appeal does not operate as a stay of execution of the orders of the court below. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend on all 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 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 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 money paid from the respondent?" (Emphasis supplied)

Thus, in determining whether or not to grant the stay application, this Court must determine whether the purported appeal will be stifled. First, the question as to whether the original notice of appeal was competently filed, the Court below ably made the correct finding and eventually granted the Appellant leave to appeal as required under section 21 of the Supreme Court of Appeal Act. However, it is the filing of the so called amended notice of appeal that seems problematic. The Appellant submits having filed an amended notice of appeal citing grounds against the summary judgment made on 09 December 2020 and the ruling of the court made on 21 April 2023. More importantly, in praying to this Court to grant the stay application the Appellant argues and submits that there is an illegality and irregularity with both judgments being appealed against. This argument only arose after the Appellant learnt of the Supreme Court of Appeal decision in ***NBS Bank plc v Capital Oil Refining Industries,*** delivered on 12 December 2022, clearly, two years after the Appellant had filed notice of appeal dated 10 December 2020.

It is my considered opinion, that the Appellant in filing the so called amended notice of appeal flouted the rules and procedure. A look at the amended notice of appeal only shows that it was paid for at the Cash Office in Chichiri Blantyre. There is neither the stamp of the Registry of the Court below nor this Court. All documents filed with either this Court or Court below bear the stamp of the Registry concerned. In other words, it is clear that the amended notice of appeal was never filed with this Court or the Court below, it was only paid for. The Appellant ought to have known that according to Order III rule 2 (2) of the SCAR, a notice of appeal is filed in the Registry of the Court below. Hence, at the very least, the stamp of the Cash Office should have been that of the Commercial Court, Blantyre Registry.

Furthermore, even if we were to find that the said amended notice of appeal was duly filed, the conclusion would still be that it has no legal basis. Order III rule 2 (5) of the SCAR states as follows:

> *(5) The appellant shall not without the leave of the Court urge or be heard in support of any ground of appeal not mentioned in the notice of appeal, but the Court may in its discretion allow the appellant to amend the grounds of appeal upon such terms as the Court may deem just.*

The above rule is quite clear that all the grounds of appeal, as added in the amended notice of appeal, cannot be argued in the appeal unless if the Appellant has sought permission from the Court to amend the grounds of appeal. Thus, from the wording of the rule, it is clear that no Appellant may amend his notice and grounds of appeal without the leave of the Court. Recently, the Court of Appeal of England and Wales in the case of ***Hickey v Secretary of State for Work and Pensions (CA)***, [2018] 4 W.L.R 71 observed that:

> "So far as appeals to the Court of Appeal (Civil Division) are concerned, rule 52.17 is supplemented by paragraph 30 of Practice Direction 52C (Amendment of appeal notice). That provision appears to be based on the premise that, once permission has been granted (and any remaining original grounds of appeal rejected), any proposed amendments are likely to be modest and can therefore sensibly be left to the appeal hearing itself. <u>However, that supposition</u>

> does not detract from the requirement that an appellant who has obtained permission to appeal and wishes to add to or otherwise amend his grounds must make a formal application to do so under rule 52.17, as soon as he reasonably can. Grounds of appeal cannot be covertly amended, for example by including changes to them in the skeleton argument. (Emphasis supplied)

It is clear from the above cited authorities that a party cannot unilaterally add new grounds and simply abandon grounds on which permission to appeal was granted or grounds on which the hearing of the appeal was set. Furthermore, in the matter at hand, it is clear that when the Court below was granting the application for leave to appeal it was doing so having looked at the notice and grounds of appeal as filed then on 10 December 2021. I cannot assume that the Court below would have granted such leave with the grounds of appeal as now cited in the amended notice of appeal. Another question perhaps not for determination at this point would be if the Appellant was not then required to seek for another leave to appeal against the order of 21 April 2021. Be that as it may, a party cannot unilaterally add new grounds and simply abandon grounds on which permission to appeal was granted or grounds on which the hearing of the appeal was set. If the Court was to proceed to hear an appeal in the present matter, the appeal would be heard based on the grounds of the notice of appeal filed on 10 December 2020.

It is therefore the finding of this Court, that no competent amended notice of appeal has been filed with the Court. As such the argument in support of the stay application to be granted, that there is an illegality and irregularity with both judgments being appealed against, has no legs to stand on. In other words, the application for stay pending appeal itself has no legs to stand on. The Court cannot proceed to grant application for stay pending appeal in the absence of a competent notice of appeal. See ***NBS Bank PLC v Dean Lungu t/a Deans Engineering co Ltd*** (Commercial Cause 14 of 2015; MSCA Civil Appeal 83 of 2019) [2019] MWSC 11 (7 November 2019).

In ***Kesi Kahindi & 23 Others v Phillip Kimeu & Another*** [2020] eKLR Munyao J. stated as follows:-

"3. The first thing that I need to be satisfied is that the applicants have exercised their right of appeal by filing a Notice of Appeal. I have seen a Notice of Appeal in the file which was lodged on 2 April 2020. It will be recalled that judgment was delivered on 11 March 2020, meaning that the Notice of Appeal needed to be filed, latest, by 25 March 2020, following the provisions of Rule 75 (2), of the Court of Appeal Rules, 2010, which stipulates that a Notice of Appeal needs to be filed within 14 days of the judgment.

4. I have no application before me for extension of time for filing the Notice of Appeal, and that being the case, the Notice of Appeal is incompetent and incapable of anchoring an appeal to the Court of Appeal. Since there cannot be filed an appeal to the Court of Appeal, as there is no competent Notice of Appeal, it is pointless issuing an order of stay pending appeal." [Emphasis supplied]

I must indeed reiterate that to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent. Further, the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. In order to satisfy the principle upon which this court can grant an order for stay of proceedings or execution pending appeal, the applicants must not only satisfy the Court that their intended appeal is arguable but also that unless the order of stay of execution is granted the intended appeal will be rendered nugatory. Thus far, in the present application the Appellant has failed to satisfy the two limbs of arguability, and nugatory aspect that are prerequisite to the granting of the stay orders.

Finally, an application for stay pending appeal presupposes that there is an appeal pending at the Supreme Court of Appeal or that a proper notice to that effect has been filed. As there is no competent notice of the intention to appeal there is no basis for the grant of the order sought. It is pointless for the Court to even consider the conditions for grant of stay as it would be a mere academic exercise with no purpose since there is no appeal. Consequently the Appellant's Inter-Partes

Application for Stay Pending Appeal is hereby dismissed with costs to the Respondent. The Respondent may proceed with execution.

MADE this 12th day of April 2024 at Blantyre.

S.A. Kalembera

JUSTICE OF APPEAL