



Republic of Malawi
IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
BLANTYRE REGISTRY
COMMERCIAL CAUSE NUMBER 104 OF 2021
(Before Msungama, J.)

BETWEEN:

**ABDUL HAMEED KASMANY AND MUHAMMAD
ZARIA KASMANY T/A PLUMBING AND HARDWARE
CENTRE (A FIRM) CLAIMANT**

AND

**MAHOMED FARUK YUSUF, ABDUL KARIM YUSUF
AND MUSTAQ AHMED YUSUF T/A MF & AK YUSUF
INVESTMENTS (A FIRM)1ST DEFENDANT
MAHOMED FARUK YUSUF 2ND DEFENDANT
MUSTAQ AHMED YUSUF3RD DEFENDANT**

Coram:

Msungama, J.

Bhana, Counsel for the Claimant
Mwangomba, Counsel for the Defendant
Makonyo, Court Clerk

RULING

1. Following a successful application by the Claimant for an order of summary judgement, this court ordered the Defendants to pay the Claimant the sum of MK57,400,783.19 with interest thereon at the rate of 3% above the National bank of Malawi plc base lending rate applicable from time to time with effect from 25th March, 2021. The Defendants were also ordered to pay the Claimant collection charges.
2. The Defendants, dissatisfied with the judgment, have, with leave of this court, lodged an appeal to the Supreme Court of Appeal to have the judgment reversed.
3. Since an appeal does not have the effect of a stay of execution/ enforcement of a judgment, the Defendants have applied to this court for an order staying the execution

/enforcement of the judgment. The application is made under O.48 r. 28 of the CPR 2017. This ruling is, therefore, on that application. This entails that the issue for the determination of this court IS whether it is appropriate to order a suspension of enforcement of the judgment. The application is opposed by the Claimant.

4. The application by the Defendants is supported by a sworn statement sworn by the Defendants' counsel who also filed skeletal arguments. In the said sworn statement, counsel states that if the judgment sum is paid to the Claimant the same is unlikely to be refunded to the Defendants in case of the appeal succeeding. Counsel has attached to the sworn statement HWM3, a copy of a letter from Claimants to the Defendants in which the Claimants are lamenting that they were financially incapable to run their business. Counsel also asserts that one of the Claimant's partners is answering very serious criminal charges at the Chief Resident Magistrate Court. He is therefore a flight risk. He attached to his sworn statement a copy of the bail bond and charge sheet. It is asserted that if these criminal charges result in a conviction, then chances of survival of the Claimant's business are doubtful as such a conviction is likely to lead to imprisonment. It is further asserted that there are allegations of tax improprieties levelled against one of the Claimant's partners which may result in heavy penalties being levied against him by the Malawi Revenue Authority ("MRA"), a situation which would render the Claimant's business unable to continue operating.
5. As stated above, the Claimant is opposing the application. The sworn statement in opposition was sworn by one Abdul Hameed Kasmany, one of the partners in the Claimant's business. Mr. Kasmany states that although the letter, HWM3, which was written to the Defendants was sent on 22nd June, 2020, a period of almost three years ago, the business is still operating. He asserts that the said letter was merely an enquiry aimed at trying to find out as regards when the Defendants intended to settle the debt. He further asserts that the Claimant's cashflow was suffering because of the size of this debt. On the issues of criminal charges levelled against him, the deponent states that it is indeed true that he was, on 14 the April, 2022 arrested in respect of certain criminal allegations levelled against him and was released on bail. One of the conditions of the bail granted to him was that he should not leave the country without the permission of the court. However, his passport was not required to be surrendered as there was no evidence that he intended to flee the country. It was his assertion further that it is not true that if the judgment sum is paid, the Claimant would not be able to refund the money in case of a successful appeal. He stated that he owns, in his own right, property in Limbe in respect of which he attached a copy of the relevant title deed as AHK1. In his view, it is in fact the Defendants who are not doing fine financially to the point that they are now selling their properties. He attached to his sworn statement a copy of an advert showing one of the properties being offered for sale.
6. There is not much dispute, even going by the submissions of the parties, on what the law is in respect of applications for suspension of enforcement of judgements (previously known to the older folk in this noble profession as 'stay of execution' before the advent of the CPR 2027) pending appeal. An order of stay of execution is granted at the

discretion of the court¹. However, the discretion of the court has to be exercised judiciously. In **Malawi Revenue Authority V Nadeem Munshi** Civil Appeal Cause No. 67 of 2013 the court stated that:

“A court considering a stay of proceedings must realise that it is exercising discretion which, like other discretions, must be exercised judiciously, comporting that the court must account for all material factors on all circumstances of the case. Failure to consider material factors and placing undue emphasis on a factor or circumstance is a wrong exercise of discretion...”

7. The discretion is exercised on the basis of what is just and expedient: **Mike Appel & Gatto Limited v Saulosi Chilima** [2014] MLR 239 (MSCA). The court has to be satisfied that the issues raised for and against the granting of an order of stay are sufficient to justify the exercise of its discretion one way or another: **Attorney General v Sunrise Pharmaceuticals and Chombe Food Products** (MSCA Civil Appeal No. 11 of 2013).
8. In exercising its discretion the court must properly balance the rights of the parties to avoid injustice: **Malawi Housing Corporation v John Suzi Banda** MSCA Civ Appeal No. 73 of 2018 (Unreported). The court must grant a stay where real prejudice to the defendant is probable if the judgment is enforced and the defendant later succeeds on appeal: **Otkrite International Investment Management Ltd v Urumov** [2014] EWHC 755 (Comm). The court in **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2016 gave guidance to the effect that the essential question in an application for stay of execution is whether there is a real risk of injustice to one or other or both parties if the court grants or refuses a stay. The court must consider 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? If a stay is refused so that the judgment is enforced and then the appeal succeeds, what are the risks of the appellant being unable to recover any of the monies being paid to the respondent?
9. The Defendants in this matter argue that the Claimant’s financial position is not good such that if the appeal succeeds, chances of recovery or rather refund of the sums awarded are minimal. To buttress this argument, the Defendants implored this court to look at the letter from the Claimants marked HWM3 which reads as follows:

“22 June 2020
MF & AK
P.O. Box 786
Blantyre
Malawi

Dear Sir,
OUTSTANDING BILLS AMOUNTING TO K67,590,998.68

¹ *Nyasulu v Malawi Railways Ltd* (1993) 16 (1) MLR 394, *Central East African Railways Limited v Christina Chithila and Others* HC Civil Appeal No. 13 of 202

Please refer to the above.

Will you kindly advise when you intend to settle the outstanding debt above? Sir, note that the bill is cumulative since year 2020.

All our efforts to get the debt settled have not been successful. Hence the need to get the payment as per credit terms as stipulated on our invoices.

Please find attached updated statement.

Kindly note with the current situation we are left financially incapable to run our business.

Yours faithfully,

AH Kasmany
Managing Director"

10. It would appear that to date, three years after issuing that letter, the Claimant is still in business and trading. Further, letters such as this one are normal in business especially when creditors are pleading for payment from their debtors. To conclude that this letter is evidence of impecuniosity of the Claimant would, in my considered opinion, be stretching matters a bit far. In any case, if indeed the letter meant that the Claimant was indeed unable to continue as a business it would by now have folded. Even if I were to find that indeed the Claimant's business was sailing in troubled waters to the point that it would be unlikely to refund the sums which the court has adjudged to be due to it from the Defendants, I would have been slow to refuse a stay on that basis simply because the delay by the Defendant to pay the debt to the Claimant would have been a contributing factor to the Claimant's financial position. The cases of **Stambuli v ADMARC** Civ Cause No.550 of 1998 and **City of Blantyre v Manda and Others** [1992] MLR 114 are authorities for the position that a court will not entertain a prayer for stay where the applicant itself is responsible for the financial dire straits of the respondent.
11. The other reason given by the Defendants for insisting on the stay is that one of the Claimant's partners is answering serious criminal charges which will result in his being sentenced to a prison term if he is convicted. The Defendants further argue that the fact that this individual is on bail pending prosecution in itself makes him a flight risk. In the first place, I must state that we do operate in a legal environment which presumes every citizen to be innocent until proven guilty. I am unable to buy the argument by the Defendants on this issue. The mere fact that one of the partners in the Claimant's business is answering a serious criminal charge should not be a ground for depriving the Claimant the fruits of its successful litigation. The criminal charge as of now remains what it is, a charge. In any case, the one facing the criminal charge states, and this has not been disputed, that although he was released on bail immediately after his arrest in April 2022, he has not yet been taken before a court of law to be formally charged and plead to the charges. All possibilities are quite open. The Individual may indeed be convicted if he is

charged. He may also be acquitted. It is also possible that he may not at all be prosecuted especially when one considers the fact that it is now more than fourteen months since he was arrested and he has yet to be taken to court. What if the court orders a stay and the individual is not prosecuted at all? The business would have been deprived of the benefit of the funds without any reasonable justification. In any case, there is no material that has been provided to this court indicating what effect the imprisonment of one of the partners would have on the business. This cannot be a product of guess work or presumption without any basis.

12. On the assertion that the individual is flight risk, there is nothing given to this court to substantiate that particular fear. The individual has indicated that he was given bail fourteen months ago. He is still in Malawi. If he had wanted to flee the country, wouldn't he have done that by now? The burden was at all material times on the Defendant to persuade this court that he is a flight risk. The mere fact that he is facing serious criminal charges is not enough. In any case even if he were to flee the jurisdiction, there is nothing that has been given to this court to conclude that his fleeing the country will necessarily impair the Claimant's ability to pay back the awarded sum.
13. There is also an allegation that one of the partners' other business is facing very serious tax issues with MRA which may result in heavy pecuniary penalties imposed on him which may in turn affect the Claimant's business. Again, here we are being invited to board a boat that is sailing in a sea of speculation. The court rejects the suggestion that this is a legitimate ground for depriving the Claimant of the benefits of the judgment in its favour. Just like the allegations of criminal wrongdoing dealt with above, the allegations relating to taxes remain just allegations as of now.
14. The Defendants also state at some point that the appeal they are taking to the Supreme Court of Appeal raises very serious issues which need to be determined by the appellate court. This court cannot argue with that opinion. The Defendants are properly entitled to it. However, by implication, this is an invitation to this court to consider granting the stay on the basis that the appeal stands a good chance of success. I would like to refrain from commenting on the chances of success of the appeal as a ground for consideration on whether or not to grant the suspension of enforcement of the judgment. For obvious reasons, it would certainly be inappropriate for a court that has made a ruling/judgment to comment on the merits of an appeal against the judgment. The evaluation of chances of success of the appeal should be left in the exclusive domain of the appellate court.
15. All in all, it is the opinion of this court that the balance of justice of this matter tilts in favour of denying the application for suspension of enforcement of the judgment. The Claimant's access to the fruits of its successful litigation need not be delayed any longer. The injustice that may befall the Claimant if the enforcement of the judgment is suspended outweighs, in the opinion of this court, any injustice that the Defendants may suffer if their appeal is successful. The application is therefore dismissed with costs the quantum of which will be assessed by the Assistant Registrar if not agreed by the parties.

16. It was brought to the attention of the court that the 2nd Defendant has since passed on. I am sure the attorneys of the Claimant will take that fact into account and take appropriate measures if or when they decide to enforce the judgment.

Made in Chambers at the High Court, Commercial Division, Blantyre Registry this 27th June, 2023.


M.T. Msungama
JUDGE

THE HIGH COURT
(COMMERCIAL DIVISION)
LIBRARY
P/BAG 22, BLANTYRE